

2022

A Solution in Search of a Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX

Mollie McQuillan

Suzanne Eckes

Maria Lewis

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Mollie McQuillan, Suzanne Eckes, and Maria Lewis, *A Solution in Search of a Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 Marq. Sports L. Rev. 195 (2022)
Available at: <https://scholarship.law.marquette.edu/sportslaw/vol33/iss1/10>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons.
For more information, please contact elana.olson@marquette.edu.

A SOLUTION IN SEARCH OF A PROBLEM: JUSTICE DEMANDS MORE FOR TRANS STUDENT-ATHLETES TO FULFILL THE PROMISE OF TITLE IX

MOLLIE MCQUILLAN*

SUZANNE ECKES**

MARIA LEWIS***

Bans related to classroom discussions that address “controversial” topics such as racial justice or LGBTQ+ issues have dominated headlines.¹ The politicization concerning the rights of all students in schools has capitalized on and exposed deep divisions, and has raised educators’ concerns about the well-being of their most marginalized students.² At the same time, marginalized students have experienced increased levels of stress and hostility as a result of

* Dr. Mollie T. McQuillan is an Assistant Professor in Educational Leadership and Policy Analysis at the University of Wisconsin - Madison. Dr. McQuillan earned her PhD and MA in Human Development and Social Policy from Northwestern University, a MA in Teaching from Saint Thomas University, and an AB in Political Science from the University of Chicago. Their research focuses on the educational policies, leadership, school climate, and health of LGBTQ+ people.

** Dr. Suzanne Eckes is the Susan S. Engeleiter Professor of Education Law, Policy and Practice at the University of Wisconsin-Madison School of Education. She is also an affiliate faculty member at the University of Wisconsin Law School. Dr. Eckes’ research focuses on how civil rights laws impact students and educators in public schools.

*** Dr. Maria M. Lewis is an associate professor in Education Policy Studies and an affiliate law faculty at Pennsylvania State University. Dr. Lewis earned her J.D. and Ph.D. from the University of Wisconsin-Madison. Her research is situated at the intersection of law and education, particularly as it relates to equity and diversity.

1. See generally Suzanne E. Eckes & Francesca Hoffman, *Addressing Current Controversies and Political Matters in the Classroom*, PRINCIPAL LEADERSHIP, May 2022, at 58-59 (highlighting how classroom discourse on various matters of public concern have been challenged).

2. See generally *The Trump Effect: The Impact of the 2016 Presidential Election on Our Nation’s Schools*, S. POVERTY L. CTR. 4 (2016), https://www.splcenter.org/sites/default/files/the_trump_effect.pdf (A 2016 survey conducted by the Southern Poverty Law Center found that eighty percent of teachers surveyed reported feeling fearful for marginalized student groups).

our political climate.³ The recent political climate has been exacerbated by some state legislatures with divisive interests weighing in on a variety of educational policy matters, including banning trans K-12 student-athletes from athletic participation.⁴ Indeed, although state legislatures and local school boards govern public schools, they must still adhere to both constitutional guarantees and federal civil rights laws.

As more circuit courts affirm transgender students' rights to access facilities that align with students' gender,⁵ conservative advocates have turned to the politicization of transgender⁶ students who would like to participate on K-12 athletic teams. Specifically, there has been a dedicated effort by legislators to attack transgender rights across the country.⁷ In doing so, policymakers use anti-trans narratives to energize a socially-conservative political base and mischaracterize policies that support transgender students as harmful to the public.⁸ As a result, state legislatures have increased the number

3. See generally John Rogers et al., *Teaching and Learning in the Age of Trump: Increasing Stress and Hostility in America's High Schools*, UCLA'S INST. FOR DEMOCRACY, EDUC., & ACCESS (Oct. 2017), <https://idea.gseis.ucla.edu/publications/teaching-and-learning-in-age-of-trump>.

4. See Stephen Sawchuk, *What's Driving the Push to Restrict Schools on LGBTQ Issues?*, EDUC. WK. (Apr. 19, 2022), <https://www.edweek.org/leadership/whats-driving-the-push-to-restrict-schools-on-lgbtq-issues/2022/04>.

5. See Suzanne Eckes, *Transgender Students and Sex Segregated Facilities: Why School Leaders Might Rethink Litigation*, 4 J. ACAD. PERSPS. 1, 1 (2019).

6. See GLAAD's website for a definition of terms when referring to LGBTQ+ persons. These terms include sex, transgender, gender identity, gender expression, sexual orientation, transsexual, trans, and cis-gender. See *GLAAD Media Reference Guide*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Dec. 30, 2022). Although we relied on these definitions, it is important to note that when discussing the legal cases, we used the language used by courts. *Id.*

7. See Alison Gash, *Anti-Transgender Bills Are Latest Version of Conservatives' Longtime Strategy to Rally Their Base*, CONVERSATION (May 6, 2021, 8:30 AM), <https://theconversation.com/anti-transgender-bills-are-latest-version-of-conservatives-longtime-strategy-to-rally-their-base-158296>; Wyatt Ronan, *Breaking: 2021 Becomes Record Year For Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (March 13, 2021), <https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation>; *The Coordinated Attack on Trans Student Athletes*, ACLU (Feb. 26, 2021), <https://www.aclu.org/news/lgbtq-rights/the-coordinated-attack-on-trans-student-athletes>.

8. See, e.g., Cris Mayo, *Distractions and Defractions: Using Parental Rights to Fight Against the Educational Rights of Transgender, Nonbinary, and Gender Diverse Students*, 35 EDUC. POL'Y 368, 369 (2021) (discussing that conservative advocates have obscured their transphobia by framing their concerns as religiously-based parental rights claims); Kayla L. Acklin, "Hurdling" *Gender Identity Discrimination: The Implications of State Participation Policies on Transgender Youth Athletes' Ability to Thrive*, 37 B.C. J.L. & SOC. JUST. 107, 109-10 (2017) (highlighting how such policies are often politically motivated and contrary to research); Selena Simmons-Duffin, *Rachel Levine Calls State Anti-LGBT Bills Disturbing and Dangerous For Trans Youth*, NPR (Apr. 29, 2022, 5:00 AM), <https://www.npr.org/sections/health-shots/2022/04/29/1095227346/rachel-levine-calls-state-anti-lgbtq-bills-disturbing-and-dangerous-to-trans-you> (explaining that the political attacks against trans youth are harming the overall well-being of students); Jeremy W. Peters, *Why Transgender Girls Are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. TIMES (May

of proposed bills that aim to ban transgender students from participating on athletic teams to historical levels.⁹ Consequently, through the initiation of lawsuits, families of trans students and civil rights attorneys are challenging the passage of these anti-trans state education laws that involve civil rights violations.¹⁰ At the center of many of these legal challenges involving transgender students' rights to compete in K-12 athletic programs is Title IX of the Education Amendments of 1972.¹¹

The recent rise in state policies¹² that create barriers or exclude transgender students from participating in their school athletic programs is problematic for several reasons. To begin, researchers argue that policies that limit or exclude transgender athletes are legally suspect, harmful to transgender students' overall well-being, and incongruent with the prevailing medical understandings.¹³ Several policies encourage policing and examination of women's bodies, which invites greater sex discrimination of any children perceived as gender nonconforming. This undermines the purpose of Title IX, which was designed to discourage discrimination based on sex in educational settings. Buzuvis contends that although the law is complex, it is generally permissive of inclusion – especially for youth and in non-elite athletic programs.¹⁴ When the law is unclear or silent on the matter, school officials can still adopt policies that promote dignity and respect for

3, 2021), <https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html> (explaining harmful political rhetoric against transgender persons).

9. See Ronan, *supra* note 7.

10. Erin Buzuvis et al., *Sport is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J. LEGAL ASPECTS SPORT 212, 218 (2021).

11. See *Soule v. Conn. Ass'n of Schs., Inc.*, No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919, at *1 (D. Conn. Apr. 25, 2021), *aff'd*, No. 21-1365-cv, 2022 U.S. App. LEXIS 34791 (2d Cir. Dec. 16, 2022); *Hecox v. Little*, 479 F. Supp. 3d 930, 968 (D. Idaho 2020).

12. See *K-12 Policies*, TRANSATHLETE, <https://www.transathlete.com/k-12> (last visited Dec. 30, 2022) (highlighting various state policies that create barriers to athletic participation in K-12 schools).

13. See Erin E. Buzuvis, *As Who They Really Are: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 MINN. J.L. & INEQ. 341, 354 (2016); see also Mollie T. McQuillan et al., *Gender Minority Stress, Support, and Inflammation in Transgender and Gender-Nonconforming Youth*, 6 TRANSGENDER HEALTH 91, 92 (2021); M. Olivia McQuade, *Drug-Free is the Way to Be Except if You're Transgender: A Constitutional Analysis of High School Athletic Associations' Transgender Policies*, 32 MARQ. SPORTS L. REV. 185, 190-91 (2022); Caitlin M. Clark & Joseph G. Kosciw, *Engaged or Excluded: LGBTQ Youth's Participation in School Sports and their Relationship to Psychological Well-Being*, 59 PSYCH. SCHS. 95 (2022).

14. Erin Buzuvis, *Law, Policy, and the Participation of Transgender Athletes in the United States*, 24 SPORT MGMT. REV. 393, 442 (2021).

transgender students.¹⁵ Specifically, these policies should be developed to ensure that transgender student athletes feel safe and comfortable when exercising their right to participate.¹⁶ After all, it is well-documented that being on a school athletic team builds important social skills and predicts a higher grade point average.¹⁷ Public health and psychology research also indicate inclusive policies positively impact the overall well-being of transgender students.¹⁸ Thus, it is not surprising that some of these state laws are being challenged in courts.

