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Sørli, A. (2020). Transgender Children's Right to Non-discrimination in Schools: The Case of Changing-room Facilities. *International Journal of Children's Rights*, 28(2), 221-242.

## **Transgender Children's Right to Non-Discrimination in Schools: the Case of Changing-Room Facilities**

Anniken Sørli\*

### **Abstract**

Transgender people's access to gender-binary facilities has recently become hotly debated. Those opposed argue that giving transgender people access to facilities corresponding to their gender identity creates a safety risk and discomforts others. This article addresses this controversy from the transgender children's perspectives as reported by their parents. The findings on the arrangement of transgender children's access to changing rooms in Norwegian schools show to what extent ways of accommodating transgender children's use of changing and shower facilities at Norwegian schools accord with the right to non-discrimination. It is argued that the gender-binary organisation of facilities and the lack of private curtains in schools create inequality and exclude transgender children.

### **Keywords**

Children; changing-room facilities; education; non-discrimination; transgender.

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## 1 Introduction

Physical education and swimming lessons are things she,<sup>1</sup> unlike most other children, absolutely dreads. There's no joy in going on with life. ... It's all about nudity. That's what's difficult. You get seen as peculiar, and no child in the entire world wants to be peculiar.<sup>2</sup>

Education, including physical education, should be a forum for learning life skills and developing children's identity, self-esteem and self-confidence (Committee on the Rights of the Child (CRC Committee), General Comment No. 1, para. 2).<sup>3</sup> As the introductory quotation suggests, however, changing and shower facilities may lead to transgender children dreading physical education classes, contrary to the aim of education. School policies on changing rooms, showers and sanitary facilities are not always sensitive to these children's needs. They are often banned from using toilets matching their gender identity and instead made to use separate facilities or showers and changing rooms matching their birth-assigned gender.

Throughout history, toilet users have been segregated based on sex, class and ethnicity.

Although users are no longer separated by class and ethnicity, sanitary facilities are still 'modeled after contemporary ideas of "femininity" and "masculinity" as binary opposites'

(Davies *et al.*, 2017: 2–3). This organisation has been seen as a legitimate, necessary way of

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<sup>1</sup> The parents speaking refer to their young transgender daughter.

<sup>2</sup> Parents of a transgender child.

<sup>3</sup> Also, see the Norwegian law relating to primary and secondary education: Education Act 17 July 1998 No. 61 [*Lov om grunnskolen og den vidaregåande opplæringa*] Section 1–1.

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separating people in the interests of social order, but today, the underlying rationale for gender-binary changing rooms and hygiene facilities has become contested. The debate on transgender persons' use of sanitary facilities presents two opposing views. On one hand, it is argued that allowing transwomen access to female facilities, such as public showers and changing facilities, violates cisgender women and girls' rights to privacy and bodily autonomy and puts their safety at risk (Jeffreys, 2014; Minkowitz, 2016). Safety concerns arise from fears sex offenders could access gendered facilities by pretending to be transgender. Privacy concerns are based on the premise that cisgender people, especially cisgender women, find it intimidating to share facilities with transgender people, especially transwomen with penises (Brown, 2014; Pirics, 2017: 455–456). On the other hand, proponents of giving transgender people access to facilities matching their gender identity argue that these safety concerns are undocumented, and these privacy concerns stem from transphobia and (re)produce prejudices about transgender people (Tobin and Levi, 2013; Moffitt, 2015).

This article joins the debate by presenting transgender children's perspectives on changing and shower facilities as reported by their parents. Focusing on Norwegian anti-discrimination law and international law binding on Norway this discussion can contribute to the debate on transgender children's access to changing and shower facilities in schools. In interviews with the parents of transgender children living in Norway and staff members at the children's schools, three ways of accommodating transgender children's use of changing and shower facilities at Norwegian primary and lower secondary schools are examined. It is questioned whether the discomfort of others or transgender children is an objective reason to treat

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transgender children differently. The overall research question is how different forms of accommodation fit with the transgender children's right to non-discrimination.

The article proceeds in four sections. In the second section, the terminology involved is explained, and legal developments concerning children's access to legal gender changes are briefly outlined. The section also gives an overview of the legal framework of the right to non-discrimination under international and Norwegian law. In the third section, the methodology applied is presented. In the fourth section, three forms of accommodation are described and analysed from a children's perspective, considering the right to non-discrimination and the particular situations of the transgender children included in this study. Section 5 offers concluding observations, arguing that privacy curtains or changing stalls should be installed in schools.

