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# Chapter 85: Providing Greater Protections For Transgender Students

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## *Education*

# Chapter 85: Providing Greater Protections For Transgender Students

*Lara Awad*

### *Code Sections Affected*

Education Code § 221.5 (amended).  
AB 1266 (Ammiano); 2013 STAT. Ch. 85.

### I. INTRODUCTION

A few days before her nineteenth birthday, Chloe Lacey committed suicide in her Eureka home.<sup>1</sup> Chloe had lived in constant fear of harassment and discrimination following her transition to the female gender.<sup>2</sup> Her tragic end is not an unfamiliar story among the transgender community.<sup>3</sup> Approximately forty-one percent of transgender persons have attempted suicide at one point in their lives.<sup>4</sup>

In California schools, transgender students often endure severe verbal and physical harassment by fellow students.<sup>5</sup> They are discriminated against in school-sponsored activities and are denied access to bathroom facilities based on their gender identity.<sup>6</sup> By failing to provide equal access for transgender students based on their gender identity, a school district “reinforces and affirms their social status as outsiders or misfits who deserve the hostility they experience from peers.”<sup>7</sup>

While California law prohibits discrimination based on sexual orientation and gender identity, school districts have failed to extend existing protections against discrimination to transgender students in the areas of school-sponsored

1. Ryan Burns, *Chloe’s Legacy*, N. COAST J. (Oct. 14, 2010), <http://www.northcoastjournal.com/humboldt/chloes-legacy/Content?oid=2131448> (on file with the *McGeorge Law Review*).

2. *Id.*

3. See JAIME M. GRANT, PH.D ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), available at [http://www.endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://www.endtransdiscrimination.org/PDFs/NTDS_Report.pdf) (on file with the *McGeorge Law Review*) (noting in their nationwide survey of 6,450 transgender participants that forty-one percent “of respondents reported attempting suicide”).

4. *Id.*

5. EMILY A. GREYTAK ET AL., *HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS* 17 (2009), available at [http://www.transyouthequality.org/documents/GLSEN\\_2009\\_Harsh\\_Realities.pdf](http://www.transyouthequality.org/documents/GLSEN_2009_Harsh_Realities.pdf) (on file with the *McGeorge Law Review*).

6. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 3 (Apr. 17, 2013).

7. DR. PAT GRIFFIN, ON THE TEAM, EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 19, available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/lgbt-issues/transgender-student-athlete-report> (on file with the *McGeorge Law Review*).

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activities and the use of facilities.<sup>8</sup> In response, Assemblymember Tom Ammiano introduced Chapter 85 to ensure that school districts comply with existing non-discrimination protections.<sup>9</sup> Chapter 85 provides “specific guidance about how to apply the mandate of non-discrimination in sex-segregated programs, activities and facilities.”<sup>10</sup> The legislation creates a blanket policy permitting student participation in school-sponsored activities and the use of facilities in accordance with a student’s gender identity, thereby ensuring compliance and uniformity in the application of non-discrimination mandates in California schools.<sup>11</sup>

## II. LEGAL BACKGROUND

This Part discusses prior legal measures aimed at prohibiting discrimination based on sexual orientation, gender identity, and gender expression in school districts.<sup>12</sup> Section A summarizes existing law prohibiting discrimination against lesbian, gay, bisexual, and transgender (LGBT) students.<sup>13</sup> Section B discusses Assembly Bill 266, which if passed, would have allowed students to participate in school-sponsored activities and use facilities in accordance with their gender identity.<sup>14</sup>

### A. *Early Efforts Aimed at Protecting LGBT Youth*

#### 1. *The California Student Safety and Violence Prevention Act of 2000*

The California Student Safety and Violence Prevention Act of 2000 (Violence Prevention Act) prohibits discrimination based on any characteristic classified as a hate crime in Section 422.6(a)<sup>15</sup> of the Penal Code.<sup>16</sup> Specifically, the amendment to the California Education Code expanded protections for LGBT youth by adding “actual or perceived” sexual orientation and gender as prohibited bases for discrimination.<sup>17</sup> The Violence Prevention Act applies to all state-funded school systems, except for schools backed by religious institutions when application of the law would not align with the teachings of the school.<sup>18</sup>

8. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 4 (June 12, 2013).

9. *Id.* at 1, 4.

10. *Id.* at 4.

11. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 3 (Apr. 17, 2013).

12. *Infra* Part II.

13. *See infra* Part II.A (examining existing protections for LGBT youth).

14. *See infra* Part II.B (discussing Assembly Bill 266).

15. *See* CAL. PENAL CODE § 422.6 (West 2010) (prohibiting discrimination based “on one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55”); *id.* § 422.55(a) (West 2011) (listing gender and sexual orientation as protected classes under the definition of hate crimes).

16. CAL. EDUC. CODE § 220 (West 2002).

17. *See id.* (referencing PENAL § 422.6); PENAL § 422.55(a).