Throughout this article we explore many of these issues involving K-12 transgender students in athletics from legal, theoretical, and policy perspectives. In doing so, we take an interdisciplinary approach to legal research and analysis. Specifically, in addition to traditional legal analysis, we integrate social science research, various legal theories, and other practical considerations when discussing the rights of K-12 trans athletes. After providing the legal and policy context, we examine recent activity in state legislatures related to K-12 athletics and analyze lawsuits involving transgender students and K-12 athletics. We then discuss the socio-political climate and its relation to previous health and social science studies on the topic. We draw on policy implementation research to better understand interpretations of Title IX that inhibit access to athletics for transgender students despite the law's inclusive intent.

I. THE LEGAL AND POLICY CONTEXT

The legal and policy context surrounding this issue provides necessary background information to the current political conversation. This section highlights the legal claims involved in lawsuits affecting transgender students' access to athletic programs. We then discuss the various guidance documents related to lesbian, gay, bisexual, transgender, queer, and other gender-expansive (LGBTQ+) students. This section concludes with an overview of the new proposed Title IX rule.

15. See Maria M. Lewis & Suzanne E. Eckes, *Storytelling, Leadership, and the Law: Using Amicus Briefs to Understand the Impact of School District Policies and Practices Related to Transgender Student Inclusion*, 56 EDUC. ADMIN. Q. 46, 49, 65, 75 (2020).

16. *Id.* at 71-76; Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue*, 40 CARDOZO L. REV. 1813, 1830 (2019).

17. *The Experiences of LGBT Students in School Athletics*, GLSEN (2013), <https://www.glsen.org/sites/default/files/2020-06/The%20Experiences%20of%20LGBT%20Students%20in%20Athletics.pdf>.

18. See Mark A. Schuster et al., *Beyond Bathrooms — Meeting the Health Needs of Transgender People*, 375 NEW ENG. J. MED. 101, 102-03 (2016).

A. Legal Claims

Legal challenges related to access issues for transgender students often involve the Equal Protection Clause and/or Title IX. The Equal Protection Clause of the Fourteenth Amendment requires that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁹ This clause generally means that those who are similarly situated need to be treated in the same manner.²⁰ School classifications based on gender are analyzed under intermediate scrutiny, meaning that a school district’s policy that treats transgender students differently would violate the Equal Protection Clause. The main exception to this rule would be if the policy promotes an important governmental interest and the classification employed is substantially related to the achievement of that objective. The U.S. Supreme Court has not examined an equal protection claim involving a transgender student, but several federal courts have done so.²¹ In all of these decisions, courts have often found an equal protection violation when transgender students were denied access to gender-specific facilities in schools.²²

In addition to equal protection concerns, Title IX of the Education Amendments of 1972 is at issue in lawsuits involving discrimination against LGBTQ+ students. Title IX prohibits discrimination on the basis of sex and applies to educational institutions that receive federal funds.²³ The law was enacted to guarantee educational opportunities for students.²⁴ It was written broadly and “Congress explicitly delegated to the administering agency ‘the task of prescribing standards for athletic programs under Title IX.’”²⁵ Transgender athletes have argued that when high schools do not permit them to participate in athletic programs, the schools violate Title IX. Likewise, lawyers arguing on behalf of cisgender female students have argued requiring

19. U.S. CONST. amend. XIV, § 1.

20. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

21. *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1304 (11th Cir. 2021) (affirming grant of summary judgment and compensatory damages for transgender student on Equal Protection Claim); *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399, 401 (4th Cir. 2020) (affirming grant of summary judgment to student on Equal Protection Clause claim); *J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 396 F. Supp. 3d 833, 843-44 (S.D. Ind. 2019) (denying school district’s motion to dismiss the transgender student’s Equal Protection Claim).

22. *See Adams*, 3 F.4th at 1304; *Grimm*, 976 F.3d at 401; *J.A.W.*, 396 F. Supp. 3d at 843-44.

23. 20 U.S.C. § 1681(a) (2022).

24. *See id.*; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (explaining that Title IX is a “broadly written general prohibition on discrimination.”).

25. *Biediger v. Quinnipac Univ.*, 691 F.3d 85, 96 (2d Cir. 2012).

cisgender girls to compete athletically against transgender girls would be sex discrimination under Title IX.²⁶

Title IX has also been at the center of lawsuits against the U.S. Government when the Obama, Trump, and Biden Administrations have attempted to provide policy guidance. Despite the absence of a Supreme Court decision, other court decisions involving Title VII of the Civil Rights Act of 1964 suggest a legal avenue for transgender athletes who have experienced gender-based discrimination.²⁷ Even though Title VII addresses employment matters, the law has been relied upon in several Title IX cases because both Title VII and Title IX prohibit sex discrimination.²⁸ While Title VII prohibits discrimination “based on sex,” Title IX uses the phrase “on the basis of sex.”²⁹ The Supreme Court has used both phrases interchangeably. As a result, courts have ruled that the definition of sex under Title VII is the same as under Title IX.³⁰

In a 1999 Title IX decision involving peer-to-peer sexual harassment, the Supreme Court relied on Title VII to determine the meaning of “gender-oriented harassment.”³¹ Additionally, after the 2020 *Bostock v. Clayton County* decision,³² when the Supreme Court determined that Title VII’s prohibition of discrimination because of sex includes sexual orientation and gender identity, other federal courts applied this finding to Title IX cases. For example, after *Bostock*, the Fourth Circuit wrote: “we have little difficulty holding that a bathroom policy precluding Grimm from using the boy’s restrooms discriminated against him ‘on the basis of sex.’”³³ The court further observed that “although *Bostock* interprets Title VII of the Civil Rights Act of 1964, it guides our evaluation of claims under Title IX.”³⁴ As the comparison has been used in past cases, it is reasonable to conclude that like Title VII, Title IX also

26. *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919, at *3 (D. Conn. Apr. 25, 2021), *aff’d*, No. 21-1365-cv, 2022 U.S. App. LEXIS 34791 (2d Cir. Dec. 16, 2022); *Hecox v. Little*, 479 F. Supp. 3d 930, 968 (D. Idaho 2020).

27. Pamala S. Karlan, Principal Deputy Assistant Att’y Gen., *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972*, U.S. DEP’T OF JUST., CIV. RTS. DIV. (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

28. See Elaine Chamberlain et al., *Athletics & Title IX of the 1972 Education Amendments*, 19 GEO. J. GENDER & L. 231, 239 (2018).

29. 20 U.S.C. § 1681(a) (2022).

30. Chamberlain et al., *supra* note 28 at 249.

31. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636 (1999).

32. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1783 (2020).

33. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

34. *Id.*

provides protections for discrimination based on gender identity and sexual orientation.

B. Guidance Documents

Guidance documents are written policy statements from federal agencies that give more specific direction to the public about how the current administration interprets a law or regulation.³⁵ These documents do not have the force of law, but they do provide helpful information for entities, and the guidance is used to recommend action.³⁶ Guidance documents can be especially useful for K-12 school administrators attempting to make sense of legal reforms in areas that they have received little education, such as gender-affirming policies and practices.³⁷

It is common for presidential administrations to release their own interpretations of various federal rules through guidance documents.³⁸ With regard to Title IX, there has been debate about whether the language in the law provides protection for LGBTQ+ students.³⁹ Thus, it was not surprising to see different Title IX interpretations that varied between administrations. During the Obama Administration, Title IX was interpreted to prohibit discrimination based on sexual orientation and gender identity.⁴⁰ For example, a January 2015 letter from the Acting Assistant Secretary for Civil Rights clarified that transgender students are protected from sex-based discrimination under Title IX.⁴¹ In May 2016, the U.S. Department of Justice and the U.S. Department of

35. For additional discussion about the role of guidance documents, see Suzanne Eckes et al., *Reactions to the Biden Administration's Proposed Title IX Changes from Education Law Scholars*, BROOKINGS (June 30, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars/>.

36. See *Report to Congressional Requesters, Regulatory Guidance Processes: Selected Departments Could Strengthen Internal Control and Dissemination Practices*, U.S. GOV'T ACCOUNTABILITY OFF. 1 (Apr. 2015), <https://www.gao.gov/assets/gao-15-368.pdf>.

37. Mollie T. McQuillan, *A Starting Point: Gender, Hot Cognition, and Trans-Informed Administrative Guidance*, 51 EDUC. RESEARCHER 336, 336-37 (2022).

38. See Maria Lewis et al., *A Comprehensive and Practical Approach to Policy Guidance: The Office for Civil Rights' Role in Education During the Obama Administration*, 48 EDUC. RESEARCHER 51, 51-52 (2019).

39. See Christopher M. Pardo & Katherine P. Sandberg, *Transgender Students and Sports: Title IX Compliance*, A.B.A. (Apr. 5, 2022), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2022/march-april/transgender-students-and-sports-title-ix-compliance/.

40. See Ming Hsu Chen, *How Much Procedure Is Needed for Agencies to Change "Novel" Regulatory Policies?*, 71 HASTINGS L.J. 1127, 1132-33 (2020).

41. See Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, Off. for Civ. Rts (Rescinded), U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 7, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf>.

Education issued a “Dear Colleague” letter further highlighting school districts’ responsibilities to provide equal access to transgender students.⁴² A separate document from the U.S. Department of Education’s Office of Elementary and Secondary Education accompanied this Dear Colleague letter; it gave examples of model policies and suggested practices for supporting transgender students.⁴³

The Trump Administration rescinded both the January 2015 letter and the January 2016 Dear Colleague letter shortly after entering office,⁴⁴ and on August 2020, it released a *Revised Letter of Impending Enforcement Action* related to the topic.⁴⁵ The letter suggested that allowing transgender high school athletes in Connecticut to participate in girls’ sports violated the rights of female athletes under Title IX. Interestingly, the letter explicitly stated that this was not to be considered formal OCR policy. The letter suggested local educational agencies should determine policies concerning gender, and the OCR stopped taking new Title IX discrimination claims within a year.⁴⁶ The validity of the Trump Administration’s Dear Colleagues letter was called into question after the *Bostock v. Clayton County* decision from the U.S. Supreme Court in 2020.⁴⁷ As discussed, the *Bostock* opinion clarified that, under Title VII, discrimination because of sex included sexual orientation and gender identity.

