

## **What Does the Law Say?**

### **1. The Education Act 1996, 2002**

**The Education Act 1996**[1] places a duty on the Secretary of State to prescribe standards for the premises of all local authority maintained schools in England and Wales. These are set out in Part 4 of the *Schools Premises (England) Regulations 2010* [2].

**The Education Act 2002**[3] empowers the Secretary of State to prescribe standards for the premises of independent schools, which include academies and free schools, pupil referral units, special schools not maintained by the local authority, independent schools and sixth-form colleges. These are set out in Part 5 of *The Education (Independent School Standards) (England) Regulations 2010*. [4]

With regard to toilet and washing facilities, Regulation 4 of the *Schools Premises (England) Regulations 2010*, says:

‘(2) Separate toilet facilities for boys and girls aged 8 years or over must be provided except where the toilet facility is provided in a room that can be secured from the inside and that is intended for use by one pupil at a time.’

Part 5, Paragraph 23 of the *The Education (Independent School Standards) (England) Regulations 2010*, says:

‘(j) there are sufficient washrooms for staff and pupils, including facilities for pupils with special educational needs and disabilities, having regard to the provisions of regulations 3 and 4 of the School Premises Regulations;’

### **2. Department for Education, non-statutory guidance on Gender Separation in Mixed Schools, 2018**

This guidance, produced to support schools in identifying what is expected of mixed schools when it comes to separation by sex says: (page 6, point 13)

“Separate toilet and washing facilities must be provided for boys and girls aged 8 years and over pursuant to Regulation 4 of the School Premises (England) Regulations 2012, which falls within the exemption provided for in Schedule 22 of the Equality Act 2010.”[5]

### **3. The Equality Act 2010**

The **Equality Act 2010** [6] is an anti-discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society. It protects people from discrimination in the workplace and in wider society and sets out the different ways in which it’s unlawful to treat someone.

Under this act, schools have a legal obligation not to discriminate against, harass or victimise pupils in relation to the characteristics protected by the Act. These characteristics include disability, race and sex. Gender is not a protected characteristic.

Schools must provide safe, single-sex spaces for both male and female pupils, whilst also not discriminating against pupils who identify as transgender by insisting they use the facilities which correspond to their biological sex. Instead, they are able to use the self-contained facilities which can be used by pupils of either sex.

#### **4. Equality and Human Rights Commission (EHRC) - Updated *Technical Guidance for Schools in England*, and *Technical Guidance for Schools in Scotland* September 2023**

The duty of the EHRC is to promote and uphold Britain's equality laws. The EHRC provides the Department of Education with advice on equality law and human rights.

In September 2023 the EHRC reviewed and updated its ***Technical Guidance for Schools in England***, and ***Technical Guidance for Schools in Scotland*** to reflect that this complex area of policy and law has evolved since it was first published in 2014 ... to ensure its references to the protected characteristics of sex and gender reassignment reflect developments in this complex area of policy and law, which continues to evolve.”[7] Page 60 of the England guidance, and p57 of the Scotland guidance, make it clear that single sex toilets should be provided.

The EHRC have removed the Wales specific guidance from their website for updating. This document [Schools-guidance-2023-for-Wales.pdf \(sex-matters.org\)](#) by Sex Matters includes Wales specific considerations on pp18-19.

The update clarifies the EHRC's position on single-sex facilities and states the obligations the Equality Act 2010 places upon schools regarding pupils with protected characteristics such as disability, race and sex and thus enables school leaders and teachers to understand and comply with the Act and fulfil their obligations to all pupils.

Chairwoman of the EHRC, Baroness Kishwer Falkner, said the update “ensures schools have access to definitive guidance on their obligations under the Equality Act 2010. Schools across England and Scotland can feel confident the updated guidance will support them to comply with the law.”[8]

With regard to sex, the updated EHRC guidance says,

“A person's sex refers to the fact that he or she is a male or female of any age. 'Sex' is understood as binary – being male or female – with a person's legal sex being determined by what is recorded on their birth certificate, based on biological sex.”[9]

With regard to toilet facilities, it says,

“Sex segregation is permitted in certain situations, such as where it is necessary and appropriate to preserve privacy and decency. The law requires schools to provide

single sex toilet facilities for children over eight and single sex changing facilities for children over 11. These may be either in sex-segregated communal facilities or in single-user lockable rooms.”[10]

**This, combined with the clarified definition of sex, makes it clear that boys (male) use the boys’ facilities and girls (female) use the girls’ facilities.**

Note: A child is not able to change their sex, sometimes referred to as ‘*legal sex*’, by applying for a Gender Recognition Certificate because an applicant must meet all of the following requirements:

- aged 18 or over
- diagnosed with gender dysphoria in the UK
- living in your affirmed gender for at least 2 years
- intend to live in this gender for the rest of your life [11]

Unfortunately there is at present no equivalent guidance for Northern Ireland.

## 5. References:

[1] <https://www.legislation.gov.uk/ukpga/1996/56/contents>

[2] <https://www.legislation.gov.uk/uksi/2012/1943/contents/made>

[3] <https://www.legislation.gov.uk/ukpga/2002/32/contents>

[4] <https://www.legislation.gov.uk/uksi/2010/1997/made>

[5] DfE, Gender Separation in Mixed Schools, 20178, p.6  
<https://assets.publishing.service.gov.uk/media/5b32201ce5274a55cdf21b3f/Gender-separation-guidance.pdf>

[6] <https://www.legislation.gov.uk/ukpga/2010/15/contents>

[7] <https://www.equalityhumanrights.com/en/our-work/news/technical-guidance-schools-updated>

[8] <https://www.equalityhumanrights.com/en/our-work/news/technical-guidance-schools-updated>

[9] *Technical Guidance for Schools in England*, EHRC, update September 2023, p.89  
<https://www.equalityhumanrights.com/en/publication-download/technical-guidance-schools-england> and *Scotland* - <https://www.equalityhumanrights.com/technical-guidance-schools-scotland>

[10] Ibid, p.60

[11] <https://www.gov.uk/apply-gender-recognition-certificate/who-can-apply>

