

# *Recent Developments in State and Federal Legislation and Litigation Affecting LGBTQI+ Students*

Legal Network for Gender Equity Webinar  
September 14, 2023, 3:00 pm ET

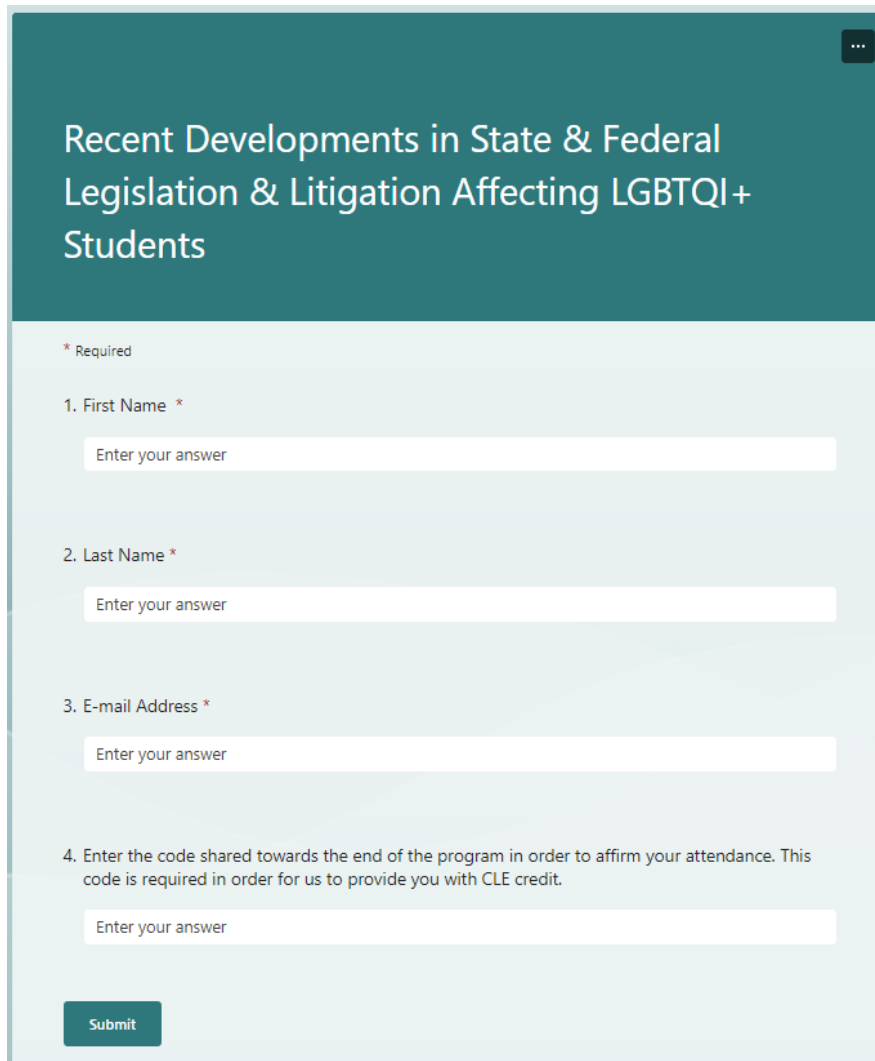
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Recent Developments in State & Federal Legislation & Litigation Affecting LGBTQI+ Students

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# Roadmap:

- I. Introductions
- II. Context and Background
- III. Overview of Recent State Legislation and Related Litigation
- IV. Recent Developments in Federal Law and Administrative Enforcement
- V. Q&A and Concluding Remarks



**Anya A. Marino** (she/her) serves as the National Women's Law Center's Director of LGBTQI Equality and drives the Center's legal and policy efforts to protect and advance the rights of LGBTQI+ people. Before joining NWLC, Anya instructed Harvard Law School's LGBTQ+ Advocacy Clinic. She also served as Deputy Legal Director for the ACLU of Florida, where she oversaw the legal department's voting rights litigation and litigated LGBTQ+ and First Amendment cases. Anya was the first openly transgender woman of color to serve in any senior legal position throughout the ACLU's federation of national and affiliate offices and was the first transgender woman of color to teach at Harvard Law School.

Throughout her career, Anya's work has included representing the most marginalized and vulnerable members of the LGBTQ+ community, including transgender, non-binary, and gender non-conforming people; LGBTQ+ people of color; LGBTQ+ youth; and LGBTQ+ people in southern communities. In 2022, the National Hispanic Medical Association honored her as a trailblazer advancing LGBTQ+ health equality, and Liaison International honored her as one of seven women who shattered the glass ceiling in higher education. Anya graduated from the University of Maryland Francis King Carey School of Law and is the law school's 2022 Rising Star Award recipient. She received her Bachelor of Arts degree in anthropology from Johns Hopkins University. In her free time, she enjoys traveling, attending concerts, studying foreign cultures and languages, and spending time with her two teacup chihuahuas.