Under the Obama Administration, the Department of Education did not adopt a regulation and instead opted for non-binding guidance documents. It

42. Catherine E. Lhamon & Vanita Gupta, Assistant Sec’y for Civ. Rts. & Principal Deputy Assistant Att’y Gen. for Civ. Rts., *Dear Colleague Letter on Transgender Students (Rescinded)*, U.S. DEP’T JUST. & U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. 1-6 (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

43. See Ann Whalen & David Esquith, *Examples of Policies and Emerging Practices for Supporting Transgender Students (Archived)*, U.S. DEP’T OF EDUC., OFF. OF ELEMENTARY & SECONDARY EDUC. & OFF. OF SAFE & HEALTHY STUDENTS 10-13 (May 13, 2016), www.ed.gov/oese/oshs/emergingpractices.pdf.

44. See Sandra Battle & T.E. Wheeler II, Acting Assistant Sec’y for Civ. Rts. & Acting Att’y Gen. for Civ. Rts., *Dear Colleague Letter (Under Review)*, U.S. DEP’T JUST. & U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. 1 (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>.

45. Kimberly M. Richey, Acting Assistant Sec’y for Civ. Rts., *Revised Letter of Impending Enforcement Action (Archived)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Aug. 31, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf>.

46. Moriah Balingit, *Education Department No Longer Investigating Transgender Bathroom Complaints*, WASH. POST (Feb. 12, 2018, 7:01 PM), <https://www.washingtonpost.com/news/education/wp/2018/02/12/education-department-will-no-longer-investigate-transgender-bathroom-complaints/>.

47. *U.S. Commission on Civil Rights Calls on Trump Administration to Revise Regulations and Enforcement Practices to Recognize Civil Rights Protections For LGBT Americans and Comply with the Bostock Decision*, U.S. COMM’N ON CIV. RTS. (June 19, 2020), usccr.gov/files/2020/2020-06-19-USCCR-Calls-for-Changes-Post-Bostock.pdf.

was therefore easier for the Trump Administration to rescind the guidance and offer its own interpretation of the matter through the August 2020 letter.⁴⁸ Not surprisingly, the Biden Administration withdrew the revised letter and noted that they have reconsidered the matter.⁴⁹ This withdrawal was consistent with the Administration's earlier action on January 2021 when President Biden signed an executive order highlighting that LGBTQ+ persons would be protected in schools and in the workplace.⁵⁰

Moreover, in March 2021, the Department of Justice's Civil Rights Division issued a memo to all federal agencies extending protections to gay and transgender people.⁵¹ The Civil Rights Division wrote that, based on the *Bostock* decision, Title IX should also be read as protecting the status of gay and transgender students.⁵² In its memo, the Civil Rights Division stated that: "[a]fter considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."⁵³

C. New Proposed Rule

If agencies want a more forceful document, they need to go through the formal rulemaking process. This process is necessary when the federal government hopes to rely on the rule as a final interpretation that would receive deference from a court. The Biden Administration is pursuing this route.⁵⁴ In 2021, the Department of Education held public hearings to elicit

48. See Letter from Kimberly M. Richey, Acting Assistant Sec'y for Civ. Rts., *Dear Educators and Stakeholders*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 1-3 (Aug. 26, 2020), <https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf>.

49. Suzanne B. Goldberg, Acting Assistant Sec'y for Civ. Rts., *Letter to Students, Educators, and Other Stakeholders Re Executive Order 14021*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Apr. 6, 2021), <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf>.

50. Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021); see also Samantha Schmidt et al., *Biden Calls For LGBTQ Protections in Day 1 Executive Order, Angering Conservatives*, WASH. POST (Jan. 21, 2021, 11:28 PM), <https://www.washingtonpost.com/dc-md-va/2021/01/21/biden-executive-order-transgender-lgbtq/>.

51. Karlan, *supra* note 27.

52. *Id.*

53. *Id.*

54. On June 16, 2021, the OCR issued a Notice of Interpretation, which states that the Department of Education interprets Title IX's prohibition on discrimination to include discrimination on the basis of sexual orientation and gender identity and based that interpretation on the Supreme Court's decision in *Bostock*. The OCR concluded that such interpretation is considered to align with Title IX. See *id.*

commentary from both sides about the inclusion of transgender student-athletes.⁵⁵ The Department of Education released its proposed rule in June 2022.⁵⁶ The proposed rule does not specifically address trans athletes, but the Biden Administration stated that it is committed to examining this issue within a subsequent proposed rule.⁵⁷ The rule does, however, include a prohibition on discriminating against someone based on sexual orientation and gender identity, which is expected to be formally written into the regulation.⁵⁸ At this time, the draft rule is published in the Federal Register; the public has the opportunity to comment during this time. The Department of Education may make changes based on this feedback; it will not take effect until the regulatory process is complete.⁵⁹ If enacted, the Department of Education's proposed rule will assist LGBTQ+ students who simply want to be included in school and school-related activities.⁶⁰

Even before the proposed rule was discussed, some Republican governors and state legislators had referenced "the Biden [A]dministration's early interpretation of Title IX's protections for transgender students as" one of the motivating factors for this recent wave of legislation that attacks transgender student-athletes, and in particular, young girls in the K-12 public school system.⁶¹ If the new proposed rule is finalized, as is expected, it would create conflict with state statutes that prohibit trans girls from competing on girls'

U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (Archived), U.S. DEP'T EDUC. (June 16, 2021), <https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity> (to support June 16th date); *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637-39 (June 22, 2021) (to support the conclusion).

55. *Announcement of Public Hearing: Title IX of the Education Amendments of 1972*, 86 Fed. Reg. 27,429, 27,429 (May 20, 2021).

56. *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (June 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>.

57. *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comments*, U.S. DEP'T OF EDUC. (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.

58. See Eckes et al., *supra* note 35; McQuillan, *supra* note 37; Mollie T. McQuillan, *Scaling Gender and Sexual Diversity Policies in K-12 Schools*, 43 EDUC. POL'Y 2, 3 (2021).

59. See Eckes et al., *supra* note 35.

60. See *id.*

61. Bianca Quilantan, *Biden Officials Prepare to Blow Up Trump's Rules on Sexual Misconduct in Schools*, POLITICO (May 7, 2022, 7:00 AM), <https://www.politico.com/news/2022/05/07/schools-rules-on-transgender-students-sexual-assault-00029945>.

sports teams, for example.⁶² Pre-empting the final rule, a group of twenty state attorney generals sued the Trump Administration because of the guidance, which has been temporarily blocked by a federal judge in the Eastern Tennessee district court.⁶³

II. ACTIVITY IN STATE LEGISLATURES RELATED TO TRANSGENDER ATHLETES IN K-12 SCHOOLS

In the midst of these varying federal policy signals, state legislatures and executive agencies have also detailed whether and how Title IX should be implemented. However, without alignment across the federal, state, and local levels, K-12 administrators may have conflicting information to guide how they reform gendered school processes.⁶⁴ In states with legislative mandates to protect trans scholar-athletes from discrimination, local districts do not always adopt or implement these protective mandates.⁶⁵ Since 2021, over thirty state legislatures proposed anti-transgender athletic bills⁶⁶ in the wake of Idaho legislators passing HB 500, which mandated the exclusion of K-12 trans students from K-12 athletic participation that would align with their gender.⁶⁷

Several of the existing and proposed state laws may violate students' privacy and set a precedent to subject youth to what would be considered inappropriate behavior in educational settings.⁶⁸ For instance, despite an existing state athletic association policy detailing the conditions under which transgender student athletes can participate,⁶⁹ the Ohio state legislature passed

62. *Id.*

63. Meena Venkataramanan, *Judge Temporarily Blocks Biden Administration's LGBTQ Protections at Work, Schools*, WASH. POST (July 18, 2022, 3:56 PM), <https://www.washingtonpost.com/politics/2022/07/17/biden-transgender-lgbtq-schools-work/>; Kimberlee Kruesi, *Republican AGs Sue US Agency Over LGBTQ School Guidance*, AP NEWS (July 26, 2022), <https://apnews.com/article/biden-education-lawsuits-discrimination-gender-identity-794c13d7a136614c8daea5add4db76aa>.

64. McQuillan, *Scaling Gender and Sexual Diversity Policies in K-12 Schools*, *supra* note 58; Maria M. Lewis & Sarah Kern, *Using Education Law as a Tool to Empower Social Justice Leaders to Promote LGBTQ Inclusion*, 54 EDUC. ADMIN. Q. 724, 724 (2018).

65. McQuillan, *Scaling Gender and Sexual Diversity Policies in K-12 Schools*, *supra* note 58.

66. Amna Nawaz, *2021 Set a Record For Anti-Transgender Bills. Here's How You Can Support the Community*, PBS NEWSHOUR (Dec. 30, 2021, 6:44 PM), <https://www.pbs.org/newshour/show/2021-set-a-record-for-anti-transgender-bills-heres-how-you-can-support-the-community>.

67. H.R. 500, 65th Leg., 2d Reg. Sess. (Idaho 2020).

68. *See generally Legal Guidance on Transgender Students' Rights*, NAT'L EDUC. ASS'N 6 (June 2016), https://www.nea.org/sites/default/files/2020-07/2018_Legal%20Guidance_Transgender%20Student%20Rights.pdf (document briefly discusses privacy issues surrounding transgender students' rights).