## **2 Background**

### ***2.1 Introduction: Change of Legal Gender***

The term "transgender" is generally used to refer to a variety of identities that cut across or over gender boundaries in modern societies (see, for example, Stryker, 1994). Transgender people differ in their self-identification and need for gender confirmation treatment and correction of legal gender. The term "cisgender" is often used to refer to people whose gender identity matches their birth-assigned gender. "Gender identity" means self-identified gender, which may or may not match birth-assigned gender.

The rights of transgender persons have been strengthened in recent years. In particular, the European Court of Human Rights (ECtHR) made a pivotal ruling that the right to private life

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under Article 8 of the European Convention on Human Rights (ECHR) includes the right to gender identity (*van Küick v. Germany*, no. 35968/97, ECHR 2003-VII, para. 75) and the right to change legal gender (*Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, ECHR 2002-VI) without undergoing sterilisation (*A.P., Garçon and Nicot v. France*, nos. 79885/12, 52471/13 and 52596/13. ECHR 2017 (extracts)). In the legal literature, the United Nations Convention on the Rights of the Child (UN CRC) is interpreted to provide rights to transgender children similar to those under the ECHR. For example, CRC Article 8 on the right to identity is understood to include gender as an aspect of children's identity (Jones, 2005: 129; Hodgkin and Newell, 2007: 115; Sandberg, 2015b: 343), and Articles 8 and 16 extend the right to privacy to allow children access to change of legal gender (Sandberg, 2015b: 343; Sørli, 2015: 375–378). The issue of access to changing, shower and bathroom facilities for transgender persons, though, has not yet reached the ECtHR or UN treaty bodies.

Over the past decade, a growing number of countries has amended or enacted laws to allow self-declared change of legal gender by people over the age of majority (see, for instance, Davy *et al.*, 2017). In 2016, the Norwegian Act on Change of Legal Gender replaced the Norwegian administrative practice requiring medical interventions for correction of legal gender.<sup>4</sup> The 2016 act establishes the individual right to self-declared change of legal gender from age 16 years (Sections 2 and 4) but does not provide gender options other than male and female (see Section 2). The act, however, is unique in giving children age six years and older<sup>5</sup> the right to change their legal gender if those with parental responsibility for them do not

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<sup>4</sup> Act on Change of Legal Gender (Gender Recognition Act) 17 June 2016 No. 46 [*Lov om endring av juridisk kjønn*].

<sup>5</sup> Children younger than six years old are not considered to be mature enough to decide this matter. See Prop. 74 L (2015-2016) *Lov om endring av juridisk kjønn*, para. 8.3.5.2.

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object (Section 4). This measure permits children to change their legal gender before starting school. However, the implications of the change of legal gender are not always clear. Neither the Norwegian Act nor its preparatory works<sup>6</sup> provide guidance on matters such as changing-room facilities that arise from gender-binary social structures and laws.

Negative attitudes towards transgender people are decreasing in Norway but remain widespread (Norwegian Directorate for Children, Youth and Family Affairs, 2018). In schools, transgender young people conceal their gender identity as a strategy to avoid bullying and exclusion (van der Ros, 2013) and often use washroom facilities for people with (dis)abilities to avoid disclosing their gender history (Wik, personal communication, 2016).<sup>7</sup>

In recent years, the number of transgender persons seeking guidance on the subject of sanitary facilities from the Norwegian Equality and Anti-Discrimination Ombud has increased.<sup>8</sup>

Research has shown that the lack of safe, comfortable changing facilities, fears of non-passing<sup>9</sup> and non-acceptance, the intimidating environment of changing facilities and dissatisfaction with one's body limit young transgender people's freedom of movement and prevents them from being sufficiently active (Jones *et al.*, 2017; Hargie *et al.*, 2017).

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<sup>6</sup> Under Norwegian law, preparatory works are viewed as a source of law.

<sup>7</sup> Personal communication with Ingun Wik, health visitor at the Public Health Centre for LGBTI young people (Helsestasjon for kjønn og seksualitet), 26 January 2017. Notes are on file with author.

<sup>8</sup> This finding is based on an examination of complaints and requests for guidance in matters related to gender identity and gender expression received from 2014 to December 2016 at the Norwegian Equality and Anti-Discrimination Ombud. Many thanks to Helle Holst Langseth, with the Equality and Anti-Discrimination Ombud, for her swift and kind assistance.

<sup>9</sup> The term "passing" generally is used to refer to being seen by others in accordance with one's gender identity rather than as transgender. See Cromwell (1999: 38–40).

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## ***2.2 Individual Protection against Discrimination***

Section 92 of the Norwegian Constitution mandates that state authorities respect and enforce human rights as expressed in the constitution and human rights treaties binding for Norway.<sup>10</sup>

These treaties include the human rights conventions incorporated into the Norwegian Human Rights Act<sup>11</sup> (Syse, 2017: 142), such as the ECHR, CRC and CEDAW Convention (Human Rights Act, Section 2). The conventions take precedence over any Norwegian laws that conflict with them (Human Rights Act, Section 3).

