AI · LAW

AI Law, 2nd Floor
8 Water Street
Liverpool, L2 8TD, UK
T: +44 (0)151 294 4722
E: info@ai-law.co.uk
W: www.ai-law.co.uk

Director for Education Services
Warwickshire County Council
Shire Hall
Warwick
CV34 4RL

E-mail:

Our Ref:

Your Ref:

Date: 20 January 2020

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Dear Sirs

Our client: The Christian Institute

We act for The Christian Institute, a registered charity which exists for the furtherance of the Christian faith and the advancement of education. Our client has instructed us to write to you in relation to their concerns about Warwickshire County Council's Relationship and Sex Education Policy for primary schools which incorporates and promotes the *All About Me Programme* and its accompanying lesson plans ("the Policy").

In particular, our client contends that you have erred in law in issuing and promoting the Policy by failing to take into account and give proper weight to at least the following matters:

1. The full terms of the Equality Act 2010, in relation to dealing with transgender pupils. In particular, the Policy takes no account of a raft of relevant exceptions, the fact indirect discrimination can be justified, and the proper scope of the protected characteristic of gender reassignment.
2. Your duty under section 6 of the Human Rights Act 1998 to act compatibly with European Convention Rights and your duties under the Education Act 1996. The Policy demonstrates that no, or no proper, regard has been had to the importance of articles 8, 9, and 10 and article 2 of the First Protocol, or to your obligations under sections 9 and 407 of the Education Act 1996.
3. Your duty under section 149 of the Equality Act 2010 to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
4. Your duty under section 79 of the Education Act 2002 to have regard to the guidance issued by the Secretary of State for Education under section 403(1A) of the Education Act 1996 when "exercising any function which may affect the provision of sex education in maintained schools".

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Dealing with transgenderism

In the section of the Policy on "Trans children and their rights", it is stated:

> *"Trans children have the right to:*
>
> - *Choose to use whatever name, pronoun or title they want. They do not need any documentation to prove their status.*
> - *Be taken seriously and do not have to have undergone any changes, medically or socially to have these rights under the Equality Act.*
> - *To decide who knows they are trans, when they tell people and how to tell people.*
> - *Have the right to use whichever toilet or changing room they feel most comfortable using.*
> - *Have the right to wear the uniform they feel the most comfortable in, within the school uniform policy. This is an important reason why schools should not gender their uniform list.*
> - *Have a right to privacy. This includes the right to keep private one's gender identity at school. Information about a pupil's transgender status, legal name, or sex assigned at birth may also constitute confidential information.*
>
> *For some children and young people exploring gender identity is all a natural part of growing up and understanding themselves and may pass over time. For others this is the start of a long journey of transitioning. It is essential that all children feel safe and feel listened to by the people around them.*
>
> *If a child or young person does 'change their mind' about their gender identity it is important they do not feel they are 'letting anyone down' or that they have caused a fuss for nothing. They should be supported to change names and pronouns again if they want to, change uniform, gendered groups and any other areas to ensure they remain comfortable in their gender identity and expression."*

The Policy then directs schools to The Proud Trust or Mermaids for further help.

The Equality Act 2010

A person cannot apply for a Gender Recognition Certificate or receive surgical interventions for gender reassignment until they are 18. However, it is possible that a minor may still have the protected characteristic of gender reassignment if he is proposing to undergo a process for the purpose of reassigning his sex and is of an age legally competent to make that decision. Section 7(1) of the Equality Act 2010 provides that:

> *"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).

The word "proposing" makes clear that it is necessary that the person's *purpose* is to reassign their sex. However, the Policy refers to children and young people *exploring* gender *identity*, and it talks about children changing their mind. Yet if a child or young person is merely exploring his gender identity (a matter on which he may have no settled mind), he would not have the protected characteristic of gender reassignment. Our client is concerned that the Policy is therefore apt to mislead schools and teachers about the circumstances in which discrimination rights may apply to children.

Having failed to define properly the circumstances in which the protected characteristic of gender reassignment applies, the Policy then erroneously asserts a series of situations where a transgender child has the right to make certain requests.

The Policy states that transgender children have the right to use whichever toilet or changing room they feel most comfortable using. However, this is not correct. Where there is a child who has the protected characteristic of gender reassignment, he has the right not to be subject to unlawful discrimination. However, under the Equality Act restrictions on access to toilets and changing facilities may be justified if they are a proportionate means of achieving a legitimate aim. It is common amongst schools to address the needs of transgender pupil by sensitively making alternative facilities available. In determining whether a restriction is proportionate, significant weight will be given to the fact a minor who appears to be transitioning will not have undergone invasive procedures or have a Gender Recognition Certificate.