69. *OHSAA Transgender Student Policy*, OHIO HIGH SCH. ATHLETIC ASS'N, <https://ohsaaweb.blob.core.windows.net/files/Eligibility/OtherEligibilityDocs/TransgenderPolicy.pdf> (last visited Dec. 30, 2022).

H.B. 151 on June 1, 2022, which would allow adults to “inspect” young people’s genitalia.⁷⁰ The Ohio genital inspections could start as young as fifth grade. These existing and proposed state laws conflict with recent federal guidance from the Biden Administration.

Additionally, the state law concerning K-12 athletics may conflict with policies and guidance from state athletic associations.⁷¹ The Florida High School Athletic Association’s policy indicates all students can participate in athletics regardless of birth certificates, hormone levels, or other supposed indicators of gender.⁷² However, the Florida state legislature passed a law banning transgender athletes from participating in athletics.⁷³ Some states have restrictive association policies that could still allow a limited number of trans athletes to participate, but the state law excludes transgender athletes from participating. For instance, the Alabama High School Athletic Association indicates students can participate in sports aligned with the gender identified on their certified birth certificate, so transgender students with amended birth certificates could participate.⁷⁴ Yet, the Alabama law says “biological males” cannot play on girls’ athletic teams.⁷⁵ Gender scholars, such as Spade⁷⁶ Singer,⁷⁷ Kirkup,⁷⁸ and Martino,⁷⁹ note that similar administrative rules place an undue burden on already marginalized transgender students, allowing only the most well-resourced students to use the accommodations developed for transgender people.

70. H.R. 151, 134th Leg., Reg. Sess. (Ohio 2021-22).

71. See Katie Barnes, *Alabama to Wyoming: State Policies on Transgender Athlete Participation*, ESPN (June 7, 2022), https://www.espn.com/espn/story/_/id/32117426/state-policies-transgender-athlete-participation.

72. *Section 16.8 Gender Identity Participation, Bylaws of the Florida High School Athletic Association, Inc.*, FLA. HIGH SCH. ATHLETIC ASS’N 73 (2021-22), https://fhsaa.com/documents/2021/6/29//2122_handbook_web.pdf?id=1775.

73. S.B. 1028, 2021 Leg., (Fla. 2021).

74. *Alabama High School Athletic Association 2021-22 Handbook*, ALA. HIGH SCH. ATHLETIC ASS’N, r. 3, sec. 6 <https://www.ahsaa.com/Portals/0/Publications/2021-2022/Final.pdf?ver=> (last visited Dec. 30, 2022).

75. H.B. 381, 2021 Leg. (Ala. 2021).

76. See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW*, at xii-xiv (Duke Univ. Press 2015).

77. See Samuel Singer, *Trans Rights Are Not Just Human Rights: Legal Strategies for Trans Justice*, 35 CANADIAN J.L. & SOC’Y 293, 309 (2020).

78. See Kyle Kirkup et al., *The Aftermath of Human Rights Protections: Gender Identity, Gender Expression, and the Socio-Legal Regulation of School Boards*, 35 CANADIAN J.L. & SOC’Y 245, 252-53 (2020).

79. See Wayne Martino et al., *Supporting Transgender Students in Schools: Beyond an Individualist Approach to Trans Inclusion in the Education System*, 74 EDUC. REV. 753, 767 (2020).

All of the anti-trans state laws conflict with guidance from the national athletic associations governing high school athletics. All state high school athletic organizations belong to the National Federation of State High School Associations (NFHS), which provides guidance on the rules and regulations governing the sanctioning of high school athletics and other extra-curricular activities.⁸⁰ The NFHS mission states that high school athletic participation should align with the following goals: “[f]oster[ing] the inclusion of diverse populations[;] [p]romot[ing] respect, integrity, and sportsmanship[;] [e]nrich[ing] the educational experience[;] [e]ncourag[ing] academic achievement[;] [d]evelop[ing] leadership and life skills[;] [and] [p]romot[ing] a healthy lifestyle.”⁸¹ Importantly, the goals of K-12 athletic participation focus on socio-emotional learning and improving educational opportunities, not recognition for athletic prowess or securing financial gain.⁸² Thus, the goals of K-12 athletic participation may be different than athletic participation for adults. The NFHS Executive Director, Karissa Niehoff, addressed this point in 2020 when discussing transgender athletes: “[w]hat is the purpose of high school sports?”⁸³

Legal and health scholars alike argue that the rules for K-12 student-athlete participation *should* be inclusive of transgender student-athletes.⁸⁴ Yet, the anti-trans athletic bill advocates include provisions that are more exclusionary than even those used by the International Olympics Committee (IOC). It is important to note that current or former coaches, officials, and athletic administrators often fill the NFHS and state high school athletics association boards, whereas state legislators generally do not have a similar expertise in youth athletics.⁸⁵ Notably, we have not found evidence indicating policy development in state legislatures promoting anti-trans legislation that has been guided by medical, health, or child development experts, consensus

80. *About Us*, NFHS, <https://www.nfhs.org/who-we-are/aboutus> (last visited Dec. 30, 2022).

81. *Mission Statement*, NFHS, <https://www.nfhs.org/who-we-are/missionstatement> (last visited Dec. 30, 2022).

82. See generally *Gender Affirming and Inclusive Athletics Participation*, GLSEN, <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation> (last visited Dec. 30, 2022).

83. Luke Modrovsky, *Transgender Athletes — Participation, Equity, and Competition*, NFHS (May 12, 2022), <https://www.nfhs.org/articles/transgender-athletes-participation-equity-and-competition/>.

84. See Doriane Labelet Coleman et al., *Re-Affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL’Y 69 (2020) (discussing how allowing equal access for K-12 athletes might be considered in a different way than more competitive college and professional sports); Alyson Sulaski Wyckoff, *AAP Continues to Support Care of Transgender Youth as More States Push Restrictions*, AAP NEWS (Jan. 6, 2022), <https://publications.aap.org/aapnews/news/19021/AAP-continues-to-support-care-oftransgender?autologincheck=redirected>.

85. See Coleman et al., *supra* note 84; Wyckoff, *supra* note 84.

statements, or research. As discussed below, some state laws related to athletic participation have been challenged and have been temporarily blocked by federal courts. Other litigation remains ongoing.

A. Lawsuits Related to Trans Female Athletes

A few courts have examined cases that challenge state laws involving transgender students and their right to participate in school athletic programs.⁸⁶ At least one lawsuit filed by cisgender plaintiffs, and another filed by twenty state attorney generals, oppose transgender female students participating on female athletic teams. These cases are briefly explored in this paper because they offer insight into some of the current legal challenges.

1. Lawsuits Filed by Transgender Students

In Idaho, plaintiffs challenged a state law that barred the participation of transgender women and girls in female student athletics, which was the first bill to pass in a state legislature and be signed into law by the governor.⁸⁷ The law would have prohibited participation on female teams without verifying the “reproductive anatomy” if it was called into question. The plaintiffs alleged that this law violated their rights under the Equal Protection Clause and under Title IX. The court only considered the equal protection claim.⁸⁸

The plaintiffs sought to apply Equal Protection Clause anti-discrimination protections to declare the state law unconstitutional. One plaintiff was a woman at Boise State who had been undergoing hormone treatment for one year. The other plaintiff was a seventeen-year-old cisgender student who believed she looked masculine and was concerned that her sex would be disputed as permitted by this state law. The federal judge granted the plaintiffs’ motion for preliminary injunction, temporarily prohibiting the law from becoming effective.⁸⁹ The court reasoned that the state did not identify any legitimate interest in this state law. Idaho appealed the district court’s

86. *See, e.g.,* *Hecox v. Little*, 479 F. Supp. 3d 930, 934 (D. Idaho 2020) (challenging Idaho state law that created hurdles for transgender athletes); *B.P.J. v. West Virginia State Bd. of Educ.*, 550 F. Supp. 3d 347, 348-53 (S.D. W. Va. 2021) (challenging West Virginia state law that prohibited trans female students from participating on school athletic teams).

87. *Hecox*, 479 F. Supp. 3d at 943-45.

88. *Id.* at 944-45.

89. *Id.* at 943.

injunction.⁹⁰ Attorneys for the state argued that the case was moot because one of the student plaintiffs withdrew from the university. The Ninth Circuit sent the case back to the federal district court to decide the mootness question. It now appears that the case will likely move forward because the student plaintiff reenrolled in the university.⁹¹ Although this case is focused on a university, the outcome will have implications for K-12 students as well. The Idaho law applies to both K-12 and university athletes.

In West Virginia, a lawsuit was initiated on behalf of an eleven-year-old student who had hoped to try out for the girls' cross-country team at her junior high school.⁹² She challenged a West Virginia state law, which would have prohibited her from joining the girls' team. The judge issued a preliminary injunction, which temporarily blocked the state law. Whether the state law is unconstitutional will be resolved at a later stage of this litigation. When granting the injunction, the judge observed that he was provided with "scant evidence that this law addresses any problem at all, let alone an important problem."⁹³ The judge also wrote:

[a] fear of the unknown and discomfort with the unfamiliar have motivated many of the most malignant harms committed by our country's governments on their own citizens. Out of fear of those less like them, the powerful have made laws that restricted who could attend what schools, who could work certain jobs, who could marry whom, and even how people can practice their religions. Recognizing that classifying human beings in ways that officially sanction harm is antithetical to democracy, the states ratified the Fourteenth Amendment. It ensures that no state may "deny to any person within its jurisdiction the equal protection of the laws." Accordingly, the courts are most juberous of any law—state or federal—that treats groups of people differently.⁹⁴

90. The Ninth Circuit remanded the case to the district court to determine if one of the plaintiff's claims was moot in light of her change in enrollment status at Boise State. *See* *Hecox v. Little*, No. 20-35813, 20-35815, 2021 U.S. App. LEXIS 18903 (9th Cir. June 24, 2021).