**Auden Perino** (they/them) is a Senior Counsel for Education and Workplace Justice at the National Women's Law Center, focused on LGBTQI+ rights advocacy. They came to NWLC after several years at legal aid organizations, representing immigrants and survivors of domestic violence in court, and also organized against campus sex harassment as a student. Auden is an alum of the University of Virginia School of Law, Tufts University, and the University of Oxford.

Like the other panelists, they also live in the DC area with two dogs, Mishka and Pumba.



**Julianna Gonen** (she/her) is the National Center for Lesbian Rights' (NCLR) Federal Policy Director, responsible for overseeing and advancing NCLR's federal policy priorities with Congress and the executive branch. Her work focuses on reproductive health, rights and justice, federal nondiscrimination protections, access to health care, and a progressive and inclusive vision of religious liberty.

Julie has extensive federal policy experience, having served as director of federal policy and advocacy at the Center for Reproductive Rights, where she advocated before the United States Congress, executive branch agencies, and in the courts for public policies at the federal level that protect and advance reproductive health and rights. While there, she led the Center's efforts to defend access to contraception under the Affordable Care Act, drafting regulatory comments advocating against allowing religious employers to deny

coverage to their employees and amicus briefs in federal court litigation regarding such exemptions. Julie also spearheaded efforts that led to the introduction in Congress of major legislation to safeguard abortion rights against politically motivated state laws designed to shut down reproductive health care providers.

Julie received her B.A. from Cornell University, and then received a doctorate in political science from the American University and a law degree from the Georgetown University Law Center. She is the author of *Litigation as Lobbying: Reproductive Hazards and Interest Aggregation*, published by The Ohio State University Press; the book is a case study of *United Auto Workers v. Johnson Controls*, a 1991 Supreme Court case in which corporate "fetal protection" policies were found to be unlawful sex discrimination. She has taught undergraduate and graduate students in public health and political science as an adjunct professor in the School of Public Affairs at the American University in Washington, D.C. and at the Bloomberg School of Public Health at Johns Hopkins University in Baltimore, Maryland. She has also taught public health law at Georgetown University Law Center. Julie served for nine years on the Board of Directors of the Abortion Care Network. She lives in Washington, DC with her wife and two dogs Willie and Ripley.



# Part I: Context and Background

# A Day in the Life of Current LGBTQI+ Students

- LGBTQI+ students need only overhear the news media their parents watch, scroll through the clickbait content and discussions pervading social media, or endure another instance of different treatment at home or school to feel like their lives and identities remain a constant *topic du jour*.
- LGBTQI+ students navigate their school and home environments at a time when LGBTQI+ people maintain great visibility while surviving persistent and relentless hostility at every turn.



# Historical Discrimination of LGBTQ+ People

LGBTQI+ people have experienced disparate treatment, harassment, and exclusion for generations. At least as far back as the mid-1940s, federal, state, and local governments have overtly policed LGBTQI+ people's identities in:

- Public Fora for Discussing Matters of Community Concern
- Institutions of Learning and Academic Scholarship
- Places of Public Accommodation
- Government Operations
- Places of Employment
- Places Used for Housing and Shelter
- Programs Used for Accessing and Receiving Life-Saving Healthcare

NB Outlined items are a non-exhaustive list.

# LGBTQ+ Students' Experiences with Persecution and Discrimination

Today, LGBTQI+ students similarly suffer discrimination and persecution throughout multiple environments and programs. While discussing the persecution and discrimination they encounter repeatedly, it is important to remember LGBTQI+ discrimination and persecution:

- Comprise layers of complex socio-cultural, multi-generational animus that were passed down and reinforced through interpersonal relationships.
- Consist of multi-generational direct and vicarious trauma that community members share with one another.
- Are systemic. Both have become deeply embedded in our social and government institutions, so much so that LGBTQI+ people, and their allies, often feel powerless to eliminate them from the system.

# Understanding LGBTQ+ Terminology

## (Sexual Orientation Edition)

- Sexual orientation – (noun) an individual's emotional, physical, or romantic attraction to another person.
- Gay – (adj.) a term that primarily refers to a man who expresses romantic or sexual attraction to other men.
- Lesbian – (adj.) a term that primarily refers to a woman who expresses romantic or sexual attraction to other women.
- Bisexual - (adj.) a term that primarily refers to a person that expresses romantic or sexual attraction toward men and women. It is sometimes used interchangeably with pansexual.
- Pansexual - (adj.) a term that primarily refers to a person that expresses romantic or sexual attraction toward a person on the gender spectrum.
- Asexual - (adj.) a term that primarily refers to a person that lacks romantic or sexual attraction toward others or has low interest in sexual activity.

