

## Gender Reassignment and The Equality Act

### *Gender Reassignment and Gender Identity Belief*

1. As with LGBT education, there has been controversy surrounding how schools should deal with the subjects of gender reassignment as a protected characteristic and gender identity belief, as a worldview. The two are often conflated but are not synonymous.
2. Section 7 of the Equality Act 2010 defines gender reassignment as: “*A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.*” [emphasis added]
  - (a) Application of S.7 to Social Transitioning
3. Increasingly, schools are confronted with claims by parents or pupils themselves that the child in question is transgendered or exploring their gender identity. This often results in pressure being put on the school to socially transition the pupil in the day- to-day environment of the school. It is the position of this memorandum that actual instances where such a legal obligation to do so would arise are rare, and in relation to children under the age of 16, non-existent.
4. While the explanatory memorandum to S. 7 notes that gender reassignment does not require medical supervision of the process involved, what is clear is that a complete and cogent commitment to live out life as a person of the opposite sex is required. That commitment must be undertaken by someone with the legal capacity to do so.<sup>1</sup> The Hansard record is also clear as to this point. Speaking on behalf of the government, Baroness Thornton explained that gender reassignment “*is intended to apply to people who make a commitment over a period of time to live permanently in their non-birth gender.*”<sup>2</sup> Elsewhere, Baroness Thornton expresses that gender reassignment applies to those who “*permanently make a transition to a new sex opposite to their birth sex.*”<sup>3</sup>

5. A conservative reading of S. 7 has also been prescribed by the EAT. The legal protections afforded to gender reassignment under the Equality Act 2010, according to EAT, only applies to a portion of the people who identify as transgender.<sup>4</sup> Therefore, a genuine legal question exists as to the application of s.7 to those on the basis that they identify as gender fluid or non-binary, or that they have simply begun using a different pronoun or chosen to wear clothes traditionally associated with someone of the opposite biological sex. The language used on S. 7 is clear that the process being spoken of relates to changing sex, and therefore there is a strong argument that non-binary (identification as neither male nor female) is outside of the meaning of the statute.
6. The Employment Tribunal, in *Taylor v Jaguar Land Rover Ltd* [2020] ET/1304471/2018, is of the opinion, however, that non-binary identification may attract the protection of S. 7 but as an ET judgment, the holding enjoys no precedential weight. Nevertheless, that case dealt with an adult and not a minor, and therefore has no application to the question of to what extent S.7 may apply in a primary or secondary school.
7. Gender reassignment is to be contrasted to gender identity belief, a philosophical worldview which espouses that gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body. According to gender identity belief, one's personal appreciation of their own gender trumps biological markers and defines identity.
8. Social transition is a process whereby an individual explores their gender identity or seeks to live out as a person of a different biological sex. While advocates of gender identity belief aspire for schools to allow any child, regardless of age or personal circumstances, to transition, the Equality Act creates no such obligation unless the pupil is Gillick competent and intends to permanently live out their life as someone of the different sex.<sup>5</sup> The Government's independent review of gender identity services for children and young people notes that social transition is: "*an active intervention because it may have significant effects on the child or young*

*person in terms of their psychological functioning... it is important to acknowledge that it is not a neutral act.”<sup>6</sup>*

9. In fact, leading experts in the area of psychiatry and paediatrics argue that abundant scientific evidence exists showing that transgender-affirming policies do none of the children they are meant to serve any real or lasting good; that it harms the vast majority of them; and that it leads to catastrophic outcomes for many such afflicted children.<sup>7</sup>

10. Of import is that the Equality Act 2010 exempts schools from Section 26 (harassment) as it relates to gender reassignment, sexual orientation or religion or belief.<sup>8</sup> This exemption pertains to the treatment of pupils, but not the treatment of employees or potential employees. With regard to gender reassignment, refusing to use a pupil’s desired pronouns or not affirming their social transition is not an actionable act of harassment under the Act. It might amount to direct discrimination, but then the onus is on the pupil to establish that Section 7 actually applies to them.

(b) Teaching Gender Identity Belief

11. Schools must also be vigilant in differentiating between teaching about the protected characteristic of gender reassignment and espousing gender identity belief. The right not to believe gender identity belief is recognised in law. So too is the fact that gender identity belief is a philosophical worldview, as opposed to a scientific reality.<sup>9</sup> While the DfE does suggest that pupils ‘should’ be taught about gender identity<sup>10</sup>, it is at the school’s discretion as to how they teach about gender reassignment. There is certainly no statutory obligation to promote gender identity belief.

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<sup>1</sup> On Gillick competency, see: *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7.

<sup>2</sup> Hansard, *Equality Bill: Volume 716* (11 January 2010), at: <https://hansard.parliament.uk/Lords/2010-01-11/debates/1001113900077/EqualityBill>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Forstater v CGD Europe & Ors*, [2021] UKEAT 0105 20 1006 at §118.

<sup>5</sup> *Supra* para. 13.

<sup>6</sup> *The Cass Review: Independent review of gender identity services for children and young people [Interim Report]*, February 2022, §5.19, available at: <https://cass.independent-review.uk/wp-content/uploads/2022/03/Cass-Review-Interim-Report-Final-Web-Accessible.pdf>.

<sup>7</sup> See e.g., United States Supreme Court: Brief of Dr. Paul R. MchHugh, M.D., Dr. Paul Hruz, M.D., PH.D. and Dr. Lawrence S. Mayer, PH.D. as Amici Curiae, *Gloucester County School Board v. G.G.*, by his next friend and mother, Deidre Grimm, (January 10, 2017)(No. 16-273), available at: <https://www.scotusblog.com/wp->

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content/uploads/2017/01/16-273-amicus-petitioner-mchugh.pdf. *See also:* American Psychological Association, “Answers to Your Questions About Transgender People, Gender Identity and Gender Expression” (pamphlet), <http://www.apa.org/topics/lgbt/transgender.pdf>.

<sup>8</sup> Equality Act 2010, Section 85(10) as applied to Section 85(3).

<sup>9</sup> *Forstater v CGD Europe & Ors*, [2021] UKEAT 0105 20 1006, paras. 106-109.

<sup>10</sup> Department for Education, *Relationships Education, Relationships and Sex Education (RSE) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers*, 13<sup>th</sup> September 2021, para. 75.