

Legal Advice on LGBT Issues and Teaching in Christian Independent Schools

Overview

1. The purpose of this document is to provide legal and policy advice on Christian education and how to safeguard the Christian ethos of a school. It is focussed in particular on independent day schools designated by the Secretary of State for Education as schools with a religious character. This means that the Department for Education (DfE) recognises that the purpose of a school, usually defined by its trust, is conducted in accordance with the tenets of a religious denomination and/or that the education provided will be in accordance with the tenets of that religious denomination.ⁱ Inspectorates must also have regard for the law in these matters.
2. Such schools should have regard to the following relevant statutory instruments:
 - [The Education \(Independent School Standards\) Regulations 2014](#)
 - [The Religious Character of Schools \(Designation Procedure\) \(Independent Schools\) \(England\) Regulations 2003](#)
 - [The Equality Act 2010 \(S. 89\(2\)\) and Part 6](#)
 - [The Relationships Education, Relationships and Sex Education, and Health Education \(England\) Regulations 2019](#)
 - [Section 80A, Education Act 2002ⁱⁱ](#)
 - [Children and Social Welfare Act 2017 \(Ss. 34 and 35\)](#)
 - [Relationships Education, Relationships and Sex Education \(RSE\) and Health Education: Statutory guidance for governing bodies, proprietors, head teachers, principals, senior leadership teams, teachers \(DfE Guidance\)](#)
 - [The Independent School Standards: Guidance for Independent Schools \(DfE Guidance\)](#)
 - [The Equality Act 2010 and Schools: Departmental advice for school leaders, school staff, governing bodies and local authorities \(DfE Guidance\)](#)
 - [Promoting fundamental British values as part of SMCS in schools: Departmental Advice for maintained schoolsⁱⁱⁱ \(DfE Guidance\)](#)
 - [Keeping Children Safe in Education 2022: Statutory guidance for schools and colleges \(DfE Guidance\)](#)
 - [Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children \(DfE Guidance\)](#)

Note on LGBT Education

(a) Relationships Education

3. The implementation of the new RSE legislation has been very confusing for schools. The regulations and accompanying guidance lack clarity as to what is legally required and what is only recommended, leaving schools unsure about the amount of discretion they have in developing their relationships education programme. This has been all the more contentious in relation to LGBT issues. Recent findings by Ofsted about the initial launch of the new regulations go to the heart of the problems facing schools:

The Act was contentious from the outset for certain groups, particularly in relation to characteristics relating to sex, sexual orientation and gender reassignment. The increasing political sensitivities in these areas have made it harder for schools to handle equalities well. For example, school staff can occasionally confuse the legal, the moral and the political, and so (often inadvertently) bring overtly political materials into their curriculum and teaching without acknowledging it as such, despite the statutory requirement of political neutrality. We have also seen recent examples of schools and parents being unable to see eye-to-eye on the content and age-appropriateness of curriculum materials used to teach primary school pupils about same-sex relationships. See: [Research Commentary: Teaching about sex, sexual orientation and gender reassignment](#).

4. When the prescription of the new regulations were promulgated by s. 34 of the Children and Social Welfare Act 2017, the 3 elements of what must be taught to pupils as part of Relationships Education did not include LGBT element.^{iv} Afterwards, when the [Education Act 2002](#) was formally amended, a fourth element was added, that being: “the nature of marriage and civil partnership and their importance for family life and the bringing up of children.” As stated above^v, Section 80A of the Education Act 2002 applies to the teaching of relationships education in maintained schools, and only has indirect application to independent schools in that they must have ‘due regard’ for the guidance set out by the DfE on delivering relationships education. Paragraph 81 of the guidance notes that secondary schools should cover “what marriage is” as part of relationships education, including the legal status of marriage. The guidance nowhere requires this specific element to be taught repeatedly. At paragraph 37 of the guidance, it does note that LGBT elements should not be taught as a stand-alone lesson but interwoven into the curriculum. The operative word in the sentence is “should”, as opposed to “must” which is used elsewhere in relation to other elements of Relationships Education. The paragraph further notes that it is up to schools to

determine how they teach LGBT elements, without any reference to a baseline for quantity of content.