# Understanding LGBTQ+ Terminology

## (Gender Identity Edition)

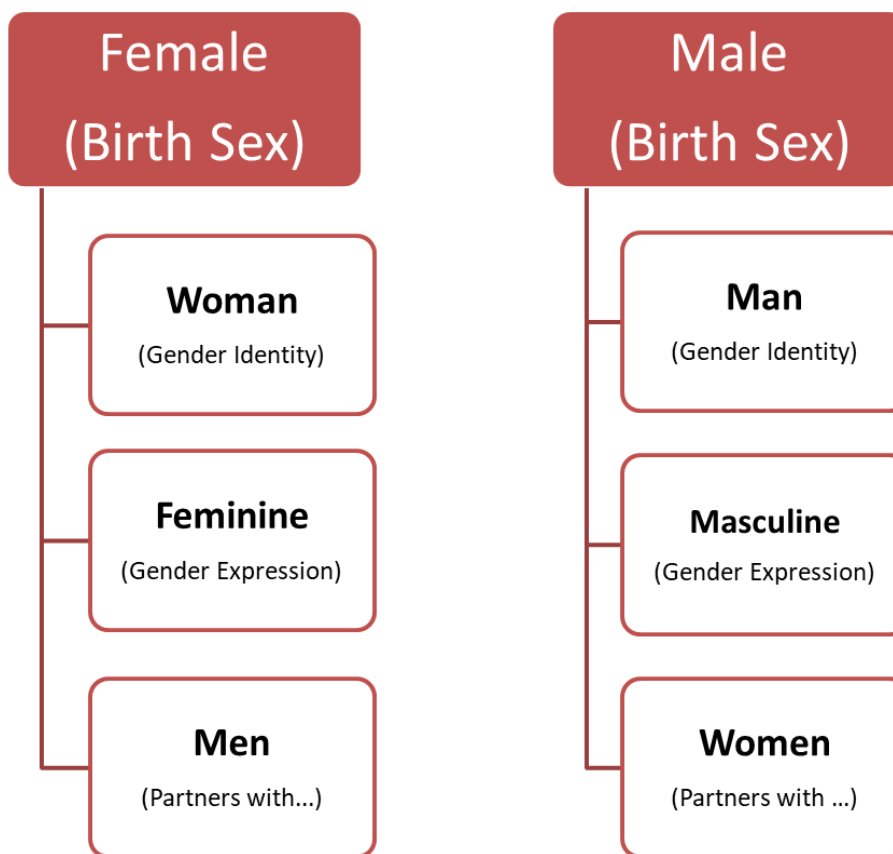
- Gender Identity - (noun) an individual's innermost concept as male, female, or a blend of both or neither. Gender identity is how individuals perceive themselves and what they call themselves. It can be different from the individual's sex assigned at birth.
- Gender Expression - (noun) the external/outward presentation of one's gender identity, usually through behavior, clothing, and body characteristics, which may not conform to standard behaviors or characteristics typically associated with being masculine or feminine.
- Transgender - (adj.) an umbrella term for individuals whose gender identity or expression is different from socio-cultural expectations based on the sex they were assigned at birth.
- Non-Binary - (adj.) an identity embraced by some people who do not identify exclusively as a man or woman. They may identify as both or identify completely outside the binary categories of man and woman.

