

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

UK Department for Education

on

Gender Questioning Children: Non-statutory guidance for schools and colleges in England

March 12, 2024

By notice published December 19, 2023, the United Kingdom’s Department for Education (hereinafter “the Department”) has solicited feedback on its draft consultation regarding Gender Questioning Children (hereinafter “the Consultation”),¹ to close on March 12, 2024.² This Consultation is intended to address social transitioning in schools by minors who are questioning their gender identity. Pursuant to the request for views on how to best support schools to inform the Department’s work in this area, the Electronic Privacy Information Center (“EPIC”) submits the following comments.

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation.³ EPIC regularly promotes individual and societal privacy interests where the LGBTQ+ community is a

¹UK Department for Education, *Draft for consultation, Gender Questioning Children: Non-statutory guidance for schools and colleges in England*, available at https://consult.education.gov.uk/equalities-political-impartiality-anti-bullying-team/gender-questioning-children-proposed-guidance/supporting_documents/Gender%20Questioning%20Children%20%20nonstatutory%20guidance.pdf

² UK Department for Education, *Guidance for Schools and Colleges: Gender Questioning Children*, (Dec. 19, 2023), https://consult.education.gov.uk/equalities-political-impartiality-anti-bullying-team/gender-questioning-children-proposed-guidance/supporting_documents/Guidance_for_schools_and_colleges_gender_questioning_children_consultation_document%20.pdf

³ EPIC, *About Us* (2024), <https://epic.org/about/>.

vulnerable, impacted community. EPIC has submitted FOIA requests,⁴ comments on regulations⁵ and filed complaints⁶ regarding unlawful practices relating to the LGBTQ+ community.

The transgender, non-binary, intersex, and other gender variant groups in the LGBTQ+ community face mounting regulation and discrimination in the United Kingdom and are particularly vulnerable to the harsh consequences of being outed. Disclosing a person's status as a transgender individual opens them up to discrimination, harassment, and violence.⁷ With appropriate warning and consent, transgender individuals can plan for possible negative outcomes of revealing their transgender status to loved ones, such as arranging alternative housing or starting discussions with family members to educate them on the LGBTQ+ community. However, this consultation effectively removes the student from the conversation by automatically notifying parents of any requested changes and notifying any staff the school deems "relevant" without input from the student. The Department should focus its efforts on supporting the students going through this challenging transitional period by respecting the individual's autonomy, limiting disclosure of the child's gender questioning status, and providing a smooth process to access school resources and facilities.

In the interest of providing comprehensive and helpful feedback, we have listed below each of the Department's questions addressed in these comments, followed by our responses.

General Provisions

11. Do you think the structure of the guidance is easy to follow?

41. Do you have any comments on the overall approach of the guidance?

42. Do you have any further comments you would like to share on the draft of the guidance that have not been captured above?

The Consultation should include guidance on non-binary, intersex, and otherwise gender non-conforming individuals. The Consultation focuses on binary transgender individuals, those who start out as either male or female, and transition to a different gender. However, there are other ways to express gender inconsistent with assigned sex at birth. First, there are intersex people who "may have biological attributes of both sexes" or whose biological attributes "do not

⁴ EPIC, *FOIA Request to HHS regarding HHS' efforts to establish or reinterpret the legal definition of sex and/or gender*, (Oct. 24, 2018), <https://epic.org/wp-content/uploads/2024/03/EPIC-18-10-24-HHS-FOIA-20181024-Request-pdf>

⁵ EPIC, *Comments to Department of Health and Human Service on System of Records Notice, System No. 09-90-2101 HIV Prevention Medication Distribution Records* (Feb. 22, 2023), <https://epic.org/documents/comments-of-epic-chlp-prep4all-and-patient-privacy-rights-to-hhs-on-hiv-prep-database-sorn/>

⁶ EPIC, *In the Matter of Grindr, LLC*, (Oct. 4, 2023), <https://epic.org/wp-content/uploads/2023/10/EPIC-FTC-Grindr-Complaint.pdf>

⁷ See *infra* pt 2. Dangers to a Child's Safety.

fit with societal assumptions about what constitutes as male or female.”⁸ Up to 1.1 million people in the UK and 1.7% of the global population are intersex;⁹ individuals have an equal chance of being born intersex and being born a twin.¹⁰ Next, non-binary is an umbrella term for individuals whose gender identity doesn’t neatly fit into the category of man or woman.¹¹ For example, some people are a mix of both male and female (genderfluid individuals) or neither (agender individuals). Because of the added complexity of non-binary and intersex individuals, the Department should issue clear guidance to ensure schools are adequately protecting the well-being of all gender non-conforming students.

