TO PEE OR NOT TO PEE? “WHERE” IS THE QUESTION: TRANSGENDER STUDENTS AND THE RIGHT TO USE PUBLIC SCHOOL RESTROOMS

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TABLE OF CONTENTS

Introduction ................................. 758
I. Background: Transgender Students’ Rights Throughout the Country ............ 762
   A. Public School Policies Toward Transgender Students Vary Across the Country ................................................................. 762
   B. Coy Mathis: Victory for Transgender Students’ Rights in Colorado... 763
   C. Doe v. Regional School Unit 26: GLAD Fighting for Transgender Rights in Maine ...................................................... 765
II. SSOA: Necessary Articulation of Existing Rights Or Reverse Discrimination? ...................................................................... 767
   A. SSOA: Groundbreaking Step in Transgender Rights .................... 767
   B. Public Reaction to SSOA ........................................................................ 768
III. The Fight to Repeal SSOA by Referendum is Unsuccessful ..................... 772
IV. Public School Students’ Fourth Amendment Rights ............................. 774
   A. The Supreme Court of the United States Relaxed Fourth Amendment Search Requirements in Public Schools to “Reasonable Suspicion” For Safety Purposes ..................................... 775
   B. The Supreme Court of California Allows Warrantless Student Searches By School Administrators That Are Not “Arbitrary, Capricious, [or] Harassing” ........................................................................ 777
   C. The California State Appellate Courts Have Relied On Both Standards To Restrict Students’ Fourth Amendment Rights ........ 778
V. SSOA: Violation of Students’ Fourth Amendment Rights? ..................... 781
   A. Protection of Education is the Primary Reason for Fourth Amendment Restrictions in Public Schools ........................................ 781
   B. SSOA: In the Spirit of Existing Restrictions of the Fourth Amendment .............................................................................. 782
Conclusion .......................................................................................... 783
INTRODUCTION

Recently, the California State Senate passed the first law in the country expressly stating the right of transgender public school students to access sex-segregated public school facilities and programs consistent with their gender identity.1 Assembly Bill No. 1266, known as the School Success and Opportunity Act, (“SSOA”),2 went into effect on January 1, 2014 and requires public schools to grant students access to “sex-segregated school programs and activities, including athletic teams and competitions, and use [of] facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”3

SSOA is an amendment to existing California anti-discrimination in education legislation, serving to clarify California Education Code § 220’s application to transgender public school students.4 “Gender identity” was added as a protected class under the state’s nondiscrimination in education statutes in 2012,5 but its addition did not adequately address the issues covered by Assembly Bill No. 1266.6 Meaning, California public schools did not understand that providing transgender students access to sex-segregated facilities and programs corresponding with their gender identity—instead of birth sex—was mandated by the addition of “gender identity” to the state’s nondiscrimination in education law.7

Shortly after its passage and prior to its going into effect, SSOA faced considerable opposition.8 It was alleged that allowing transgender students access to bathrooms and locker rooms corresponding with their gender identity that were traditionally only used by non-transgender students, violated the non-transgender students’ right to privacy in those facilities.9

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3 CAL. EDUC. CODE § 220 (West 2012); McBride, supra note 2.


6 FAQ: The Gender Nondiscrimination Act, supra note 5.

7 Yan, supra note 1.

8 Frequently Asked Questions About the AB 1266 Referendum, PRIVACY FOR ALL STUDENTS (Sept. 11, 2013), http://privacyforallstudents.com/frequently-asked-questions-about-the-ab-1266-referendum/.

9 Id.
A coalition of conservative groups immediately began procedural efforts to have SSOA repealed by voter referendum.\textsuperscript{10} In California, a law can be placed on the ballot if an applicant complies with certain criteria, including the collection and submission of approximately 505,000 registered voter signatures to the county election officials within ninety days of a bill’s passage into law.\textsuperscript{11} Although the coalition appeared to comply with the aforementioned criteria,\textsuperscript{12} the outcome of a random sampling of signatures, required by state referendum procedures, necessitated a recount of all signatures to verify their validity.\textsuperscript{13} On February 24, 2014, the California Secretary of State announced that SSOA would not appear on the November 2014 ballot because it failed to meet the signature requirement.\textsuperscript{14} If the group was able to place SSOA on the ballot and have it repealed via referendum, the legislative body could not reenact it for one year from the date of its repeal.\textsuperscript{15}

Proponents of SSOA reference both short and long-term effects of sex-segregated school facilities in support of the bill’s passage and its goal of protecting the rights of transgender public school students.\textsuperscript{16} These proponents contend that sex-segregation of bathrooms is a form of institutional discrimination against transgender students, which marginalizes them in school settings and creates a unique opportunity for mistreatment with profound negative results.\textsuperscript{17} Without institutional protection of transgender students’ rights, the recognition of these students’ rights is left to arbitrary standards created by teachers and administrators who may harbor misunderstanding at best, and personal bias at worst, allowing for discrimination at all levels of the public schools system.\textsuperscript{18} A recent study conducted by The National Center for Transgender Equality and the Gay and Lesbian Task Force showed alarming statistics at which transgender students are subject to bullying, harassment, and discrimination, conducted by peers, teachers, and school administrators.\textsuperscript{19} There is also a clear correlation between

\begin{thebibliography}{99}
\bibitem{10}CAL. CONST. art. II, § 8(a) (West 2014) (voters have “the right to repeal laws by referendum”);
\emph{Group: Calif. Transgender Law Repeal Will Qualify}, CBS SACRAMENTO (Nov. 10, 2013, 4:16 PM),

\bibitem{11}Referendum, CAL. SECRETARY OF ST., http://www.sos.ca.gov/elections/ballot-measures/referenda.htm (last visited Nov. 10, 2013) (the required amount of petitions signed by registered voters, must be “in the amount equal to 5% of the votes cast for all candidates for Governor at the last gubernatorial election.” As such, the number of signatures required in this case was precisely 504,760).


\bibitem{13}Referendum, supra note 11.

\bibitem{14}Transgender rights repeal misses California ballot, USA TODAY (Feb. 24, 2014, 9:12 PM),

\bibitem{15}38 CAL. JUR. 3d Initiative and Referendum (Effect of Repeal) § 87 (2014).

\bibitem{16}McBride, supra note 2.

\bibitem{17}Id.

\bibitem{18}Id.