# Understanding LGBTQ+ Terminology

## (Gender Identity Edition)

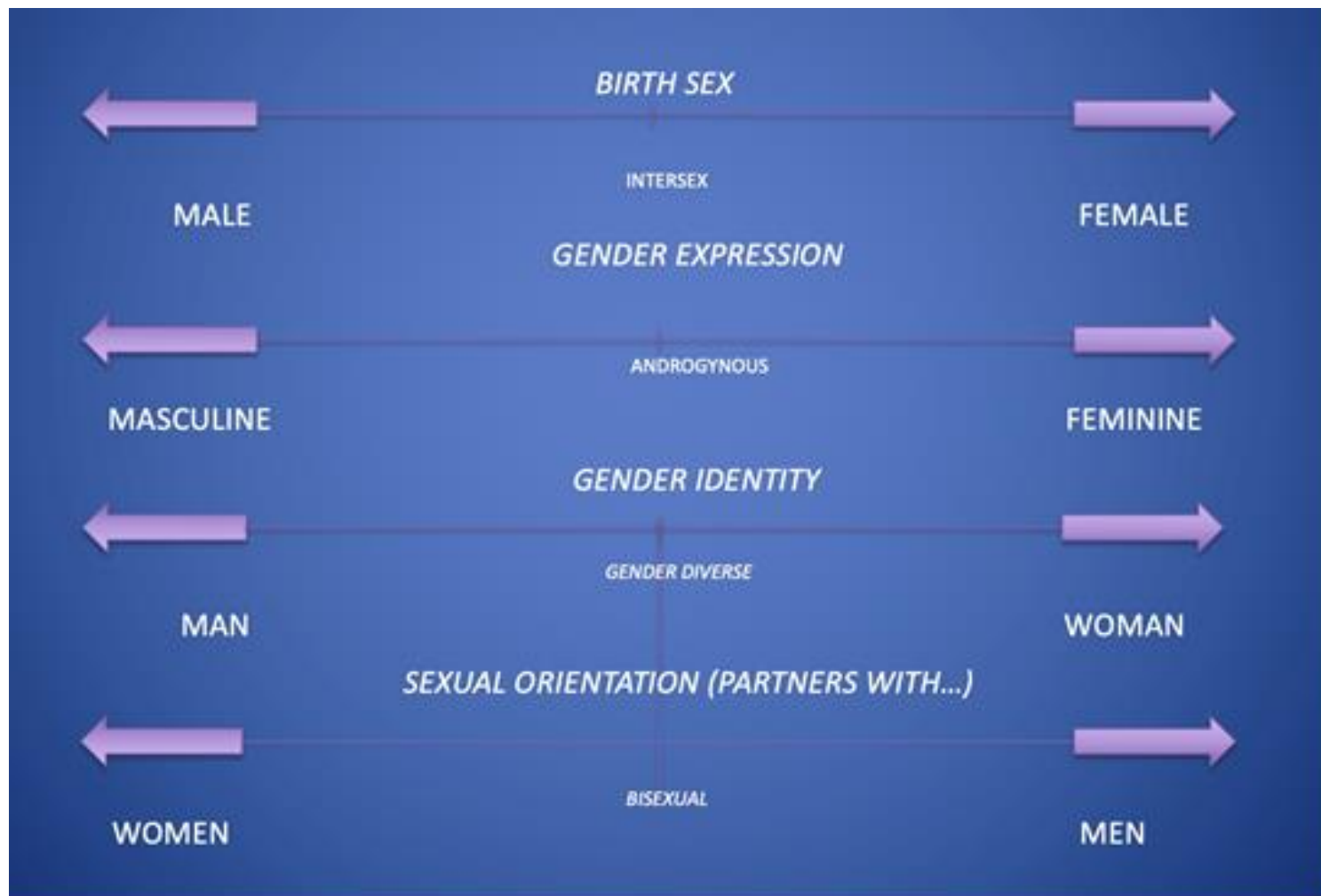
- Cisgender - (adj.) a term used to refer to an individual whose gender identity and expression corresponds to their sex assigned at birth (non-transgender).
- Intersex - (adj.) an umbrella term used to refer to individuals who maintain differences in their sex traits and reproductive anatomy. People are born with these differences or develop them at an early age.
- Gender dysphoria - (noun) a medical diagnosis for the feeling of incongruence between one's gender identity and one's sex assigned at birth, and the resulting distress caused by the incongruence. Untreated, it can lead to disabling distress, depression, anxiety, impairment of function, substance use, self-surgery to alter one's genitals or secondary characteristics, self-injurious behavior, and even suicide. It can substantially limit one or more major life activities, including sleeping, concentrating, thinking, communicating, interacting with others, working, and social and occupational function. It may also substantially limit the operation of certain bodily functions, including genitourinary, endocrine, brain, and reproductive functions.
- Gender Affirmation - (noun) the process by which a transgender or non-binary person seeks to align their gender identity with their outward appearance. Gender affirmation is multi-modal and involves, social and medical components.

# Binary Gender Model





# A More Authentic Gender Model



# Why LGBTQI+ Issues Matter to NWLC

- LGBTQI+ discrimination and persecution are built upon regressive and misogynistic traits about the roles of women and men to assert dominance, devalue anything viewed as traditionally non-masculine or non-feminine, and to encourage violence and fear.
- Anti-LGBTQI+ policies create unsafe environments for LGBTQI+ identifying or perceived individuals and for women and girls who fail to fit specific expectations of what it means to be feminine or a woman.
- Politicians and community leaders grasping onto their dwindling power exploit people's fears and endeavor to create wedges between cis women and girls and trans women and girls. They understand division and conflict amongst already marginalized communities pose barriers to united messages against their broader anti-democratic agenda.

# Part II: Overview of Recent State Legislation and Litigation

# STATE LEGISLATIVE TRENDS

Anti-LGBTQI+ politicians have ramped up efforts to single out LGBTQI+ students and youth as legislative targets for surveillance, censorship, body policing, and threats of family separation through sanctioned kidnapping by anti-LGBTQI+ parents and/or weaponization of "child welfare" infrastructure.

Transgender, nonbinary & intersex people remain primary targets for legalized threats and violence, especially Black and brown trans people & youth who are openly transgender, gender expansive, or gender nonconforming.

# STATE LEGISLATIVE TRENDS

Even though bullying and attacking trans youth is massively unpopular

Source: April 2023 [Fox News Poll](#); 86% of respondents agree political attacks on trans kids are "a problem"

33.-34. And in general, how much of a problem is each of the following -- a major problem, a minor problem, or not a problem? [RANDOMIZE]

	Major problem	Minor problem	Not a problem	(Don't know)
Families with transgender children being targets of political attacks	57%	26	15	3
21-24 Apr 23				

Over 80% of adults in the U.S. support LGBTQI+ rights, and are favor of strong, nationwide nondiscrimination laws

Source: 2021 Hart & HRC [poll](#)