Furthermore, the Department needs to issue clear guidance as to what constitutes bullying to ensure adequate protection. The Consultation briefly mentions a prohibition of bullying and harassment but has policies that conflict with this sentiment. Under this Consultation, staff and other students are not required to respect the pronouns and preferred name of the child who requests the accommodation. Respecting a person’s preferred pronouns and chosen name is a widely recognized facet of gender affirmation;¹² not doing so can lead to stigma and negative mental health outcomes.¹³ Furthermore, the Consultation has indicated multiple situations where students would be restricted to using facilities inconsistent with their gender identity increases the risk of sexual assault for the transgender individual.¹⁴ The Consultation’s choice to allow and even encourage behaviors which directly harms individuals’ mental health flies in the face of the prohibition on bullying and harassment from both staff and students. Furthermore, the brief reference to bullying paradoxically focuses not on the victim of the alleged conduct, but the perpetrator. While an honest mistake should not be sanctioned, a child who is the subject of repeated misgendering should be secure in the knowledge that their school will take corrective action to protect them. The Department should clarify the guidance regarding bullying and harassment to ensure that all students can co-exist peacefully and without discrimination.

⁸ Stonewall, *List of LGBTQ+ Terms*, <https://www.stonewall.org.uk/list-lgbtq-terms> (last visited Mar. 12, 2024); see also Office of the High Commissioner, *Technical Note on The Human Rights of Intersex People: Human Rights Standards and Good Practices*, United Nations Human Rights, 1-2 (Nov. 3, 2023), <https://www.ohchr.org/sites/default/files/2023-11/ohchr-technical-note-rights-intersex-people.pdf> (discussing intersex people facing similar struggles as transgender individuals regarding access to single sex facilities and activities such as sports).

⁹ Emma Richmond, *The rights of intersex children*, The University of Manchester Magazine (2021), <https://www.manchester.ac.uk/discover/magazine/features/rights-of-intersex-children/>.

¹⁰ *Id.*

¹¹ National Center for Transgender Equality, *Understanding Nonbinary People: How to be Respectful and Supportive*, (Jan. 12, 2023), <https://transequality.org/issues/resources/understanding-nonbinary-people-how-to-be-respectful-and-supportive>

¹² Tonia Poteat et al., *Managing uncertainty: A grounded theory of stigma in transgender health care encounters*, 84 Soc. Sci. & Med. 22, (May 2013),

<https://www.sciencedirect.com/science/article/abs/pii/S0277953613001019?via%3Dihub>

¹³ Jae M. Sevelius et al., *Gender Affirmation through Correct Pronoun Usage: Development and Validation of the Transgender Women’s Importance of Pronouns (TW-IP) Scale*, 17(24) Int’l. J. Env’t. Rsch. and Pub. Health 9525, (Dec. 19, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7766835/>

¹⁴ Gabriel R. Murchisson et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143(6) Pediatrics (2019) <https://publications.aap.org/pediatrics/article/143/6/e20182902/76816/School-Restroom-and-Locker-Room-Restrictions>

Finally, the Department should issue guidance regarding students who have already begun to transition, medically or otherwise. For example, students who are at least 16 can legally change their name with a deed poll without parental consent.¹⁵ While chosen names should be respected in all circumstances, this situation would absolutely require schools to honor the student's new legal name. Schools also need guidance as to students who are already using new pronouns, a new name, a different gender marker, different facilities, or otherwise living consistently with their new gender identity before arriving at the school. This guidance must ensure consistency across schools and reduce the burden on students who have already gone through a lengthy and intensive review process. If the student has already gone through a review process at another school and received accommodations, the new school should honor that decision.

Dangers to a Child's Safety

17. Think about the points outlined for schools and colleges to consider on pages 9-11 regarding making decisions about how to respond to requests for social transition. Are these points helpful?

18. If you answered no, what considerations would be more helpful for schools and colleges to consider? For example, when assessing whether to support a child wishing to socially transition, do you think different weight should be given to the views of parents, the age of the child, the long- and short-term impacts on the child, the impact on other children, and any relevant clinical or medical advice?