\bibitem{19}JAIME M. GRANT, LISA A. MOTTET & JUSTIN TANIS, INJUSTICE AT EVERY TURN: A REPORT OF
discrimination and long-term effects, including increased risk for attempted suicide, homelessness, substance abuse, and illness.\textsuperscript{20}

The constitutionality of this type of law is largely unprecedented, as only a few cases have been decided across the country.\textsuperscript{21} In 2013, the Colorado Rights Division upheld a six-year-old transgender girl’s right to use the girls’ restroom at her public elementary school.\textsuperscript{22} The young girl’s school had decided to prohibit her from using the girls’ bathroom, and the girl’s parents effectively challenged this decision under the Colorado Anti-Discrimination Act.\textsuperscript{23} Further, in 2014, the Gay & Lesbian Advocates & Defenders (“GLAD”) successfully represented a transgender teenage girl in Doe v. Regional School Unit 26,\textsuperscript{24} against her Maine public school district.\textsuperscript{25} The student was compelled to use a staff-only, private bathroom, instead of the communal girls’ bathroom.\textsuperscript{26} GLAD appealed the trial court’s order for summary judgment in favor of the school and the court held that the school’s actions violated the state’s Human Rights Act on January 30, 2014.\textsuperscript{27}

If, as SSOA opponents allege, non-transgender students have a right to this type of privacy—sex-segregated public school bathroom and locker room facilities\textsuperscript{28}—and that this privacy right falls within the penumbra\textsuperscript{29} of the Fourth Amendment,\textsuperscript{30} SSOA can still be upheld as students’ Fourth Amendment rights have a history of being limited when necessary for overall student safety.\textsuperscript{31} Traditionally, this has allowed school administrators to search students and their belongings for weapons or controlled substances under a more relaxed standard of suspicion than that required by the Fourth Amendment.\textsuperscript{32} This encroachment on students’ Fourth Amendment rights has been justified by the importance of

\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Doe v. Reg’l Sch. Unit 26, 86 A.3d 600 (Me. 2014); see also Cases: Doe v. Clenchy, GLAD, http://www.glad.org/work/cases/doe-v.-clenchy (last visited Sept. 15, 2014) (GLAD refers to Doe v. Regional School Unit 26 as Doe v. Clenchy).
\textsuperscript{25} Reg’l Sch. Unit 26, 86 A.3d at 600.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Yan, supra note 1.
\textsuperscript{30} U.S. CONST. amend. IV.
\textsuperscript{31} The Supreme Court of the United States and California state courts have repeatedly established that a student’s right to privacy in public schools is not absolute. See New Jersey v. T.L.O., 469 U.S. 325, 339-42 (1985); see also In re William G., 40 Cal.3d 550, 557 (1985); In re Randy G., 26 Cal.4th 566 (2001); In re Latasha W., 60 Cal.App.4th 1524 (1998); In re Sean A., 191 Cal.App.4th 182, 186 (2010).
\textsuperscript{32} T.L.O., 469 U.S. at 341.
TO PEE OR NOT TO PEE?

maintaining a safe school environment so that student learning can take place.\textsuperscript{33} In fact, the Court in one of these cases described education as "perhaps the most important function of the state and local governments" when deciding to encroach upon this constitutionally protected right.\textsuperscript{54}

The invasion of privacy alleged in SSOA differs vastly from the cases where safety concerns have previously been balanced against students’ rights to privacy. In the past, these cases involved warrantless physical searches of students,\textsuperscript{35} an act explicitly forbidden by the Fourth Amendment,\textsuperscript{36} whereas, under SSOA, almost all students of a certain gender are alleged to have their privacy violated by the presence of transgender students in an area historically segregated by one’s gender at birth,\textsuperscript{37} a right not explicitly protected by the Fourth Amendment.\textsuperscript{38} However, the prevalence of bullying, including physical assault, against transgender students is so high that it may constitute a legitimate threat to school safety, thereby aligning SSOA and its effect with the aforementioned precedent, and therefore meriting curtailment of students’ Fourth Amendment rights.\textsuperscript{39}

This Note’s objective is to investigate the significance of SSOA, the context in which it became a law, and the challenges to its validity. Part I will explain the legal context in which SSOA was passed, including a similar policy in Massachusetts, as well as recent litigation in Maine and Colorado to establish the rights recognized in SSOA. Part II will explore the public’s reaction to SSOA, the reason for its passage, and examine the current experience of transgender students in public schools. Part III touches upon the failed effort to have SSOA repealed through voter referendum. Part IV looks at existing federal and California state precedent justifying restriction of students’ Fourth Amendment rights in order to maintain school safety. Part V analyzes protection of public school education as the underlying justification for restricting students’ Fourth Amendment rights. It also demonstrates that SSOA fits within the existing case law as it seeks to provide institutional protection for transgender students that will improve public school safety and promote schools’ educational function.\textsuperscript{40}

\textsuperscript{33} Id.
\textsuperscript{34} In re Randy G., 26 Cal.4th at 566-68 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
\textsuperscript{35} See T.L.O., 469 U.S. at 339-42; see also In re William G., 40 Cal.3d at 557; In re Randy G., 26 Cal.4th at 566; In re Latasha W., 60 Cal.App.4th at 1524; In re Sean A., 191 Cal.App.4th at 152; In re William G., 40 Cal.3d at 557; In re Randy G., 26 Cal.4th at 566; In re Latasha W., 60 Cal.App.4th at 1524; In re Sean A., 191 Cal.App.4th at 186.
\textsuperscript{36} U.S. CONST. amend. IV.
\textsuperscript{37} Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
\textsuperscript{38} U.S. CONST. amend. IV.
\textsuperscript{39} McBride, supra note 2.
\textsuperscript{40} T.L.O., 469 U.S. at 325; In re William G., 40 Cal.3d at 550; In re Randy G., 26 Cal.4th at 566; In re Latasha W., 60 Cal.App.4th at 1524; In re Sean A., 191 Cal.App.4th at 182.
I. BACKGROUND: TRANSGENDER STUDENTS’ RIGHTS THROUGHOUT THE COUNTRY

California first addressed the rights of transgender public school students in 2012 when the state’s existing anti-discrimination in education law was amended to include prohibition of discrimination based on “gender identity.” In 2014, SSOA became the first law in the country to expressly recognize transgender public school students’ right to access sex-segregated facilities and programs consistent with their gender identity.

A. Public School Policies Toward Transgender Students Vary Across the Country

Outside of California, only a few states have begun to examine the rights of transgender students. One example is the Massachusetts statewide policy that grants transgender public school students the same protections as SSOA. In February 2013, the Massachusetts Department of Elementary and Secondary Education announced its policy recognizing transgender students’ right to use bathrooms and participate on sports teams consistent with their gender identity. The Department of Elementary and Secondary Education explained the rationale behind this new policy: ‘‘These students, because of widespread misunderstanding and lack of knowledge about their lives, are at a higher risk for peer ostracism, victimization, and bullying’ . . . ‘Some students may feel uncomfortable sharing those facilities, but this discomfort is not a reason to deny access to the transgender student.’”

The Department’s official policy further explains that the policy intends to “create a culture in which transgender . . . students feel safe, supported, and fully included, and to meet each school’s obligation to provide equal educational opportunities for all students.” This policy was established to help Massachusetts’ schools follow the state’s 2011 equal opportunity bill protecting

41 CAL. EDUC. CODE § 220 (West 2012).
42 Yan, supra note 1.
43 Payne, supra note 21.
44 Id.
46 Glennisha Morgan, Massachusetts Education Department Accommodates Transgender Students, HUFFINGTON POST (Feb. 9, 2013, 1:38 PM), http://www.huffingtonpost.com/2013/02/19/massachusetts-education-d_n_2717446.html.
47 Id.
48 Guidance for Massachusetts Public Schools Creating a Safe and Supportive School Environment, supra note 45.
transgender residents. The Transgender Equal Rights Bill went into effect on July 1, 2012 and prohibits discrimination against transgender people in employment, housing, education, and lending. The law also allows prosecutors to bring hate crime charges when someone is attacked for being transgender. The school further explained the need for the policy: “...these students, because of widespread misunderstanding and lack of knowledge about their lives, are at a higher risk for peer ostracism, victimization, and bullying...” Some students may feel uncomfortable sharing those facilities, but this discomfort is not a reason to deny access to the transgender student.