The Policy has had no regard to the fact that the Equality Act includes several exceptions, for example, in relation to discrimination on grounds of sex and gender reassignment in the provision of single or separate sex services (see paragraphs 26, 27 and 28 of schedule 3 to the Equality Act). In each case, the restriction must be objectively justified. However, the lack of any reference in the Policy to such exceptions will mislead teachers and schools into acting as if equality law confers absolute rights on transgender children and they will fail to take account of the impact on other pupils.

The Policy also states that transgender children have the right to decide *who* knows they are transgender, *when* they tell people and *how* to tell people. But concealing information about a child's transgender status could give rise to significant safeguarding and privacy breaches. For example, the Equality Act (at schedule 23, paragraph 3) contains an exception which disapplies the prohibition on gender reassignment discrimination in relation to communal accommodation. It means that it is usually lawful to prevent a transgender person from sharing sleeping accommodation with members of the opposite biological sex. The exception envisages that service providers will have regard to matters such as privacy and safeguarding. But not knowing that a particular pupil is transgender could give rise to a mixed sex group of children sharing sleeping accommodation on a school trip without the parents of any of the children being aware. This could seriously undermine a school's duty of care to students.

Rights of staff and other pupils

As a public authority, it is unlawful for a school to act in a way which is incompatible with a Convention right (see section 6 Human Rights Act 1998). This includes the following Convention rights: article 8 (right to respect for family and private life), article 9 (freedom of

thought, conscience and religion) and article 10 (freedom of expression). Case law is clear that freedom of expression includes the right not to express a view (and keep silent) as well as the right not to express words or a message with which the speaker profoundly disagrees.

Articles 8, 9 and 10 are all qualified rights and may be restricted in so far as it is necessary in a democratic society. This includes the protection of the rights and freedom of others. But this is the case whether those rights are being claimed by a person seeking to live in their chosen gender identity or by another person who might be *affected* by that person's decision. Both have rights. The failure of the Policy to have any regard to this is stark.

The Policy states that a transgender pupil should self-determine their choice of toilet and changing facilities. This means that adherence to the Policy could result in interferences with the rights of other pupils. For instance, in some cases transgender pupils might elect to use the toilets or changing rooms of the opposite biological sex. But for many children and young people, being forced to share toilets or changing facilities with transgender pupils who retain the genitalia of the opposite sex will unacceptably interfere with their right to privacy, particularly in the case of girls. Some girls in primary school may already have started their periods and will be particularly self-conscientious. It cannot be right for them to have to share facilities with those who are biologically boys. This also raises concerns about the discriminatory impact on pupils because of their sex (also protected under the Equality Act 2010).

Allowing mixed sex toilets is likely to result in non-transgender pupils avoiding using toilets. There are documented cases of children achieving this by avoiding drinking – which has implications for health and wellbeing. Alternatively, they may only use the facilities when they are not otherwise in use. This could interfere with those pupils' freedom of expression by publicising their discomfort regarding transgenderism. These are matters on which those pupils have a right not to *express* an opinion.

Such interferences with the rights of non-transgender pupils are disproportionate and cannot be justified, not least because there is no law which gives a transgender child the right to use the toilet or changing facilities of their choice.

Likewise, the Policy has had no regard to the fact that in allowing transgender pupils to be referred to by the name or pronoun of their choice the school must take account of the rights of others to freedom of conscience and expression. Whilst all transgender pupils must be protected from bullying and unlawful discrimination, schools have a duty not to put staff and other pupils in a position where they forced to use words with which they profoundly disagree, unless weighty justification can be shown for doing so. For many people, using a name or pronoun which does not denote a person's biological sex amounts to speaking a falsehood, particularly in relation to minors because they cannot legally change sex.

Imposing a blanket requirement on all staff and pupils to refer to a transgender pupil in that pupil's acquired gender identity will give rise to *compelled speech*, in breach of articles 9 and 10 (see Lee v Ashers Baking Company [2018] UKSC 49). Any such interference with articles 9 and 10 must be justified. This means that any interference must be proportionate. But the interference cannot be proportionate if the school has not explored reasonable alternative

solutions falling short of compelling a person to use words he or she believes to be false. Similarly, under the Equality Act, a school is under a duty to make reasonable adjustments to accommodate the religious or philosophical beliefs of staff and pupils.

