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**Education Alert
February 2013**

**Massachusetts' Department of Education Issues Guidance
on Gender Identity Law**

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On November 23, 2011, Governor Deval Patrick signed into law "An Act Relative to Gender Identity" (Chapter 199 of the Acts of 2011). It went into effect on July 1, 2012, amending M.G.L. ch. 76, § 5 to prohibit discrimination on the basis of gender identity of students who enroll in or attend public schools. On February 15, 2013, the Massachusetts Department of Elementary and Secondary Education issued guidance, clarifying how the new law and its accompanying regulations apply to school districts.

Definition of Gender Identity

The law and its accompanying regulations have a broad and cumbersome definition of "gender identity." It is "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."

The new guidance clarifies that this definition is intended to encompass two groups -- gender non-conforming and transgender students. Transgender students are youth whose assigned sex at birth differs from their clearly and persistently identified sex. Gender non-conforming youth do not meet the stereotypically expected norms associated with their assigned sex at birth.

Identifying Gender-Related Identity

A student or a parent, in the case of a young student, is in the best position to determine the student's gender identity. As a result, a school should accept a student's claimed gender identity unless it has a "credible basis" for believing that the student is asserting the gender identity for an improper purpose. The guidance does not specify the circumstances under which a school would have a "credible basis" to doubt a student's gender identity. Nor does it outline the reasons for which a student would be improperly asserting a gender identity.

That being said, a student inconsistently asserting his or her gender identity is not a "credible basis" for doubting the student's gender identity "as long as there is other evidence that

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the gender-related identity is sincerely held as part of [the] person's core identity." Examples of acceptable evidence are letters from family members, health care providers, school staff, social workers, clergy members, coaches or family friends. The letters could explain that a student is receiving treatment related to the gender identity or has been asked to be treated consistent with his or her asserted gender identity. A student may also provide photographs of public events or family gatherings.

Addressing Transgender and Gender Non-Conforming Students

Schools should approach transgender or gender non-conforming students to determine what name and pronoun to use within the school. Massachusetts' law allows for common law name changes, so upon a request from a student or parent, the school should change the student's name in its records and in the Student Information Management System. A school district does not need a court order.

Additionally, because many students are not openly transgender or gender non-conforming, school personnel should speak with these students about how to refer to them in correspondences and before discussing the students' gender identity with the parent(s).

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 another under the assigned birth name.

A school should direct staff to use the student's chosen name. It may only disclose information in the student's record related to gender identity when personnel require it to provide services to the student and when it will benefit the student. Before disclosing the information, the school should consult with the student or with a parent, in the case of young student.

The school should also alter records listing the student's sex if a transgender student or in the case of a young student, a parent, requests the change.

Restrooms, Locker Rooms, and Changing Facilities

A school should meet with a transgender student and his or her parent to discuss the student's access to restrooms, locker rooms and changing facilities. The student must be allowed



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access to the facilities that correspond with his or her gender identity. However, transgender students who do not feel comfortable should be provided with access to a single unisex restroom or the nurse's restroom.

Other students in the school may feel uncomfortable with the transgender student using these facilities. Nevertheless, the school cannot deny the transgender student access to these facilities. The guidance instead suggests providing counseling to the students feeling discomfort.

Athletics

If a school has sex-segregated classes or athletic activities, including intramural and interscholastic athletics, it should allow students to participate on teams consistent with their gender identity. The Massachusetts Interscholastic Athletic Association will rely on the gender determination made by the student's district.

Policies and Procedures

School districts must update their policies and procedures, including their non-discrimination statement, to address the new law. They should especially reexamine gender-based policies such as rules requiring gender based garb for graduation, prom or the National Honor Society Ceremony.

Districts must also provide training to staff to ensure that transgender and gender nonconforming students have equal access to school programs. Districts should further incorporate training on gender identity into their anti-bullying curriculum and student leadership trainings. Murphy, Hesse, Toomey & Lehane is available to provide professional development on the new law and guidance.

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If you have any questions or concerns with regard to this alert, please contact Alisia St. Florian or the attorney assigned to your account.

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