However, in states where policies and laws clarifying the rights of transgender students, as discussed above, do not exist, parents of these students have looked to the judiciary for clarification. In Colorado, the parents of Coy Mathis, a six-year-old transgender girl, successfully brought a claim in the Colorado Civil Rights Division under the Colorado Anti-Discrimination Act for denying Coy access to the girls’ bathroom. In Maine, the parents of a transgender teenage girl eventually prevailed under the state’s Human Rights Act when they sued their daughter’s school for limiting her bathroom use to a private facility.

B. Coy Mathis: Victory for Transgender Students’ Rights in Colorado

The passage of SSOA came in the wake of a first grade transgender girl establishing her right to use the girls’ bathroom in her Colorado public school. Six-year-old Coy Mathis was born a boy but identifies and dresses as a girl, and is recognized as such on her passport and state-issued identification card. Coy, a triplet with two sisters, began displaying a penchant for clothes traditionally associated with girls when she was five months old. She was diagnosed with “gender identity disorder,” a term recently removed from the American Psychiatric

49 Id.
51 Id.
52 Id.; Morgan, supra note 46.
53 Morgan, supra note 46.
54 Payne, supra note 21; see also, Doe v. Reg’l Sch. Unit 26, 86 A.3d 600 (Me. 2014).
55 Reg’l Sch. Unit 26, 86 A.3d at 600.
57 Payne, supra note 21.
59 Payne, supra note 21.
60 Banda & Riccardi, supra note 58.
Association’s list of mental ailments, and identified as a girl before attending elementary school.  

When Coy was in first grade, her parents were notified by the school district that she could use the boys’ bathroom, a gender-neutral bathroom, or the nurse’s bathroom, but not the girls’ bathroom. As a result, Coy’s parents decided to bring suit against the school district in the Colorado Civil Rights Division for violating the Colorado Anti-Discrimination Act. Until this matter was resolved, Coy’s parents opted to homeschool Coy.

Mr. Dude, the school’s attorney, argued that the Anti-Discrimination Act does not require public schools to allow transgender students to use the bathroom of the gender they identify with, and that the school complied with the law by allowing Coy to attend regular classes, wear girls’ clothing, and be referred to as a girl. The District concluded that Coy should not have access to the girls’ bathroom after considering the current impact of Coy’s use of the girls’ bathroom on non-transgender girls, the reaction of parents, and the impact of Coy’s presence in the girls’ bathroom once she goes through puberty.

The Colorado Rights Division, “found that the school district ‘discriminatorily denied’ Coy ‘full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations in a place of public accommodation due to [her] sex and sexual orientation.’”

This decision in favor of Coy and against the Fountain-Fort Carson School District is the first ruling in the country on transgender students’ rights. The Colorado Division of Civil Rights firmly established that transgender students must be treated equally in public schools. Perhaps the most well-known case relied on by the agency is Brown v. Board of Education, a landmark Civil Rights case where the Supreme Court held that segregation based on race in public schools was not constitutional. The agency paraphrased the decision in Brown v. Board of

61 Id.
62 Id.
64 Banda & Riccardi, supra note 58.
65 Payne, supra note 21.
66 Payne, supra note 21.
68 Payne, supra note 21.
69 Id.
To pee or not to pee?

Education to conclude that “separate but equal is rarely equal and it is certainly not equal in Coy’s case.”

Regardless of the school’s position, other members of the community are pleased with the court’s decision, including Michael Silverman, Coy’s attorney and executive director of The Transgender Legal Defense & Education Fund. Mr. Silverman has called the decision “a high-water mark for transgender rights” stating:

By denying Coy the right to use the little girls restroom like all the other little girls at school it had created an environment that was hostile, discriminatory and unsafe. Coy was treated in what was referred to as an exceptional way, which limited her educational opportunities. In the end, we’ve been saying from the start, that Coy wants the same dignity, respect and opportunity, and deserves that, as every other student in Colorado. The state of Colorado has now said that’s exactly what she deserves.

Coy’s parents were also pleased with the outcome of the case: “[w]e’re very thrilled that Coy is able to return to school and have the same rights that all the other girls had, that she should have had and was afforded by law to begin with.”

However, this decision is by no means a uniform standard. In 2013, a transgender teenage girl faced significant obstacles while fighting for these same rights in Maine.

C. Doe v. Regional School Unit 26: GLAD Fighting for Transgender Rights in Maine

In Doe v. Regional School Unit 26, a teenage transgender girl, Susan Doe, sued her Maine public school district for the right to use the girls’ bathroom. Although her elementary and middle schools were initially accommodating, in the end, they prohibited her from using the girls’ bathroom and compelled her to use a staff-only private bathroom. It was also alleged that the school severely restricted her activities because of her gender identity and that she was subjected to bullying

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71 Payne, supra note 21.
72 Id.
73 Banda & Riccardi, supra note 58.
75 Payne, supra note 21.
76 Id.
77 Doe v. Reg’l Sch. Unit 26, 86 A.3d 600 (Me. 2014).
78 Id. at 603.
79 Id.
80 Id.
in violation of Maine’s antidiscrimination law.\textsuperscript{81} Susan’s parents removed her and her twin brother from the Orono school district and moved “to another part of the state where they could go to school quietly and safely.”\textsuperscript{82} Her parents filed both a complaint with the Maine Human Rights Commission and a lawsuit on behalf of their daughter, who was represented by GLAD and another attorney.\textsuperscript{83}

The action against the school district began in May 2011, when GLAD filed a complaint in the Penobscot Superior Court, enumerating “counts of discrimination in education and public accommodation, harassment, and infliction of emotional distress,” and naming the Superintendent of the Orono Schools Department, the Orono Schools Department, School Union 87, and Riverside Regional Schools Unit as defendants.\textsuperscript{84} “On January 30, 2012, GLAD filed a motion for summary judgment arguing that Maine’s law prohibiting discrimination in schools based on gender identity requires schools to provide a transgender girl with access to the girls’ bathroom.”\textsuperscript{85} The Maine trial court granted the school district summary judgment on November 20, 2012.\textsuperscript{86} In response, GLAD filed an appeal in the Maine Supreme Judicial Court on March 14, 2013.\textsuperscript{87}

On May 3, 2013, the Maine Chapter of the American Academy of Pediatrics, along with other child welfare organizations, filed an amicus brief on Susan’s behalf in the Maine Supreme Judicial Court.\textsuperscript{88} The brief asserted that transgender youth have the same developmental needs as non-transgender children.\textsuperscript{89} Additionally, although transgender children’s gender identity is different from their birth sex, it is gender identity that is determinative of one’s sex, and living inconsistently with one’s birth gender leads to emotional distress.\textsuperscript{90} Finally and most importantly, the amicus brief addressed the importance of transgender students having access to bathrooms consistent with gender identity.\textsuperscript{91} The brief argues that bathrooms play an integral role in peer relationships and socialization, and that segregation based on sex will have harmful long-term effects.\textsuperscript{92}

\textsuperscript{81} GLAD To Appeal Ruling in Case of Transgender Girl Discriminated Against at School., supra note 56. Maine’s Antidiscrimination law prevents discrimination “in education on account of sex, sexual orientation, or physical or mental disability.” ME. REV. STAT. ANN. tit. 5, § 4552 (2014). Sexual orientation is defined as “a person’s actual or perceived heterosexuality, bisexuality, homosexuality, or gender identity or expression.” ME. REV. STAT. ANN. tit. 5, § 4553 (West 2014).