In the Norwegian legal context, the right to protection against discrimination has a strong formal basis. Section 98(2) of the Norwegian constitution guarantees the individual right to protection against discrimination and prohibits the enactment of laws contrary to the non-discrimination clause (Dokument 16 (2011–2012): 147). CRC Article 2 obligates states to respect and protect the rights of all children under the CRC (see Section 1) without discrimination. The right to non-discrimination is one of the CRC's general principles<sup>12</sup> and thus a substantive right, an interpretive legal principle and a rule of procedure (CRC Committee, General Comment No. 5, para. 12; CRC Committee, General Comment No. 14, para. 6 a–c). The provision gives an open-ended list of prohibited grounds for discrimination, which encompasses gender identity under 'other status' (CRC Committee, General Comment No. 15, para. 8; see also Sandberg, 2015b: 339–340). Under the CRC, therefore, the right to

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<sup>10</sup> For more on the interpretation of Section 92, see Strand and Larsen (2015).

<sup>11</sup> Act Relating to the Strengthening of the Status of Human Rights in Norwegian Law 21 May 1999 No. 30 (Human Rights Act) [*Lov om styrking av menneskerettighetenes stilling i norsk rett*].

<sup>12</sup> General principles under the CRC also include the right to have the child's best interests taken into account as a primary consideration (Article 3), the right to life and development (Article 6) and the right to be heard (Article 12). CRC Committee, *Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child*, 3 March 2015, CRC/C/58/Rev.3, paras 23–27.

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education under Article 28 and the right to privacy under Article 16 must be ensured without discrimination based on gender identity. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity,<sup>13</sup> which are based on existing, legally binding, human rights, include in Principle 2 the right to equality and non-discrimination, while Principle 35 of the Yogyakarta Principles Plus 10 guarantees the right to equitable, adequate, safe sanitation without discrimination against gender identity. Principle 35 b obliges states to ensure the right to sanitation in public institutions, such as schools; therefore, if facilities are discriminatory, measures must be taken to change practices. Similarly, the Norwegian Equality and Anti-Discrimination Act (Section 6) prohibits discrimination on grounds of gender identity and gender expression. This protection against discrimination also applies to children and the education sector (Section 2).

The prohibition on discrimination under international and Norwegian law covers direct, indirect and intersectional discrimination (Equality and Anti-Discrimination Act, Section 6; Besson, 2005: 452; Hellum, 2017: 130–134). Direct discrimination refers to acts and omissions that are intended to ensure (or have the effect) that persons are treated worse than others in the same situation because of protected discrimination grounds. Indirect discrimination encompasses any apparently neutral provisions, conditions, practices, acts and omissions that put persons put in a worse position than others due to protected discrimination grounds. Intersectional discrimination results from the interactions of social identities linked to more than one grounds of discrimination.

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<sup>13</sup> For more on the Yogyakarta Principles, see O'Flaherty (2017).



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Differential treatment that makes person worse off than others constitutes unlawful discrimination if linked to a prohibited ground for discrimination, which has a causal connection to the less favourable treatment.<sup>14</sup> However, less favourable treatment is lawful if it serves and is necessary to achieve an objective purpose, and there is a reasonable proportionality between the intended result of the differential treatment and the negative impacts on the persons whose position is made worse (Equality and Anti-Discrimination Act, Section 9; CESCR, General Comment No. 20, para. 13; *Belgian Linguistic case* (No. 2) (1968) 1 EHRR 252, para. 10; Ketscher, 2008: 44–45; Hellum, 2017: 125).

### **2.3 Structural Discrimination**

Structural discrimination refers to structural inequalities between groups of people or people within a group resulting from laws, practices or attitudes. This definition encompasses discriminatory structures, gender stereotypical structures and structures of gender hierarchies (Hellum, 2017: 135–136; Hellum and Strand, 2017: 14–15; Wærstad, 2017: 198–200).

Norwegian authorities have the duty to take measures to abolish or modify structural inequalities under CEDAW Article 2 (f) and 5(a) and the CRC Committee's dynamic interpretation of the CRC (CRC Committee, General Comment No. 5, para. 12; CRC Committee, General Comment No. 14, para. 41; CRC Committee, General Comment No. 21, paras 26–27; Sandberg, 2014: 73; Sandberg, 2015a: 225). Sandberg (2015a) contends that although CRC Article 2 requires protection against discrimination on the individual level, it also pertains to discrimination on a more general level. Sandberg (2015a: 225–227) argues

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<sup>14</sup> The burden of proof of difference in treatment lies with the person claiming to suffer discrimination. When circumstances give grounds to believe that discrimination has occurred and that the difference in treatment is linked to discrimination, the burden of proof shifts to the person said to have discriminated. See Equality and Anti-Discrimination Act, Section 37.

