



Department
for Education

Gender separation in mixed schools

Non-statutory guidance

June 2018

Contents

Overview	3
Who is this publication for?	3
Separation	4
Other Practices that Result in Sex Discrimination	4
Positive Action and Single-sex Activities	5
Single-sex sport	5
Negligible and exceptional separation	6

Overview

This non-statutory guidance is provided to support schools in identifying what is expected of mixed schools (maintained, academies and other independent) when it comes to separation by sex following the Court of Appeal's judgment in *HM Chief Inspector of Education, Children's Services and Skills v the Interim Executive Board of Al-Hijrah School* [2017] EWCA Civ 1426 (*Ofsted v Al-Hijrah*).

This guidance does not obviate the need for schools to satisfy themselves in their individual circumstances that they are complying with the law and, consequently, they may wish to take their own legal advice. The Department is not able to provide legal advice to individual schools.

Who is this publication for?

This guidance is for:

- School leaders, school staff and governing bodies in all mixed maintained and independent schools, academies and free schools.

Separation

1. Schools should not generally separate pupils by reference to protected characteristics such as sex, race or faith while at school. Any separation by reference to a protected characteristic is likely to give rise to unlawful discrimination unless permitted by:
 - section 158 of the Equality Act 2010; or
 - section 195 of the Equality Act 2010; orunless the separation does not subject any pupil to a detriment because it is exceptional and its effect negligible (see paragraphs 12-13).
2. In a mixed school, any separation of pupils of either sex that denies them the choice or opportunity to interact socially, or to interact in an educational setting, with pupils of the other sex is likely to involve subjecting the pupils to a detriment because of their sex. This will be direct discrimination and will be unlawful unless it falls within one of the statutory exceptions contained within the Equality Act, even if done for religious or other bona fide reasons and even if the quality of the education provided to boys and girls is the same. The only relevant exceptions are section 158 (positive action – see paragraphs 6-9) and section 195. (competitive sport – see paragraphs 10-11).
3. If pupils are separated by sex (or by reference to any other protected characteristic) in specific classes, assemblies and/or for any extra-curricular activities, school leaders and governors will be expected to justify to Ofsted and other inspectors, parents and the wider community the reasons for the separation. Where a statutory exception is relied upon, they will be expected to demonstrate that they have considered and documented why the exception applies. Outside the specific statutory exceptions, they should be in a position to demonstrate that separation does not give rise to any detriment because its effect is negligible.

Other practices that result in sex discrimination

4. Schools should check that there are no practices that could result in less favourable treatment of a boy or a girl because of his or her sex.
5. For example, it would be unlawful for a school to require girls to learn textile design technology while giving boys the choice of textile design technology or practical carpentry classes. The girl who wants to learn practical carpentry would be denied the choice of learning practical carpentry because of her sex. It would also be unlawful to provide food technology classes for girls (only) and metal work classes for boys (only). In this case, there would be less favourable treatment of both girls who might wish to take metal work and boys who might wish to take food technology. In both cases, the less favourable treatment would be because of their sex and is therefore unlawful.

Positive action and single-sex activities

6. It is also the case that there will be instances where separating by sex is appropriate and lawful. In certain circumstances schools may be able to provide activities or lessons which are confined to one sex, or in which boys and girls are separated, by reference to justifications based on positive action.
7. Positive action, as a general exception to discrimination under the Act, is set out in section 158 of the Equality Act 2010. Under that section separation of pupils by sex may be justified if the school reasonably thinks that:
 - a) girls or boys suffer a disadvantage connected to their sex;
 - b) girls or boys have needs that are different from the needs of the other sex; or
 - c) participation in an activity by girls or boys is disproportionately low.
8. In those circumstances, schools may take action designed to achieve the aim of enabling or encouraging girl or boy pupils to overcome or minimise the disadvantage, to meet the sex-specific needs or to enable or encourage participation in the activity (as relevant), but only if the action taken is a proportionate means of achieving the aim.
9. For example, it would be lawful to teach sex education and elements of Personal, Social, Health and Economic (PSHE) education to single-sex classes because boys and girls may have different needs in this context. But it would be necessary to ensure that appropriate classes were provided to both boys and girls. If a positive action initiative in the curriculum was designed specifically to help one sex it would not necessarily be unlawful (for example, if boys were doing disproportionately badly in maths) but the school would need to be able to show that this was a proportionate way of dealing with a specific identified disadvantage experienced by and connected to their sex. It would not be proportionate simply to refuse help to girls with similar difficulties in order to help boys as a group catch up with the higher average attainment of girls. Another example is if schools might want to do more to encourage the participation of girls in STEM subjects (where there is clear evidence to suggest that girls' participation in STEM subjects is lower than it should be). Any measure to encourage girls would have to be a proportionate way of dealing with the participation issue.

Single-sex sport

10. Section 195 of the Act contains an exception, which permits single-sex sports. It applies to participation in a "gender-affected activity". A "gender-affected activity" is a sport, game or other activity of a competitive nature in circumstances where the

physical strength, stamina or physique of the average girl (or boy) would put her (or him) at a disadvantage in competition with the average boy (or girl). So, for example, this exception might permit a mixed school to have a boys-only football team, or a girls-only hockey team. However, the school would still have to allow girls, or boys as the case may be, equal opportunities to participate in comparable sporting activities. The judgment on whether girls would be at a physical disadvantage needs to take into account the particular group in question, so it is much less likely to justify separation in relation to sports for younger children. It is appropriate for schools to take account of the age and stage of development of children who are likely to be competitors in considering whether an activity is gender-affected.

11. Where separate teams exist for different sexes, it would be unlawful discrimination for a school to treat one group less favourably – for example by providing the boys' hockey or cricket team with better resources than the girls' team.

Negligible and exceptional separation

12. Apart from the statutory exceptions, there may be occasions where a mixed school can lawfully separate boys and girls if the separation can be considered negligible in its effect on the ability of pupils of both sexes to mix, socialise or learn from and with each other. Schools will have to consider any such sex separation on a case-by-case basis and should regularly evaluate whether the separation could be said to give rise to any detriment to any pupil of either sex.
13. It is permissible for toilet and boarding accommodation facilities to be separate as they are captured under existing statutory exceptions. 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. With regards to boarding accommodation, Schedule 23 of the Equality Act 2010 allows for separation by sex providing the same standard of accommodation is provided for both boys and girls.



Department
for Education

© Crown copyright 2018

This publication (not including logos) is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

To view this licence:

visit www.nationalarchives.gov.uk/doc/open-government-licence/version/3

email psi@nationalarchives.gsi.gov.uk

write to Information Policy Team, The National Archives, Kew, London, TW9 4DU

About this publication:

enquiries www.education.gov.uk/contactus

download www.gov.uk/government/publications

Reference: DFE-00177-2018



Follow us on Twitter:
[@educationgovuk](https://twitter.com/educationgovuk)



Like us on Facebook:
facebook.com/educationgovuk