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## The Dangers of Overbroad Transgender Legislation, Case Law, and Policy in Education: California's AB 1266 Dismisses Concerns about Student Safety and Privacy

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# THE DANGERS OF OVERBROAD TRANSGENDER LEGISLATION, CASE LAW, AND POLICY IN EDUCATION: CALIFORNIA'S AB 1266 DISMISSES CONCERNS ABOUT STUDENT SAFETY AND PRIVACY

To a certain extent law must forever be subject to uncertainty and doubt; not from the obscurity and fluctuation of decisions . . . but from the endless complexity and variety of human actions. . . . [T]here will remain immeasurable uncertainties in the law, which will call for the exercise of professional talents, and the grave judgments of courts of justice.

– U.S. Supreme Court Justice Joseph Story (1779–1845)<sup>1</sup>

## I. INTRODUCTION

Gender has played a major role in ordering both ancient and modern societies.<sup>2</sup> If gender did not matter in our society, the phrases “it’s a boy” and “it’s a girl” would not make card-making companies millions of dollars each year. Although gender plays a major role in society, gender itself is not always a straightforward concept. For example, references to gender get complicated when a person has a female self-image, identifies as and behaves like a female, but was born with the physical characteristics of a male. Transgender individuals face unique challenges in a gender-oriented social order.<sup>3</sup> Gender-

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<sup>1</sup> JOSEPH STORY, *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 70–71 (William W. Story ed. 1852).

<sup>2</sup> See, e.g., Sam Curtin, *Gender Roles in Ancient Societies*, ANTHROBUM.BLOGSPOT.COM, (July 18, 2011), <http://anthrobun.blogspot.com/2011/07/gender-roles-in-ancient-societies.html>.

<sup>3</sup> See SHANNON MINTER & CHRISTOPHER DALEY, NAT’L CTR. FOR LESBIAN RIGHTS & THE TRANSGENDER LAW CTR., *TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES*, 3 (2003), available at [www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/transrealities0803.pdf) [hereinafter *Trans Realities*]. Statistics obtained through a survey of 155 transgender individuals published in this study reveal:

- Nearly 1 in every 2 respondents has experienced gender identity based employment discrimination;
- More than 1 in every 3 respondents has suffered from gender identity discrimination in a place of public accommodation;
- Nearly 1 in every 3 respondents has been the victim of gender identity

oriented systems of social order are abundant in schools,<sup>4</sup> making education a useful context to analyze transgender law and policy.

Colleges and universities<sup>5</sup> are especially fertile ground for transgender issues to arise. For example, a transgender student attending college might encounter issues with restroom use, locker room access, gender-specific sports, gender-specific housing on campus, records that identify the student's gender, university health plan coverage problems, and pronouns used by teachers to address the student. Administrators need to face these issues for the safety and well-being of transgender students, and to minimize legal liability. Non-transgender students must also face some of these issues as they deal with concerns for personal privacy, safety, and fairness. Although higher education may face more transgender issues than secondary and primary education, national media tends to focus on K–12 transgender law and policy.<sup>6</sup> Similarly, much of this article will focus on primary and secondary education.

The legal and social complexities associated with transgender individuals have received increasing attention over the last several years.<sup>7</sup> Vice President Joe Biden has called it the “Civil Rights issue of our day.”<sup>8</sup> Much of the

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discrimination in housing;

- Over 30% of respondents report that they have been discriminated against while trying to access health care;
- More than 1 in 4 respondents have been harassed or abused by a police officer;
- 1 of every 5 respondents has suffered discrimination while attempting to access services from a social service provider;
- 14% of respondents have suffered from discrimination in jail or prison.

<sup>4</sup> Schools have many gender-specific facilities and activities. Sex is recorded and kept in official educational files.

<sup>5</sup> For brevity, the word “universities” will be used in place of “colleges and universities” for the remainder of this article.

<sup>6</sup> The media's focus on primary education is mainly in response to a recent piece of legislation that was passed in California, which broadens the rights of students who possess a gender-identity different from their natal sex.

<sup>7</sup> See TRANS REALITIES, *supra* note 3, at 3. See also Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. Pa. J. Const. L. 895, 2007 (noting legal and social advancements regarding transgender issues).

<sup>8</sup> Jennifer Bendery, *Joe Biden: Transgender Discrimination Is 'The Civil Rights Issue of Our Time,'* HUFFINGTONPOST.COM, (Oct. 31, 2012, 2:17 PM), <http://www.huffingtonpost.com/2012/10/30/joe-biden-transgender->

attention given to the transgender community has come from its association with other sexual minorities—gays, lesbians, and bisexuals. However, other sexual minorities do not face all of the same difficulties that transgender individuals face. For instance, a gay or lesbian person is not uncomfortable using the restroom or locker room that corresponds to his or her birth sex. Only transgender people have to worry about their health insurer covering medical costs associated with aligning their internal gender identity with their external anatomy. General LGBT law will not resolve most transgender issues. Accordingly, many transgender anti-discrimination laws have been passed, usually at the local level.<sup>9</sup> California passed Assembly Bill (AB) 1266 in August 2013, which expands on an existing transgender anti-discrimination law in the California Education Code.<sup>10</sup>

The purpose of this article is to expose the safety hazards that trending legislation imposes on all students, including transgender students, and to assist state legislatures and courts as each are called upon to create law addressing these complicated issues.

The breadth of potential discussion on transgender issues in education is expansive. Accordingly, Part II of this article limits the scope of discussion. Part III sets forth and defines relevant terms. Part IV uses California's Assembly Bill 1266 as a case study of transgender legislation in education. Part V provides insights for courts and legislatures facing transgender issues. Part VI focuses on institutions of higher education.

## II. SCOPE: WHAT THIS ARTICLE IS NOT SAYING

Discussing the transgender laws and policies of educational institutions can turn a civil conversation into a cage match. This clash is evident in the two common titles given to California's AB 1266: supporters call it the "School Success and Opportunity Act"<sup>11</sup> while opponents call it the "Transgender

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rights\_n\_2047275.html.

<sup>9</sup> See Elkind, *supra* note 7, at 896.

<sup>10</sup> Assemb. B. No. 1266, Cal. State Leg. 2013-2014 Reg. Sess., (Cal. 2013).

<sup>11</sup> Parker Marie Malloy, *California's School Success and Opportunity Act (AB 1266) Will Save Lives*, HUFFPOST GAY VOICES, HUFFINGTONPOST.COM (AUG. 21, 2013, 4:00 PM), <http://www.huffingtonpost.com/parker-marie-molloy/californias-school->

Bathroom Bill.”<sup>12</sup> Rather than stir the pot of controversy with moral arguments, this article will focus on implications of trending law and policy in educational settings. This article has political implications, but it is not written to sway moral perceptions of the transgender community one way or the other.

### III. KEY TERMS AND DEFINITIONS

Different sources adopt slightly varying definitions of transgender, sex, gender identity, and so forth. Terms used to describe transgender identity continue to evolve.<sup>13</sup> The word “transgender,” as used in this paper, is an “umbrella term to describe people who ‘. . . have gender identities, expressions, or behaviors not traditionally associated with their birth sex.’”<sup>14</sup> In contrast, “cisgender” individuals have a gender identity that matches their natal sex.<sup>15</sup> People born with atypical chromosome combinations, genitalia, and hormones are categorized as intersex, which is distinct from transgender and falls outside the scope of this piece.<sup>16</sup> The term transsexual—identifying with the sex that was not assigned at birth<sup>17</sup>—is included in the transgender category.<sup>18</sup> Additionally, those who do not identify as either male or female, and those who identify with certain aspects of their non-natal sex but not as a member of that sex (i.e. cross-dressers) are generally included in the transgender category.<sup>19</sup> Throughout this article, predators who

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success-and-opportunity-act\_b\_3786798.html.

<sup>12</sup> Joe Fitzgerald Rodriguez, *Conservative Activists Try to Flush Transgender Bathroom Bill*, SFBG (Nov. 11, 2013, 7:50 PM), <http://www.sfbg.com/politics/2013/11/11/conservative-activists-try-flush-transgender-bathroom-bill>.