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that the CRC Committee's clarification of states' obligations to take measures to change attitudes are directed at more structural and profound changes in society. In General Comment No. 21 on children in street situations, the CRC Committee stipulates that safeguarding the right to non-discrimination

is not only a passive obligation to prohibit all forms of discrimination, but also requires appropriate proactive measures to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This requires positive measures aimed at redressing a situation of substantive inequality. Systemic discrimination is responsive to, and can therefore be addressed by, legal and policy change. (para. 26)

States' obligations under the CRC and CEDAW Article 5 (a) pertain to harmful and wrongful practices leading to discrimination or violations of others' rights and freedoms (see also Joint General Recommendation No. 18/General Comment No. 31, paras 10 and 14). Social and cultural norms must be changed to prevent harmful practices (para. 56). In cases involving vulnerable people (i.e. those subjected to widespread stigma, prejudice and stereotyping due to personal characteristics, such as LGBT status), the ECtHR increasingly takes a "social-contextual approach" to interpreting ECHR Article 14 on non-discrimination (Arnardóttir, 2014: 653–654). In this approach, 'non-discrimination analysis should be conscious of how structural patterns of social disadvantage and exclusion function to keep marginalised groups in the margins' (Arnardóttir, 2014: 664). The following analysis adopts a broader perspective that includes the especially vulnerable situation of transgender children.

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### **3 Methodological Considerations**

In 2015 and 2016, in-depth interviews were conducted with parents of transgender children recruited with the assistance of Norwegian LGBT and transgender organisations. With the parents' permission, four leaders and teachers from three public primary and lower secondary schools attended by the children were also interviewed in 2016.<sup>15</sup> The parents were interviewed face to face in their homes, according to their preferences. Follow-up interviews and interviews with teachers and school leaders were conducted by telephone. Before the interviews, all the interviewees gave written consent after receiving written and oral information about the project.

In the semi-structured interviews, parents were encouraged to speak freely on matters such as their children "coming out" as transgender and their experiences with public healthcare services, sanitary facilities and name changes. The interviews lasted two to four hours and were recorded on a Dictaphone and a smart phone. The teachers and school leaders were questioned about how they learned of the children's gender identity, whether any measures concerning toilet and changing-room facilities were taken and what they knew about transgenderism. The interviews lasted approximately 30 minutes and were recorded and transcribed verbatim, and the audio files were deleted. Information that could identify the children, either directly or indirectly, was deleted or stored in Services for Sensitive Data (TSD).<sup>16</sup>

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<sup>15</sup> I selected this method based on agreement and advice from the Data Protection Office. The Data Protection Office granted permission to conduct the research from 2 February 2015 to 9 May 2016.

<sup>16</sup> For more information, see: <http://www.uio.no/english/services/it/research/sensitive-data/index.html> (accessed 3 January 2017).

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## **4 Norwegian School Practice and the Right to Non-Discrimination**

### ***4.1 School Practice: Three Types of Changing and Shower Facilities***

Children have a right and an obligation to receive an education, including physical education (CRC Article 28 (1a); Norwegian Education Act Sections 2-1, 2-3). Accordingly, transgender children may not choose whether to take part in physical education classes, and as a rule, children have to attend and actively participate in gym classes (Education Act Sections 2-1, 2-3, para. 4; Jakhelln and Welstad, 2012: 87). How schools accommodate transgender children's use of facilities, therefore, may affect both their educational rights and obligations.

In the analysed experiences of the children whose parents were interviewed, they identify as boys or girls and are largely seen in accordance with their gender identity at school. However, their gender history becomes apparent in changing and shower facilities, and this keeps them awake at night. In contrast, the use of toilets never causes worries. Without the involvement of parents or school staff, the children have been using toilets corresponding to their gender identities.

At the three schools, which are mixed gender like all other schools in Norway, the changing and shower facilities consist of shared shower and changing areas for girls and shared facilities for boys, as well as separate facilities for teachers. The shared facilities without private areas lead to a need for accommodations for transgender children. Based on negotiations between the parents and school representatives, the parents' requests for accommodation are met with one of three options:

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- 1) the use of facilities matching the child's gender identity, where the child showers and changes alone before the other pupils. The child stays in the changing room while the others change and shower (the gender-identity alternative)
- 2) the use of the separate changing and shower facilities for teachers (separate facilities)
- 3) the use of a toilet with no shower facilities (the toilet alternative)

None of the children was open about their gender identity when starting school. When they "came out", none of the school staff had any knowledge on gender identity issues or had developed relevant policies. In accordance with the wishes of the parents, the schools arranged for full openness about the transgender children's gender history and wide dissemination of information about transgenderism to school staff and pupils. The school staff and the parents see this as a great success. In contrast, except for the parents whose child was provided with the gender-identity alternative, the process of finding accommodations for the children's use of changing and shower facilities is seen as an endless, painful struggle.