91. Rebecca Boone, *Lawsuit Over Idaho Transgender Athlete Ban Likely to Proceed*, OR. LIVE (Apr. 14, 2022, 4:32 PM), <https://www.oregonlive.com/sports/2022/04/lawsuit-over-idaho-transgender-athlete-ban-likely-to-proceed.html>.

92. *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 351-52 (S.D. W. Va. 2021).

93. *Id.* at 350.

94. *Id.*

Subsequently, the State Board of Education moved to dismiss the plaintiff student's claims in this case. However, the motion was denied, with the judge stating that the student's allegations of discrimination under Title IX and the Equal Protection Clause were plausible.⁹⁵ It is also interesting to note that within this same circuit, a transgender student (Gavin Grimm) prevailed in the Fourth Circuit where he challenged his school's discriminatory practices related to his gender identity.⁹⁶ This West Virginia case, which is binding in the Fourth Circuit, holds that Title IX and the Equal Protection Clause provide protections for transgender students from discriminatory practices in schools.

Finally, shortly after the conservative state legislature overrode the governor's veto on a new state law prohibiting girls from participating in girls' athletics in Indiana if they are transgender, a lawsuit was filed on behalf of a ten-year-old transgender girl who was denied the opportunity to play on her school's softball team.⁹⁷ This lawsuit also named the school district as a defendant because it would have been required to implement this new law. This particular school district issued a statement that it does not agree with the law and had supported the governor's veto.⁹⁸ Nevertheless, the district was required to uphold state law. This suit also involves a Title IX and Equal Protection claim like many of the earlier suits.⁹⁹ In July 2022, a federal district court issued a preliminary injunction because the state's law violates the student's Title IX protections. The judge wrote that "the facts of this case leads to a result that is not even a close call: A.M. has established a strong likelihood that she will succeed on the merits of her Title IX claim."¹⁰⁰ According to the judge, when a state law prohibits a student from playing on a sports team that does not conform to one's gender identity, it is punishing

95. *B.P.J. v. W. Va. State Bd. of Educ.*, No. 2:21-cv-00316, 2021 U.S. Dist. LEXIS 230011, at *3, 10-11 (S.D. W. Va. Dec. 1, 2021). In another later proceeding, a cisgender student was allowed to intervene in this case permissively. This student had secured a soccer scholarship to West Virginia State University and moved to intervene to defend the constitutionality of the state law because she was concerned about injury and losing her playing spot on the team. *Id.* at *1, 3-4, 9-10.

96. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593-94 (4th Cir. 2020); *Grimm v. Gloucester Cnty. Sch. Bd.*, 976 F.3d 399, 399 (4th Cir. 2020) (en banc hearing denied), *cert. denied*, 141 S. Ct. 2878 (2021).

97. *A.M. v. Indianapolis Pub. Schs.*, No. 1:22-cv-01075, 2022 U.S. Dist. LEXIS 132356, at *1-2 (S.D. Ind. July 26, 2022).

98. Arika Herron, *Minutes After Lawmakers Override Veto of Transgender Sports Ban, First Lawsuit is Filed*, INDYSTAR (June 23, 2022, 10:44 AM), <https://www.indystar.com/story/news/politics/2022/05/24/indianas-transgender-sports-ban-first-lawsuit-filed-over/9904915002/>.

99. *A.M.*, 2022 U.S. Dist. LEXIS 132356, at *21, 42.

100. *Id.* at *32.

students for their gender non-conformance in violation of Title IX. These very initial rulings have enjoined these state laws from taking effect.¹⁰¹

In addition to these lawsuits, there also have been other complaints filed in other federal courts challenging similar state laws.¹⁰² For example, a middle school girl questioned Florida's law on athletic participation for transgender students, alleging that it violates Title IX. The student began using hormone blockers at age eleven and has been participating on various girls' teams without incident.¹⁰³ This case was put on hold while another case involving a transgender student was being decided en banc at the Eleventh Circuit; the Eleventh Circuit case will likely affect the outcome of this case.¹⁰⁴ Similarly, another lawsuit has challenged Tennessee's law related to athletic participation. The complaint was filed on behalf of a transgender boy prohibited from trying out for the boys' golf team.¹⁰⁵ In yet another case, families in Utah alleged that the state's law banning girls from participating in sports only if they are transgender violates the state's constitution by singling them out for disfavored treatment. They sued both the state's high school activities association and the school district because these entities would be responsible for enacting the new law. The governor had vetoed this law, but the conservative state legislature overrode the governor's veto.¹⁰⁶

These other lawsuits are still pending. Although highly unfortunate that they need to do so, these students are relying on Title IX and other provisions to simply be a part of their school community. As noted, Title IX was enacted to guarantee educational opportunities for students, and expanding school-based athletic participation has long been associated with the implementation of Title IX. It is only in recent years that conservative activists have used Title IX as an exclusionary strategy targeting transgender students. As such, these anti-trans state laws appear to be a solution in search of a problem. Plaintiffs, such as the ones discussed above, will likely continue to contest state laws that try to regulate the lives of transgender students without legal, medical, or

101. *Id.* at *32-33.

102. See Complaint for Declaratory and Injunctive Relief at 2, *D.N. v. DeSantis*, No. 0:21-cv-61344 (S.D. Fla. June 29, 2021) [hereinafter "*DeSantis Complaint*"]; Complaint for Declaratory and Injunctive Relief at 2, *E. v. Lee*, No. 3:21-cv-835 (M.D. Tenn. Nov. 4, 2021) [hereinafter "*Lee Complaint*"].

103. *DeSantis Complaint*, *supra* note 102.

104. *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1304 (11th Cir. 2021).

105. *Lee Complaint*, *supra* note 102.

106. Kolbie Peterson & Scott D. Pierce, *Utah Families of 2 Teens Sue Over State Ban of Transgender Athletes in School Sports*, SALT LAKE CITY TRIB. (June 1, 2022, 11:56 AM), <https://www.sltrib.com/news/2022/06/01/utah-families-teen/>.

practical justification.¹⁰⁷ The recent push to discriminate against K-12 transgender athletes is especially unfortunate as teams are important social networks for students during a critical time of their psychological development.¹⁰⁸

2. Lawsuits Filed by Cisgender Students

Cisgender students have also used Title IX in their claims of inequitable treatment related to athletic participation. Four cisgender high school girls in Connecticut filed a lawsuit claiming that the Connecticut Interscholastic Athletic Conference (“the Conference”) was violating Title IX by denying them equal opportunities for participation in athletics due to transgender students participating in high school athletic teams that align with their gender identity.¹⁰⁹ The plaintiffs contend this may have affected their ability to achieve top finishes in races and may have had an impact on their chances to acquire college scholarships. When examining the case, the court did note that courts across the U.S. have consistently ruled that Title IX requires schools to treat transgender students consistent with their gender identities.¹¹⁰ In the end, the court held that the cisgender students’ claim was moot because the transgender students who participated on the girl’s track team had all graduated. The Conference’s motion to dismiss this case was granted,¹¹¹ the student plaintiffs have appealed this decision to the Second Circuit.¹¹²

3. Lawsuits Filed by State Attorney Generals

As discussed above, some Republican governors and state legislators have referenced the Biden Administration’s early interpretation of Title IX’s protections for transgender students as one of the motivating factors for this recent wave of gender-focused legislation that attacks transgender athletes

107. Danielle J. Brown, *Federal Lawsuit: FL’s Trans Athlete Law ‘Has Nothing to do with Fairness or Equality For Girls of Women in Sports.’*, FLA. PHOENIX (July 6, 2021, 4:37 PM), <https://floridaphoenix.com/2021/07/06/federal-lawsuit-fls-trans-athlete-law-has-nothing-to-do-with-fairness-or-equality-for-girls-or-women-in-sports/>.

108. See Maria Lewis et al., *Educational Policy, Racial Equity, and the Courts*, AERA HANDBOOK EDUC. POL’Y RSCH. (forthcoming 2022).

109. *Soule v. Conn. Ass’n of Schs.*, No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919, at *3 (D. Conn. Apr. 25, 2021), *aff’d*, No. 21-1365-cv, 2022 U.S. App. LEXIS 34791 (2d Cir. Dec. 16, 2022).

110. *Id.* at *28.

111. *Id.* at *30.

112. Brief of Intervenor Defendants-Appellees Andraya Yearwood and Thania Edwards on Behalf of T.M., *Soule v. Conn. Ass’n of Schs.*, (2d Cir. 2021), No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 25, 2021).

who are girls.¹¹³ In fact, there is a coalition of twenty state attorney generals who are suing the Department of Education to stop it from enforcing its interpretation of Title IX. This lawsuit is similar to the coordinated efforts to attack trans student-athletes in the state legislatures.¹¹⁴ The plaintiffs argued that they risk losing federal funding if they prohibit transgender students from playing on sports teams and using restrooms that align with their gender identities. A federal district court judge granted the states' attorney generals' request for a preliminary injunction.¹¹⁵ The attorney generals argued that guidance documents from the Department of Education conflict with state laws related to gender identity. One example discussed in this case involved a Tennessee state law clarifying that middle school and high school athletic participation must be determined by the student's sex assigned at birth. The Department of Education's Fact Sheet indicated that participation should align with a student's gender identity. The court determined that this undermined the plaintiffs' sovereign authority to enforce their state laws.¹¹⁶

We will later discuss how the lawsuits filed by cisgender plaintiffs and the twenty states' attorney generals are simply policy distractions designed to hinder students' rights as guaranteed by Title IX. Similar to the earlier cases, focused on restroom access, the cisgender plaintiffs and states' attorney generals in these two athletic-related challenges rely on scare tactics and other false stereotypes.¹¹⁷ Moreover, the anti-trans legislation and court cases initiated to prohibit trans female athletes from participating on teams will ultimately result in policies that harm both cisgender and transgender students.