<sup>13</sup> GRETCHEN P. KENAGY, *Transgender Health: Findings from Two Needs Assessment Studies in Philadelphia*, OXFORD JOURNALS, HEALTH & SOC. WORK, Feb. 2005, Vol. 30, Issue 1, at 19. *available at* <http://hsw.oxfordjournals.org/content/30/1/19.full.pdf+html>.

<sup>14</sup> *Id.* (quoting Gender Education & Advocacy, Inc., 2001).

<sup>15</sup> AVERY BROOKS TOMPKINS, *INTIMATE ALLIES: IDENTITY, COMMUNITY, AND EVERYDAY ACTIVISM AMONG CISGENDER PEOPLE WITH TRANS- IDENTIFIED PARTNERS* 1 n. 1 (2011).

<sup>16</sup> Erin Buzuvis, *Transgender Student Athletes and Sex-Segregated Sport*, 21 SETON HALL J. SPORTS & ENT. L. 1, 10-11, 18 (2011).

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

feign a gender identity to gain access to transgender rights, privileges, or accommodations<sup>20</sup> will be referred to as trans-imposters. Rather than using the term “sex-segregated,” which implies discrimination, the more innocuous term “gender-specific” will be used. Rather than using the phrase “sex assigned at birth,” the more concise term “birth sex” will be used.<sup>21</sup>

Below, a brief review of how the psychological field has viewed transgender sexual orientation provides useful context to better understand the term “transgender” and how it has evolved. Until recently, transgender sexual orientation was couched as a disability known as Gender Identity Disorder (GID).<sup>22</sup> The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, third edition (DSM-III) incorporated GID as a mental disorder.<sup>23</sup> Patients with “strong and persistent cross-gender identification” and “significant distress or impairment in social, occupational, or other important areas of functioning” could be diagnosed with GID by their psychiatrist.<sup>24</sup> The new manual, DSM-V, eliminated GID and replaced it with “gender dysphoria,” which only applies to those who feel distressed by their gender identity.<sup>25</sup> This change was likely a response to mental health specialists and LGBT activists who have long considered GID a stigmatizing label, as it classified transgender individuals as mentally ill.<sup>26</sup> Later in this article, GID and gender dysphoria will be discussed from the standpoint of disability rights in education.

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<sup>20</sup> A predator may seek access to the locker room, showers, or restroom of the other gender for voyeurism or other, even more serious, crimes.

<sup>21</sup> In this article, the term “birth sex” is employed for ease of reference and is not meant to offend transgender people by suggesting that they were not born with feelings of incongruence between the sex assigned at birth and the sex they self-identify with.

<sup>22</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994).

<sup>23</sup> Nicole M. True, *Removing the Constraints to Coverage of Gender-Confirming Healthcare by State Medicaid Programs*, 97 IOWA L. REV. 1329, 1334 (2011).

<sup>24</sup> AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed. 1994).

<sup>25</sup> Moni Basu, *Being Transgender No Longer a Mental 'Disorder' in Diagnostic Manual*, CNN.COM, (Dec. 27, 2012, 10:46 AM). <http://inamerica.blogs.cnn.com/2012/12/27/being-transgender-no-longer-a-mental-disorder-in-diagnostic-manual/>.

<sup>26</sup> *Id.*

Some transgender individuals desire transition, that is, they seek to transform their bodies to match their gender identity. This is done through hormone treatments and surgical procedures. The World Professional Association for Transgender Health (W-PATH) recommends at least three months of “real life experience” (living day-to-day life as a member of the other sex), or at least three months of psychotherapy before receiving hormone therapy.<sup>27</sup>

**Figure 1: Transgender Spectrum**



Transgender is a broad category that includes people who merely “derive pleasure from dressing in the garb of the opposite sex,”<sup>28</sup> to those who have completed the transition process with sex reassignment surgery. Figure 1 provides a simple illustration of the range of behaviors and actions among transgender people. This article will discuss how the law may need to account for differences among people who occupy different positions of the transgender spectrum, and will also show how California AB 1266 broadens this spectrum without accounting for differences among transgender people.

#### IV. CRITICISM OF CALIFORNIA ASSEMBLY BILL 1266

Assembly Bill 1266 requires California public schools to allow students to use facilities, including restrooms, showers, and locker rooms, and participate on sports teams that match their stated gender identity.<sup>29</sup> The bill adds one subsection to

<sup>27</sup> WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 13 (6th ed. 2001).

<sup>28</sup> Janie Allison Sitton, *(De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law*, 7 WM. & MARY J. WOMEN & L. 1, n. 3 (2000-2001) (quoting WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 1 n.1, 3 n.b (1999)).

<sup>29</sup> CAL. EDUC. CODE § 221.5(f) (Deering 2013).

section 221.5 of California's education code and is only thirty-seven words long.<sup>30</sup> It reads as follows: "A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil's records."<sup>31</sup>

The implementation of this law depends on the definition of gender identity. The term "gender identity" is not defined in the code, rendering this law ambiguous. However, the term "gender" is defined as "sex, and includes a person's gender identity and gender expression."<sup>32</sup> The definition of "gender" goes on to define gender expression, but fails to assign a specific meaning to gender identity.<sup>33</sup> Administrators are not given any tools to determine whether a given student really does identify with a given gender or not. This situation gets more complicated when the student in question appears and behaves consistently with his or her birth-sex (in other words, the student has a gender expression that matches his or her birth-sex) but internally identifies with the other sex.

Without any definition or standards associated with gender identity, a student could establish a gender identity with nothing more than an unverified statement. Administrators are not given any legal means to verify gender identity. Nothing in the education code prevents cisgender students from lying about their gender identity to access whatever facilities and sports teams they want, for whatever reason they want. Identifying as male or female becomes a menu choice for students. Without knowing what is and is not gender identity, schools are forced into a corner where they either accept bare assertions of gender identity—even if they suspect the assertion is false—or risk breaking the law.

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> CAL. EDUC. CODE § 210.7 (Deering 2013).

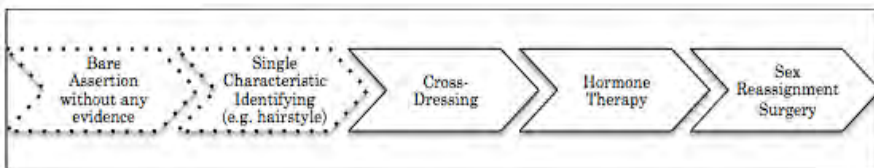
<sup>33</sup> Gender expression is defined as a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth. CAL. EDUC. CODE § 210.7 (Deering 2013). Since "sex" is defined as both gender identity and gender expression, it is unclear whether sex can be established if a given student's gender identity and expression are at odds with each other. Under this law, sex still must be determined—even if gender identity and expression are incongruent—so either gender identity *or* expression could be used to establish sex. As a practical matter, the statutory definition of sex does not require both gender identity *and* expression, as would appear at first glance.



AB 1266 fails to account for the varying degrees of transgender identity. Students who identify with a certain limited aspect of their non-natal sex—hairstyle for example—can assert a nonconforming gender identity. This becomes a problem when such a student has an illicit motive for wanting access to certain facilities or sports teams.

AB 1266 is broad enough to encompass students who look and express themselves in accordance with their birth sex, but internally identify with the opposite sex. As discussed previously, the term “transgender” covers a broad spectrum,<sup>34</sup> but this statute goes beyond the transgender spectrum to a point where any person willing to claim a state of mind can qualify.

**Figure 2: Transgender Spectrum Under AB1266**



Some sources mistakenly report that the law does not allow an overnight switch in gender identity, that students cannot switch their gender identity back and forth, and that the law requires gender identity to be verified.<sup>35</sup> However, nothing in the education code supports these assertions.<sup>36</sup> The California legislature not only based this law on an easily manipulated, subjective standard, but also failed to provide a statutory definition of that standard. This creates a real possibility for trans-imposters (and students who identify with limited aspects of their non-natal sex, but not as a member of that sex) to potentially abuse the new law and other students.<sup>37</sup>

<sup>34</sup> See *infra* Part II.