#### **4.2 Need for Accommodation**

Today's custom and practice of providing separate boys' and girls' changing-room facilities based on birth-assigned gender is a gender-specific practice rooted in the two-sex model, which fosters the cultural taboo on undressing in the presence of people of 'different' genders (Tobin and Levi, 2013: 324). This practice is blind to the diversity of gender and leads to a need for accommodations in changing and shower facilities for transgender children. Equal treatment of transgender and cisgender children based on birth-assigned gender leads to

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making transgender children use facilities not corresponding to their gender identities. This arrangement implies that transgender children's gender identities are not recognised and risks their safety and disclosure of their gender history. With reason, the lack of accommodation and flexible changing-room facilities can be regarded as differential treatment based on gender identity and expression (Equality and Anti-Discrimination Ombud, 2015).

Transgender children appear to be treated worse than cisgender children, whose privacy rights are not impaired.

### **4.3 Accommodation**

Equal treatment does not protect transgender children's privacy rights or gender identities, so the schools have been asked to accommodate the children's use of facilities. Accommodations mean the children are treated differently from cisgender children. Considering the right to non-discrimination, however, the question is which of the three alternatives is preferable—if any one is.

The gender-identity alternative provides access to proper changing and shower facilities. One school representative explains choosing the gender-identity alternative as based on a desire to normalise the situation and demonstrate where the transgender child belongs. Enabling them to use facilities matching their gender identity clearly recognises their identity. It also enables the transgender child to take part in the social interactions taking place in changing-room facilities as they stay in the changing room while the other children use the facilities.

However, this alternative singles out the transgender child, revealing their gender history to every person who sees them entering the changing room alone. It also carries the risk of mandatory disclosure of the child's gender history to teachers and substitute teachers, who

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unlock the changing room for the transgender child before class starts. This risk of disclosure follows the child throughout 13 years of schooling—involving a significant number of people. It makes the child unable to decide whether and to whom to be open about their gender history. Involuntarily disclosure of gender history may conflict with the right to respect for private life under Article 8 of the ECHR (Sharpe, 2012), as well as Article 16 of the CRC and Section 102 of the Norwegian constitution. It is reasonable to question the need for others knowing another's gender history, especially in relation to children's changing and shower facilities. The mandatory disclosure of gender history and lack of equal inclusion with fellow pupils may lead to stigma and lack of respect for their privacy. This situation disadvantages transgender children and makes them worse off than other children.

The teachers' changing and shower facilities closest to the facilities for the other children are provided due to practical reasons. School staff regard this arrangement as the best and simplest way to handle the dilemma. Like the gender-identity alternative, it meets the basic needs of the transgender child, but it also creates an exclusionary environment. Separate facilities mean exclusion from other children and disclosure of the child's gender history. Furthermore, separate facilities prevent the child from taking part in social interactions in changing and shower facilities.

Changing rooms are not space for formal learning but are an important arena for social interaction and bonding. In European human rights law, inclusion is an important element in the concepts of equality and non-discrimination (Arnardóttir, 2007). In a case concerning mixed swimming lessons, the ECtHR placed weight on schools' special role in social integration and comprehensive education and considered that the benefit to children from

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attending swimming lessons primarily arises from participating in them with other children (*Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, ECHR 2017). Exclusionary facilities for transgender children do not promote the values of social integration and inclusion of all pupils. Yogyakarta Principle 16, subsection 16(f), lays out the right to education and stipulates that states shall ensure that students suffering social exclusion and violence are not marginalised or segregated in order to protect them (see also Council of Europe, Committee of Ministers, 2010: para. 31–32; Council of Europe, Commissioner for Human Rights 2009, recommendation 7). This alternative works against schools' role in social integration and may contribute to feelings of discomfort in other children, which might not otherwise occur if the school does not address the “otherness” of the child.

Systematically exclusion from the discussions, laughter and conversation in the changing rooms makes transgender children worse off than fellow pupils. According to the parents, being alone in a room, particularly a separate place on their own, while the other children go together to a different place creates stigma and otherness. Some parents describe that when told about the separate facilities, their child ‘sat there crying, burying [their] face in [their] hands saying to me: “I’ll be all alone, mum. All alone in the changing room”. Being excluded from both boys and girls was painful.’ As shown in this statement, separate facilities act as a constant reminder that the transgender child is different, not a “normal” boy or girl.

