

## What You Need to Know About State Laws Attacking Transgender Youth

Over the last few years, the LGBTQ community has won important victories against discrimination. In June 2020, the Supreme Court recognized the rights of LGBTQ individuals to be free from employment discrimination in *Bostock v. Clayton County*.<sup>1</sup> Since taking office in January 2021, President Biden has prioritized preventing and combatting anti-LGBTQ discrimination, announcing that children “should be able to learn without worrying whether they will be denied access to the restroom, the locker room, or school sports” and that people “should be able to access healthcare . . . without being subjected to sex discrimination.”<sup>2</sup> The Departments of Education and Justice followed up with guidance interpreting federal laws to protect LGBTQ youth. And this August, the Departments of Justice, Education, and Health and Human Services, released a [Back-to-School Address for Transgender Students](#). In the video, leaders from each department declare that the federal government stands behind transgender students and highlight the Dep’t of Education’s Office of Civil Rights’ page of other [resources](#) for supporting LGBTQI students, including this resource for [Supporting Transgender Youth in School](#).

In a backlash to this progress, state legislatures across the country introduced a record number of laws attacking transgender youth. Most of these laws either prohibit transgender youth participating in school-related sports on the teams that align with their gender identity or prohibit transgender youth from receiving gender-affirming healthcare. To ensure that our members and state affiliates are prepared to challenge and prevent these attacks, this summer, the NEA adopted NBI 5 at the RA:

The NEA will use existing materials to educate its state and local affiliates and members about the dangers of anti-transgender legislation targeting transgender youth in sports and/or restricting their access to gender-affirming health care. Resources should describe the current legal landscape at the federal and state level, include model language from partner organizations on ways to support modifications to existing laws that prevent such discriminatory applications, provide talking points for advocacy, and link to existing resources for members and state affiliates to use in efforts to prevent the use of such laws as a license to discriminate.

The NEA’s Office of General Counsel is providing this brief memorandum as part of our office’s LGBTQ advocacy and response to NBI 5.

<sup>1</sup> NEA, “Momentous Supreme Court Decision Supports LGBTQ Rights,” *NEA EdJustice*, June 16, 2020: <https://neadjustice.org/2020/06/16/pending-supreme-court-case-could-affect-all-lgbtq-educators-students/>.

<sup>2</sup> “Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” January 20, 2021: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>

Eight states have enacted transgender sports bans and two states have enacted laws banning gender-affirming care for transgender youth.<sup>3</sup> Advocates are already seeing some success shutting down these laws in the courts. But unfortunately, we expect that state legislators will introduce similar bills in the next session. Thus, educators should take steps to make their education communities safe and inclusive environments for transgender students.

## Sports

The Departments of Justice and Education have made it clear that Title IX's prohibition on sex discrimination applies to discrimination against transgender students.<sup>4</sup> In June 2021, the departments released a factsheet on [Confronting Anti-LGBTQI+ Harassment in Schools](#). The factsheet provides examples of illegal discrimination against transgender students, including prohibiting them from participating in sex-segregated activities that align with their gender identity, and instructs families on how to file complaints. They also filed a [brief](#) in support of transgender students who filed a lawsuit challenging a West Virginia state law that bans transgender girls from playing on girls' sports teams. They argued that the West Virginia law not only violates Title IX, but is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment.

But despite federal law protecting transgender students' right to participate on the sports teams that match their gender identity, several states have passed laws banning the activity:

- Alabama - [HB 391](#)
- Arkansas – [Act 461](#) –Fairness in Women's Sports Act
- Arkansas – [Act 953](#)– Gender Integrity Reinforcement Legislation for Sports (GIRLS) Act
- Florida – [S1028](#) – Fairness in Women's Sports Act
- Idaho – [HB 500](#) – Fairness in Women's Sports Act
- Mississippi – [SB 2536](#)
- Montana – [HB 112](#)
- Tennessee – [Pub. Ch. 40](#)
- Texas – [HB 25](#)
- West Virginia – [HB 3293](#)

These laws aim primarily at female transgender athletes who want to participate on school sports teams designated for girls or women, though some (e.g. Texas) also prohibit male transgender athletes from participating in male sports. West Virginia, Montana, and Idaho allow athletes who are harmed by another student violating the law to sue their schools. Idaho's law also states that a dispute over an athlete's sex can only be resolved by a signed statement from a doctor based on the student's genetic makeup, reproductive anatomy, and testosterone levels.