III. DISCUSSION

As demonstrated by the cases and legislation presented above, the sociopolitical climate informs both the construction and application of the law.¹¹⁸ In this section, we situate what we learned from the cases and legislation within the existing social science literature. In doing so, we specifically examine the following four areas: advancement/retrenchment, policy distractions, the empirical health evidence, and administrative sensemaking and repressive legalism.

113. Quilantan, *supra* note 61.

114. *See The Coordinated Attack on Trans Student Athletes*, *supra* note 7.

115. *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-cv-308, 2022 U.S. Dist. LEXIS 125684, at *67 (E.D. Tenn. July 15, 2022).

116. *Id.* at *25.

117. Eckes, *supra* note 5, at 14-15.

118. *See generally* Gash, *supra* note 7; *see* Ronan, *supra* note 7.

A. Advancement and Retrenchment Concerning Trans Rights

Civil rights experts have long noted that periods of advancement are followed by retrenchment or efforts to chip away at previously achieved progress.¹¹⁹ While this characterization of legal trends does not capture the nuances or the jagged ways that the law has evolved over time, it helps to capture waves and momentum shifts in meaningful ways. To illustrate, LGBTQ+ people have experienced a wave of legal decisions that protect LGBTQ+ rights and promote the dignity of the LGBTQ+ community. More specifically, the legal recognition of marriage equality in cases like *Obergefell v. Hodges*,¹²⁰ and *U.S. v. Windsor*,¹²¹ and the protection of transgender student rights in cases such as *Whitaker v. Kenosha*,¹²² *Evancho v. Pine-Richland*,¹²³ and *Doe v. Boyertown*,¹²⁴ represent advancement, albeit incomplete. OCR guidance issued under the Obama Administration is similarly representative of this progress in the executive branch.¹²⁵

We are now in a moment of retrenchment, where we are witnessing multi-tiered, organized efforts to undermine equity for people with marginalized identities.¹²⁶ In a report honoring the sixtieth anniversary of *Brown v. Board of Education*, Orfield and colleagues characterized the trend of school desegregation as “great progress, a long retreat, and uncertain future.”¹²⁷ Indeed, the fight for racial equality experienced progress in the 1960s and retrenchment in the 1990s when the Court reversed course.¹²⁸ Likewise, there has been more recent retrenchment on policies involving affirmative action in

119. See generally Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimization in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 167–77 (1987).

120. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

121. *United States v. Windsor*, 570 U.S. 744 (2013).

122. *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017).

123. *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017).

124. *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018).

125. Lhamon & Gupta, *supra* note 42.

126. Sawchuk, *supra* note 4. Some scholars even argue that LGBTQ+ progress and the corresponding legal theories or decisions paved the way for retrenchment. See Osamudia James, *Superior Status: Relational Obstacles in the Law to Racial Justice and LGBTQ Equality*, 63 B.C. L. REV. 199, 218–20 (2022).

127. Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat, and an Uncertain Future*, CIV. RTS. PROJECT (May 15, 2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

128. Sam Spital, *Restoring Brown's Promise of Equality after Alexander v. Sandoval: Why We Can't Wait*, 19 HARV. BLACKLETTER L.J. 93, 100–03 (2003).

schools and universities.¹²⁹ The U.S. Supreme Court has also hindered progress in other areas including privacy rights¹³⁰ and the separation of church and state in schools.¹³¹ As the Court has moved to the far right, we have experienced another round of retrenchment after longstanding precedent has been overturned. The recent period of retrenchment through Supreme Court decisions has influenced public opinion about the Court. A recent Gallup Poll indicates that the Court has lost credibility in 2021-2022 after its latest controversial decisions.¹³²

Similarly, LGBTQ+ progress has been met with significant resistance, signifying a period of retrenchment.¹³³ For example, OCR guidance was rescinded under the Trump Administration,¹³⁴ the Supreme Court issued two significant decisions that promote religious freedom in ways that undermine LGBTQ+ rights,¹³⁵ and Republican lawmakers have voted against codifying same-sex marriage.¹³⁶ At the state-level, legislatures have also passed numerous laws that deny LGBTQ+ people, particularly transgender and nonbinary individuals, critical protections such as access to healthcare and inclusion in athletics.¹³⁷ Recent litigation demonstrates resistance to rights for transgender people as well. As discussed, there have been coordinated legal challenges mounted by cisgender plaintiffs and states' attorney generals alleging Title IX violations when transgender students participate on school teams.¹³⁸ The plaintiffs are asking judges to interpret Title IX and other provisions in ways that limit the rights of trans students. In the past, conservative activists and policymakers have used similar political strategies

129. *Id.*; see, e.g., *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

130. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

131. See, e.g., *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

132. Jared Gans, *Confidence in Supreme Court is at Lowest Level in 50-Year Recorded History, Gallup Poll Finds*, HILL (June 23, 2022, 4:06 PM), <https://thehill.com/regulation/court-battles/3534955-confidence-in-supreme-court-is-at-lowest-level-in-50-year-recorded-history-gallup-poll-finds/>.

133. See Sawchuk, *supra* note 4.

134. *Battle & Wheeler III*, *supra* note 44.

135. *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n.*, 138 S. Ct. 1719 (2018); *Fulton v. Philadelphia*, 141 S. Ct. 1868 (2021). *But see* *Respect for Marriage Act*, Pub. L. 117-228, 136 Stat. 2305 (2022).

136. Susan Davis et al., *Supreme Court Skepticism Leads Dems To Push Codifying Same-Sex Marriage*, NPR Politics Podcast, NPR (July 26, 2022, 5:21 PM), <https://www.npr.org/2022/07/26/1113765601/supreme-court-skepticism-leads-dems-to-push-codifying-same-sex-marriage>.

137. *Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS., <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> (last visited Dec. 30 2022).

138. *Soule v. Conn. Ass'n of Schs.*, No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919, at *3 (D. Conn. Apr. 25, 2021), *aff'd*, No. 21-1365-cv, 2022 U.S. App. LEXIS 34791(2d Cir. Dec. 16, 2022).

to undermine advancement among other minoritized populations in schools.¹³⁹ These cases are still playing out in lower courts. If the anti-LGBTQ+ cases eventually advance to the U.S. Supreme Court, it remains to be seen if this more extreme conservative Court might hinder progress on LGBTQ+ rights as well. If the Supreme Court did take up the question of athletic bans for transgender student-athletes, it could be a giant step backwards for civil rights because the vast majority of state and federal court decisions have ended in favorable results for transgender students.¹⁴⁰

B. Athletic Bans as Policy Distractions

Efforts to undermine transgender and nonbinary student inclusion have been disguised as seemingly benign arguments such as parental rights, religious freedom, and alleged protection of women.¹⁴¹ For instance, Mayo argues that many of the anti-trans advocates pushing “parents’ rights” arguments fail to account for parents who want schools to respect gender diversity and inclusion. At the same time, socially conservative parents rights’ advocates subvert the rights of students to learn in healthy, inclusive environments in favor of conservative parents arguing for more restrictive learning environments.¹⁴² Payne and Smith question the underlying framing of cisgender children needing to be protected from “dangerous” transgender individuals inherent in the parental rights movement.¹⁴³ Despite the overwhelming evidence that transgender youth experience greater academic and health risks due to poor school climates,¹⁴⁴ some K-12 administrators and parents of cisgender students suggest that transgender students’ rights to privacy could compromise or harm cisgender students if their transgender identities are not disclosed.¹⁴⁵

139. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Bob Jones Univ. v. U.S.*, 461 U.S. 574 (1982).

140. Ecker, *supra* note 5, at 1-2.

141. Mayo, *supra* note 8, at 369-70.

142. *Id.* at 369, 373-74.

143. Elizabeth Payne & Melissa Smith, *The Big Freak Out: Educator Fear in Response to the Presence of Transgender Elementary School Students*, 61 J. HOMOSEXUALITY 399, 408 (2014).

144. See Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools*, GLSEN, at xvii (Nov. 20, 2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf; see NAT’L ACAD. SCIS., ENG’G, & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 233-38, 244 (Charlote J. Patterson eds., 2020); INST. OF MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 158 (Nat’l Academies Press, 2011).

145. Kosciw et al., *supra* note 144, at xxiii; NAT’L ACAD. SCIS., ENG’G, & MED., *supra* note 144, at 27; INST. OF MED., *supra* note 144.

The anti-trans athletic bills beg the same question that Payne and Smith pose concerning K-12 administrators, “[m]any of their decisions imply they feel responsible to parents, community, or the myth of childhood innocence—not to the transgender child.”¹⁴⁶ Indeed, the previous iteration of anti-trans educational policies, sometimes referred to as the “bathroom bills,” have been associated with increased assault of transgender students compared to their peers that do not face similar restrictions.¹⁴⁷ In other words, the health literature indicates restricting students from accessing bathrooms that align with their identity puts students in harm’s way. The institutionalized exclusion of transgender youth—and any youth that adults with power deem as gender-nonconforming—has been condoned with anti-transgender athletic legislation in this most recent round of targeting transgender students for political gain. As Farley, Leonardi, and Donnor,¹⁴⁸ and Mayo¹⁴⁹ note, these justifications to exclude the transgender student function as “policy distractions.” “The politics of distraction ‘dictate, with little accountability, how crucial social problems and issues are named, discussed, and acted upon’¹⁵⁰ and ignore the dynamics of power and privilege, which can, in turn, reify and perpetuate unequal structures.”¹⁵¹ In using athletic bans of transgender students as a policy distraction, proponents of these bills ignore the prevailing health and social science research pointing to the harmful effects of systemic discrimination of transgender youth in schools. There is also little accountability for the lack of evidence to support athletic bans. Indeed, when two Associated Press journalists contacted twenty-four state legislatures supporting athletic bans, most lawmakers could not name an instance of transgender athletes competing in their state.¹⁵²

146. Payne & Smith, *supra* note 143, at 415.

147. See Gabriel R. Murchison et al., *School Restroom and Locker Room Restrictions and Sexual Assault Risk Among Transgender Youth*, 143 PEDIATRICS 1, 2 (2019).