According to the parents, the child finds ways to avoid the facilities, for instance, coming to class wearing sportswear and not showering. Separate facilities disadvantage transgender children, putting them in a worse situation than other children.



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Staff members cite schools' limited facilities as the rationale for providing one child with a toilet. They fear that providing the transgender child with separate facilities will create a precedent and lead to more children demanding such facilities. The toilet alternative is similar to separate facilities as it excludes the transgender child from the other children and discloses their gender history. However, this alternative is significantly different and has far more serious repercussions for the child. Unlike all other children, the transgender child cannot shower after physical education, which can be a significant, stigmatising disadvantage.

According to the parents, their child finds not being able to shower extremely upsetting, and it makes them feel disgusting. Although schools may not require children to shower after physical education (Norwegian Directorate for Education and Training, 2014), schools are not entitled to deny children the opportunity to shower after physical education, which happens as a consequence of not providing shower facilities.

When the transgender child goes into the toilet, they believe that everyone is staring at them, and they feel uncomfortable about being alone in the room. Consequently, they have been skipping class. Thus, the toilet alternative's effects on the child's school attendance and ability to concentrate at school threatens their educational opportunities and right to education under the CRC and the Norwegian Education Act. Section 9A-2 of the act establishes that all pupils are entitled to a good, safe school environment conducive to their health, well-being and learning. Exclusionary and stigmatising changing rooms, such as toilets, do not promote a good psychosocial school environment. This alternative imposes considerable disadvantage on transgender children and clearly makes them worse off than other children. These accommodations mean that transgender children are treated differently, suffer disadvantages and, therefore, are legally worse off than cisgender children, regardless of whether schools

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intend to do so (Prop. 81 L (2016–2017), chapter 12). How much worse off the child is varies among the alternatives, with the toilet alternative clearly the more disadvantageous.

### **4.3 Objective Purpose: The Reason of Modesty or (Supposed) Discomfort**

Others' *discomfort* is often put forward as an argument against providing transgender people access to bathroom, changing and shower facilities matching their gender identity. What is at stake is the belief that it is intimidating to undress or be seen naked by a person who has different genitals but the same gender identity. The Norwegian Equality and Anti-Discrimination Ombud or the Equality and Anti-Discrimination Tribunal has not dealt with a complaint about transgender people's access to gender-binary facilities,<sup>17</sup> but the Ombud has stated that in certain circumstances, it may be lawful to place weight on a legal woman having 'male sex characteristics' and thus to treat them differently from other women. This rationale may be justified by the concept of modesty (Equality and Anti-Discrimination Ombud, case 14/840, 9 September 2014), which—although a narrow exception—may be seen as an objective purpose (Prop. 88 L (2012–2013), para. 12.1.1; Prop 81 L (2016–2017), paras. 14.2.1 and 14.9.5). School staff do not explicitly state that transgender children's bodily appearance creates a need for accommodation, but this appears to be the underlying cause. According to the parents of one transgender child, the child's genitals are the reason why they need accommodation. The transgender child, too, would feel uncomfortable and different if changing and showering with fellow pupils. Moreover, the parents assume that other students

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<sup>17</sup> As of September 2017, the Equality and Anti-Discrimination Ombud had received two complaints concerning changing room and toilet facilities for adults but had not yet given any opinions. In January 2018, the Ombud's authority to handle individual complaints was transferred to the Equality and Anti-Discrimination Tribunal. Personal communication with Helle Holst Langseth, senior adviser, Equality and Anti-Discrimination Ombud, 13 September 2017. Notes are on file with author.

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and especially their parents would feel discomfort if their child shared facilities with transgender children.

#### 4.3.1 Concerns of Transgender Children

According to the parents, undressing and showering with many other children is problematic for transgender children. For example, not all the other girls know that one transgender girl has a penis, and having one makes her ashamed. For this girl, being different from the majority is the main problem. If she could choose, she would prefer to share facilities with a few close friends.

In this study, pupils and teachers generally see transgender children in accordance with their gender identities. Undressing in front of fellow pupils would reveal or remind classmates of their gender history. According to one parent, the other children are rude sometimes.

Undressing in front of them would entail a risk of more cheeky remarks, creating a poor school environment. Lessening this risk would serve the best interests of the child, which is a legitimate aim (see for example ECtHR, *X and Others v. Austria*, para. 138). Accommodating transgender children with separate changing and shower facilities due to these children's modesty and privacy concerns is an objective purpose based on their actual needs, as required for a purpose to be objective (Prop. 81 L (2016-2017) para. 14.2.1).