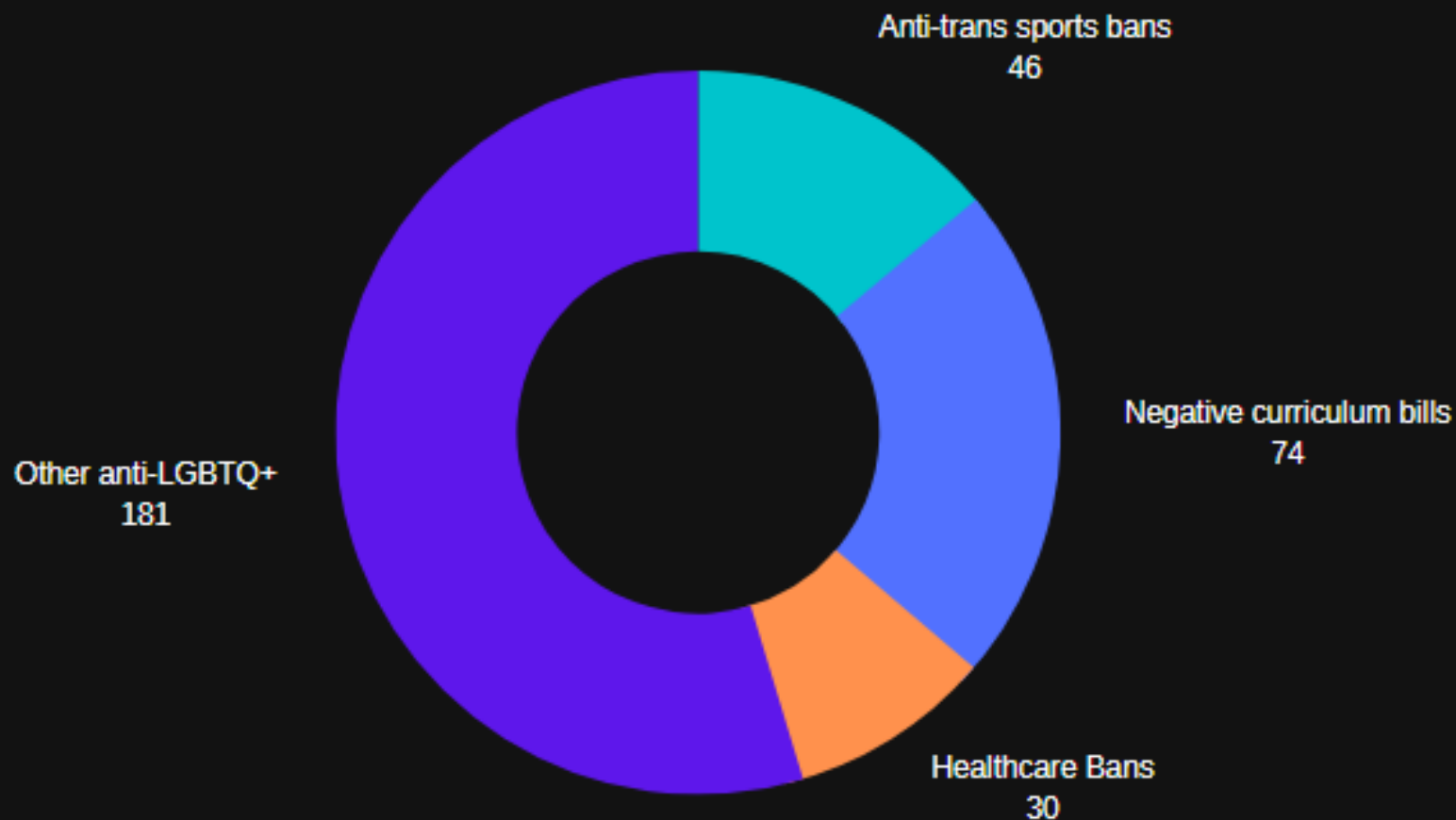
- **Equality Act support is especially important given the disconnect between Americans' belief in the degree to which LGBTQ people are and should be protected by federal law.** A 57% majority of voters believe that LGBTQ people are already totally (20%) or somewhat (37%) protected from discrimination by federal law. However, this is well below the 82% who say that LGBTQ people *should be* totally (51%) or somewhat (31%) protected.
- Transgender people should be able to live freely and openly according to their gender identity (85%)
- Transgender people should have equal access to medical care as other Americans (92%)

In 2022, 10s of millions poured into anti-trans campaigning by the far right created basically zero electoral benefit...

This week's election results called into question the power of culture war education politics, as a string of Republicans who leaned into the issue lost close races or were trailing their opponents.

This year saw an underwhelming showing for anti-LGBTQ candidates and historic wins for LGBTQ nominees.