\textsuperscript{82} Cases: Doe v. Clenchy, supra note 24.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} Brief for the Maine Chapter of the American Academy of Pediatrics as Amicus Curiae supporting Petitioners, Reg’l Sch. Unit 26, 86 A.3d 600 (2014) (No. PEN-12-582).

\textsuperscript{89} Id. at 5.

\textsuperscript{90} Id. at 8.

\textsuperscript{91} Id. at 19.

\textsuperscript{92} Id. at 19-21.
2015] TO PEE OR NOT TO PEE? 767

On June 12, 2013, Susan Doe presented a statement to the court, “I want all transgender kids to be able to go to school and not have to worry about being treated unfairly or bullied. I’ve been very lucky to have a family that’s stood by me and stuck up for me, and I’m really grateful for them.”93

On January 30, 2014, the court made a groundbreaking ruling in Nicole’s favor, holding that the school’s actions violated the State’s Human Rights Act.94

II. SSOA: NECESSARY ARTICULATION OF EXISTING RIGHTS OR REVERSE DISCRIMINATION?

SSOA is the first law in the country to articulate the right of transgender public school students, from kindergarten to twelfth grade, to access bathrooms, locker rooms, and sports teams consistent with their gender identity.95 As demonstrated by Doe v. Regional School Unit 2696 and the victory of Coy Mathis,97 the terrain of transgender students’ rights is largely unsettled.98 Therefore, it is very significant that a state as large as California has adopted such a far-reaching and comprehensive acknowledgement of transgender students’ rights.99

A recent study by the National Gay and Lesbian Task Force and the National Center for Transgender Equality, called the National Transgender Discrimination Survey, reveals the need for protection, similar to SSOA, for transgender students who face institutional discrimination with both short and long-term effects.100 Proponents of SSOA believe that institutional discrimination can be alleviated by the law.101 In contrast, SSOA opponents believe that the law violates non-transgender students’ right to privacy, can lead to abuses in the use of facilities that are traditionally sex-segregated by those who want to “game the law,” and amounts to reverse discrimination if a transgender student takes a non-transgender student’s spot on a school sports team.102

A. SSOA: Groundbreaking Step in Transgender Rights

Effective January 1, 2012, California Education Code § 200 outlawed discrimination in educational institutions based on a number of factors, including

93 GLAD Argues Transgender Girl’s Case Before Maine High Court, LGBT WEEKLY (June 12, 2013), http://lgbtweekly.com/2013/06/12/glad-argues-transgender-girl’s-case-before-maine-high-court/.
94 Reg’l Sch. Unit 26, 86 A.3d at 600.
95 Yan, supra note 1.
96 Reg’l Sch. Unit 26, 86 A.3d at 600.
97 Nicholson, supra note 67.
98 Chiasson, supra note 45; but see Morgan, supra note 46; Payne, supra note 21.
99 McBride, supra note 2.
100 GRANT, MOTTET & TANIS, supra note 19.
101 McBride, supra note 2; Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
102 Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
gender identity, stating:

It is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, equal rights and opportunities in the educational institutions of the state.\textsuperscript{103}

“Gender identity and expression” were added to the California non-discrimination law after Assembly Bill No. 887 was passed on August 30, 2011.\textsuperscript{104} Democratic Assembly member Toni Atkins authored the bill, which Governor Jerry Brown signed into law after passing in the Senate with a vote of twenty-five to thirteen.\textsuperscript{105} The law, originally introduced in February 2011, proposed adding “gender identity and expression” as a category to remedy discrimination towards transgender individuals resulting from confusion over whether or not it was protected by the law.\textsuperscript{106} However, adding “gender identity and expression” to the California state nondiscrimination laws did not end uncertainty about which rights are afforded to transgender people.\textsuperscript{107} Advocates of SSOA argue that confusion regarding these rights necessitated its passage,\textsuperscript{108} along with the right of transgender students to have access to school facilities based on their gender identity to prevent bullying and other consequences of segregation based on sex.\textsuperscript{109}

\textbf{B. Public Reaction to SSOA}

The passage of SSOA has proven to be a polarizing subject, receiving support and opposition from various groups across the political spectrum.\textsuperscript{110} Proponents of the law, including LGBT groups, school administrators, and politicians, have applauded the law’s clarification of the existing rights of transgender students.\textsuperscript{111} Proponents have also looked to short and long-term consequences of the current institutional discrimination, arguing that SSOA will end this discrimination and thereby its accompanying consequences.\textsuperscript{112} Opponents believe the law is a kind of reverse discrimination that violates the right to privacy of non-transgender students by allowing students of the opposite gender into areas traditionally segregated by

\textsuperscript{103} \textsc{Cal. Educ. Code} § 200 (West 2012) (emphasis added).
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} \textit{Id}.
\textsuperscript{107} \textsc{McBride, supra} note 2.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
\textsuperscript{110} Yan, \textit{supra} note 1.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} McBride, \textit{supra} note 2.
sex. Opponents also allege that SSOA will create an opportunity for sexual assault within schools by allowing students of the opposite sex to gain access to bathrooms and locker rooms.

The National Gay and Lesbian Task Force and the National Center for Transgender Equality recently released the National Transgender Discrimination Survey, revealing that discrimination against transgender students exists at all levels of the public school system, which is conducted by peers, teachers, and school administrators. Of the transgender students surveyed, seventy-eight percent reported harassment, thirty-five percent reported physical assault, and twelve percent reported sexual violence. Perhaps even more shocking is the rate at which teachers and school administrators contributed to this discrimination. Out of the above statistics, thirty-one percent reported being harassed by teachers or school staff, five percent reported being physically assaulted by teachers or school staff, and three percent reported being sexual assaulted by teachers or school staff.

The survey also revealed that suffering from harassment and assault puts students at a higher risk for dropping out of school, facing homelessness, drug and alcohol abuse, HIV, and attempted suicide. Fifteen percent of those surveyed reported leaving school due to severe harassment, six percent reported being expelled due to their gender identity/expression and forty-eight percent reported experiencing having experienced homelessness. Transgender students were more likely to abuse drugs and alcohol when they were harassed than when they were not harassed; the rate was twice as high when the student reported physical assault or dropping out of school due to harassment. Further, students who left

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113 Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
114 Yan, supra note 1.
115 GRANT, MOTTET & TANIS, supra note 19 (“[t]he mission of the National Gay and Lesbian Task Force is to build the grassroots of the lesbian, gay, bisexual and transgender (LGBT) community. We do this by training activists, equipping state and local organizations with the skills needed to organize broad-based campaigns to defeat anti-LGBT referenda and advance pro-LGBT legislation, and building the organizational capacity of our movement.”).
116 Id. (“[t]he National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of important to transgender people. By empowering transgender people and our allies to educate and influence policymakers and others, NCTE facilitates a strong and clear voice for transgender equality in our nation’s capital and around the country.”).
117 Id. at 2 (the Survey included the participation of 6,450 transgender and gender non-conforming study participants from all fifty states, the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and was completed online or on paper).
118 Id. at 3.
119 Id.
120 Id.
121 GRANT, MOTTET & TANIS, supra note 19, at 38.
122 Id. at 33.
123 Id.
124 Id. at 33, 44.
school due to harassment were found to have HIV at a rate more than eight times that of the general population.125 Finally, if a teacher or staff-member assaulted a transgender student, there was a seventy-six percent chance that the student would attempt suicide.126 

