


Transgender pupils and single sex schools

26 October 2023  Philip Wood

It's not uncommon for single sex schools to ask what position they should take on transgender pupil admissions where the applicant young person is of the opposite sex to the one the school selects.

In the absence of a Court decision on this point, this article seeks to explain the law and its different interpretations with the expectation that the Department for Education (DfE) will shortly publish guidance for state schools on this topic.

Discrimination

Schools cannot discriminate, directly or indirectly, against pupils on the basis of sex or gender reassignment. That duty includes the arrangements that a school makes for the admission of pupils and the terms on which it does or does not admit a pupil are set out under section 85 of the Equality Act 2010 ('the Act').

Young people under 18 cannot obtain a gender reassignment certificate under the Gender Recognition Act 2004 but the definition of gender reassignment under the Act is wider than this; it includes anyone who is:

"...proposing to undergo, is undergoing or has undergone a process for the purpose of reassignment the person's sex by changing physiological or other attributed of sex".

The definition means that it would include a pupil who was proposing to undergo a process if they communicate that and/or take steps to further it, such as living and dressing as the sex they are seeking to transition to.

Sex is not defined under the Act (and is not limited to biological sex) but there is reference to it being about men and women, which includes people of any age.

Single sex schools' exemption

Single sex schools have a specific exemption under Schedule 11 of the Act so far as relating to the protected characteristic of sex and admissions. Single sex schools don't lose this status if they admit pupils of the opposite sex as long as:

- Those admissions are exceptional.

And/or

- The numbers are comparatively small and their admission is confined to certain classes or courses (e.g. a coeducational sixth form).

The different interpretations on the law stem from the fact that the exemption only relates to sex and not gender reassignment. Whilst direct discrimination against a transgender pupil (that discrimination being directly due to the protected characteristic) would be difficult to show and is less likely, there could be a claim that the arrangements for admission were indirectly discriminatory under s.19 of the Act.

S.19 states that a school will be discriminating a potential pupil if:

1. They apply their admission policy to persons who don't share that protected characteristic.
2. It puts persons who share that protected characteristic at a particular disadvantage compared to those who don't share it.
3. It puts the person making the claim at a disadvantage
4. It cannot be shown to be a proportionate means of achieving a legitimate aim.

One view of this is, for example, that a boys' school is able to refuse admission to a pupil whose sex is female but who is seeking to transition to male, given that they would be treating that pupil no differently to a female pupil who was not seeking to transition.

In this way, the decision to refuse admission is not because they are a pupil who is transitioning but because of their sex, with the comparator, as set out under point 2) above, being someone in the same situation but without the relevant protected characteristic of gender reassignment. There would also be an argument that the arrangements are justified under point 4) being that it was a proportionate response to the legitimate aim of seeking to maintain their single sex status.

On the other hand, the parents of the transgender pupil might argue that the relevant comparator to them is a male pupil and not a female pupil and that their child was being treated differently to a male pupil.

“Significant uncertainty”

Our view is that the former is more likely to be the position that any Court would reach were this to be considered, given how the test works with a comparator. There does remain significant uncertainty about it though and it is untested even after 13 years of the Act being in force.

A single sex school could not refuse an application from a transgender pupil whose sex was the sex that the school selects as that would amount to discrimination on the basis of gender reassignment. There is also no ability for a school to seek to remove a pupil from the roll because they are seeking to transition.

As set out above, single sex schools need to be careful to ensure any admissions of pupils of the opposite sex are limited either in their number and/or to particular classes/courses so as to avoid any risk that the single sex exemption is lost.

Admissions policies

Admission policies that have been set out by the admission authority also need to be followed or alternatively changed to make the position that the school will adopt more explicit.

Why have there been no cases on this point so far? Well, some single sex schools have taken the position that it is easier to admit a transgender pupil of the opposite sex given how infrequent this is likely to be, in order to avoid a dispute. Clearly legal costs are likely to be a factor too which would put any potential claimant off, especially given the significant uncertainty in the law.

We await to see if the DfE guidance will provide a helpful steer for single sex schools on admission decisions.

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