<sup>35</sup> Mario Vasquez, *Youth leader clarifies AB 1266 for readers*, THE ANTELOPE VALLEY TIMES, Sep. 27, 2013, available at <http://theavtimes.com/2013/09/27/youth-leader-clarifies-ab-1266-for-readers/>.

<sup>36</sup> CAL. EDUC. CODE § 210.7 (Deering 2013); CAL. EDUC. CODE § 221.5(f) (Deering 2013).

<sup>37</sup> See *infra* Part III.A, p. 11 (highlighting differences between AB 1266 and a Massachusetts policy, and specifically noting how the Massachusetts policy implemented gender identity verification standards to deter trans-imposters).

The vagueness of this bill gives everyone from youthful predators to aspiring athletes the ability to lie about their gender identity without being caught. Now, a male predator need not sneak into the women’s locker room to catch a glimpse of a girl in a state of undress; instead, he can waltz in and watch in plain view with the assurance that if someone objects to his presence, he can assert a female gender identity. The insufficient deterring power of social repercussions that accompany “coming out” as transgender will be discussed later on.

### A. *History of AB 1266*

The bill, which was sponsored by Assemblyman Tom Ammiano (D-San Francisco), passed the California Legislature on July 3, 2013.<sup>38</sup> Thirty-three registered support groups backed the bill, while only three groups formally opposed it.<sup>39</sup> Despite the lopsided lobbying efforts, the bill did not pass with ease.<sup>40</sup> All republicans opposed the bill, with the exception of four who abstained.<sup>41</sup> Two democrats voted “no” and twelve declined to vote.<sup>42</sup> Governor Jerry Brown approved the bill on August 12, 2013.<sup>43</sup>

The public has been just as divided, if not more so. An organized opposition called Privacy for All Students is working to collect the necessary 505,000<sup>44</sup> signatures to get a

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<sup>38</sup> A.B. 1266, 2013 Sess. (Cal. 2013), [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_bill\\_20130812\\_history.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_bill_20130812_history.html).

<sup>39</sup> *Pupil rights: sex-segregated school programs: Hearing on AB 1266 Before the Assemb. Comm. on Educ.*, 2013–14 Leg., 2013–14 Reg. Sess. 8–9 (Cal. 2013), available at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_cfa\\_20130417\\_183\\_007\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130417_183_007_asm_comm.html) [hereinafter *Apr. 17, 2013 Hearing*].

<sup>40</sup> George Skelton, *Opponents gear up to fight transgender law*, Los Angeles Times, Oct. 20, 2013, available at <http://articles.latimes.com/2013/oct/20/local/la-me-cap-transgender-20131021>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The bill was signed into law in August 2013, but it does not take effect until January 1, 2014.

<sup>44</sup> Although this is the number generally reported by media sources (e.g. Kimberly McDougall, *Backlash against Transgender Bathroom Bill Continues*, FOX40, Aug. 26, 2013, available at <http://fox40.com/2013/08/26/backlash-against-transgender-bathroom-bill/>), Article II, §9 of the California Constitution, which provides the referendum process, requires a number of signatures greater than or equal to 5 percent of the votes for all candidates for Governor at the last gubernatorial election. To get this

referendum on the ballot to do away with the new law.<sup>45</sup> If the necessary signatures are gathered and verified, the law would be suspended until the November 2014 general election, at which time the public would vote to keep or repeal the law.<sup>46</sup> The opposition partially stems from concerns that predators will abuse the law, exposing children to serious danger. Members of Privacy for All Students spoke out, saying, “It’s just not reasonable, it’s just not logical. It’s not safe, it’s not prudent that a young man would have free access on any given day that he so chooses to enter into the girls lockerroom [sic] or vice versa.”<sup>47</sup> The group alleges that some parents are so outraged by the bill that they are pulling their children out of public schools.<sup>48</sup> This is evidence of the defects of AB 1266.

In rebuttal to the concerns just mentioned, supporters argue that AB 1266 is “in line” with statewide policies in Massachusetts and Colorado.<sup>49</sup> However, California’s new law is out of line with those policies in several important ways. One difference is the statutory attention given to defining and verifying gender identity. In Massachusetts, for example, the law states

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

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referendum on the ballot, 504,700 signatures need to be verified. The verification process is based on a verification projection completed by counties, which sample 3 percent or 500 signatures—whichever is greater—and projects the findings to the statewide number of petitions.

<sup>45</sup> Kimberly McDougall, *Backlash against Transgender Bathroom Bill* Continues, FOX40, Aug. 26, 2013, available at <http://fox40.com/2013/08/26/backlash-against-transgender-bathroom-bill/>.

<sup>46</sup> *California Republican Party Endorses Referendum*, PRIVACYFORALLSTUDENTS.COM (Oct. 10, 2013, 8:59 AM), <http://privacyforallstudents.com/california-republican-endorses-referendum/>.

<sup>47</sup> McDougall, *supra* note 45.

<sup>48</sup> *Id.*; see also Becky Yeh, *Fallout from Calif. ‘transgender bathroom’ bill begins*, ONENEWSNOW.COM (August 20, 2013), <http://www.onenewsnow.com/culture/2013/08/20/fallout-from-calif-%E2%80%98transgender-bathroom%E2%80%99-bill-begins#.Up7NqY1drII> (assemblyman Tim Donnelly says at least one of his sons will no longer attend public school with the passage of the transgender bill).

<sup>49</sup> *VICTORY! CA Bill Will Ensure the Success and Well-being of Transgender Students*, TRANSGENDERLAWCENTER.ORG (Aug. 12, 2013), <http://transgenderlawcenter.org/archives/3544>.

person's core identity; provided, however, that gender-related identity shall not be asserted for any improper purpose.<sup>50</sup>

Under California's new law, there is no requirement that gender identity be supported by any evidence at all. AB 1266 ignores the possibility of gender identity being asserted for an "improper purpose," and is silent on the topic. Another key difference is the case-by-case approach of Massachusetts compared to the top-down approach of AB 1266.<sup>51</sup> The Massachusetts law is responsive to the individual, assessing the needs associated with each student's position on the transgender spectrum. The overbroad language of AB 1266 uses a one-size-fits-all approach. The transgender student who presents consistently with their birth-sex but asserts a nonconforming identity is given the same accommodations as the student who has fully transitioned to their non-natal sex.

### *B. Destroying Fences*

The opening paragraph of the California Constitution states, "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining **safety, happiness, and privacy.**"<sup>52</sup> AB 1266 puts these rights in jeopardy.

If the right to keep private parts private falls under the umbrella of privacy rights, this law deprives California students of their Constitutional right to privacy. This law threatens student safety by fostering circumstances that likely lead to harassment and abuse of all students, including transgender students. It could potentially rob female athletes of opportunities to compete. It provides a built-in scapegoat for youthful predators. The logical ends of this law could be the undoing of gender-specific boys' and girls' restrooms, showers, locker rooms, and sports teams. Some argue that such results

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<sup>50</sup> Mass. Gen. Laws. Ch. 4, § 7 (2012).

<sup>51</sup> *Compare* MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., MASSACHUSETTS ON GENDER IDENTITY 2 (2013), *available at* [www.doe.mass.edu/ssce/genderidentity.pdf](http://www.doe.mass.edu/ssce/genderidentity.pdf) (concluding by emphasizing the importance of addressing problems faced by transgender and gender nonconforming students on a case-by-case basis), *with* Assemb. B. No. 1266, Cal. State Leg. 2013–2014 Sess., (Cal. 2013).

<sup>52</sup> Cal. Const., art. I, § 1 (emphasis added).

are desirable.<sup>53</sup> But, to achieve these results, a price must be paid. In this case, student privacy and safety rights are painted over by the broad brushstrokes of AB 1266.

G.K. Chesterton illustrated the wisdom behind understanding the purposes of laws before attempting to reform them, stating

In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you do see the use of it, I may allow you to destroy it."<sup>54</sup>

Society has long fenced men out of certain women's facilities, and vice versa. Assembly Bill 1266 takes a wrecking ball to these fences. Preserving privacy, ensuring safety, and promoting female athletic opportunities are some of the uses behind erecting gender-based fences in schools. There is little evidence to suggest that the California Legislature contemplated the uses of these fences.