Advocates across the country are filing lawsuits to challenge these state laws and winning. In *Hecox v. Little*, a court in Idaho [enjoined](#) that state's law after the ACLU brought suit on behalf of female transgender athletes. The case is now on appeal at the Ninth Circuit.<sup>5</sup> Advocates in West Virginia, led by the ACLU and Lambda Legal, have sued to block their state's transgender sports ban. The case,

---

<sup>3</sup> In addition, the state legislatures in Kansas, Louisiana, North Dakota, and South Dakota passed transgender sports bans, but the governors in those states vetoed the laws or refused to sign them. However, South Dakota Gov. Noem issued two executive orders, one that banned female transgender athletes from participating in [K-12 sports](#) and one that banned their participation in [college athletics](#).

<sup>4</sup> In March 2021, the Department of Justice published this [memorandum](#) applying *Bostock* to Title IX, and interpreting the statute to prohibit discrimination against transgender individuals. In June 2021, the Department of Education issued a [notice](#) in the Federal Register that reached the same conclusion.

<sup>5</sup> The NEA joined the National Women's Law Center's [amicus brief](#) on appeal.

*B.J.P. v. West Virginia Board of Education*, is ongoing but a judge [ruled](#) that, for now, the state cannot enforce the law against the specific plaintiff in that case. The Human Rights Campaign is challenging Florida's law in [D.N. v. Ron DeSantis et al.](#), and Tennessee's law in [A.S. et al. v. Lee](#). There have not been any significant rulings on the merits in either case yet.<sup>6</sup> In November, the ACLU and Lambda Legal filed an additional challenge to Tennessee's sports ban case, [L.E. v. Lee, et al.](#) Finally, in Connecticut, cisgender female athletes unsuccessfully challenged the state's interscholastic athletic conference's inclusive policy, in [Soule et al. v. Connecticut Interscholastic Athletic Conf. et al.](#) That case is now on appeal at the Second Circuit.

This troubling trend from state legislatures has gotten a lot of national attention, which is warranted. But many states already protect transgender students from discrimination at school, either through nondiscrimination statutes that explicitly include sexual orientation and gender identity or because the state's courts and agencies have interpreted their state's prohibition on sex discrimination to include discrimination based on sexual orientation and gender identity (like the Supreme Court did in *Bostock*).<sup>7</sup> For example, [California](#) passed a law in 2013 requiring schools to let students participate on the sports and other sex-segregated teams that align with their gender identity, regardless of what gender their records list. Colorado, Connecticut, D.C., Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington also have guidance allowing high school transgender athletes to compete on teams that match their gender identity.<sup>8</sup> [GLSEN](#) and the [Transgender Law & Policy Institute](#) both have guidelines for creating inclusive policies for transgender student athletes.

### **Gender-affirming Health Care**

So far, two states have passed laws banning transgender youth from receiving different forms of gender-affirming health care. Arkansas passed [Act 626](#), the Arkansas Save Adolescents from Experimentation (SAFE) Act, which prohibits providing minors (under age 18) with of puberty blockers, hormone treatments, gender reassignment surgeries, and other medical interventions to facilitate gender transition for transgender individuals. Tennessee passed [Pub. Ch. 460](#), which prohibits healthcare providers from prescribing gender affirming hormone treatments for transgender "prepubertal minors,"<sup>9</sup> but allows hormone treatments for other conditions "unrelated to gender dysphoria or gender incongruity." The ACLU is challenging the Arkansas law, *Brandt et al. v. Rutledge et al.* The Arkansas district court in that case [enjoined](#) the law. The case is now on appeal in the Eighth Circuit.