As this data demonstrates, transgender students face significant discrimination in educational environments that have both short and long-term effects.127 The Center for American Progress128 and other proponents of SSOA believe that by recognizing that transgender students have a right to access school facilities and programs based on their gender identity, SSOA will alleviate the institutional marginalization of these students.129 They believe that the law will help school officials understand the rights of transgender students, thereby enabling them to appropriately handle their needs and create institutional protections for these students.130 Further, institutional protection of transgender students will deter short-term problems like bullying and harassment.131 It will also help transgender students feel more comfortable and less isolated, and therefore foster the continual success of these students in schools.132 

Opponents of the law argue that it violates the privacy rights of non-transgender students by allowing students of the opposite gender to gain access to areas traditionally segregated by birth gender.133 The Pacific Justice Institute134 alleges that the law presents issues of privacy regarding locker rooms and bathrooms, and that allowing transgender students access to these sex-segregated facilities violates the privacy of non-transgender students who traditionally use these facilities and amounts to reverse discrimination against them.135

125 Id. at 33.
126 Id.
127 GRANT, MOTTET & TANIS, supra note 19, at 33.
128 The Center for American Progress is an independent nonpartisan educational institute under section 501(c)(3) of the Internal Revenue code and is dedicated to improving the lives of Americans through progressive ideas and action. About the Center for American Progress, CTR. FOR AM. PROGRESS, http://www.americanprogress.org/about/mission/ (last visited Feb. 21, 2015).
129 McBride, supra note 2; VICTORY! CA Bill Will Ensure the Success and Well-Being of Transgender Students, TRANSGENDER L. CENTER, http://transgenderlawcenter.org/archives/3544 (last visited Feb. 24, 2015) (the Transgender Law Center views SSOA as “ensuring transgender youth have the opportunity to fully participate and succeed in schools across the state.”).
130 See VICTORY! CA Bill Will Ensure the Success and Well-Being of Transgender Students, supra note 129.
131 See McBride, supra note 2.
132 See Chiasson, supra note 45.
133 Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
With respect to the issue of privacy, Republican California State Senator Jim Nielsen has alleged that this law will create an opportunity for “youthful sex offenders” who will gain access to victims of the opposite birth gender in bathrooms and locker rooms. As later discussed in Part III, Privacy for All Students attempted to add SSOA to the November 2014 California statewide ballot to have it repealed via voter referendum. The group argues that transgender students are protected from discrimination and bullying under the current non-discrimination law. The organization further alleges that the language of SSOA is not carefully crafted to deal with such a complex issue. It claims,

There are many problems with the legislation. First, it’s an invasion of student privacy to open sensitive school facilities such as showers, restrooms and locker rooms to students of the opposite sex. Further, the legislation is poorly drafted and flawed, a one-size-fits-all approach that contains no standards, guidelines or rules. The law does not require that a student have ever demonstrated any indication that he or she considers himself or herself as transgendered . . . Because of the lack of requirements, some teens and young adults will undoubtedly game the law.

Although Privacy for All Students provides no explanation for what “game the law” means, the Center for American Progress has assembled a list of common misconceptions about SSOA that may provide some insight. Among these is the belief that students will pretend to be transgender in order to gain access to the girls’ bathroom “for nefarious reasons,” or in order to play on a girls’ sports team because they were not good enough for the boys’ team. The organization refutes these ideas, stating that they do not create a valid incentive for non-transgender students to risk the “family rejection, alienation from friends, extreme discrimination, and significant rates of bullying” that are typically faced by transgender students. Privacy for All Students has not provided statistics, studies, or facts to verify these assertions so it appears that they are merely conjecture. On the contrary, there is evidence to refute these claims. The Los Angeles Unified School District, California’s largest school district, implemented a policy similar to SSOA a

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136 See Yan, supra note 1.
137 Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
138 Id.
139 Id.
140 Id.
141 Id.
142 McBride, supra note 2.
143 Id.
144 Id.
145 See Frequently Asked Questions About the AB 1266 Referendum, supra note 8.
146 Largest & Smallest Public School Districts, CAL. DEP’T OF EDUC.,
decade ago without any reported problems.\textsuperscript{147} A statement describing this policy by Judy Chiasson, Program Coordinator for Human Relations, Diversity and Equity for the Los Angeles Unified School District, helps to further debunk Privacy for All Students’ criticism of SSOA.\textsuperscript{148} She states,

Our policy has helped transgender students feel comfortable, rather than isolated, at school. We made sure that students can use bathrooms that correspond to their gender identity. We have helped them join the appropriate gym classes and sports teams. And we have watched these students thrive . . . Opponents of A.B. 1266 [SSOA] have expressed concerns that students will abuse the policy, imperiling the safety of others. But our experience stands in stark contrast to such fears: In all the years since the LAUSD [Los Angeles Unified School District] implemented its policy, we have encountered nothing but positive results. We are committed to providing safe schools for all children. Our equal access policy enhances, rather than diminishes, school safety.\textsuperscript{149}

According to Ms. Chiasson, both parents and students have supported the school’s policy and “discomfort cannot justify discrimination.”\textsuperscript{150} Further, she believes that SSOA will give all “transgender students the opportunity to succeed in school” by providing an environment that adequately responds to the needs of transgender students.\textsuperscript{151}

\textbf{III. The Fight to Repeal SSOA by Referendum is Unsuccessful}

California adopted the referendum process in 1911 in order to give citizens an opportunity to repeal laws.\textsuperscript{152} The referendum process allows constituents to approve or reject statutes or parts of statutes to the exclusion of urgency statutes and those related to elections, tax levies, and appropriation of normal state expenses.\textsuperscript{153}

Article II, Section 9 of the California Constitution sets forth criteria that must be fulfilled in order to have a referendum placed on the statewide ballot.\textsuperscript{154} A citizen must request and obtain a title and summary of the disfavored bill from the Attorney General, print petitions, collect a minimum of approximately 505,000 signatures, and submit the petitions to local elections officials, all within ninety

\begin{footnotesize}
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\item \textsuperscript{147} Chiasson, \textit{supra} note 45; \textit{OFFICE OF THE GEN. COUNSEL, LOS ANGELES UNIFIED SCHOOL DISTRICT, REFERENCE GUIDE NO. -1557: TRANSGENDER AND GENDER NONCONFORMING STUDENTS 1} (2005), http://www.casafeschools.org/TransgenderLAUSD.pdf.
\item \textsuperscript{148} Chiasson, \textit{supra} note 45.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{STATEWIDE INITIATIVE GUIDE, supra} note 12, at 1.
\item \textsuperscript{153} \textit{Referendum, supra} note 11, at 1.
\item \textsuperscript{154} See \textit{id.}
\end{itemize}
\end{footnotesize}
days after enactment of the bill. The signatures must come from citizens who are registered to vote in an amount equal to five percent of the votes cast for all candidates for Governor at the last election. After a petition is filed and the signature requirement is reached, the petition is put through a lengthy validation process.