5. Again, independent schools must only show that they have had ‘due regard’ for the guidance and should deliver Relationships Education in a way which respects other statutory obligations, including ensuring the material is age appropriate, has regard for the religious background of the pupils^{vi} and is delivered in a manner which respects the right of parents to raise their children in accordance with their own religious and philosophical beliefs.^{vii} Paragraphs 21-22 of the DfE’s RSE guidance^{viii} further notes that schools with a religious ethos may teach their particular faith perspective on LGBT issues, including marriage, so long as it does not undermine respect for the law or create an imbalance in how the material is approached. Paragraph 3.30 of the DfE’s *The Equality Act 2010 and Schools* guidance^{ix} goes further noting that it is not the intention of the Equality Act, and by extension parliament, to undermine the religious ethos of any school in how it approaches the teaching of any subject related to the protected characteristics.

(b) The Equality Act 2010

6. [S. 89\(2\) of the Equality Act 2010](#) specifically exempts the curriculum of schools from its purview: “*Nothing in this Chapter applies to anything done in connection with the content of the curriculum.*” No Part of the Equality Act requires the teaching of LGBT elements. Nothing in the DfE’s guidance on the Equality Act 2010 references a requirement to teach LGBT elements. Part 6, which deals with education, does prohibit unlawful discrimination in how education is delivered. This is a specific duty relating to specific pupils who have suffered one of the disadvantages listed in Part 6 because of a protected characteristic, but it does not create a general obligation to promote any of the protected characteristics.
7. The Equality Act 2010 does require that all schools exercise their public sector equality duty to have ‘due regard’, when developing their policies, to: (i) eliminate unlawful discrimination, harassment, and victimisation; (ii) advance equality of opportunity; and (iii) foster good relations between those who share a specific protected characteristic and those who do not.
8. ‘Due regard’ has been defined by the Department for Education in relation to equality, in advice provided for school leaders and governors, as: “*The duty to have ‘due regard’ to equality considerations means that whenever significant decisions are being made or*

policies developed, thought must be given to the equality implications.”^x In case-law, a requirement to have regard to a specified list of factors means that the authority subject to the requirement must consider each factor separately; but it does not prevent the authority from going on to consider other factors also, even if those other factors combine to outweigh the factors specifically listed.^{xi} A relevant competing factor for schools with a religious character to consider when developing its curriculum would be their statutory obligation to respect the rights of parents to raise their children in accordance with their own religious and philosophical beliefs. This obligation is arguably heightened given a foreknowledge that many parents have sent their children there to receive a Christian education in line with religious designation recognised by the DfE. Other relevant considerations would be faithfulness to the objectives of the school as set out in its Trust and the safeguarding of the school’s Christian ethos.

9. The Court of Appeal in *Stuart Bracking and Ors v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, particularly at paragraph 26, sets out detailed judicial guidance on assessing whether the equality duty was properly engaged in the exercise of a public function. Of particular relevance are the quoted paragraphs of Elias LJ, from *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court), where it is held that it is not for a court, or as the case may be, a school inspectorate, to determine whether appropriate weight was given to the duty. The public sector equality duty merely requires that the entity exercising the duty can demonstrate that they have given rigorous consideration to the duty and shown proper appreciation of the potential impact of their decision on equality objectives.^{xii} The PSED does not require the teaching of LGBT elements.

(c) British Values

10. Paragraph 5(a) of the Education (Independent School Standards) Act 2014’s schedule requires independent schools to actively promote British values as part of the spiritual, moral, social and cultural development of pupils. The 4 British values specified by the Standards are democracy, rule of law, individual liberty, and mutual tolerance of those with different faiths and beliefs. The duty to promote British values in schools was introduced by the ‘Prevent’ strategies of 2011 and 2014. The DfE has also published guidance on the promotion of British values for maintained schools. For the avoidance of doubt, the British values are nowhere statutorily defined but it is accepted that they are not synonymous with the protected characteristics. Neither the ‘Prevent’ strategies nor the DfE guidance on British values ever conflate British Values with the protected

characterises, and neither do they reference LGBT education. Some training organisations and individual inspectors are not fully aware of this leading to significant misunderstandings.

Gender Reassignment and Gender Identity Belief

11. As with broader LGBT elements, 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.

12. [Section 7 of the Equality Act 2010](#) defines gender reassignment, a characteristic only open to an adult, 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.*”

(a) Application of S.7 to Social Transitioning

13. Increasingly, schools are confronted with claims by parents or pupils themselves that a child is “transgender” 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 document 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.