148. Amy N. Farley et al., *Perpetuating Inequalities: The Role of Political Distraction in Education Policy*, 35 EDUC. POL’Y 163, 169 (2021).

149. See Mayo, *supra* note 8, at 369-70.

150. HENRY A. GIROUX, AMERICA’S EDUCATION DEFICIT AND THE WAR ON YOUTH: REFORM BEYOND ELECTORAL POLITICS 46 (Monthly Rev. Press 2017).

151. Farley et al, *supra* note 148, at 165; see also Henry Giroux, *The New Extremism: Politics of Distraction in the Age of Austerity*, PHILOSOPHERS FOR CHANGE (Jan. 29, 2013), <https://philosophersforchange.org/2013/01/29/the-new-extremism-politics-of-distraction-in-the-age-of-austerity/>; Liliana Garces, *Aligning Diversity, Quality, and Equity, Public Policy Developments for Promoting Racial Diversity in Graduate Students*, 120 AM. J. EDUC. 4 (2014); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* (Basic Book, 1992); Michele Moses & Mitchell Chang, *Toward a Deeper Understanding of the Diversity Rationale*, 35 EDUC. RESEARCHER 1 (2006).

152. David Crary & Lindsay Whitehurst, *Lawmakers Can’t Cite Local Examples of Trans Girls in Sports*, AP NEWS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls->

The state athletic ban legislation is another policy distraction pushed by conservative lawmakers that harms a politically unpopular group of vulnerable students. As the judge in the Idaho case observed, there is no legitimate state interest in such laws. Still, legislators continue to push anti-transgender legislation despite the increasing number of medical association and research studies indicating this legislation harms young people. The Ohio House Bill 151 passed despite a standing, restrictive state high school association policy concerning transgender athletes that already prevented many youths from participating.¹⁵³ Ohio had only one out transgender athlete participating in the state high school athletic association when the Ohio bill was considered.¹⁵⁴ In other words, the law would do little to effectively change who participated in athletics. However, the bill *did* bring national media attention to the politicians proposing and defending the bill. Rather than establishing an inclusive educational opportunity for girls, the new bills restrict opportunities and encourage greater policing of girls' and nonbinary students' bodies by adults. Additionally, the educational policy literature concerning the disproportionate use of disciplinary policies to exclude black and LGBTQ+ students suggests that this policing is more likely to disproportionately affect black students. Scholars across academic disciplines have documented the policing of black girls' gender expression and identity, which can result in increased exclusion of black girls from U.S. schools.¹⁵⁵ The recent anti-transgender athletic bills would likely provide another pathway to encourage the exclusion of black, indigenous, and other girls of color from educational opportunities.

Importantly the anti-transgender athletic policies do not address the main stated needs of women athletes at any level of competition, nor are they

sports-914a982545e943ecc1e265e8c41042e7. In fact, transgender students may make up only 0.44% of high school athletes. See Katie Barnes, *Young Transgender Athletes Caught in Middle States' Debates*, ESPN (Sept. 1, 2021), https://www.espn.com/espn/story/_/id/32115820/young-transgender-athletes-caught-middle-states-debates.

153. Morgan Trau, *GOP Passes Bill Aiming to Root Out 'Suspected' Transgender Female Athletes With Genital Inspection*, OHIO CAP. J. (June 3, 2002, 3:45 AM), <https://ohiocapitaljournal.com/2022/06/03/gop-passes-bill-aiming-to-root-out-suspected-transgender-female-athletes-with-genital-inspection/>.

154. Jake Zuckerman, *She's Ohio's Only Trans Female Playing Varsity Sports; Lawmakers Want Her Out*, CINCINNATI (June 13, 2022, 4:26 PM), <https://www.cincinnati.com/story/news/2022/06/13/ohio-transgender-law-would-prevent-one-athlete-playing-her-story/7615376001/>.

155. See Kevin Michael Foster, *Panopticonics: The Control and Surveillance of Black Female Athletes in a Collegiate Athletic Program*, 34 ANTHROPOLOGY & EDUC. Q. 300, 301-02 (2003); Dorinda J. Carter Andrews et al., *The Impossibility of Being "Perfect and White:" Black Girls' Racialized and Gendered Schooling Experiences*, 56 AM. EDUC. RSCH. J. 2531, 2533-35 (2019); Abiola Farinde-Wu et al., *Policing Black Femininity: The Hypercriminalization of Black Girls in an Urban School*, 34 GENDER & EDUC. 804, 804-06 (2022); Simone Ispa-Landa, *Gender, Race, and Justifications for Group Exclusion: Urban Black Students Bussed to Affluent Suburban Schools*, 86 SOCIO. EDUC. 218, 218-19 (2013).

accompanied by legislation or funding that would address these needs. Proponents of women's athletics cite the prevalence of unequal resource allocation to women's teams, a lack of visibility, and sexist and harassing behavior on the part of coaches and officials as the major barriers.¹⁵⁶ Rather, anti-transgender policies target marginalized youth and frame transgender students as a dangerous threat to cisgender students without evidence of this claim. On the contrary, an expanding number of studies provide evidence of the academic, safety, and health risks transgender students face compared to cisgender students in U.S. schools. The athletic policies in question do not address the ways leaders perpetuate bullying of students, reify gender binaries, and exclude youth from educational opportunities in- and outside of school. Moreover, these laws and policies often provide *more power* to the adults who have an interest in gender-policing and have also perpetuated the systemic problems within women's athletics that prevent parity with men's programs.

C. Evidence-Based Policymaking? The Empirical Evidence on Transgender Student-Athletes

Major medical and health associations that have issued statements on transgender youth consistently support the health benefits of transgender youth's athletic participation.¹⁵⁷ The nation's preeminent association for pediatric medicine, the American Academy of Pediatrics, released the following statement to this effect by stating: "[t]hese bills not only ignore these recommendations, they undermine them."¹⁵⁸ Studies examining the benefits of athletic participation for transgender K-12 athletes reflect that athletics do enhance the educational experiences of youth.¹⁵⁹ For example, transgender students who participate in athletics report a better sense of school belonging and well-being compared to trans students who do not participate in sports.¹⁶⁰

156. See Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022), <https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa> (citing Chase Strangio); Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), <https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams/>; Cheryl Reeve, *Cheryl Reeve: We All Win When Trans Athletes Are Included*, SPORTS ILLUSTRATED (Mar. 31, 2021), <https://www.si.com/wnba/2021/03/31/cheryl-reeve-minnesota-lynx-transgender-athletes-jaycee-cooper-powerlifting>.

157. See, e.g., Wyckoff, *supra* note 84.

158. Lee Savio Beers, *American Academy of Pediatrics Speaks Out Against Bills Harming Transgender Youth*, AM. ACAD. PEDIATRICS (Mar. 16, 2021), <https://www.aap.org/en/news-room/news-releases/aap/2021/american-academy-of-pediatrics-speaks-out-against-bills-harming-transgender-youth/>.

159. Clark & Kosciw, *supra* note 13, at 96.

160. *Id.*

Playing on sports teams also helps youth develop self-esteem, correlates positively with overall mental health, and has a protective effect against suicide.

Many advocates of anti-trans athletic bills cite the unfair physical advantage transgender athletes could have. Yet, among the relatively limited analysis of the impact of transgender athletes' participation in high school athletics, evidence that trans youth dominate competition has been lacking: For instance, in Lunarini's study of 1,149 Connecticut track athletes, the data revealed that "out" transgender girls did not exhibit an unfair advantage over cisgender girls, and that cisgender boys outpaced transgender boys.¹⁶¹ Lunarini's conclusion aligns with similar studies with adult athletes that indicated trans athletes did not have an overwhelming physical advantage that resulted in faster track times.¹⁶²

In addition to political gain, the goals of anti-trans legislation preserve the gender status quo in schools. The institutionalization of a gender binary reaches across school policies, processes, and practices, but it is perhaps most prominent in discussions about facility use and athletic participation. Several studies indicate anti-transgender legislation¹⁶³ and negative media messages¹⁶⁴ contribute to poorer mental health for transgender students when compared to transgender individuals who have not been exposed to such negative messages. Further, transgender youth receiving less social support and experiencing increased gender-related stress experience a host of poorer mental and physical health outcomes compared to youth who have been supported in their gender.¹⁶⁵ This increased stress related to gender identity

161. Glenn Michael Lungarini, *The Impact of High School State Athletic Association Transgender Participation Policies on Female Transgender and Cisgender Track Athletes* (Apr. 2021) (Doctor of Education Leadership, Northcentral University) (on file with Northcentral University ProQuest Dissertations system).

162. Joanna Marie Harper, *Race Times for Transgender Athletes*, 6 J. SPORTING CULTURES & IDENTITIES 1, 3-4 (2015).

163. Elliott A. Tebbe et al., *A Dangerous Visibility: Moderating Effects of Antitrans Legislative Efforts on Trans and Gender-Diverse Mental Health*, PSYCH. SEXUAL ORIENTATION & GENDER DIVERSITY 1, 1-2 (2021); Landon D. Hughes et al., *"These Laws Will Be Devastating:" Provider Perspectives on Legislation Banning Gender-Affirming Care for Transgender Adolescents*, 69 J. ADOLESCENT HEALTH 976, 978 (2021); Harry Barbee et al., *Anti-Transgender Legislation—A Public Health Concern for Transgender Youth*, 176 JAMA PEDIATRICS 125, 125 (2022).