Rights of parents
As well as protecting the rights of children, article 8 (taken with article 9 and article 2 of the First Protocol) protects the right of parents to raise and have their children educated in conformity with their own religious or philosophical convictions. Parents have primary responsibility for raising their children, giving guidance to them, and for their safeguarding. This means that parents have the right to be kept informed about matters relating to their child's development and wellbeing, particularly when the child is of primary school age.

However, the Policy suggests that schools may decline to inform parents if their own child chooses to explore their gender identity only at school. The Policy states that transgender pupils have the right to "decide who knows they are trans, when they tell people and how to tell people". The Policy also states that transgender pupils can keep private their gender identity at school. This will discourage schools from notifying parents about potentially life-changing decisions which the child is making and cause schools to conspire in keeping a child's transgenderism from the parents. Meanwhile, teachers may be actively affirming the child's gender transition at school.

Keeping such information from parents will seriously undermine parental authority. It trespasses into a space which is the proper responsibility of the family and in relation to matters on which the parents might have strong religious or philosophical convictions. It could also put the school in breach of data protection law by resulting in the processing or disclosure of sensitive personal data about the child without parental consent. Given that the child is at primary school, the explicit consent of the parents should be required for the processing of sensitive personal data about their child. And as has been said, it could result in a school permitting pupils of different sexes sharing changing facilities or sleeping accommodation on school residential visits against the wishes of parents. Neither the parents of the transgender child or other children have been given an opportunity to object.

The silence in the Policy about the rights and responsibilities of parents will cause schools to breach the Convention rights of parents.

Gender ideology

It is clear that the section on transgender children and their rights is part of a wider campaign to promote gender ideology in primary schools. Rather than merely teach children about difference and the need to respect those who do not do not "fit the binary stereotypes of their birth gender", the Policy actively requires that children are taught that "gender identity is complicated and multi-faceted and can be best understood as being a spectrum rather than necessarily needing to be a binary choice between male and female".

This agenda is then incorporated in the course materials presented to children from reception age upwards. In the material for lesson 1 in year 5, children are presented with the story of King Binary who lives in a castle. All children in the kingdom are born in the castle and King

Binary decides whether each new born child leaves the case through the pink door to Sheland or through the blue door to Heland – two lands which are separated for ever by a "wide, fast moving river". However, according to the story, not everyone felt they fitted neatly into Sheland or Heland. Some of the boys and girls felt they had been sent through the "wrong door" and would be happier on the other side of the river. As King Binary didn't know what to do, he called a meeting and the children in the class are asked to come up with ideas how to solve the problem which King Binary and his people have.

The lesson materials are calculated to undermine the notion that the binary classification of people into male and female is normative. However, many parents would be alarmed by the approach taken by the council, which seems aimed at indoctrinating children with the ideological tenets of a particular radical gender theory which teaches that a person's sex is not a biological reality determined at conception but an arbitrary 'assignment' which can be readily changed. Whilst the information provided for parents portrays the main emphasis of the lesson as being on undermining gender stereotypes, in fact the lesson does the opposite, teaching that whether a child is male or female depends upon whether they are happier conforming to the gender stereotypes of a male or a female. The book 'Alien Nation' which the Policy says is 'highly recommended' for use in the lesson promotes the idea that some people are 'non-binary', neither male nor female: not based on biological fact but on what they 'feel like'. The book suggests questions for children to encourage them to adopt gender ideology. It is not an even-handed examination of gender dysphoria but a one-sided celebration of transgender activism. Indeed, this can be said of the All About Me Programme itself. No counter view is presented in the scheme of work. This one-sided teaching is highly inappropriate in any school but especially so in primary schools. Children as young as nine have not fully developed their critical faculties to weigh and assess such controversial ideas. It will simply lead to children being confused and/or even questioning their own identity.

Local authorities are under a statutory duty to have regard to the general principle that pupils are to be educated "in accordance with the wishes of their parents" (see section 9 of the Education Act 1996). Furthermore, a local authority must not act in a way which is incompatible with the rights set out in the European Convention on Human Rights, which include article 2 of the First Protocol. The second sentence of this article states that "In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions".