Each county takes a random sample of signatures to verify that the required amount of signatures was reached across the state and report their findings to the Secretary of State. If more than 110 percent of the required signatures, approximately 555,237, are projected to have been collected, the referendum can go on the ballot. However, if the projection suggests that between ninety-five percent and 110 percent of the signatures have been gathered, then each California county must check all of its signatures and report its results to the Secretary of State within thirty working days. If the statewide estimate reaches 100 percent of the required number of valid signatures, the referendum can be added to the ballot. The law will be repealed if voters cast more “NO” votes than “YES” votes. If a law is repealed by referendum, it cannot be enacted again until a year has passed from the date of its repeal.

The referendum initiative was led by a coalition of conservative groups including Privacy for All Students, the National Organization for Marriage, and the Capitol Resource Institute. Frank Schubert, political strategist for the
signature campaign to repeal SSOA, has successfully led campaigns blocking same-sex marriage legislation in North Carolina and Maine.167 He was also the political strategist behind Proposition 8, the 2008 California initiative that prohibited same-sex marriage.168 Shubert was unsuccessful in his efforts to prevent legalization of gay unions in Maryland, Minnesota, Maine, and Washington.169

Privacy for All Students claimed to have met all state requirements to have SSOA appear on the November 2014 ballot.170 However, the California Secretary of State projected that according to a random sampling of the 619,244 signatures submitted by Privacy for All Students, only 482,582 were likely to be valid.171 As a result, the office of the Secretary of State began a recount and verification of all signatures to determine if the law qualified for the ballot.172 On February 24, 2014, the California Secretary of State announced that only 487,484 of the submitted signatures were valid, meaning SSOA failed to meet the 505,000 valid signature requirement, and would not appear on the November 2014 ballot.173 However, opponents of SSOA may still look to the judiciary to challenge SSOA’s validity.174

IV. PUBLIC SCHOOL STUDENTS’ FOURTH AMENDMENT RIGHTS

Opponents of SSOA claim that allowing transgender students access to sex-segregated facilities and programs consistent with their gender identity will violate the privacy of non-transgender students who traditionally use those facilities.175 If this right exists and it falls within the penumbra176 of the students’ Fourth Amendment right to privacy, as it is not explicitly protected in the amendment’s text,177 it can still be limited.178 Although it has been established that public

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170 Id.

171 Transgender rights repeal misses California ballot, supra note 14; Referendum, supra note 11, at 1.

172 Yan, supra note 1.

173 Frequently Asked Questions About the AB 1266 Referendum, supra note 8.


175 “The right of the people to be secure in their persons, houses, papers, and effects, against
school students have Fourth Amendment rights, these rights have a history of being curtailed when deemed necessary for student safety. Courts have explained that infringing on students’ Fourth Amendment rights is essential to create a safe school environment and is justified by the importance of educating students.

Both the Supreme Court of the United States and California state courts have decided cases involving student claims of Fourth Amendment violations in school settings, and have come to similar, but not identical holdings. The Supreme Court of the United States set a precedent of restricting students’ Fourth Amendment rights in favor of school safety in \textit{New Jersey v. T.L.O.}, where it allowed for school administrators to conduct warrantless searches when there was reasonable suspicion of drug or weapon possession. The California state courts have also restricted students’ Fourth Amendment rights in favor of student safety in \textit{In re Sean A.}, \textit{In re William G.}, and \textit{In re Latasha W.}. In these cases, school administrators were allowed to conduct warrantless searches of students for drugs or weapons as long as they conformed with either the Supreme Court of the United States’ reasonable suspicion standard or the Supreme Court of California’s standard of not being “arbitrary, capricious, or undertaken for purposes of harassment,” as introduced in \textit{In re Randy G.}.

\textbf{A. The Supreme Court of the United States Relaxed Fourth Amendment Search Requirements in Public Schools to “Reasonable Suspicion” For Safety Purposes}

The Supreme Court has restricted students’ Fourth Amendment rights when balancing the student’s right to privacy against the need for school safety. In \textit{New Jersey v. T.L.O.}, this involved physical searches of students’ bodies and unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.


181 See generally \textit{T.L.O.}, 469 U.S. at 325; \textit{In re William G.}, 40 Cal.3d at 550 (holding that the search was unreasonable); \textit{In re Randy G.}, 26 Cal.4th at 566; \textit{In re Latasha W.}, 60 Cal.App.4th at 1524; \textit{In re Sean A.}, 191 Cal.App.4th at 182.

182 \textit{T.L.O.}, 469 U.S. at 326.


184 \textit{T.L.O.}, 469 U.S. at 339-42.
seizures of their personal belongings.\textsuperscript{185} The Supreme Court acknowledged that students have a Fourth Amendment right to privacy, but also explained that this right may be limited in public school settings to maintain safety.\textsuperscript{186} Accordingly, the Supreme Court introduced a standard to evaluate alleged violations of Fourth Amendment rights applicable to students in public school settings.\textsuperscript{187} Under this standard, the Supreme Court will uphold a student search when it is based on “reasonable suspicion” which is a relaxed version of the traditional “probable cause” standard.\textsuperscript{188}

The Supreme Court introduced this standard in \textit{New Jersey v. T.L.O.}, a 1984 case involving the search of a public school student by a school administrator and seizure of personal belongings that rendered proof of drug dealing.\textsuperscript{189} A teacher at a New Jersey public high school discovered the student smoking in a bathroom,\textsuperscript{190} and then escorted her to the Principal’s office to be searched by the Assistant Vice Principal.\textsuperscript{191} The Assistant Vice Principal found marijuana, drug paraphernalia, and a list of students who owed the student in question money.\textsuperscript{192}

The State of New Jersey brought delinquency charges against the student in juvenile court.\textsuperscript{193} The Court denied the student’s motion to suppress evidence found as a result of the Assistant Principal’s search, and held that the search did not violate the Fourth Amendment because it was a reasonable.\textsuperscript{194} On appeal, the Appellate Division of the New Jersey Superior Court affirmed the trial court’s holding.\textsuperscript{195} The student appealed to the New Jersey Supreme Court, which reversed the trial court’s holding, finding that the Assistant Vice Principal’s search was “unreasonable” and ordered suppression of the evidence obtained therefrom.\textsuperscript{196}

The Supreme Court of the United States reversed the Supreme Court of New Jersey’s decision, holding that the State court’s decision to suppress the evidence was “erroneous.”\textsuperscript{197} Explaining that while the “Fourth Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials,” the search of the student’s purse was reasonable.\textsuperscript{198}
The U.S. Supreme Court further explained that they balanced the student’s “legitimate expectations of privacy and the school’s equally legitimate need to maintain an environment in which learning can take place.”\textsuperscript{199} The Court indicated that this requires “some easing of the restrictions to which searches by public authorities are ordinarily subject.”\textsuperscript{200} It follows from the decision that a school administrator could permissibly conduct a warrantless search of a student if there is “reasonable suspicion” that the student brought dangerous substances onto school grounds.\textsuperscript{201} The Court reasoned that this standard would “neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions” on students’ privacy.\textsuperscript{202} This standard differs somewhat from the approach taken by the California state courts.\textsuperscript{203}

\textbf{B. The Supreme Court of California Allows Warrantless Student Searches By School Administrators That Are Not “Arbitrary, Capricious, [or] Harassing”}

In 1985, the same year the Supreme Court of the United States decided \textit{New Jersey v. T.L.O.},\textsuperscript{204} the California Supreme Court decided \textit{In re William G.}, its first case dealing with the Fourth Amendment rights of public school students.\textsuperscript{205} This case dealt with a search of a public school student that resulted in the seizure of an illegal substance.\textsuperscript{206} A school administrator searched the student after he exuded suspicious behavior and found marijuana, a small metal scale, and cigarette rolling papers.\textsuperscript{207}