Schools must not forcibly out minors to their parents and extraneous staff, as such a choice exposes these students to exponentially higher risks of homelessness, threats to the child's safety, harassment, and severe damage to mental health. Transgender people face heightened threats to their safety based on their transgender status. Between 2021 and 2022, the UK Home Office reported 4,355 hate crimes based on transgender status, a marked 56% increase from the previous year, despite high rates of non-reporting.¹⁶ According to a survey by Stonewall, 41% of transgender respondents experienced a hate crime based on their gender.¹⁷

A familial connection does not lower the danger to students. A 2015 survey by the National Center for Transgender Equality found that 10% of transgender people reported that an immediate family member was violent to them and 8% were kicked out of the house, in both cases because of the individual's transgender status.¹⁸ According to Stonewall 14% of transgender people aren't open about their gender identity to anyone in their family, and 41% of transgender people delay or forego medical intervention because they fear the consequences to

¹⁵ *Change your name by deed poll*, GOV.UK, <https://www.gov.uk/change-name-deed-poll> (Last visited Mar. 12, 2024)

¹⁶ UK Home Office, *Hate crime, England and Wales, 2021 to 2022*, GOV.UK (Oct. 6, 2022), <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2021-to-2022/hate-crime-england-and-wales-2021-to-2022>

¹⁷ Stonewall, *LGBT in Britain: Trans Report*, 6 (2018) https://www.stonewall.org.uk/system/files/lgbt_in_britain_-_trans_report_final.pdf

¹⁸ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey*, 70-72 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

their relationships with family.¹⁹ Prior to any notification, schools should investigate whether automatically involving the parents would put the child’s physical safety at risk.

Outing students to educational staff can also be dangerous. According to Stonewall, 36% of respondents have faced negative comments and behavior from educational staff.²⁰ The child’s safety is paramount, and schools should not expose children to undue risk for any reason.

Discouraging Children from Transitioning by Severely Restricting Autonomy

21. Does this section on page 12 provide enough detail for schools and colleges to respond to a child’s requests to change their name?

22. If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a child’s requests to change their name?

23. Does this section on page 13 provide enough detail for schools and colleges to respond to a child’s requests to change their pronouns?

24. If you answered no, in which of the following areas do schools and colleges need further guidance to respond to a child’s requests to change their pronouns?

The Department should allow for a greater range of flexibility in a child’s ability to change their name and pronouns due to the importance of social transitioning to mental health outcomes. Social transitioning has been linked to a reduction in suicidal ideation and depression as well as fewer negative mental health outcomes as an adult if started earlier in life.²¹ By denying name and pronoun changes, schools become a gatekeeper to the child’s gender expression and cause detrimental outcomes in mental health.²² The blanket denial of any changes under a certain age, the delayed waiting period for instituting any change, and enabling staff and other students to not respect the change devalues both the internal work the child has done to come to the conclusion that they are transgender and the external work they have done to transition outside of school, such as coming out to family or beginning medical interventions. The individual is the one who should determine their gender expression, including chosen name

¹⁹ *Supra* note 17 at 14. In fact, there is evidence that family rejection increased the odds of suicide attempts and substance misuse in transgender adults. August Klein & Sarit A. Golub, *Family Rejection as a Predictor of Suicide Attempts and Substance Misuse Among Transgender and Gender Nonconforming Adults*, 3(3) *LGBT Health* (May 25, 2016), <https://www.liebertpub.com/doi/abs/10.1089/lgbt.2015.0111?journalCode=lgbt>.

²⁰ *Supra* note 17 at 12.

²¹ Stephen T. Russell et al., *Chosen Name Use is Linked to Reduced Depressive Symptoms, Suicidal Ideation and Behavior among Transgender Youth*, 63(4) *J. Adolescent Health* 503, (Mar. 30, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6165713/>; Jack L. Turban et al., *Timing of Social Transition for Transgender and Gender Diverse Youth, K-12 Harassment, and Adult Mental Health Outcomes*, 69(6) *J. Adolescent Health* 991 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8612964/>; see also Asaf Orr & Joel Baum, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, 9 (2015) (emphasizing social transition as a means of preventing or alleviating gender dysphoria in transgender youth). <https://assets2.hrc.org/files/assets/resources/Schools-In-Transition.pdf>

²² Scott Skinner-Thompson, *Identity by Committee*, 57 *Harvard Civ. Rts.-Civ. Liberties L. Rev.* 658, 683-93 (2023).

and pronouns, not an outside committee that doesn't have access to the individual's internal thoughts and feelings.²³

Furthermore, the broad and sometimes mandatory disclosure of birth name and sex to extraneous educational staff is an invasion of the child's privacy. Only the staff who would be directly affected by a name or pronoun change, such as the teachers in charge of the student, should be made aware to limit the potential harm to the child.