The European Court of Human Rights has emphasised that the aim of the second sentence of article 2 of Protocol 1 "is to safeguard the possibility of pluralism in education, it requires the state, in exercising its functions with regard to education and teaching, to take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner, enabling pupils to develop a critical mind particularly with regard to religion in a calm atmosphere free of any proselytism. The state is forbidden to pursue an *aim of indoctrination* that might be considered as not respecting parents' religious and philosophical convictions". (See Lautsi v Italy (2012), at paragraph 62.) These principles are also reflected in section 407 of the Education Act 1996, which requires local authorities and

schools to take steps "to ensure that where political issues are brought to the attention of pupils…they are offered a balanced presentation of opposing views".
It is clear that parents have no statutory right to withdraw their children from lesson 1 in year 5. It is not labelled as sex education, from which there is a right of withdrawal. In the absence of such right, the local authority is under a greater obligation to ensure that teaching and materials do not undermine parental authority or seek to indoctrinate children. As the UK Supreme Court has emphasised:

> *"The first thing that a totalitarian regime tries to do is to get at the children, to distance them from the subversive, varied influences of their families, and indoctrinate them in their rulers' view of the world. Within limits, families must be left to bring up their children in their own way."* (The Christian Institute v The Lord Advocate [2016] UKSC 51, at paragraph 73)

For the above reasons, our client contends that your promotion of gender ideology in primary schools puts the council in breach of its duties under sections 9 and 407 of the Education Act 1996 and under the Human Rights Act 1998.

Public Sector Equality Duty

Section 149 of the Equality Act places a duty on the council in the exercise of its function to have due regard to the need to "advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it", which involves the need to "remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic" (sections 149(1)(b) and 149(3)). It also requires the council to have due regard to the need to "foster good relations between persons who share a relevant protected characteristic and persons who do not share it", which includes "tackling prejudice and promoting understanding" (sections 149(1)(c) and 149(5)).

For the reasons set out in this letter, it does not appear that the council, in issuing the Policy, has had any regard to the disproportionate impact of the Policy on those of faith or on members of one particular sex (e.g. girls who may especially object to trans-girls sharing their toilets or changing facilities). Given the real potential for negative impact on girls and faith groups should schools follow the Policy, the council would have been expected to have considered these matters. However, there is no evidence in the document that any regard has been had to the protected characteristics other than gender reassignment.

By failing to balance the rights of trans-pupils with the rights of others, the Policy demonstrates a woeful disregard for the need to foster good relations between trans-pupils and others who do not share the protected characteristic of gender reassignment. It is difficult to see how the Policy can promote good relations if it insists on the 'rights' of trans-pupils in every circumstance to the exclusion of the rights of others. Similarly, the Policy does not foster good relations between those who share a particular faith or belief and others who do not share it. Rather, the Policy sends a clear signal that those who may hold to beliefs about gender identity that do not align with this document are not worthy of respect. No attempt is made to promote understanding.

Breach of section 79 duty

Under section 403(1A) of the Education Act 1996, the Secretary of State for Education:

> "must issue guidance designed to secure that when sex education is given to registered pupils at maintained schools—
>
> > *(a) they learn the nature of marriage and its importance for family life and the bringing up of children, and*
> >
> > *(b) they are protected from teaching and materials which are inappropriate having regard to the age and the religious and cultural background of the pupils concerned."*

Under section 79 of the Education Act 2002, every local education authority in England is required to have regard to the guidance issued by the Secretary of State under section 403(1A) of the Education Act 1996 when "exercising any function which may affect the provision of sex education in maintained schools". Indeed, under the Relationships Education, Relationships and Sex Education and Health Education (England) Regulations 2019, which come into force on 1 September 2020, that section 79(6) duty will state:

> *"In exercising any function which may affect the provision of sex education in maintained schools (whether or not as part of the education required to be provided under section 80(1)(d)), every local authority in England must have regard to relevant guidance issued by the Secretary of State under section 80A of this Act or section 403(1A) of the Education Act 1996."*

Like the statutory guidance issued under section 403(1A) of the 1996 Act, section 80A of the Education Act 2002, as inserted by the 2019 regulations, will require the Secretary of State to issue guidance regarding the provision of relationships education in primary schools and relationships and sex education in secondary schools, to ensure that:

> *(a) the pupils learn about—*
>
> *(i) the nature of marriage and civil partnership and their importance for family life and the bringing up of children,*
>
> *…*
>
> *(b) the education is appropriate having regard to the age and the religious background of the pupils."* (Section 80A (2))

It is clear that the requirement that schools teach about marriage and that they ensure the appropriateness of materials is an essential part of both relationships and sex education. Indeed, it will form the cornerstone of the new relationships and sex education curriculum.
It is clear that you have breached your duty to have regard to the section 403(1A) guidance in developing and promoting the Policy. This is the case in relation to two main issues:

A. The Policy is silent on the issue of marriage

There is no reference whatsoever to marriage in either the sex or relationships education materials. This omission is stark and inexplicable.

