

Nondiscrimination on the Basis of Gender Identity

On November 23, 2011, Governor Deval Patrick signed into law “An Act Relative to Gender Identity.” The law, which went into effect on July 1, 2012, amended M.G.L. c. 76, § 5 to prohibit discrimination on the basis of gender identity of students who enroll in or attend public schools. The amendment to M.G.L. c.76, §5 states in part:

No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.

In June 2012, the Massachusetts Board of Elementary and Secondary Education (Board) adopted revised regulations reflecting a school district's obligation to provide equal access to all educational opportunities irrespective of a student's gender identity. 603 CMR §26.01-26.09. The Board also directed the Department of Elementary and Secondary Education (DESE) to provide guidance.

On February 15, 2013, the DESE issued its guidance, clarifying how the new law and its accompanying regulations apply to school districts. As described below, the new DESE guidance addresses a school district's obligations when dealing with students whose gender identity is different than their birth sex.

[Gender Identity - Defined](#)

Gender Identity is defined as “a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth. Gender-related identity may be shown by providing evidence including, but not limited to, medical history, care or treatment of the gender-related identity, consistent and uniform assertion of the gender-related identity, or any other evidence that the gender-related identity is sincerely held as part of a person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.” 603 CMR 26.01, Acts of 2011, Session Law 199.

[Summary of Advisory](#)

School districts should first determine whether the student's gender-identity is a “sincerely held” belief. According to the DESE guidance, the student and/or parent should be given broad discretion to demonstrate their gender identity, including but not limited to confirmation of a student's asserted gender identity by a parent, health care provider, school staff member familiar with the student, clergy member, coach or family member.

The [DESE guidance](#) covers a broad range of topics:

- **Student Records.** A school district must keep confidential a student's assigned birth sex, name change for gender identity purposes, gender transition, and any medical or mental health treatment related to gender identity. If a student uses a chosen name, the school should keep two files - one under the student's chosen name and one under the student's birth name. When requested by the student or the student's parents, the school should alter records listing the student's birth sex. The student's birth sex

- should be maintained in a separate file and limited to those administrators who need to know (e.g. superintendent, school nurse). The DESE has a procedure in place to update name changes and gender markers in the DESE Student Information Management System (SIMS) upon request.
- **Addressing Students.** School personnel should refer to the student based on his or her chosen name (e.g. John wishes to be called Jane). Massachusetts' law allows for common law name changes, so a school district does not need a court order formalizing a name change before responding to a request from a student or parent to use a chosen name. A student's teacher(s) should ensure that the class uses the proper pronoun (he or she) to refer to the student based on their gender identity.
 - **Restrooms, Locker Rooms, and Changing Facilities.** A student must be provided access to the facilities that correspond with his or her gender identity. Students who are not comfortable using these facilities should be provided with access to a unisex bathroom and/or a reasonable accommodation to help the student feel comfortable (e.g. a privacy curtain in the locker room). School districts are encouraged to meet with the student (and parent) to discuss the student's preferences and develop a plan to allow comfortable access to restrooms, locker rooms and changing facilities.
 - In schools where there are sex-segregated classes or athletic activities, student must be allowed to participate consistent with their gender identity.

The DESE guidance also provides some practical suggestions of accommodations that a school district may provide in order to facilitate a student being free from discrimination based on gender identity.

Action Items

1. School districts should review all existing policies and handbooks to ensure the non-discrimination clause is updated to prohibit discrimination based on gender identity.
2. School districts should review any gender distinct policies (e.g. dress codes for proms or special events based on sex) to ensure compliance with the new law. Schools should eliminate gendered policies (e.g. change to one color for all graduation gowns instead of boys wear blue and girls wear white graduation gowns).
3. School districts should provide education and training to create a safe and supportive environment for all students.
4. School districts need to be cognizant of bullying against students based on gender identity. See [DESE Guidance on Notifying Parents When a Student Has Been Bullied Based on Sexual Orientation or Gender Identity/Expression.](#)

For more information regarding the DESE guidance or if you have any questions, please contact one of our attorneys. CLP attorneys are available to provide training and professional development on the new law and guidance.