The student moved to suppress the evidence after the State brought charges of unlawful marijuana possession for purposes of sale in violation of the State’s Health and Safety Code.\textsuperscript{208} Similarly to the U.S. Supreme Court in \textit{New Jersey v. T.L.O.}, the Supreme Court of California held that a student’s Fourth Amendment rights could be limited in order to protect the safety of all students.\textsuperscript{209} Further, the \textit{William G.} court concluded, in accordance with the U.S. Supreme Court’s decision in \textit{New Jersey v. T.L.O.}, “the unique characteristics of the school setting require that the applicable standard [for searches] be reasonable suspicion.”\textsuperscript{210} However, in 2001, the Supreme Court of California adopted its own unique standard for

\begin{flushleft}
\textsuperscript{199} \textit{Id.} at 340.
\textsuperscript{200} \textit{Id.}
\textsuperscript{201} \textit{Id.} at 341.
\textsuperscript{202} \textit{Id.} at 343.
\textsuperscript{204} \textit{T.L.O.}, 469 U.S. at 325.
\textsuperscript{205} \textit{In re William G.}, 40 Cal.3d at 550.
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{Id.}
\textsuperscript{208} \textit{Id.}
\textsuperscript{209} \textit{Id.}
\textsuperscript{210} \textit{Id.} at 562.
\end{flushleft}
warrantless searches in its decision, *In re Randy G.*\(^{211}\)

*In re Randy G.* involved the search and detention of a student who brought a knife onto school grounds.\(^{212}\) The student was searched after exhibiting a series of suspicious behaviors including: being found in a restricted area, “‘act[ing] very paranoid and nervous’ and attempting to conceal something in his pocket.”\(^ {213}\) The student’s motion to suppress the evidence obtained by the search was denied by the trial court.\(^ {214}\) The student appealed this decision to the Court of Appeals, which relied on the “reasonable suspicion” standard introduced in *New Jersey v. T.L.O.*, to conclude that the search did not violate the student’s Fourth Amendment rights.\(^ {215}\)

On appeal, the Supreme Court of California did not apply this standard,\(^ {216}\) and instead explained that school administrators have “broad authority” over students in order to ensure school safety.\(^ {217}\) This “broad authority” includes “the power to stop a minor student in order to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as such authority is not exercised in an arbitrary, capricious, or harassing manner.”\(^ {218}\)

**C. The California State Appellate Courts Have Relied On Both Standards To Restrict Students’ Fourth Amendment Rights**

In general, the California State appellate courts have looked to both federal and state precedent when deciding cases with similar issues and facts.\(^ {219}\) The two have worked in concert to help these appellate courts restrict students’ Fourth Amendment rights in similar cases when doing so would contribute to school safety.\(^ {220}\)

In *In re Latasha W.*, the Court appears to rely more heavily on the California Supreme Court standard by upholding student searches that are not exercised in an “arbitrary, capricious, [or] harassing manner.”\(^ {221}\) In this case, California brought a petition charging a student with bringing a knife on school grounds.\(^ {222}\) The student’s high school had a written policy for daily weapon searches to be

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212 *Id.* at 560.
213 *Id.*
214 *Id.*
215 *Id.*
216 *Id.* at 559.
217 *Id.*
218 *Id.*
221 *In re Randy G.*, 26 Cal. 4th at 559.
222 *In re Latasha W.*, 60 Cal.App.4th at 1526.
TO PEE OR NOT TO PEE?

conducted at random. The school gave students and parents a notice of this practice, which consisted of using hand-held metal detectors to search the student’s person. Students were then asked to open jackets or open pockets when the metal detector was set off to expose whatever caused the detection.

On the day that the student in question was searched, the Assistant Principal adjusted the search policy to include students who arrived late for school. As a result, she, along with eight to ten other students, was searched, revealing that she was in possession of a knife.

The student was charged in a Juvenile Court with bringing a knife with a blade longer than 2.5 inches onto school grounds. She appealed the trial court’s previous denial of her motion to suppress evidence, contending that the evidence obtained as a result of the search was “unlawfully seized.” The Court of Appeals upheld the trial court’s ruling, holding that the search met the constitutional standard because, “‘special needs’ administrative searches, conducted without individualized suspicion, do not violate the Fourth Amendment where the government need is great, the intrusion on the individual is limited, and a more rigorous standard is unworkable.” The Court found that the search conducted by the administrator was minimally intrusive and that a system requiring a greater degree of suspicion would not be workable.

In re Sean A., decided by the Court of Appeals for the Fourth District, the Court appears to combine both the federal and state standards when upholding a student search as justified, not by the student’s suspicious behavior, but failure to comply with school policy, because the search was not “unreasonable.” The school’s policy to search students who had left campus and then returned was created to prevent students from bringing harmful substances onto school grounds. Sean’s attendance records indicated that he had left and then returned to campus, therefore, the Assistant Principal called him into his office to be searched. The search resulted in the discovery of forty-four pills of methylenedioxy-methamphetamine—also known as ecstasy—and led to a petition

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223 Id.
224 Id.
225 Id.
226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
231 Id.
232 Id. at 1527.
233 Id.
235 Id. at 185.
236 Id.
in juvenile court alleging “(1) unlawful possession of a controlled substance for the purpose of sale; and (2) unlawful possession of a control substance.”

Sean brought a motion to suppress the evidence obtained from the Assistant Principal’s search claiming that it was unlawful. Sean appealed the juvenile court’s denial of his motion to suppress to the Court of Appeals, Fourth District. Relying on the precedent set by New Jersey v. T.L.O., In re Randy G., In re William G., and In re Latasha W., the court concluded that the search was legal and upheld the juvenile trial court’s denial on Sean’s motion to suppress.

The court explains the reasoning behind its’ ruling as follows:

The Fourth Amendment protects students on a public school campus against unreasonable searches and seizures. However, strict application of these principles of the Fourth Amendment as used in criminal law enforcement matters does not appropriately fit the circumstances of the operation of the public schools. The need to maintain discipline, provide a safe environment for learning and prevent the harmful impact on the students of drugs and weapons cannot be denied.

The California Court of Appeals, Fourth District, in In re Sean clearly articulates that students’ rights to privacy are not unyielding and can be curtailed in favor of student safety.

Student safety is integral to the analysis of the decisions by the Supreme Court of the United States and the California state courts in these cases. So much so, that it was used to justify infringing upon constitutionally protected rights. However, a closer examination of the opinions of these aforementioned cases reveals that the courts are primarily interested in protecting the educational function of schools.

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237 Id. at 185-86.
238 Id. at 186.
239 Id.
240 Id. at 189.
241 Id. at 190.
242 Id. at 186 (emphasis added).
243 Id. at 182.
245 T.L.O., 469 U.S. at 325.
246 Id.
V. SSOA: VIOLATION OF STUDENTS’ FOURTH AMENDMENT RIGHTS?