The Biden Administration has not published standalone guidance on this issue, but the Dep't of Justice filed a [brief](#) in favor of the transgender minors and their parents in *Brandt*. There, the Department argued that the Arkansas law singled out transgender youth, prohibiting them receiving necessary care, based solely on their sex assigned at birth. And, although the state attempted to justify its discrimination on the basis of the health and safety of its citizens, the real motivation

---

<sup>6</sup> The court in Tennessee denied the plaintiff's motion for a temporary restraining order, but only on the basis that the plaintiffs filed their case too close to the start of the school year even though the bill was signed in May and went into effect in August.

<sup>7</sup> Educators can check the status of more general school non-discrimination laws in their state on this [map](#), maintained by Advancement Project.

<sup>8</sup> GLSEN and transathlete.com maintain a [map](#) of state athletic association guidance on the inclusion of transgender and nonbinary students in athletics. It was last updated July 27, 2021.

<sup>9</sup> Advocates note that youth [do not receive hormones pre-puberty](#), so that this law does not disrupt existing care, but is nonetheless sending a hateful message. Sam Levin, "Mapping the anti-trans laws sweeping America: 'A war on 100 fronts,'" *The Guardian*, Jun. 14, 2021: <https://www.theguardian.com/society/2021/jun/14/anti-trans-laws-us-map>.

behind the law was animus against transgender youth. Accordingly, the Arkansas law violated the Equal Protection Clause of the Fourteenth Amendment.<sup>10</sup>

As the Biden Administration argued, these laws do not protect transgender children. They go against the consensus of the [American Academy of Pediatrics](#) and the [American Academy of Child and Adolescent Psychology](#). Other states have passed laws that guarantee equal access to medical care and prohibit discrimination by insurance companies.<sup>11</sup> For example, [Colorado](#) prohibits insurance companies from charging individuals different rates based on their sexual orientation or transgender status, categorizing sexual orientation or transgender status as a preexisting condition, or denying coverage for medically necessary procedures for transgender individuals if those services would be provided to others without regard to their sexual orientation or transgender status. The Commissioners of Insurance in [Wisconsin](#), [New York](#), and [Michigan](#) have issued similar bulletins.

### **Talking Points and Calls to Action for Advocates**

All children, whether they're gay, straight, bi, cisgender, transgender, or gender nonconforming, deserve to attend schools that are safe and inclusive - schools where they can thrive and participate in activities like sports, where they can be part of a team, push themselves, and learn to be leaders. And every family deserves to make deeply personal medical decisions that are right for them, without worrying about government interference. More than ever before, our courts and federal government are taking steps to protect transgender youth.

But Republican lawmakers in state legislatures across the country are attacking transgender youth in order to divide us. We need to support laws and policies that will allow all youth, including LGBTQI+ youth, to lead normal lives, without worrying about which restroom they use, compete in sports without fear of public shaming, and make important medical decisions with their parents and doctors. To do so, we need inclusive policies in our local communities and we need judges and politicians at all levels who will protect transgender youth.

### **Steps educators can take:**

1. Support LGBTQ youth in their schools by sponsoring Gay Straight Alliances ([GSA](#) resources from GLSEN) so that youth have a safe community and adults they can turn to.
2. Organize their local affiliates to pass incorporating LGBTQ materials into an [inclusive curriculum](#), pass inclusive school board policies and resolutions, so that LGBTQI+ students can see themselves in their schools and be free from discrimination.
3. Vote for and help elect state candidates who will pass laws to protect transgender youth and adults.
4. [Contact their senators and urge them to support the Equality Act.](#)

---

<sup>10</sup> The Department of Justice also noted that it had an important interest in protecting individuals' rights to nondiscriminatory access to healthcare under Section 1557 of the Affordable Care Act.

<sup>11</sup> See Movement Advancement Project. "Equality Maps: Healthcare Laws and Policies." [https://www.lgbtmap.org/equality-maps/healthcare\\_laws\\_and\\_policies](https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies). Accessed 11/08/2021.