#### 4.3.2 Concerns of Other Children

To protect the privacy of transgender children, the interview material does not include the views of their fellow pupils. To the researcher's knowledge, no studies have examined whether others feel discomfort when sharing facilities with transgender people.

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Undocumented assumptions may not qualify as factually correct and relevant to an actual need (Prop. 81 L (2016-2017) para. 14.2.1). If others' discomfort does exist, it might not constitute an objective purpose if it arises from stereotypes and negative attitudes (Equality and Anti-Discrimination Tribunal case 2/2017, 23 March 2017) towards transgender people or other interests unworthy of protection (Prop. 81 L (2016–2017) para. 14.2.1).

The United States courts<sup>18</sup> and Office for Civil Rights have ruled that others' discomfort does not justify denying transgender students access to facilities matching their gender identity (for locker rooms, see Township High School District 211<sup>19</sup>; for restrooms, see *Kenosha Unified School District v. Whitaker*, 2016 U.S. App. LEXIS 20401 (7th Cir. 2016)). In the case of *Kenosha Unified School District v. Whitaker*, an appeals court recognised the legitimacy of protecting privacy interests but viewed the privacy argument as based on 'sheer conjecture and abstraction' (*Kenosha Unified School District v. Whitaker*, 29) as the school district did not provide evidence of harm to other students. The court stated that a 'transgender student's presence in the restroom provides no more of a risk to other students' privacy rights than the presence of an overly curious student of the same biological sex who decides to sneak glances at his or her classmates performing their bodily functions' (*Kenosha Unified School District v. Whitaker*, 29–30).<sup>20</sup> One, of course, might ask why transgender children's discomfort is worthier of protection as their concern is also socially and culturally produced. However, the

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<sup>18</sup> US courts disagree on whether legal protection against discrimination due to sex and sexual orientation also covers gender identity and transgender status (see Tobin and Levi, 2013; Brown, 2014; Moffitt, 2015; Eckes, 2017; Pirics, 2017). The United States has not ratified the CRC.

<sup>19</sup> US Department of Education, Office for Civil Rights letter to Dr Daniel E. Cates, superintendent, Township High School District 211, 2 November 2015.

<sup>20</sup> See, however, Danish Board of Equal Treatment case no. 2015-6811-22682, 2 March 2016. The board concluded that providing separate facilities—and not women's changing and shower facilities—to a legal woman who had not undergone gender confirmation surgery was not discriminatory for reasons of modesty.

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court's statement rightly implies that accepting the privacy argument suggests that being seen by transgender children brings more discomfort—or harm—than being seen by cisgender children. This view is based on stereotypes of and prejudices against transgender children. Fellow students' assumed concern arises from customs and practices regarding the use of shower and changing facilities, the understanding that genitals determine gender and the dominant heteronormativity of modern societies.

It, therefore, is questionable whether others' (supposed) discomfort warrants their protection. Protecting others from discomfort perpetuates stigma, stereotypes and prejudices against transgender children, or what Tobin and Levi (2013: 317–318) call “cultural bias”, which laws prohibiting discrimination aim to address. This protection of others indicates that transgender people's bodies—and thus bodily diversity—are harmful and should be separated from cisgendered bodies. Accepting others' discomfort as an objective reason protects the interests that are the underlying cause of discrimination against transgender people and makes their protection from discrimination illusory. Even more so, in this study, others' discomfort is based not on facts but on the assumptions of the parents of the transgender children. Differential treatment, therefore, is justified only by the objective to protect the privacy of the transgender child.

#### ***4.4 Other Solutions: Curtained-Off Areas***

The requirement of necessity stipulates that differential treatment in a particular case must be mandatory in a particular case to achieve the aim of protecting transgender children's privacy (Prop. 81 L (2016–2017), paras 14.2 and 14.9.3). The gender-identity alternative does ensure this privacy, but less stigmatising options are available. The U.S. Office for Civil Rights has

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called for installing privacy curtains that can meet the wishes of all pupils who desire more privacy.<sup>21</sup> Privacy curtains could enable children to use facilities matching their gender identity while changing and showering with their schoolmates. Installing curtains requires architectural modifications. However, considering that these are changing and shower facilities in public schools and that the matter affects children's right to education and direct discrimination, which are all significant issues (Prop. 81 L (2016–2017), para. 14.2.1 and 14.9.5), the cost of architectural modifications is not necessarily a legitimate reason for not installing privacy curtains, which would make it unnecessary for transgender children to use changing rooms before their classmates. For the children in this study, who have safe school environments but want more inclusive alternatives, privacy curtains are the most adequate and equitable solution.