A. Protection of Education is the Primary Reason for Fourth Amendment Restrictions in Public Schools

Education has always been the primary motivation and justification behind restricting students’ Fourth Amendment rights in public school settings.247 The “reasonable suspicion” standard introduced by the Supreme Court of the United States in *New Jersey v. T.L.O.* set a precedent allowing federal and state courts to restrict students’ Fourth Amendment rights when necessary for school safety.248 The California state courts in *In re Randy G.*, *In re Latasha W.*, *In re Sean A.*, and *In re William G.*, specifically cite *New Jersey v. T.L.O.* to justify their decisions to curb students’ Fourth Amendment Rights in favor of school safety.249 Although it appears that school safety is the basis for restricting students’ Fourth Amendment rights,250 the court’s decision in *New Jersey v. T.L.O.* demonstrates that it is simply a means to an end.251

In *New Jersey v. T.L.O.*, the Court identified two factors in its initial balancing test: (1) students’ “legitimate expectations of privacy” and more importantly, (2) “the school’s equally legitimate need to maintain an environment in which learning can take place.”252 In this case, the “environment in which learning can take place” is challenged when “drug use and violent crime in schools” threaten school safety.253 In order to maintain an effectual learning environment, the Court presented the “reasonable suspicion” standard to prevent drugs and weapons from interfering with school safety.254

The Supreme Court of California’s decision in *In re Randy G.* provides further support for this argument.255 Relying on the precedent set in *New Jersey v. T.L.O.*, the Court upheld a suspicion-less search of a student and introduced a search standard even more relaxed than “reasonable suspicion.”256 The Court looked to *Brown v. Board of Education* to explain that education is “perhaps the most important function of state and local governments” and protecting it warranted further encroachment on students’ Fourth Amendment rights.257

247 Id.
248 Id.
249 *In re William G.*, 40 Cal.3d at 559; *In re Randy G.*, 26 Cal.4th at 569; *In re Sean A.*, 191 Cal.App.4th at 187.
250 *In re William G.*, 40 Cal.3d at 559; *In re Randy G.*, 26 Cal.4th at 569; *In re Sean A.*, 191 Cal.App.4th at 187.
251 *T.L.O.*, 469 U.S. at 325.
252 Id. at 326.
253 Id. at 339–40.
254 Id. at 325–26.
255 *In re Randy G.*, 26 Cal.4th at 566.
256 Id. at 567.
257 Id. at 566.
Therefore, it appears that the underlying philosophy behind the Supreme Court of the United States and the California state courts’ decisions to restrict students’ Fourth Amendment rights is to prevent interference with public education. This discovery unveils a link to SSOA, and further analysis under this framework is the key to greater understanding.

B. SSOA: In the Spirit of Existing Restrictions of the Fourth Amendment

It is clear that SSOA does not fit within the traditional framework of the cases applying the aforementioned balancing test. The facts of these cases involved physical searches and seizures. Under SSOA, however, the alleged invasion of privacy would not be as physically intrusive and the accompanying safety justification would not be the prevention of controlled substances and weapons, but the prevention of discrimination and assaults against transgender students. However, as discussed in Part IV, in the decision responsible for setting this precedent, New Jersey v. T.L.O., the court was primarily concerned with maintaining school safety to support the furtherance of student education. Accordingly, it is fair to argue that there may be threats to student safety other than drugs and weapons that are worthy of restricting students’ Fourth Amendment rights. For example, the discrimination faced by transgender students in public schools and its short and long-term consequences discussed in Part II may be one such threat.

As demonstrated in Part II, the effects of SSOA, including the prevention of the short term and long-term consequences of the discrimination of transgender students, constitutes an important safety measure. To reiterate, the bullying experienced by transgender students, which includes physical and sexual assault, is a safety concern.

Taking this into account, if a Fourth Amendment challenge to SSOA is brought, application of the aforementioned balancing test is most appropriate. If the balancing test is applied, the court should uphold SSOA because it helps create a safe school environment, which allows for effective education to take place and therefore aligns SSOA with the philosophical underpinnings of existing case

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259 T.L.O., 469 U.S. at 325; In re William G., 40 Cal.3d at 550; In re Randy G., 26 Cal.4th at 566; In re Latasha W., 60 Cal.App.4th at 1524; In re Sean A., 191 Cal.App.4th at 182.
260 McBride, supra note 2.
261 T.L.O., 469 U.S. at 326.
262 Id.
263 McBride, supra note 2.
264 Id.
265 Id.
266 See supra Part II.B.
law in this area. 267

CONCLUSION

The recent passage of Assembly Bill No. 1266 into the School Success and Opportunity Act is a milestone in transgender rights. 268 SSOA is the first law in the country to expressly state the right of transgender public school students to access sex-segregated facilities and programs consistent with their gender identity. 269 “Gender identity” was added to the state’s existing non-discrimination in education law statutes in 2012, establishing “equal rights and opportunities in the educational institutions of the state” for transgender public school students; 270 however, confusion over whether § 220 applied to transgender student access to school facilities and programs in alignment with gender identity necessitated the passage of SSOA. 271 Although SSOA is the first state law recognizing these rights, a similar policy was successfully instituted on a smaller and less formal scale by the Los Angeles Unified School District over ten years ago. 272

Despite this, reactions to the bill have varied across the political spectrum. 273 Supporters of the bill, which include LGBT groups, school administrators, and politicians, applaud its attempt to protect the rights of transgender students. 274 Proponents argue that the lack of institutional protections, like SSOA, is responsible for the discrimination faced by transgender public school students. 275 In other words, denying transgender students access to sex-segregated facilities and programs consistent with their gender identity amounts to institutional discrimination. 276 This institutional discrimination makes transgender students especially vulnerable to individual discrimination, including bullying and assault, at the hands of faculty and peers. 277 Consequently, recognition of transgender students’ right to equal access of school resources through legislation like SSOA will create institutional protection that can alleviate individual discrimination. 278 In contrast, many conservative organizations allege that the law will create an opportunity for sexual assault in public school bathrooms and locker rooms and for

268 Yan, supra note 1.
269 Id.; CAL. EDUC. CODE § 221.5 (2014).
270 FAQ: The Gender Nondiscrimination Act, supra note 5; CAL. EDUC. CODE § 220 (2012) CAL.
EDUC. CODE § 200 (2012).
271 Yan, supra note 1; CAL. EDUC. CODE §§ 220, 221.5.
272 Yan, supra note 1.
273 McBride, supra note 2.
274 Id.
275 Id.
276 Id.
277 Id.
278 Id.
reverse discrimination in athletic settings. Presently, there is only data to refute this contention. Conservative organizations also allege that SSOA will violate the privacy rights of non-transgender students.

Despite the coalition of conservative groups’ failed attempt to have the bill placed on the November 2014 statewide ballot to be repealed via referendum, it may still be challenged in the judiciary. If SSOA is challenged on the basis that it violates non-transgender students’ Fourth Amendment rights to privacy in public school bathrooms and locker rooms, and if this right exists under the Fourth Amendment penumbral right to privacy, it can be argued that SSOA aligns with existing case law that justifies restricting students’ recognized Fourth Amendment rights when necessary to create a safe and effective learning environment for other students. As previously discussed, the School Success and Opportunity Act’s creation of institutional protections for transgender students can not only help to end discrimination against and assault of transgender students by creating safer, more effective schools, but it can also give transgender students the opportunity for success in school, as the law’s name suggests.

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279 Id.
280 Chiasson, supra note 45.
281 McBride, supra note 2.
283 McBride, supra note 2.
284 Griswold v. Connecticut, 381 U.S. 479, 485 (1965); U.S. CONST. amend. IV.
286 McBride, supra note 2.