### 1. *Privacy rights*

"Privacy for all students" has been the battle cry of opponents to AB 1266.<sup>55</sup> This is a natural concern when a law puts both male and female anatomy together in the same locker room, shower room, and restroom. Privacy is an enumerated right in California's State Constitution.<sup>56</sup> However, the California Legislature did not classify the privacy concerns raised as being included under the state's Constitutional

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<sup>53</sup> See, e.g., Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. Contemp. Legal Issues 321 (1998) (arguing that sex-segregated sports harm women more than help them).

<sup>54</sup> G. K. CHESTERTON, *THE THING: WHY I AM A CATHOLIC* 27 (1929), available at [http://www.cse.dmu.ac.uk/~mward/gkc/books/The\\_Thing.txt](http://www.cse.dmu.ac.uk/~mward/gkc/books/The_Thing.txt).

<sup>55</sup> The name of the organized opposition is "Privacy For All Students." See *infra*, Part III.A.

<sup>56</sup> CAL. CONST. art. I, § 1.

guarantee of privacy.<sup>57</sup> Whether privacy concerns in this case implicate constitutional rights or not, privacy is an interest sought after by transgender students and cisgender students alike. For example, in an Education Committee hearing where this bill was analyzed, the committee discussed the harm caused to transgender pupils when they are denied access to facilities because of their birth sex.<sup>58</sup> An account was given of a female-to-male transgender student who was prohibited from using the boys' restroom.<sup>59</sup> The student did not comply with this instruction because "the pupil felt more comfortable using the boys' restroom."<sup>60</sup> This is not unreasonable. Restrooms are a socially delicate space where extremely personal functions take place.<sup>61</sup> This student perceived others of the same birth sex as being members of the opposite sex, and was uncomfortable with the idea of sharing the private space of a restroom with those people. Similar logic applies to cisgender students. If a girl who identifies as a girl is asked to share a restroom with people she perceives as male, she will be uncomfortable. In both cases, the students' discomfort is caused by the perception that someone of the opposite sex is violating their personal space. This discomfort may stem partially from principles of modesty—a principle rooted in privacy—and partially from feelings of vulnerability.

In one hearing, the California Legislature referred to the Massachusetts Department of Elementary and Secondary Education, which "caution[ed] that another student's discomfort sharing a facility with a transgender student is not a reason to deny access to the transgender student."<sup>62</sup> This policy reflects the idea that a transgender student's discomfort matters more than a cisgender student's discomfort. However, both groups of students have a state Constitutional right to privacy.<sup>63</sup> The problem is, by granting it to one group, the other

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<sup>57</sup> See *April 17, 2013 Hearing*, *supra* note 39.

<sup>58</sup> *Apr. 17, 2013 Hearing*, *supra* note 39 at 7.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Terry S. Kogan, *Transsexuals in Public Restrooms: Law, Cultural Geography and Etsitty v. Utah Transit Authority*, 18 TEMP. POL. & CIV. RTS. L. REV. 673, 683–84 (2009).

<sup>62</sup> *Apr. 17, 2013 Hearing*, *supra* note 39, at 6 (internal quotation marks omitted).

<sup>63</sup> CAL. CONST. art. I, § 1.

group loses the right. To accommodate everyone, all students need a space where they can be assured that no one they perceive as being of the opposite sex can enter.<sup>64</sup>

The stakes are even higher in the locker room than they are in the restroom. Individual stalls with latching doors, and dividers between urinals protect privacy in restrooms. A pre-operative transgender person can likely use the restroom of the gender they identify with without anyone noticing the transgender person's birth sex. However, the same transgender person is far less likely to keep people from noticing his or her birth sex in, for example, a swim team locker room. The privacy implications of locker rooms should be treated separately from privacy implications of restrooms.

The legislature's discussion on privacy was confined to a brief and erroneous analysis of a hearing in *California Education Committee, LLC, et al. v. Jack O'Connell* and an accompanying amici curiae.<sup>65</sup> Other than stating that this challenge of California's anti-discrimination statute was unsuccessful,<sup>66</sup> it is unclear what proposition the legislature thought the *O'Connell* case stood for. The natural inference is that since AB 1266 and the anti-discrimination statute are similar, a challenge to AB 1266 would probably be unsuccessful too. The following argument rests on the assumption that the legislature thought *O'Connell* supported the constitutionality of AB 1266.

The precedential value of *O'Connell* is weak. It never went to trial, was never published, and many of the Plaintiff's arguments were defeated on procedural grounds.<sup>67</sup> In *O'Connell*, the Plaintiffs challenged the amended definition of "gender"<sup>68</sup> in the education code (same definition used by AB 1266), in connection with SB 777, an anti-discrimination law.<sup>69</sup> They argued, among other things, that the statute was

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<sup>64</sup> One example of such a space is a family restroom consisting of an individual toilet or changing room behind a locking door.

<sup>65</sup> *April 17, 2013 Hearing, supra* note 39, at 2.

<sup>66</sup> *Id.*

<sup>67</sup> Cal. Educ. Comm., LLC, et al. v. Jack O'Connell, No. 34-2008-00026507, (Sacramento Super Ct. 2009), available at <http://transgenderlawcenter.org/issues/youth/california-education-committee-llc-v-jack-connell-decision> (order granting demurrer).

<sup>68</sup> See *infra* p. 7 and note 29.

<sup>69</sup> Cal. Educ. Comm., LLC, No. 34-2008-00026507 (order granting demurrer).

unconstitutional on its face and as applied because the new definition put educators in the position of reading students' minds to determine each student's self-identified sex.<sup>70</sup> The court responded that to prove a statute is facially unconstitutional, a plaintiff must show that application is impermissibly vague in all its applications, and the Plaintiffs failed to set forth sufficient facts to meet that burden.<sup>71</sup> The court reasoned that the as-applied challenge was brought against the wrong defendant because the complaint did not allege that the defendant did anything wrong.<sup>72</sup> The court further reasoned that the plaintiffs lacked a factual basis to establish a specific violation of privacy<sup>73</sup> (essentially ruling that Plaintiffs lacked standing for an as-applied challenge).

Plaintiffs further argued that educators would be less able to protect student privacy and safety from students of the opposite sex.<sup>74</sup> This argument was not directly addressed.<sup>75</sup> The ruling in this hearing does not establish law that dismisses a student's right to privacy in the locker room, or anywhere else.<sup>76</sup> Nor did the court rule that a cisgender student has no right to privacy in the presence of a transgender student.<sup>77</sup> Where the safety and privacy concerns raised in this case were dismissed on procedural grounds, it can hardly justify the conclusion that AB 1266 poses no threat to student safety and privacy. Accordingly, it is unclear what, if anything, the legislature's discussion of *O'Connell* adds to the analysis of the constitutionality of AB 1266.

The *O'Connell* case lacked a specific invasion of privacy, so the court did not address the issue.<sup>78</sup> What if there had been a specific incident? What if a student who was born a male, acted and appeared male, but claimed to identify as female, walked into the girls locker room after a drill-team competition and saw the girls showering or changing? The girls' sense of

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<sup>70</sup> *Id.* at 1.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1.

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.*

<sup>78</sup> *Id.*



modesty and dignity is compromised. “Through invasions upon [her] privacy,” she may suffer “. . . mental pain and distress far greater than could be inflicted by mere bodily injury.”<sup>79</sup> Assembly Bill 1266 robs these girls of a remedy.

Hypothetical scenarios that are likely to arise are an effective way to consider the consequences of dismissing privacy rights in this context. Imagine a male-to-female transgender student who begins using the girls’ locker room for gym class and interscholastic sports. This student is relieved to get away from the uncomfortable and sometimes hostile environment in the boys locker room. Not long after she starts using the girls’ locker room, the very boys who made her uncomfortable assert a female gender identity and start using the girls’ locker room as well. Assembly Bill 1266 destroys gender-specific fences so thoroughly that it could annihilate the privacy of the very students it was designed to protect.

Under this law, there are countless other scenarios—many of them more serious than those just mentioned—that would leave predators unpunished for violating the privacy rights of vulnerable students, including transgender students. Predation is never mentioned in any AB 1266 hearing.<sup>80</sup> The new law does not lock anyone into a gender—consistency is not a requirement.<sup>81</sup> This makes privacy predation more likely because predators who get caught could claim that on the specific day in question they were identifying with the opposite sex, but could switch back at any time. Since students are not required to commit to a gender, trans-imposters are shielded from the social consequences of “coming out” because they can reclaim their cisgender identity whenever they want. The law is held hostage by a lying student.