18. CAL. EDUC. CODE § 221 (West Supp. 2013).

2. *The Student Civil Rights Act of 2008 and the Gender Non-Discrimination Act of 2011*

The Student Civil Rights Act amended the California Education Code to include a non-discrimination clause that uniformly applies to provisions throughout the Code.<sup>19</sup> The Violence Prevention Act amended the Education Code to include sexual orientation and gender as protected classes by reference to the prohibited hate crimes in the California Penal Code.<sup>20</sup> Thus, it removed ambiguity regarding the extension of non-discrimination protection to LGBT students by specifically listing gender and sexual orientation as prohibited bases for discrimination.<sup>21</sup> In addition, the Act defined gender as “sex, and includes a person’s gender identity and gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.”<sup>22</sup> In 2011, the California State Legislature enacted the Gender Non-Discrimination Act, which further extended protections for transgender people by adding gender identity and gender expression as prohibited bases for discrimination.<sup>23</sup>

*B. Prior Legislation*

In 2011, Assemblymember Tom Ammiano introduced Assembly Bill (AB) 266.<sup>24</sup> Similar to Chapter 85, the bill would have permitted a student to “participate in sex-segregated school programs, activities, and facilities . . . consistent with his or her gender identity.”<sup>25</sup> AB 266 failed to pass in the Assembly Committee on Education in February 2012.<sup>26</sup>

### III. CHAPTER 85

Chapter 85 furthers the goals of the California Student Safety and Violence Protection Act, the Student Civil Rights Act, and the Gender Non-Discrimination Act.<sup>27</sup> Chapter 85 prohibits restrictions on student participation in school-sponsored activities based on gender identity.<sup>28</sup> The legislation creates a

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19. *Id.* § 220.

20. *Id.*; PENAL § 422.6.

21. EDUC. § 220.

22. *Id.* § 210.7 (West 2007) (enacted by SB 777, subsequently amended by AB 887). The amendment defines gender expression as “a person’s gender related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.” *Id.*

23. *Id.* §220.

24. AB 266, 2011 Leg., 2011–2012 Sess. (Cal. 2011) (as amended on Jan. 4, 2012, but not enacted).

25. *Id.*

26. *Id.*

27. *See* EDUC. § 221.5(f) (amended by Chapter X) (providing further protections for transgendered youth).

28. *Id.*

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standardized policy of allowing students ‘to participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with [their] gender identity, irrespective of the gender listed on the pupil’s records.’”<sup>29</sup>

### IV. ANALYSIS

This Part explores the implications of Chapter 85.<sup>30</sup> Section A examines the relationship between discrimination based on gender identity and educational outcomes and social development.<sup>31</sup> Section B discusses potentially unfair advantages male-to-female transgender student athletes might possess over their competitors.<sup>32</sup>

#### A. *Creating a Safer Environment for LGBT Youth*

Harassment is directly linked to “increased absenteeism, decreased educational aspirations, and lower academic performance.”<sup>33</sup> Most transgender students experience some form of verbal harassment in schools, and more than half experience physical harassment.<sup>34</sup> Lacking any real sense of security on their school campuses, transgender students often miss classes and fail to obtain the credits needed for graduation.<sup>35</sup> Creating gender-neutral policies provides transgender students a sense of belonging on their school’s campus, thereby increasing their likelihood of achieving academic success.<sup>36</sup>

Opponents of the legislation argue that by providing open access to bathroom and restroom facilities, “transgender students’ rights are overshadowing other students’ rights to privacy.”<sup>37</sup> San Francisco and Los Angeles Unified School Districts addressed those concerns by adopting open access policies for transgender students while providing alternative facilities for students seeking

29. *Id.*

30. *Infra* Part IV.

31. *Infra* Part IV.A

32. *Infra* Part IV.B

33. EMILY A. GREYTAK ET AL., HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION’S SCHOOLS 44 (2009), available at [http://www.transyouthequality.org/documents/GLSEN\\_2009\\_Harsh\\_Realities.pdf](http://www.transyouthequality.org/documents/GLSEN_2009_Harsh_Realities.pdf) (on file with the *McGeorge Law Review*).

34. *Id.* at 18 (observing that about nine in ten transgender youth experienced verbal harassment based on their gender expression, while over half experienced physical harassment).

35. *Id.* at 14 (noting that transgender students often miss classes because they feel uncomfortable on their school campus).

36. *Id.* at 25 (“[Sixty-eight percent] of transgender students experiencing high levels of harassment because of their gender missed at least one day of school in the last month because they felt unsafe or uncomfortable in school.”).

37. Cord Jefferson, *California Legislators Pass Transgender-Rights Bill for K–12 Students*, GAWKER (July 3, 2013, 9:56 PM), <http://gawker.com/california-legislators-pass-transgender-rights-bill-for-665279850> (on file with the *McGeorge Law Review*).

