


What does the new gender questioning guidance mean for schools?

09 February 2024  Philip Wood

Just before Christmas, the Department for Education (DfE) published its long-awaited draft guidance on gender questioning pupils, which has inevitably resulted in some controversy.

The guidance is subject to a 12-week consultation, so is unlikely to be in effect until late spring 2024 at the earliest given the likely responses and high-profile nature of the guidance.

Taking into account early reactions to the guidance, it is also quite possible that following publication, depending upon what any final version states in some areas, it could be subject to a formal challenge.

When it is finalised, it will be non-statutory and aimed at all schools including independent schools, and further education providers, in England. The non-statutory nature of the guidance means that whilst schools should consider and understand the final version when it is released, they will be able to depart from it. Advice on complex cases that schools face will still be important given how broad the guidance is in many areas.

The guidance is framed around five key principles:

1. Schools have statutory safeguarding duties and need to promote the welfare of all children.
2. School and colleges should be respectful places and bullying is not to be tolerated.
3. Parents should not be excluded from decisions apart from in exceptionally rare circumstances.
4. Schools have legal duties around a child's biological sex.
5. There is no general duty to allow a child to socially transition.

Many of these, in the context of current legislation, are not going to be controversial because they link to existing pieces of guidance and/or legislation. The position taken on informing parents and social transition are, however, a change and in our view lack the nuance that is essential in this area.

The draft guidance makes clear that schools should be involving parents in discussions about a child that is questioning their gender, except where there are serious risks of harm to the child. Harm in the context of child protection, is not limited to physical harm. The framing of the guidance likely emanates from some limited research undertaken by Policy Exchange that showed that 72% of schools surveyed were not reliably involving parents in these decisions. It is clearly always sensible to involve parents where possible and where older pupils are hesitant about doing so, the role of schools is likely to act in a supporting way to have those discussions. There will remain important considerations about data protection and safeguarding of the pupil concerned when considering whether to inform parents.

Whilst the draft guidance states that bullying should not be tolerated, there can be a tension with freedom of speech arguments and gender critical views, which could apply both to other pupils and/or staff.

On many of the practical areas that the draft guidance covers, including toilets, changing rooms, sports and single sex schools, the advice accords with existing guidance to the sector from NGA/CST/ASCL/NAHT.

Where the draft guidance does go further than existing pieces of guidance available to the sector, is in relation to names and pronouns. Here the draft advice is that schools should consider the views of others in the school before agreeing to change a pronoun of a pupil,

with the draft guidance stating that it is expected that there will be very few occasions where there will be an agreement to change a pronoun.

That position is somewhat at odds with existing practice in schools and again lacks the nuance that schools will need. It also appears to selectively quote the Cass Review. Whilst the Cass Review Interim Report makes clear that changing pronouns and names of a child is not a neutral act, and one that schools and other bodies must be careful about, similarly it is also clear that not doing so is also not a neutral act. We still await the final report from the Cass Review, which is due to cover the role of schools on this difficult issue.

Gender issues in schools remain a significantly untested area in the Courts and the guidance being published may mean that those who hold strong views on either side of this political debate use the final guidance being published to challenge the position taken by the DfE.

The consultation runs until 12 March and responses can be provided [here](#). We would encourage [schools and trusts](#) to provide their real-world examples as part of the consultation to bring to life the challenges schools are facing in practice in this area.

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