Further, the law does not require students to seek permission of administrators, or inform administrators of their intention to use the facilities of their non-birth sex.<sup>82</sup> AB 1266

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<sup>79</sup> Samuel D. Warren, Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

<sup>80</sup> See *Apr. 17, 2013 Hearing*, *supra* note 39; *Sex-segregated activities and facilities: Hearing on AB 1266 Before the S. Comm. on Educ.*, 2013-14 Leg., 2013-14 Reg. Sess. (June 12, 2013), available at [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_1251-1300/ab\\_1266\\_cfa\\_20130610\\_160930\\_sen\\_comm.html](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_1251-1300/ab_1266_cfa_20130610_160930_sen_comm.html) [hereinafter *June 12, 2013 Hearing*].

<sup>81</sup> Assemb. B. No. 1266, Cal. State Leg. 2013-2014 Reg. Sess., (Cal. 2013).

<sup>82</sup> *Id.*

grants the permission, not the school.<sup>83</sup> This allows youthful predators to gain access to gender-specific private areas without even asserting a gender identity consistent with those private areas. The predator need only assert a nonconforming gender identity if his or her motives are questioned.

## 2. *Safety rights*

Safety is another enumerated right in the California Constitution. A key issue with this piece of legislation is whether the new law poses a legitimate threat to student safety. Frankly, it does. Safety implications are of particular concern when children are involved. Harassment and abuse concerns carry even more weight than general privacy concerns.

Supporters of AB 1266 maintain that student safety concerns are not sincere, but rather, “myths to stir up fear and transphobia . . . .”<sup>84</sup> One argument used to justify this position is the “overwhelming evidence that it is trans people who face pervasive violence in these spaces.”<sup>85</sup> This argument fails to support the conclusion that safety concerns about AB 1266 are not adequately considered. First, this argument assumes that the safety concerns associated with AB 1266 are limited to cisgender students. In reality, safety concerns extend to transgender students as well. This argument also implicitly assumes that transgender students will face less violence in facilities that match their gender identity as opposed to facilities that match their birth sex. Such an assumption may not be accurate. A female-to-male transgender student might escape abuse and harassment from girls in the women’s locker room only to be sexually assaulted in the men’s locker room. To assume that abuse of transgender students will stop if they are allowed to use different facilities is to assume that bullies are only willing to abuse people of the same birth-sex. The dismal realities of bullying, abuse, and violence in schools need to be addressed with other, more reliable measures.

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<sup>83</sup> *Id.* (“A pupil shall be permitted to . . . .”)

<sup>84</sup> David, *Victory For Transgender Students In California*, BASICRIGHTS.ORG (Aug. 27, 2013), <http://www.basicrights.org/news/trans-justice-news/victory-for-trans-students-in-california/>.

<sup>85</sup> *Id.*

School locker rooms have been the site of shocking sexual assaults in the past.<sup>86</sup> AB 1266 makes locker rooms more dangerous by producing circumstances where individuals of the opposite birth sex are grouped together in an environment where people are undressing or showering. Even if you take trans-imposters out of the equation, the law produces circumstances that push the boundaries of student safety. For example, a female-to-male preoperative transgender student possesses anatomy that could make that student a target of sexual assault in the men's locker room. By grouping individuals of the opposite birth sex together in a private space, AB 1266 produces conditions that make sexual harassment and abuse more likely.

Under AB 1266, misdemeanor lewdness and indecent exposure are no longer crimes if committed in school facilities. California's Penal Code § 314.1 provides "Every person who willfully and lewdly, . . . [e]xposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby . . . is guilty of a misdemeanor." Students are generally not offended or annoyed by seeing the private parts of a person of the same sex in a locker room or restroom, but principals of modesty and safety cause students—especially K–12 students—to be offended and annoyed by people of the opposite sex who expose their private parts. The feelings of students who are subjected to an affront so shocking would likely be far deeper than mere offense and annoyance. Imagine a middle school girl entering a school locker room for the first time and feeling unsafe, vulnerable, and threatened by the sight of, and proximity to, male genitals, even if those genitals belong to a person who otherwise presents and identifies as female.

This girl and her similarly situated peers would choose to avoid such an encounter in the future by not using the locker room, which would affect their participation in school programs, like physical education. Feeling unsafe and

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<sup>86</sup> See, e.g., FREEH, SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNCIL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (Freeh Report), (July 12, 2012), available at [http://www.thefreehreportonpsu.com/REPORT\\_FINAL\\_071212.pdf](http://www.thefreehreportonpsu.com/REPORT_FINAL_071212.pdf). This comprehensive report lists all known Sandusky abuses and various failures of Penn State's administration.

uncomfortable, these students might skip class or entire days of school. This situation prevents these students from getting the credits they need to graduate on time. Some might drop out.

Many will meet this argument with skepticism, but the California legislature used this exact argument to explain why AB 1266 was necessary for transgender students.

The 2009 national school climate survey indicates that lesbian, gay, bisexual, and transgender (LGBT) youths feel unsafe at school, and are more than three times as likely as other students to have missed class or an entire day of school because of *feeling unsafe or uncomfortable*. Situations such as these prevent transgender students from getting the credits they need to graduate on time while others drop out of school.<sup>87</sup>

One article reported, “in many cases, students who are transgender are unable to get the credits they need to graduate on time when they do not have a place to get ready for gym class.”<sup>88</sup> Transgender youth feel unsafe and uncomfortable when forced to share intimate facilities with peers that do not share the same gender identity as the transgender student. While trying to solve this legitimate problem for transgender students, the California legislature created the exact same problem for all other students.

California code criminalizes lewdness and indecent exposure to protect people from the negative results just described. AB 1266 contradicts this criminal law by permitting a male-born transgender person to go into the girls’ locker room and expose male genitalia without consequence. Such was the case for a 17-year-old student in Washington.<sup>89</sup> The female student’s mother filed a police report after her daughter was upset about seeing a person displaying male genitalia in the sauna of the girls’ locker room.<sup>90</sup> The naked “man” was actually a male-to-female transgender individual.<sup>91</sup> Had the

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<sup>87</sup> *Apr. 17, 2013 Hearing, supra* note 39, at 7 (emphasis added).

<sup>88</sup> David, *supra* note 84.

<sup>89</sup> Alyssa Newcomb, *Transgender Student in Women’s Locker Room Raises Uproar*, ABC NEWS (Nov. 3, 2012, 6:14 PM), <http://abcnews.go.com/blogs/headlines/2012/11/transgender-student-in-womens-locker-room-raises-uproar/>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

transgender woman been a cisgender man that decided to use the women's sauna that day, criminal charges for indecent exposure and lewdness likely would have followed. But, because of an internal female gender identity, there is no legal remedy for the traumatized young woman. In fact, the transgender individual still has the school's blessing for continued use of the girls' locker room.<sup>92</sup> The upset 17 year-old victim is just as scarred by seeing the penis of a transgender person as she would be by seeing the penis of a cisgender person. She is left without vindication and remains uncertain about whether she will be subject to the same assault on her senses on another day.

Under AB 1266, this scenario could become an everyday occurrence in school locker rooms filled with vulnerable adolescents. Public policy favors heightened moral protections for young students, not removing moral protections all together. Misdemeanor lewdness and indecent exposure cannot coexist with AB 1266 in public school facilities because the very conduct that is criminalized under the one is expressly permitted under the other.