Separate facilities serve the privacy concerns of transgender children, but the same aim can be achieved in other ways, such as architectural modifications and the gender-identity alternative, if preferred by transgender children. Separate changing-room facilities, therefore, are not necessary. In this particular case, the gender-identity alternative is less invasive for the children, but it should be borne in mind that children have different views on which option (the gender-identity alternative, separate facilities or privacy curtains) is preferable and least stigmatising. Their particular class environments may lead to different experiences.

The toilet alternative is an invasive way to protect modesty, although it achieves this purpose.

As with the first and second alternatives, there are other ways to maintain privacy. When

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<sup>21</sup> The Township School District agreed to provide privacy curtains and grant the transgender girl access to women's changing rooms. US Department of Education, Office of Civil Rights letter to Dr Daniel E. Cates, superintendent, Township High School District 211, 3 December 2015.

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interviewed, one school staff member admitted the staff had realised they could have handled the situation differently and provided the separate teacher facilities:

I'd have to say that it has been a learning process. There was a lot of talk about the fact that there are lots of children who don't want to shower or undress. We assumed we would need a lot of separate changing rooms, but I see now that this is different. It's not the same as if you're a Muslim and don't want to undress, but that was an argument at the time. I see that we need to handle it differently.

This statement suggests that the school staff members changed their minds and will provide another alternative than the toilet in the future. However, there also appears to be unwillingness to recognise children's needs for more privacy. The gender-identity alternative, separate facilities and privacy curtains are better arrangements than the toilet option to maintain privacy. In no circumstances does ensuring privacy require making children change in toilets. Moreover, in the particular situations discussed, separate facilities and the gender-identity alternative are not necessary as privacy curtains can protect transgender children's privacy. In these particular cases, therefore, all the alternatives are discriminatory.

#### **4.5 Summary**

To varying extents, these three alternatives exclude, impose stigmas on and lead to disclosure of transgender children's gender history. Consigning transgender children to toilets without shower facilities amounts to unlawful discrimination on the grounds of gender identity.

Transgender children are significantly worse off than other pupils due to their gender identity.

The discomfort felt by transgender children sharing facilities with classmates of the same gender identity is an objective reason to treat transgender children differently from cisgender

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children. However, the (supposed) discomfort of other pupils is not objective but is based on prejudice against transgender children, which non-discrimination law are intended to combat.

The analysis has shown less intrusive ways than providing toilets, such as the other two alternatives, to protect transgender children's privacy. However, in the particular situations analysed in this study, where the school environment is good, and transgender children desire inclusion, privacy curtains should be installed.

In certain circumstances, such as in a poor school environment, the gender-identity alternative and separate facilities may be justified as privacy curtains or stalls may not be in the transgender children's best interests. The decision must be governed by the wishes and best interests of transgender children, which should be a primary consideration in all actions concerning children (CRC Article 3; Norwegian Constitution Section 104). To determine children's best interests, they must be given the opportunity to express their views, and these must be given due weight (CRC Article 12; CRC Committee, General Comment No. 14, para. 43). A clarification of children's rights should be stated in written school policies to push schools to respect the rights of transgender pupils. Indeed, although gender-binary facilities cause challenges for the schools in this study, none has issued written policies for handling similar requests in the future.

## **5 Concluding Remarks**

The school practices demonstrate the power of gender-binary norms and the structural inequality and exclusion of transgender children resulting from gender-binary institutions.

Under the CRC, the Norwegian authorities have a duty to take measures to redress substantive inequality and ensure all children have equal opportunities to enjoy the right to education



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(CRC Article 2 and 28; CRC Committee, General Comment No. 21, para. 26). Installing privacy curtains for all children who desire privacy is a way to combat the structural inequalities transgender children face.

When weighing the positive effects of privacy curtains for both transgender children and other children against the generally assumed costs of curtains, creating curtained-off changing and shower facilities for all students who desire more privacy does not appear too onerous for schools. Granting public funds to install privacy curtains or cubicles would be an important step towards enabling transgender children to use changing facilities at the same time as their fellow pupils without disclosing their gender history, thus fostering inclusion. This measure would help ensure universal access to changing and shower facilities regardless of gender identity and satisfy other pupils' desire for more privacy due to, for instance, religious reasons. This option aligns with the aim of non-discrimination law to promote equality (Sexual Orientation Anti-Discrimination Act, Section 1) and the aim of the CRC to ensure equal educational opportunities for all children. Inclusion, rather than exclusion and special procedures, can contribute to changing negative attitudes and combating prejudices against transgender children. Embracing difference (see Fredman, 2011: 30-31) can help achieve substantive equality for transgender people and other minorities.

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