14. 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.^{xiii} 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.*”^{xiv} Elsewhere, Baroness Thornton expresses that gender reassignment applies to those who “*permanently make a transition to a new sex opposite to their birth sex.*”^{xv}

15. A conservative reading of S.7 has also been prescribed by the Employment Appeal Tribunal (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.^{xvi} Therefore, a genuine legal question exists as to the appropriate 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.

16. 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 biological sex observed at birth, including the personal sense of the body. According to gender identity belief, one's personal, subjective appreciation of their own gender trumps objective, biological markers, and defines identity.

17. Social transitioning 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.^{xvii} The Government's independent review of gender identity services for children and young people (the Cass Review) notes that social transitioning 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.*"^{xviii}

18. 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.^{xix}

(b) Teaching Gender Identity Belief

19. Schools must also be vigilant in differentiating between teaching about the protected characteristic of adult 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.^{xx} While the DfE does suggest that pupils 'should' be taught about gender identity^{xxi}, 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. A school's Christian ethos is also a defence to not teaching about gender identity belief.

Conclusion

20. The law does provide the scope for a Christian school with a genuine desire to stay true to its ethos to do so. This document has provided a brief legal framework addressing some of the key challenges facing Christian schools in the area of Christian moral doctrine.

21. Inspection regulations are subject to the law, and should a school believe an inspector has acted unreasonably, the leadership of the school should robustly address this during any inspection processes using the information outlined in this document.

22. Often, the greatest existential threats to the health of a school's ethos are not external factors, but internal ones. Employees can over time, by actively challenging school norms and values, change school policies and even its character, especially where schools appoint non-Christians or those with more liberal commitments. Governors and Head-teachers are advised of the need to be particularly vigilant in their recruitment processes.

Christian Legal Centre & Christian Concern Education Department

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ⁱ The Religious Character of Schools (Designation Procedure)(Independent Schools)(England) Regulations 2003, Section 5(1)(a,d).

ⁱⁱ Section 80A spells out the statutory obligations of what must be taught as part of Relationships Education in maintained schools. Section 80A(2)(a) does not statutorily bind independent schools. It does, however, inform the guidance prescribed by the DfE to which independent schools must have due regard.

ⁱⁱⁱ While this advice is specifically given to maintained schools in relation to their duty to promote a broad and balanced curriculum pursuant to S. 78 of the Education Act 2002, a statutory requirement which does not extend to independent schools, the Department for Education nonetheless recommends the guidance for independent schools. See: <https://www.gov.uk/government/news/guidance-on-promoting-british-values-in-schools-published> [specifically note 1 of the 'Notes to editors'].

^{iv} Quote :“There was a lot of confusion around schools’ teaching obligations. This stemmed from:

- the lack of a detailed central curriculum
- the grey areas (awareness that primary schools can opt not to teach LGBT issues if they do not deem this age-appropriate and after consultation with parents)
- perceived contradictions in the information published by the DfE”

^v *Supra* endnote iii.

^{vi} Children and Social Welfare Act 2017, S. 34(3)(b); *cf.* Education Act 2002, S. 80A(2)(b).

^{vii} European Convention on Human Rights, Protocol 1, Article 2.

^{viii} Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1090195/Relationships_Education_RSE_and_Health_Education.pdf.

^{ix} Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf

^x Department of Education, *The Equality Act 2010 and schools: Departmental Advice for school staff, governing bodies and local authorities*, May 2014.

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- ^{xi} *Dunnachie v Kingston upon Hull City Council* [2004] UKHL 36.
- ^{xii} *Stuart Bracking and Ors* at para. 26(8)(i).
- ^{xiii} On Gillick competency, see: *Gillick v West Norfolk and Wisbech AHA* [1985] UKHL 7.
- ^{xiv} Hansard, *Equality Bill: Volume 716* (11 January 2010), at: <https://hansard.parliament.uk/Lords/2010-01-11/debates/10011139000077/EqualityBill>.
- ^{xv} *Ibid.*
- ^{xvi} *Forstater v CGD Europe & Ors*, [2021] UKEAT 0105 20 1006 at §118.
- ^{xvii} *Supra* para. 12 & 13.
- ^{xviii} *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>.
- ^{xix} 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-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>.
- ^{xx} *Forstater v CGD Europe & Ors*, [2021] UKEAT 0105 20 1006, paras. 106-109.
- ^{xxi} 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*, 13th September 2021, para. 75.