### 3. *Athletic opportunities*

The California Legislature addressed concerns about the impact that AB 1266 might have on sports.<sup>93</sup> Its conclusion was that any concern about transgender individuals participating in competitive sports is unfounded.<sup>94</sup> Their analysis relied on a report that was co-sponsored by the National Center for Lesbian Rights and the Women's Sports Foundation.<sup>95</sup> The report entitled *On the Team: Equal Opportunity for Transgender Students*<sup>96</sup> is fraught with flawed logic. First, it dismisses any worry that is not a competitive advantage concern, such as safety.<sup>97</sup> Consequently, political, cultural, and safety concerns are swept under the rug. It points out that

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<sup>92</sup> *Id.*

<sup>93</sup> *Apr. 17, 2013 Hearing, supra* note 39, at 3–4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> PAT GRIFFIN, HELEN J. CARROLL, *ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENTS* (2010), available at [www.wiaa.com/ConDocs/Con550/TransgenderStudentAthleteReport.pdf](http://www.wiaa.com/ConDocs/Con550/TransgenderStudentAthleteReport.pdf).

<sup>97</sup> *Id.* at 14.

concerns about creating an unfair competitive advantage for male-to-female transgender athletes are based on three unfounded assumptions.<sup>98</sup> As will be shown below, these assumptions are not effectively rebutted, nor are they necessarily tied to competitive advantage concerns.

The first supposedly unfounded assumption is “that transgender girls and women are not ‘real’ girls or women and therefore, not deserving of an equal competitive opportunity.”<sup>99</sup> This statement may be a legitimate political view, and represents a genuine frustration, but it does not directly address competitive advantages.

The second assumption is “that being born with a male body automatically gives a transgender girl or woman an unfair advantage when competing against non-transgender girls and women.”<sup>100</sup> This assumption seems to be accurate and supportive of the competitive advantage concerns. The report dismisses this assumption by pointing out that the male competitive advantage assumption relies on the belief that male puberty is the cause of physical advantages.<sup>101</sup> The report points out that some transgender youth did not undergo normal male puberty because they were receiving hormone therapy before puberty.<sup>102</sup> This reasoning fails to account for all the students who did undergo male puberty and still want to compete in women’s sports. Ignoring the moral concerns that arise out of a discussion of pre-pubescent gender transitioning, and assuming that athletic advantage concerns are resolved by pre-pubescent hormone treatment, it should be noted that AB 1266 does not restrict access to sports teams to transgender students who received hormone therapy before puberty.

The report further argues that transgender students who went through male puberty are not all taller, stronger, faster, and more skilled at sports than all females.<sup>103</sup> This assertion seems reasonable on the surface. However, stating generally that some people who undergo male puberty might be less athletic than the most athletic females misses the point.

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 15.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

Essentially this argument is asserting that since there is a possibility that a male-to-female transgender student is not as athletic as the most gifted female, all male-to-female transgender students lack a competitive advantage over female athletes. If this were true, women's sports would be integrated with men's sports and done away with, all because there are some men who are less athletic than some women.

Further, the issue is not whether a transgender female is better than all other females. The issue is whether a transgender female has an advantage, associated with her male birth sex, over some other females who are competing for limited spots on a women's team. In other words, the concern is partially about a transgender female's advantage over opponents, and partially about her advantage over others trying to make the team. Essentially, the question of whether having a male birth sex gives a transgender female an advantage over some other females (as opposed to all other females) is avoided by the report's argument.

The third assumption is "that boys or men might be tempted to pretend to be transgender in order to compete in competition with girls or women."<sup>104</sup> The report rightfully argues that "the decision to transition from one gender to the other—to align one's external gender presentation with one's internal sense of gender identity—is a deeply significant and difficult choice that is made only after careful consideration and for the most compelling of reasons." The flaw in this argument is that AB 1266 allows students to compete with whatever gender's sports team they want without taking any steps towards transitioning. Transitioning is serious. The real consequences of transition deter trans-imposters from pursuing athletics in a women's league where they could be more competitive. However, if people can merely say they identify with the sex opposite their assigned birth sex instead of socially and physically transitioning, the consequences are far less likely to deter gender fraud. Under AB 1266, a male does not need to dress as a female, express himself as a female, take testosterone blockers, or have any operations to play on the women's basketball team. All he has to do is say his internal sense of gender identity is female.

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<sup>104</sup> *Id.* at 14.

In further support of the argument that gender fraud is an unrealistic assumption, the report points to the long history of sex verification procedures in international competitions, and the lack of a single instance of such fraud being reported.<sup>105</sup> This argument supports a policy contrary to AB 1266. It supports the idea that if we want to keep trans-imposters from fraudulently competing in women's sports, we should use sex verification procedures. AB 1266 does not even prescribe a means for schools to verify gender identity, let alone birth-sex. The existence of a verification procedure deters would-be fraudsters. AB 1266 makes women's athletics vulnerable to abuse because it lacks consequences for potential trans-imposters, and does not prescribe means to verify that a student is truly transgender.

In 2011, the NCAA adopted a new transgender policy<sup>106</sup> that is essentially based on the same report.<sup>107</sup> Despite sharing a common origin, the new NCAA policy and AB 1266 do not arrive at the same conclusion. The NCAA policy safeguards against trans-imposters by requiring a significant degree of gender transition—at least one year of hormone therapy—before allowing biological males to compete on women's teams.<sup>108</sup> Specifically, a male-to-female transgender athlete cannot compete on a women's team unless the athlete has had a year or more of testosterone suppression.<sup>109</sup> Similarly, a female-to-male athlete who has received hormone therapy (testosterone supplements) for a year or more cannot participate on a women's team without changing that team's status to a mixed team.<sup>110</sup> These policies are responsive to competitive advantage realities. Even though the NCAA policy was based on the same information the California legislature used to create AB 1266, the NCAA policy drew a line on the transgender spectrum<sup>111</sup> at one year of hormone therapy and designed logical policies for transgender athletes who have

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<sup>105</sup> *Id.* at 14–15.

<sup>106</sup> NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES (2011), *available at* [www.uh.edu/lgbt/docs/Transgender\\_Handbook\\_2011\\_Final.pdf](http://www.uh.edu/lgbt/docs/Transgender_Handbook_2011_Final.pdf).

<sup>107</sup> *Id.* at 7–8.

<sup>108</sup> *Id.* at 13.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *See infra*, Figure 1, Figure 2.



passed that line.

In contrast, AB 1266 makes no distinction between those who have received hormone treatments and those who have not.<sup>112</sup> An unverified assertion of gender identity is the standard California lawmakers chose. The over-broad nature of AB 1266 leads to an incongruent transition from high school athletics to college athletics where a male-to-female transgender athlete who still has normal male levels of testosterone is no longer eligible for women's sports. The substantial disconnect between the NCAA policy and AB 1266, which were both based on the same report, should at least be cause for increased skepticism of AB 1266.

Finally, the loose, subjective standard of gender identity will weaken Title IX's ability to protect women's athletic opportunities in K–12 schools. From 1971 to 2008, Title IX caused female participation in high school athletics to jump by over 900 percent.<sup>113</sup> AB 1266 could undo some of that progress by allowing trans-imposters to fill women's rosters.

AB 1266 entices cisgender people to become or pretend to be transgender rather than protecting students who are already transgender. Incentivizing students to adopt a more fluid gender identity, or at least question their gender identity, is not a stated purpose of AB 1266,<sup>114</sup> but it is a consequence. The lure of athletic success in less competitive women's sports could pressure young male students into cashing in their gender identity—or some nominal portion of it, for a chance to better fill a stat sheet. Making this trade-off (gender identity for athletic opportunities) has long-term consequences for the student making the trade and for the female students who otherwise would obtain those athletic opportunities.

Cisgender female students who are afforded certain athletic opportunities under Title IX now have to share those limited opportunities with someone who was born male, and who, more likely than not, has normal male levels of testosterone. Additionally, based on the current language of AB 1266 and the relevant definitions in the California Education Code, students could abuse this law without consequence (since gender

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<sup>112</sup> See Assemb. B. No. 1266, Cal. State Leg. 2013-2014 Reg. Sess., (Cal. 2013).

<sup>113</sup> Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 404 (2010).

<sup>114</sup> *June 12, 2013 Hearing, supra* note 80, at 5.

identity is a subjective standard under this law). Even if the law is only abused by a small number of people, each abuse robs a student of an otherwise available athletic opportunity.