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enhanced privacy.<sup>38</sup> Opponents further assert however, that open access policies will lead to instances of sexual harassment in restrooms and locker rooms.<sup>39</sup> No problems have been reported in either school district following implementation of open access policies regarding privacy or sexual harassment.<sup>40</sup> In fact, Los Angeles Unified School District has experienced a positive “transformation” in their schools and an increase in academic success among their transgender students.<sup>41</sup>

*B. Providing an Unfair Advantage in School Athletics?*

School districts previously failed to provide transgender students access to athletics based on concerns that male-to-female transgender athletes might possess physical advantages over their competitors.<sup>42</sup> Such advantages are “due to the growth in long bones, muscle mass, and strength that is triggered by testosterone” following the occurrence of male puberty.<sup>43</sup> However, transgender student participation in athletics will not have a significant impact on sports overall, as it is estimated that transgender people comprise merely two to five percent of the population.<sup>44</sup> Furthermore, unfair advantages possessed by male-to-female transgender athletes will subside as the use of hormonal treatment therapy becomes more prevalent among transgender youth.<sup>45</sup> Research indicates that an increasing number of children now receive hormonal treatment prior to experiencing male puberty, thereby eliminating any advantages they would have otherwise possessed over non-transgender student athletes.<sup>46</sup> There remains some

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38. See ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 3 (Apr. 17, 2013) (noting that Los Angeles and San Francisco Unified School Districts permit student use of facilities in accordance with their gender identity).

39. *AB-1266—The Day the California Legislature Voted to Strip Women of their Rights*, WORD PRESS (May 10, 2013), <http://ab1266.wordpress.com/2013/05/10/ab-1266-the-day-the-california-legislature-voted-to-strip-women-of-their-rights/> (on file with the *McGeorge Law Review*).

40. Patrick McGreevy, *Transgender Students Now Able to Use Preferred Bathroom in School*, L.A. TIMES (Aug. 12, 2013, 7:02 PM), <http://www.latimes.com/news/local/la-me-transgender-20130813,0,4811697.story> (on file with the *McGeorge Law Review*).

41. Judy Chiasson, *Success and Opportunity for Transgender Students*, HUFFINGTON POST (Aug. 12, 2013, 2:58 PM), [http://www.huffingtonpost.com/judy-chiasson/success-and-opportunity-for-transgender-students\\_b\\_3744830.html](http://www.huffingtonpost.com/judy-chiasson/success-and-opportunity-for-transgender-students_b_3744830.html) (on file with the *McGeorge Law Review*).

42. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 2 (Apr. 17, 2013).

43. GRIFFIN, *supra* note 7.

44. *Transgender Issues: A Fact Sheet*, THE TRANSGENDER L. AND POL’Y INST., available at <http://www.transgenderlaw.org/resources/transfactsheet.pdf> (on file with the *McGeorge Law Review*).

45. GRIFFIN, *supra* note 7 (“[A] growing number of transgender youth are undergoing medically guided hormonal treatment prior to puberty.”).

46. See *id.* (“Transgender girls who transition in this way do not go through a male puberty, and therefore their participation in athletics as girls does not raise the same equity concerns that might otherwise be present.”). The study conducted did not provide an exact number regarding the increase in children receiving hormonal treatment prior to experiencing puberty. *Id.*

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potential for unfair advantages however, as the cost of hormonal treatment therapy is prohibitive for a large number of transgender youth.<sup>47</sup>

## V. CONCLUSION

The Violence Protection Act, the Student Civil Rights Act, and the Gender Non-Discrimination Act prohibited discrimination based on sexual orientation, gender, and gender identity and expression.<sup>48</sup> School districts have failed to extend these non-discrimination protections to transgender students in the areas of school-sponsored activities and the use of bathroom facilities.<sup>49</sup> In response, Assemblymember Ammiano authored Chapter 85, which requires school districts to permit student participation in school-sponsored activities and the use of facilities in accordance with their gender identity.<sup>50</sup> According to Ammiano, the legislation provides a meaningful opportunity for transgender students to “fully participate and succeed in school and graduate on time with their classmates.”<sup>51</sup>

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47. See *Understanding Transgender*, NAT’L CTR. FOR TRANSGENDER EQUALITY 5 (2009), available at [http://transequality.org/Resources/NCTE\\_UnderstandingTrans.pdf](http://transequality.org/Resources/NCTE_UnderstandingTrans.pdf) (on file with the *McGeorge Law Review*) (“The majority of transgender people cannot afford to pay [the] costs” associated with hormonal treatment therapy, which “are often not covered by insurance.”).

48. *Supra* Part II.A.

49. SENATE COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 4 (June 12, 2013).

50. ASSEMBLY COMMITTEE ON EDUCATION, COMMITTEE ANALYSIS OF AB 1266, at 1 (Apr. 17, 2013).

51. *Id.* at 5.