B. Explicit sexual images

Our client is alarmed about the use of explicit sexual images or topics in lesson materials. The content and manner of presenting those subjects in the contexts in which they are found is inappropriate having regard to the age of the pupils.

In lesson 3 for year 5, the children learn about "me and my body". This purports not to be sex education. However, the pictures presented are gratuitously graphic. For example, under part 5.14 the teacher is required to give all the children a copy of *the guided tour to girls and boys bits worksheet* and ask them to label the parts highlighted. Those parts include a realistic drawing of an erect penis.

The purpose of section 403(1A) of the Education Act 1996 and the Secretary of State's guidance issued under that section is to ensure that pupils are protected from inappropriate content in lessons. It cannot then be open to schools to evade this by teaching sexually explicit materials under the heading of another subject. Indeed, if the content is sexually explicit it must be sex education notwithstanding that it may not be labelled as such. Whether a lesson constitutes sex education is not determined by how it is badged but by what is being presented. This means that the full panoply of sex education safeguards still applies, including the Secretary of State's section 403 guidance.

The Secretary of State's current guidance provides that "Inappropriate images should not be used nor should explicit material not directly related to explanation" (at paragraph 1.8 of DfEE 0116/2000). However, the worksheet given to year 5 children in lesson 3 clearly contains explicit material which is not directly related to any explanation. The image of an erect penis is incongruous with a lesson which merely purports to teach about body parts. By depicting male genitals sexually aroused, the image takes the lesson into the scope of sex education.

The Policy also contains lessons which raise the issue of masturbation. Lesson 4 in year 2, on me and my body, explores the subject of "touching myself". After acknowledging that people may touch their private parts, it goes on to state:

> *"this is really very normal. However, some people may get cross or say that it is dirty, especially when you touch your own privates. This is strange as it is really very normal, however, it is not polite to do it when other people are about. It is something we should only do when we are alone, perhaps in the bath or shower or in bed, a bit like picking your nose, it is certainly not polite to do in class when everyone is watching".*

Later in the lesson, under scenarios on which the children are required to offer a view as to whether each scenario is 'ok' or not, the children are presented with:

> *"When Autumn has a bath and is alone she likes to touch herself between her legs, it feels nice".*

None of the above mentioned material is compliant with the Secretary of State's statutory guidance in that it is not appropriate, not least with respect to the age of pupils. Furthermore, the explicit images are not related to any explanation.

Failure to take into account relevant considerations

In summary, our client submits that the council has erred in law in issuing and promoting the Policy by failing to take into account and give proper weight to at least the following matters:

1. The full terms of the Equality Act 2010, in relation to dealing with transgender pupils. In particular, the Policy takes no account of a raft of relevant exceptions, the fact indirect discrimination can be justified, and the proper scope of the protected characteristic of gender reassignment.
2. Your duty under section 6 of the Human Rights Act 1998 to act compatibly with European Convention Rights and your duties under the Education Act 1996. The Policy demonstrates that no, or no proper, regard has been had to the importance of articles 8, 9, and 10 and article 2 of the First Protocol, or to your obligations under sections 9 and 407 of the Education Act 1996.
3. Your duty under section 149 of the Equality Act 2010 to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it, and to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
4. Your duty under section 79 of the Education Act 2002 to have regard to the guidance issued by the Secretary of State for Education under section 403(1A) of the Education Act 1996 when "exercising any function which may affect the provision of sex education in maintained schools".

In light of these breaches, we ask you to confirm within the next 14 days that you will withdraw the Policy with immediate effect and contact all schools using the policy to make clear to them that their continued adoption of the policy could lead to them breaching their legal obligations. If you decide not to do so, our client will pursue a claim for judicial review of that decision on the basis of the serious legal flaws contained in the Policy which we have drawn to your attention in this letter.

We look forward to hearing from you.

Yours faithfully

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