*C. Long-Term Effects: Is 1266 a Trojan Horse?*

Before the passage of AB 1266, California implemented SB 777, an anti-discrimination law that prohibits, among other things, discrimination based on gender<sup>115</sup>—which includes gender identity.<sup>116</sup> The California Legislature stated that the need for AB 1266 was to “provide specific guidance about how to apply the mandate of non-discrimination in sex-segregated programs, activities and facilities.”<sup>117</sup> Although the new law does clarify the contexts in which a school must not discriminate, it falls short of its stated purpose and fulfills other unexpressed purposes.

Prior to AB 1266, California public schools had express permission to keep certain facilities gender-specific.<sup>118</sup> AB 1266 effectively withdraws that permission. Rather than clarifying how to implement the existing anti-discrimination law, as the Legislature contends, AB 1266 grants privileges to a statutorily undefined category of students at the expense of other students’ privacy, safety, and athletic opportunities. If the Legislature wanted to merely clarify existing law, it could have defined gender identity or at least provided a standard for determining students’ gender identities instead of relying on bare assertions of their psychological state.

Before AB 1266, the San Francisco Unified School District and the Los Angeles Unified School District created policies dealing with restroom access for transgender students.<sup>119</sup> These policies required that the student’s gender identity be consistently and exclusively asserted at school, which reduced the risk of trans-imposters abusing the policy. Both policies also required that all students have access to a single stall gender-neutral restroom, or health room restroom if privacy was a concern.<sup>120</sup> Significantly, both policies specifically

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<sup>115</sup> Cal. Educ. Code § 220 (Deering 2013).

<sup>116</sup> Cal. Educ. Code § 210.7 (Deering 2013).

<sup>117</sup> *June 12, 2013 Hearing, supra* note 80, at 5.

<sup>118</sup> California Education Code § 231 (Deering 2013).

<sup>119</sup> *Apr. 17, 2013 Hearing, supra* note 39, at 5.

<sup>120</sup> *Id.*

address the unique privacy needs associated with locker rooms in addition to restrooms.<sup>121</sup> Under these policies, the locker room accommodations that are provided to transgender students are those that “best [meet] the needs and privacy concerns of all students involved.”<sup>122</sup>

Although these kinds of policies may still have defects, they seem to be responsive to student needs, not easily abused by trans-imposters, and attuned to locker-room-specific privacy issues. The argument in opposition to passage of the bill highlighted the practicality of allowing this issue to be addressed “at the level closest to the problem,” rather than using a “one size fits all” piece of legislation.<sup>123</sup> AB 1266 takes discretion out of school administrators’ hands and mandates specific treatment no matter the circumstances.

With the anti-discrimination law in place, and districts administering policies that fit their needs, why did the legislature need to pass AB 1266? AB 1266 is not a piece of legislation that simply addresses a problem—the problem was already being addressed. It is a political statement. By relying on the undefined term “gender identity” and failing to provide any means of gender identity verification, the law became dangerously ambiguous. With this ambiguity, people may stop asking whether a person really identifies with a certain gender out of fear that they are discriminating by questioning someone’s gender identity. If no one is ever questioned, deciding which locker room or restroom to use becomes a menu choice. It is not a stretch to imagine gender-specific facilities and sports teams being done away with completely. Viewed under this lens, AB 1266 is a weapon in a culture battle, compromising student safety and leaving their rights in its wake. If the California legislature is trying to reduce the importance of gender in American culture, let it pass a law that makes that purpose explicit instead of using a cloak and dagger approach that is more likely to sneak through the democratic process unnoticed.

School districts become the last line of defense for students. District policies could address the trans-imposter abuse of AB

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<sup>121</sup> *June 12, 2013 Hearing, supra* note 80, at 6, 7.

<sup>122</sup> *Id.* at 7.

<sup>123</sup> *April 17, 2013 Hearing, supra* note 39 at 7–8.

1266 by outlining transgender verification procedures. These procedures may require a consistently presented and expressed gender identity that is not just internal, but that involves parental acknowledgment, and perhaps a psychological exam. Although some or all of these verification procedures could be struck down in court as inconsistent with AB 1266, they would prevent trans-imposters from abusing the law. Importantly, school districts do not have leeway to create policy that would prevent the exposure of male genitals in a crowded girls locker room or vice-versa. That circumstance will become a reality under AB 1266 no matter what policies are adopted by school districts.

## V. INSIGHTS FOR LAWMAKERS AND COURTS

Courts and legislatures can learn much from the previously discussed defects of California AB 1266. Lawmakers and judges should demonstrate an understanding of the purposes of gender fences before clearing them away. If lawmakers and judges can show that they see the purpose of those fences, then society will be more likely to accept the law or precedent that is given. Below are some specific principles that will assist legislatures and courts as they are called on to create transgender law in the context of education.

When drafting transgender law or opinions in an educational context, legislators and judges should recognize the likelihood for abuse if the rights, privileges, and/or accommodations given to transgender students can be stolen by imposters who proclaim a fraudulent gender identity. If gender identity is determined solely by the self-proclaimed statement of a student, and the law does not provide any means for administrators to verify the student's assertion, student predators can use this overbroad standard as a shield to criminal guilt and civil liability. Unverified gender identity is a poor, easily manipulated legal standard that leaves students vulnerable, including the very students transgender laws are designed to protect.

Courts and legislatures can take measures to reduce the likelihood of abuse by implementing transgender verification standards. Few, if any, students would abuse AB 1266 if it required any student wanting to assert a nonconforming

gender identity to meet with administrators and their parents, consistently dress and present as their non-natal sex, and provide medical verification of their nonconforming gender identity. Although these standards would be effective in deterring abuse of the law, they do not fit well in every conceivable situation. For example, a number of transgender people do not identify anywhere in the traditional binary world of gender. They see themselves as neither male nor female. This group is not likely to have a consistent gender expression. In cases like this, where the student is planning to assert a fluid gender identity that is subject to constant change, one option would be the use of single-stall, unisex bathrooms. By allowing such students to use both male and female facilities and participate on both male and female sports teams, the school is compromising the privacy and safety of other students. Additionally, the concept of a fluid gender identity is especially attractive to student predators who want the benefits and accommodations given to transgender students, but do not want to undergo any degree of transition. Transgender law in education should deter trans-imposters by using standard verification procedures, and should make special considerations for transgender students who adopt a fluid gender identity.

Transgender law in education should specifically address locker rooms and treat them separate from restrooms. Privacy in locker rooms is less protected than in restrooms. Locker room saunas, showers, and common changing areas are places where anatomy matters. It matters for safety, privacy, decency, and morality. Transgender laws in education should not undo criminal statutes like those barring indecent exposure and lewdness. Law should not endorse the previously discussed scenario that played out in a girls' locker room in Washington.

A certain degree of flexibility is needed to account for the wide array of circumstances that arise when dealing with transgender issues. The flaws of AB 1266's broad top-down approach have already been discussed. Although the NCAA tried to create a more nimble policy, it may still have deficiencies. The people best situated to handle the complex issues surrounding transgender rights in education are those at the ground level, who can recognize and balance the interests of all students. To discourage these people from

discriminating against transgender students, laws could provide a process or method for dealing with each student in an individualized way.

As a matter of public policy, the safety and privacy interests of each student need to be recognized and understood. Privacy and safety are issues implicated by transgender law and should not be dismissed without careful consideration. This does not mean that a transgender student should never be allowed to use the restroom of the sex they identify with. For example, if most students recognize a female-to-male transgender student as a boy, then allowing that student to use the boys' restroom may result in fewer privacy and safety problems than forcing them to use the girls' restroom.

## VI. TRANSGENDER ISSUES IN HIGHER EDUCATION

Institutions of higher education are facing transgender issues that are complex, varied, and still somewhat novel. Universities would do well to learn from transgender case law to foresee areas of potential liability. Understanding the laws that could impose liability for transgender discrimination helps frame transgender issues from the perspective of university administrators.

### A. *Evolution of Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of sex.<sup>124</sup> Universities hire and maintain a workforce of student and non-student employees and must comply with Title VII. Early on, transgender people bringing Title VII claims were unsuccessful.<sup>125</sup> However, the landscape surrounding transgender discrimination claims under Title VII has evolved.

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<sup>124</sup> 42 U.S.C. § 2000(e) et seq. Title VII provides that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual’s . . . sex . . . .” 42 U.S.C § 2000(e)-2(a).