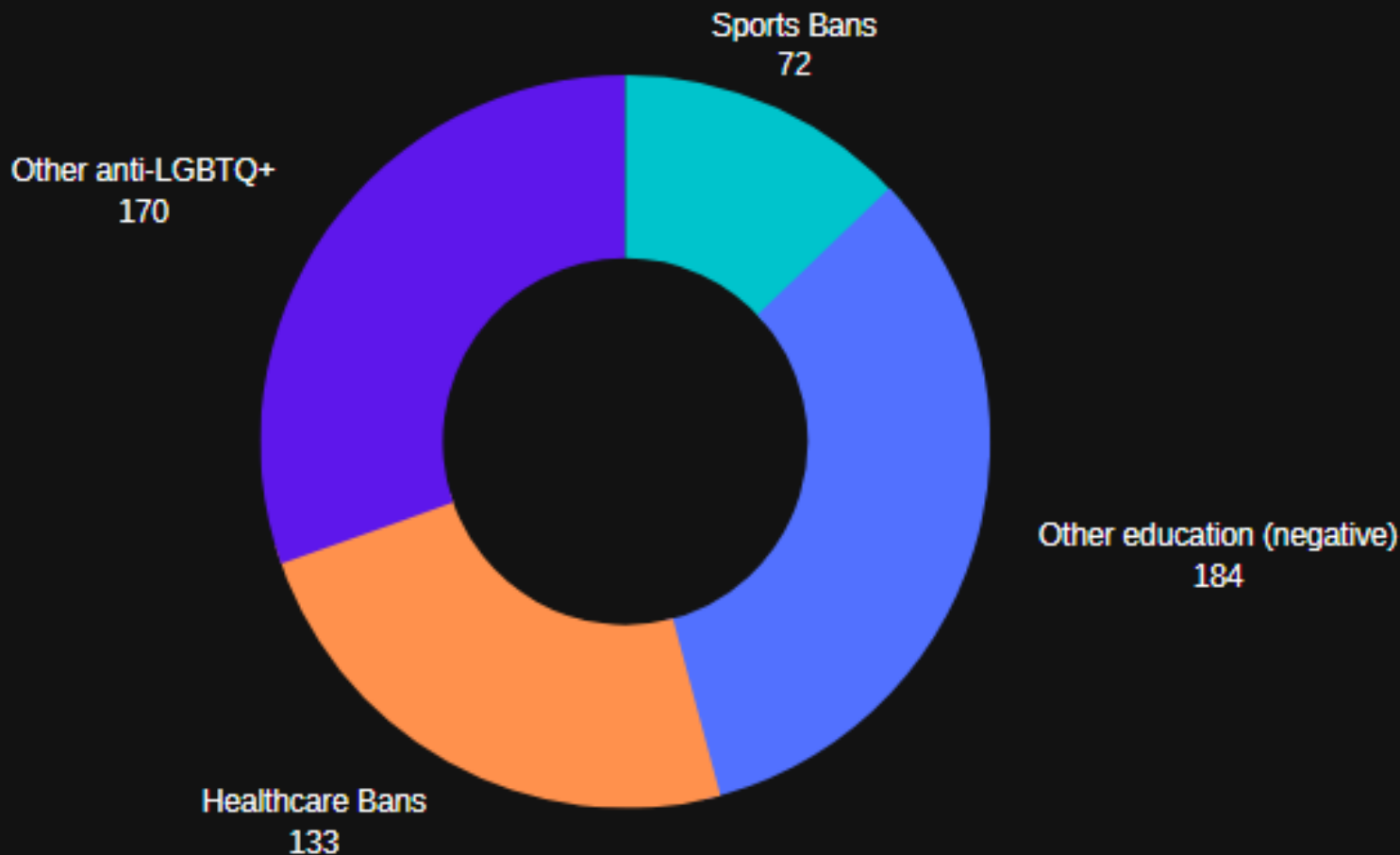
# Anti-LGBTQ+ Bills 2022



(July 2022) tracking by Equality Federation



# Anti-LGBTQ+ Bills 2023



**Source: Equality Federation**

# Anti-LGBTQI+ Education Bills: what do they do?

Undermine key civil rights for students:

- Narrow view of "biological sex" as "natural" basis for organization of school, family, life
- Allow centralized and/or vigilante "challenges" to students' gender, up to and including forcing kids into genital inspections based on white, straight, cisgender norms of who "counts" as a "real" boy/girl
- Erode rights to learn free from discrimination & enforcement of gender stereotypes

*Common bill categories include:*

- *Anti-trans sports bans--especially harm girls and women at all levels of education & increase risks of body policing against Black & brown girls and women in school, and trans, nonbinary, intersex students*
- *Forced outing & misgendering policies—often asserting a "religious" or speech right to harass students*
- *Book & curriculum bans, including "Don't Say Gay" policies—these typically frame LGBTQI+ people as inherently "prurient" or "obscene;" may repackage homophobic stereotypes to fearmonger about trans people being inherently predatory "groomers"*
- *Anti-trans restroom bans—less popular/motivating even among opposition, but still around*

# Censorship & Book Bans

**2021: 22 states introduce 54 school censorship bills. 12 are enacted.**

*Politicians seeking to dictate what can be taught and learned openly aim to censor and chill teaching truth, & even discussion about gender, LGBTQI+ people, race, and racism--especially Black history.*

**2022: 36 states introduce 137 school censorship bills—a 250% increase.**

*Although only 7 are enacted, proposals are much more punitive, some even proposing to criminalize teachers based on speech.*



# SPLC 2022 Hate & Extremism Findings

"Today's so-called parental rights activists have also copied & pasted from the scripts of past groups, **adapting old racist and homophobic ideas, as well as conspiracy theories** asserting Marxist indoctrination. They are now adding a dash of QAnon rhetoric, accusing progressives of attempting to groom and sexualize children...