Restricting Children's Access to School Resources and Activities

25. Does this section on pages 14 and 15 provide enough detail for schools and colleges to respond when a child who is questioning their gender makes a request to use facilities (e.g. toilets, changing rooms, showers and boarding and residential accommodation) designated for the opposite sex?

26. If you answered no, in which of the following areas do schools and colleges need further guidance?

27. Think about the circumstances provided in the guidance on pages 14 and 15, outlining the option for schools and colleges to find alternative facilities. Does the guidance provide enough support to help schools and colleges determine how to offer alternative facilities?

28. Does this section provide enough detail for schools and colleges to support children who do not wish to use accommodation that is designated for their sex in relation to boarding and overnight accommodation?

Denying access to the appropriate washroom and boarding facilities could violate both the Equality Act and the Education (School Premises) Regulation 1996. Under the Equality Act, gender reassignment is a protected characteristic, and engaging in a social transition is sufficient to constitute gender reassignment for the purpose of the Equality Act.²⁴ Under section 85(5) of the Equality Act, a responsible body of a school cannot victimize a pupil in the way it provides education or access to facilities.²⁵ Barring a transgender student from accessing the bathroom that aligns with their gender identity could be an example of such discrimination. The feelings of others, including parents, should not allow schools to infringe upon the transgender student's right to protection from discrimination. The Education (School Premises) Regulation 1996 also allows for schools to consider "special requirements" of students when allocating bathroom placement, including "needs arising from physical, medical, . . . emotional, or behavioural difficulties."²⁶ The default under the Consultation requires students to use a facility inconsistent with their gender identity, unless a school is willing to provide voluntary alternate

²³ *Id.*

²⁴ Equality Act 2010, c. 15, § 7 (Eng.). See also *Gender reassignment discrimination*, Equal. And Hum. Rts. Comm'n. (Feb. 23, 2023), <https://www.equalityhumanrights.com/equality/equality-act-2010/your-rights-under-equality-act-2010/gender-reassignment-discrimination> (stating that medical transition is not necessary to receive protection under the Equality Act).

²⁵ Equality Act 2010, c. 15, § 85(5) (Eng.).

²⁶ The Education (School Premises) Regulations 1996, § 2(2) (Eng. & Wales).

accommodations. The Department should update this Consultation to require a case-by-case evaluation as to whether a student should be able to use the appropriate facility and mandate the existence of alternate accommodations if a child is unwilling to use the facilities inconsistent with their gender identity.

The Department should make the Consultation's option of providing an alternative accommodation to transgender students mandatory. Using a bathroom inconsistent with the student's gender identity opens transgender youth to a higher risk of sexual assault, according to a 2019 Harvard study.²⁷ Being transgender and using an inconsistent facility could give rise to medical issues (clinical dysphoria)²⁸ as well as feelings of isolation or humiliation. This is a particularly salient issue for students who have already otherwise transitioned. The use of an inconsistent facility could lead to an involuntary admission of their transgender status due to visibly not matching the expectations of their sex assigned at birth. The Department should include clear guidance for students who have previously transitioned to ensure that these students are adequately protected. Where schools have denied students access to facilities consistent with their gender identity, they should be required to provide alternate accommodations to protect transgender students from these heightened risks.

Conclusion

The Department for Education should not enshrine these harmful policies that actively suppress students' rights to self-expression, autonomy, and dignity. The Consultation explicitly states that its guiding principles are safeguarding and promoting the welfare of all children and creating a "respectful and tolerant" place where bullying is not tolerated. The Consultation as written directly exposes children to a tangible risk of physical harm and homelessness, and it deprives children of the ability to live authentically in their day to day lives. Instead, the Department should require schools to assess who may be notified in the event of a child requesting a social transition accommodation, analyze whether it would be safe for the child to notify those individuals, and thereafter limit the spread of information to that which the child consents to. Schools should also assess students on a case-by-case basis to determine whether access to a single sex space consistent with the child's gender identity is appropriate, or providing an alternative accommodation to ensure that no child is uncomfortable in necessary spaces like bathrooms. All students deserve to feel safe and respected at school, and the Department for Education can support that vision with its guidance relating to gender questioning kids by centering the privacy and wellbeing of the transgender child in its policies, rather than focusing on the effect of the transition on outside parties.

²⁷ *Supra* note 14.

²⁸ American Psychiatric Association, *Diagnostic and statistical manual of mental disorders* Fifth Edition Text Revision (DSM-5-TR), (2022).

Respectfully submitted,

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