<sup>125</sup> See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (“Congress had a narrow view of sex in mind” and “never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (refusing to extend Title VII protection to transgender people, reasoning that discrimination based on “gender” is different from discrimination based on “sex”).

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins* where it held that an employer discriminated on the basis of sex when it engaged in sexual stereotyping of a non-transgender female employee who had some traditionally male characteristics.<sup>126</sup> Several federal courts have used the rationale of this case to extend Title VII protection to transgender individuals.<sup>127</sup> Universities must be careful to avoid discriminating against transgender individuals in the workplace since such discrimination would result in liability in most jurisdictions.

### B. *Claims Under the ADA*

Although gender dysphoria is a psychiatric disorder, transgender students cannot seek relief under the Americans with Disabilities Act (ADA) or the Rehabilitation Act of 1973 since both expressly bar “transsexualism” and “gender identity” disorders.”<sup>128</sup> This exclusion offers substantial protection to universities. The costs of accommodating transgender students’ could be extensive. For example, if there were no transgender exclusion under the ADA, a university might be required to provide gender-neutral on-campus housing, install unisex restrooms, provide private changing facilities, and adjust student health insurance. While universities do not need to worry about liability under the ADA or the Rehabilitation Act, some may provide these accommodations, or others, to promote the welfare of transgender students and limit liability under alternative theories like local anti-discrimination laws. Many universities have policies that prohibit discrimination based on gender identity and expression even if the state law governing

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<sup>126</sup> 490 U.S. 228, 250 (1989).

<sup>127</sup> *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (finding “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (stating in dicta that the logic and language of *Price Waterhouse* overruled the rationale of earlier Title VII/transgender cases; held that ‘sex’ under Title VII encompasses biological differences between men and women and gender); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (holding that a cross-dressing male plaintiff may state a sex discrimination claim under the Equal Credit Opportunity Act under certain circumstances); *see also Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

<sup>128</sup> *See* 42 U.S.C. § 12101 (ADA); 29 U.S.C. § 705 (20)(F)(i) (Rehabilitation Act).

the university does not require universities to do so.<sup>129</sup>

### C. State Anti-Discrimination Laws

State anti-discrimination laws may<sup>130</sup> or may not<sup>131</sup> protect transgender people from discrimination. Each university needs to be aware of the law in its jurisdiction and act accordingly. Many universities have institutional policy statements that are in line with state law or provide protection beyond what the state requires.<sup>132</sup> For example, Northern Arizona University offers gender inclusive housing<sup>133</sup> even though Arizona state law only prohibits transgender discrimination in public employment.<sup>134</sup> The following statement explains Northern Arizona University's reasons for offering gender inclusive housing:

The purpose of GIH is to provide a comfortable, safe living environment where a student can room with any other student—regardless of sex, gender, gender identity/expression, or sexual orientation. Providing a supportive, inclusive living

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<sup>129</sup> For an updated list of universities with transgender anti-discrimination policies, see *Colleges and Universities with Nondiscrimination Policies that Include Gender Identity/Expression*, CAMPUS PRIDE (Dec. 16, 2013), <http://www.campuspride.org/tpc-nondiscrimination/>.

<sup>130</sup> See *Lie v. Sky Pub. Corp.*, 2002 Mass. Super. LEXIS 402 (2002) (holding, based on *Price Waterhouse* rationale, that discrimination against a transsexual was sex discrimination under Massachusetts Fair Employment Practices Law); *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 373 (N.J. Super. 2001) (holding that “sex” includes gender, and that the transsexual plaintiff was therefore protected under state sex discrimination law); *Maffei v. Kolaeton Indus.*, 164 Misc.2d 547, 555 (N.Y. Sup.Ct. 1995) (dismissing rationale of earlier cases as “unduly restrictive,” holding that harassment arising out of the transitioning process of a transgender employee constituted sex discrimination under New York City anti-discrimination law).

<sup>131</sup> See, e.g., *Underwood v. Archer Management Services, Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994); *Dobre v. National R.R. Passenger Corp.*, 850 F. Supp. 284, 288 (E.D.Pa. 1993); *Conway v. City of Hartford*, 1997 Conn. Super. LEXIS 282,19 (Conn. Super. 1997); *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470, 474 (Iowa 1983).

<sup>132</sup> The Transgender Law and Policy Institute maintains a database of information regarding specific university policies on various transgender issues. *Campus Pride Trans Policy Clearinghouse*, CAMPUS PRIDE (Dec. 16, 2013), <http://www.transgenderlaw.org/college/index.htm>.

<sup>133</sup> *Gender Inclusive Housing (GIH)*, NAU.EDU (2013), <http://nau.edu/Residence-Life/Housing-Options/Gender-Inclusive-Housing-%28GIH%29/>.

<sup>134</sup> The ACLU created a map that shows a state-by-state comparison of state laws that govern transgender discrimination. See *Non-Discrimination Laws: State by State Information – Map*, ACLU (Sep. 21, 2011), <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.



space is critical for developing a healthy place for students to learn, develop, and grow.<sup>135</sup>

Gender inclusive housing is just one example of how some universities are offering transgender students protections that go above and beyond what is required under state law.

#### D. Title IX

Transgender students could use Title IX as a potential vehicle to bring a discrimination claim.<sup>136</sup> Despite the employment focus of most transgender cases, “discrimination claims may arise in health care, housing, educational services and related programs, and other venues.”<sup>137</sup> Universities need to be cautious about discriminating both inside and outside of the employment context. If discrimination takes place outside of employment, a university may be facing a novel Title IX claim.

Title IX prohibits federally funded educational institutions from discriminating on the basis of sex.<sup>138</sup> Sex discrimination under Title VII has already been expanded to include gender identity and expression discrimination in some jurisdictions.<sup>139</sup> Thus, it is not a stretch to imagine a court applying the same reasoning to a Title IX claim. Indeed, the U.S. Department of Justice and the U.S. Department of Education applied the Title VII definition of sex discrimination to Title IX in reaching a settlement in 2012.<sup>140</sup> In that settlement, the EEOC determined that “discrimination against an individual because that person is transgender (also known as gender identity discrimination) is discrimination because of sex.”<sup>141</sup> While the

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<sup>135</sup> *Gender Inclusive Housing (GIH)*, *supra* note 133.

<sup>136</sup> The Sixth Circuit held in *Smith v. City of Salem* that the *Price Waterhouse* rationale protects transgender people under 42 U.S.C. §1983, which is not an employment statute. This holding suggests that the *Price Waterhouse* rationale could be used by transgender plaintiffs in other contexts, including Title IX.

<sup>137</sup> Francine Tilewick Bazluke, Jeffrey J. Nolan, *Gender Identity And Expression Issues At Colleges And Universities*, 3 NACUA NOTES, No. 3, Jun. 2, 2005, at 1, 2.

<sup>138</sup> 20 U.S.C. §§1681–1688.

<sup>139</sup> *See, e.g.*, *City of Salem*, 378 F.3d at 574.

<sup>140</sup> Chris Geidner, *Federal Officials Protect Transgender Student Against Discrimination*, BUZZFEED POLITICS (July 24, 2013, 9:54 P.M.), <http://www.buzzfeed.com/chrisgeidner/federal-officials-protect-transgender-student-against-discri>.

<sup>141</sup> *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012); 2012 WL 1435995 (E.E.O.C.). *See also*, *Processing Complaints of Discrimination by Lesbian*,

agencies' interpretation is not binding on courts, it might foreshadow likely rulings that are to come.

## VII. CONCLUSION

We end where we began, with “immeasurable uncertainties in the law, which will call for the exercise of professional talents, and the grave judgments of courts of justice.”<sup>142</sup> Transgender law in education is complex and carries weighty interests that often collide. California AB 1266 failed to appropriately address and account for some of those competing interests. Criticisms raised in this article reveal potential pitfalls that courts and legislatures should strive to avoid when creating similar laws.

*Tyler Brown \**

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*Gay, Bisexual, and Transgender (LGBT) Federal Employees*, EEOC.GOV, [http://www.eeoc.gov/federal/directives/lgbt\\_complaint\\_processing.cfm](http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm).

<sup>142</sup> STORY, *supra* note 1.

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