Onset of the COVID-19 pandemic & resulting remote schooling of children... led to a resurrection of anti-public school sentiment, as far right activists opposed school mask mandates, demanded a return to school on their terms or withdrew in favor of private or homeschool. After schools reopened, the fight morphed into confrontation about pedagogy & curriculum, as far-right antigovernment parents under the guise of simply being concerned, began to assert themselves into what can and cannot be taught in public schools.

Like the mothers of massive resistance before them, Moms for Liberty is ready to fight tooth and nail to preserve the unseen but understood caste system existing in their public schools & communities.... They have publicly battled teachers' unions, labeling them as "cartels" & "terrorist organizations."

# Elements of Book Banning Ideology

- **Nationalism** (incl intertwined government & religion)
  - *Elements of xenophobic, white supremacist "great replacement" conspiracy theory*
- **Sexism:** enforcing strict gender roles & stereotypes
  - *"Natural" organization of society around a nuclear family led by a patriarchal father*
- Unifying against **common enemies**
- **Control of media** (this brings in the antisemitism)
  - *"they're forcing this woke agenda down our throats"*
- Anti-government conspiracy theories (i.e. seeking to defund and dissolve federal Dept of Education)





# Anti-Trans Sports Bans



## Top 3 Things:

1. **Timeline tells you *everything*: starting 2008, most U.S. jurisdictions began recognizing the right of trans, nonbinary, & intersex youth to openly play alongside their peers in school sports. This caused zero (0) problems for over 10 years.**

*2018-2019: anti-trans extremists ramped up a heavily-funded campaign to make the education of trans kids a "major national issue," often with politicians not knowing of [one, single trans student](#) playing sports in their state. see next slide*

2. **There is no way to enforce anti-trans sports bans without policing whose body is stereotypically feminine or masculine enough to be a "real girl" or a "real boy"**

*Anti-trans advocates realized forced genital inspections of children cause (justified) visceral alarm in any sensible person—as they try to pivot away from this, remember scrutinizing children's genitals appears in the text of the first anti-trans bill they passed: Idaho (2020).*

3. **Initial research shows: where trans girls and women are excluded from play, *all* girls have lowered rates of playing school sports.**

**Where trans girls and women are included in play, *all* girls have increased rates of playing school sports. ([source](#))** *Anti-trans extremists are lying when claiming to care about issues girls' & women's sports. They never even talk about the real issues.*

## Exploiting Trans Students as a Wedge + Fake Moral Panic

- "The fight to keep trans people out of sports is about power and control... scrutiny of women's bodies is the real threat to women's sports." -Layshia Clarendon, WNBA star, Marie Claire, Feb 2021 ([link](#))*

Recent history: Targeting trans students as easy scapegoats traces back to Soule case filed in CT by hate group ADF

- "Historian Gillian Frank has noted the parallels between the myths about trans women making bathrooms unsafe for cis women and girls... and the racist myths pushed by segregationists stoking fears about integration's purported threat to white women's virtue and purity. The idea of protecting girls is meant to win, and with it, they can fuel a stigmatizing moral panic about trans people." -Melissa Gira Grant, The Soapbox, 2021, [link](#)*



Gillian Branstetter  
@GGBranstetter

In 2018, the cis girl on the left came in 8th in a HS track event. The trans girl on the right came in 1st.

The cis girl went on to earn 5 state titles, qualify for nationals 4 times, and now runs D1.

The trans girl was pushed out of sports altogether.

Guess who's suing who?



There is one best, evidence-supported intervention to mitigate crisis level health risks to trans youth: social support, from even one adult. Sometimes that life sustaining adult will be a coach.

# Litigation Against Anti-LGBTQI+ Legislation and Administrative Policies

- Federal Court Litigation
- State Court Litigation

## Federal Court Litigation Example

*Poe v. Labrador*, No. 1:23-cv-00269-CWD (S.D. Idaho)

- The case involves HB 71, a law criminalizing gender affirming medical care for transgender youth.
- HB 71 bans puberty blockers, hormone therapy, and certain surgeries if they are used to affirm the gender of transgender youth, and threatens medical providers who provide this widely accepted care with a felony conviction and up to ten years in prison.
- Case is brought by our colleagues at the ACLU National LGBTQ & HIV Project, ACLU of Idaho, and Rest, Collective, Paul, Weiss, Rifkind, Wharton & Garrison LLP

## State Court Litigation Example

*Van Garderen v. State of Montana*, No. DV 23-541  
(4th Dist. Ct. Mont.)

- The case involves SB 99, a law criminalizing gender affirming medical care for transgender youth.
- SB 99 bans puberty blockers, hormone therapy, and certain surgeries if they are used to affirm the gender of transgender youth. Healthcare professionals who provide care in violation of the Act are subject to licensing and disciplinary review, and they may be sued by the state Attorney General or private parties.
- Case is brought by our colleagues at the ACLU National LGBTQ & HIV Project, ACLU of Montana, Lambda Legal, and Perkins Coie.



# Part III: Recent Developments in Federal Law and Administrative Enforcement

# Federal Policy Developments

- Congress
- Biden Administration



# Federal Legislative Developments

- Respect for Marriage Act (2022)
- Equality Act (HR 15 / S 5)
- Parents Bill of Rights Act (HR 5)
- Anti-Censorship Resolution (H Res 219)
- Protection of Women and Girls in Sports Act of 2023 (HR 734)

# Equality Act

- HR 15 / S 5
- Would add sexual orientation and gender identity (SOGI) to 7 areas of civil rights laws (and sex to a couple where it isn't now\*)
  - Federally-funded programs\* (1964 CRA Title VI)
  - Employment (1964 CRA Title VII)
  - **Public education (1964 CRA Title IV)**
  - Public accommodations\* (1964 CRA Title II)
  - Housing (FHA)
  - Jury service
  - Credit (ECOA)
- Definition of sex that includes SOGI, pregnancy/childbirth/related medical conditions, sex stereotypes, sex characteristics

# Parents Bill of Rights Act

- HR 5
- Passed House March 24 by 213-208 vote
- Better name: "Politics Over Parents Act"
- Empowers censorship
- Forced outing of LGBTQ students
- Elimination of data collection

# Bill of Rights for Parents and Students

- Response to Parents Bill of Rights Act
- H Res 219
  - “Expressing support for developing supportive, inclusive, safe, and responsive public schools that provide all students with a well-rounded education and prepare all students for success in life and for the exercise of their social and economic rights, fostering parental involvement in education in a manner that builds partnerships and trust between parents and educators, and protecting the civil rights of students and families.”

# Protection of Women and Girls in Sports Act of 2023

- HR 734
- Passed House April 20 by 219-203 vote
- Better name: "Politics Over Participation Act"
- Would be Title IX violation to allow transgender girls to participate in sports
- "Sex shall be recognized based solely on a person's reproductive biology and genetics at birth."

# Federal Administrative Developments

- Executive Orders
- Title IX Regulations
  - General
  - Athletics
- Religious Exemptions



## Context: Title IX

- Enacted in 1972, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. 1681(a).

# Biden Executive Orders

- January 2021: **EO 13988** on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation
- March 2021: **EO 14021** on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity

# Context: Title IX Rules Over the Years

- **1975: 1st set of regulations (34 CFR part 106)**
- 1997: Sexual Harassment Guidance (included lesbian and gay students)
- 2001: revised Sexual Harassment Guidance
- 2014: Q&A addressed gender identity (rescinded under Trump Administration)
- 2016: DoJ / Ed Dear Colleague re: trans students (rescinded under Trump Administration)
- **2020: Trump Administration revised regs re: sexual harassment and religious exemptions**
- 2021: Dept of Ed *Bostock* notice
- **2023(?): Biden Administration revised regs**

# Trump/DeVos Title IX Rules

- Narrowed definition of actionable sexual harassment
- Narrowed scope – only conduct within school programs or activities
- Onerous process for survivors
- Higher standard of proof (clear & convincing)
- No requirement to seek religious exemption in advance

# Biden/Cardona Proposed Title IX Rules

- NPRM mid-2022
- More sex-based harassment actionable
- SOGI expressly covered
- No change to religious exemption process or scope
- Punted on sports

# Biden/Cardona Proposed Title IX *Athletics Rule*

- NPRM April 2023
- Standard for limiting eligibility for trans inclusion:
  - Substantially related to achievement of important educational objective, and
  - Minimize harms to student whose opportunities would be limited or denied

# Where lawmakers won't go: state anti-trans executive actions

Example:

Missouri Attorney General "emergency rule" attempting to ban transgender health care for adults; ACLU suit in April 2023 argued AG had no authority to block all GAC based on state consumer protection law; enjoined & withdrawn by AG mid-May 2023

*Example: TX family services investigations*

*Example: VA VDOE & AG opinion re imposing anti-trans rules on VA school districts*

# Questions?



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# Survey & Thank you!

Survey: State and Federal  
Legislation and Litigation Affecting  
LGBTQI+ Students Webinar



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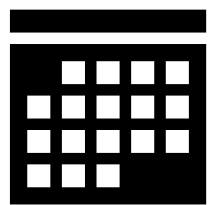
<https://www.facebook.com/nwlc>



[nationalwomenslawcenter](https://www.instagram.com/nationalwomenslawcenter)



Join the Legal Network for Gender Equity at  
[nwlc.org/legalnetwork](https://nwlc.org/legalnetwork)



# Save the date . . . for our next webinar!

Thursday, November 2, 2023 from 12 – 1 pm ET

*Survivors Speaking Out: A Toolkit About Defamation  
Lawsuits and Other Retaliation by and for People  
Speaking Out About Sex-Based Harassment*