164. Jaclyn M.W. Hughto et al., *Negative Transgender-Related Media Messages Are Associated with Adverse Mental Health Outcomes in a Multistate Study of Transgender Adults*, 8 LGBT HEALTH 32, 32 (2021).

165. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students—19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 71 (2019); McQuillan et al.,

can have long-term consequences because it can alter physiological stress and immune pathways.¹⁶⁶ While the overwhelming evidence from academic health literature and statements from professional medical associations support allowing transgender athletes to play athletics on teams that align with their gender identities, conservative legislatures have amplified an anti-transgender sentiment with a historical rise in anti-transgender bills proposed in the last five years.

D. Administrative Sensemaking and Repressive Legalism.

In addition to the creation and construction of the law, it is important to consider the interpretation and implementation of the law in practice. Concepts such as administrative sensemaking¹⁶⁷ and repressive legalism¹⁶⁸ provide insight into why those interpreting the law—such as judges, lawyers, and K-12 district leaders—need to consider power and structural inequities. A breadth of literature suggests educational practitioners often understand the same legal and policy mandates in dramatically different ways.¹⁶⁹ Administrative sensemaking describes how leaders derive meaning from policy issues and understand policy reforms.¹⁷⁰ This includes identifying the resources needed to translate policy reforms into practices. As a first step, leaders need to understand the goal and the “target” of an educational policy reform.¹⁷¹ For instance, in the case of transgender athletes, leaders may differ in whether they identify transgender student-athletes as the policy “problem” or if they identify

supra note 13; Kristina R. Olson et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 PEDIATRICS (2016).

166. Johns et al., *supra* note 165; McQuillan et al., *supra* note 13; Olson et al., *supra* note 165.

167. McQuillan, *supra* note 37, at 337.

168. Liliana M. Garces et al., *Repressive Legalism: How Postsecondary Administrators' Responses to On-Campus Hate Speech Undermine a Focus on Inclusion*, 58 AM. EDUC. RSCH. J. 1032, 1032, 1036 (2021).

169. *Id.*

170. Dennis A. Gioia & Kumar Chittipeddi, *Sensemaking and Sensegiving in Strategic Change Initiation*, 12 STRATEGIC MGMT. J. 433, 442 (1991); James P. Spillane et al., *Policy Implementation and Cognition: Reframing and Refocusing Implementation Research*, 72 REV. EDUC. RSCH. 387, 391 (2002).

171. DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 266-69 (W. W. Norton & Co., 1997); Cynthia E. Coburn, *Collective Sensemaking about Reading: How Teachers Mediate Reading Policy in Their Professional Communities*, 23 EDUC. EVALUATION & POL'Y ANALYSIS 145, 146 (2001); Cynthia E. Coburn, *Framing the Problem of Reading Instruction: Using Frame Analysis to Uncover the Microprocesses of Policy Implementation*, 43 AM. EDUC. RSCH. J. 343, 351, 357 (2006); James P. Spillane & Lauren Anderson, *Negotiating Policy Meanings in School Administrative Practice: Practice, Professionalism, and High-Stakes Accountability in a Shifting Policy Environment*, in INNOVATIONS IN EDUCATION CHANGE: CULTIVATING ECOLOGIES FOR SCHOOLS 121, 123 (David Hung et al. eds., 2019).

the restrictive gendered system as the policy problem.¹⁷² The first mindset problematizes the students, whereas the second frames the policy problem as systematic.

Leaders' pre-existing practices, life trajectories, and professional beliefs also shape how they understand educational policies.¹⁷³ On the one hand, supportive principals who see the legal landscape as inclusive of transgender students, such as those in Mangin's study of New England administrators, took a "child-centered" approach and sought out resources when they did not know how to support the diverse student populations in their schools.¹⁷⁴ On the other hand, educational leaders often see their own diversity and inclusion policies to be exclusive of gender and sexual orientation. For instance, in Payne and Smith's study, resistant school leaders do not see a place for gender-equity in their diversity and inclusion goals and reject professional development concerning LGBTQ+ students.¹⁷⁵ These differences in how leaders approach their work with transgender students can influence how they understand their role in implementing discrimination protections for transgender students, mobilize support for student-athletes, or refrain from engaging in the conversation.¹⁷⁶

Additionally, existing practices, politics, and features of school organizations often shape how practitioners engage with educational policy reforms. K-12 educational leaders and lawyers in states with protective legislative mandates that align with the Biden Administration's federal policy signals and guidance from the state high school athletic association may understand transgender student-athletes' participation in very different ways from leaders in states where several bans on transgender student-athletes' participation have been proposed by lawmakers. Similarly, access to resources, such as administrative guidance that instructs leaders on how they can support transgender student-athletes or legal briefs that interpret existing case law, could influence how K-12 leaders understand the policy issue.¹⁷⁷

172. McQuillan, *supra* note 37, at 339.

173. Spillane et al., *supra* note 171, at 391.

174. Melinda M. Mangin, *Transgender Students in Elementary Schools: How Supportive Principals Lead*, 56 EDUC. ADMIN. Q. 255, 265, 268 (2020); MELINDA M. MANGIN, *TRANSGENDER STUDENTS IN ELEMENTARY SCHOOL: CREATING AN AFFIRMING AND INCLUSIVE SCHOOL CULTURE* 52-57 (Harvard Educ. Press 2020).

175. Payne & Smith, *supra* note 143, at 407-08.

176. Mollie McQuillan et al., "Sometimes It's Hard to Do the Right Thing:" *Administrators' Sense-Making of Gender Identity Laws and the Implications of Understanding State Policies*, AERA ANN. MEETING (Apr. 21, 2022), <https://tinyurl.com/y3fb3cyp>.

177. McQuillan, *supra* note 37; McQuillan et al., *supra* note 176.

Yet, these resources may be scarce. In Meyer and Quantz’s critical review of forty-five years of Title IX educational research literature, the authors found one empirical K-12 article that addressed the impact of Title IX on transgender students.¹⁷⁸ While legal scholars, such as Spade, warn about the overreliance on the law and administrative reforms to create just systems,¹⁷⁹ these variations in how leaders understand the same legal terrain play an important role in creating equitable educational systems.

Repressive legalism draws from the same organizational theory as the policy sensemaking literature to describe how administrators make sense of the law and political pressures.¹⁸⁰ Garces et al., state that repressive legalism “represents the interpretation and application of legal norms and other facets of the legal environment in a manner that suppresses, or holds back, other possible actions.”¹⁸¹ In applying the repressive legalism concept to higher education administrative discussions about race-based hate crimes, Garces and colleagues reveal that administrators’ understanding of the law is influenced by conservative advocacy organizations and fears about reactionary litigation. Rather than weighing the mission-driven principles of inclusion and free speech equally, administrators attempt to protect their institutions by tailoring their responses to reflect a “neutral” response to hate crimes.¹⁸² Yet, administrators’ “neutral” approaches weigh free speech more heavily than the harm inflicted upon students of color. Prioritizing free speech over the rights of students of color effectively prevents leaders from adopting more inclusive policies and practices that would address the racially motivated hate crimes.¹⁸³ As a result, these “neutral” administrative responses reinforce interpersonal race-based violence by ignoring the historical and systemic factors contributing to the free speech-inclusion dilemma.¹⁸⁴

We propose that a similar process of repressive legalism occurs in K-12 educational policy conversations concerning equity, inclusion, and justice for transgender students. Judges, lawyers, educators, and policymakers sacrifice

178. Elizabeth J. Meyer & Mary Quantz, *Who Is (Not) Protected by Title IX? A Critical Review of 45 Years of Research*, 123 TEACHERS COLL. REC. 1, 24 (2021).

179. SPADE, *supra* note 76, at 8.

180. Garces et al., *supra* note 168, at 1036; Lauren B. Edelman et al., *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, 12 ANN. REV. L. SOC. SCI. 395, 395 (2016); Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 479 (1997).

181. Garces et al., *supra* note 168, at 1036.

182. *Id.* at 1050.

183. *Id.* at 1038.

184. *Id.* at 1059-60.

the inclusion of transgender student-athletes by tailoring their decision-making to the reactionary litigation of conservative advocacy groups threatening litigation. This litigation and messaging about transgender athletes threatening women's sports has been part of a public, national strategy to focus on wedge issues in order to gain the support of socially-conservative voters. This strategy has been discussed in conservative political forums such as the Heritage Foundation,¹⁸⁵ Alliance Defending Freedom,¹⁸⁶ and the Conservative Political Action Conference.¹⁸⁷

It is also worth noting that targeting transgender student-athletes comes after a strategy of targeting transgender students' access to bathroom and locker room facilities that has largely been unsuccessful.¹⁸⁸ The social science literature clearly points to the harm inflicted upon transgender students by cisgender parents, students, and administrators, and there is no social science literature that the authors are aware of that shows transgender students have systematically inflicted harm on cisgender students. Similar to what Garces et al. argue in the context of university conversations about racially-motivated harassment, educators, policymakers, lawyers, and judges use a number of strategic responses – which often come at the cost of including transgender students – to appear neutral to outside observers and proactively protect their institutions from conservative attacks. In this latest round of using transgender youth for political ends, educators, policymakers, lawyers, judges, and other adults making decisions about athletic bans may be sacrificing students' access to the educational benefits athletics provide – the exact goal of Title IX.

IV. CONCLUSION AND IMPLICATIONS

As we reflect upon the fiftieth anniversary of Title IX, it is important to consider the law's promise to protect students at the margins. Research demonstrates the profound impact that exclusionary policies and practices

185. *Gender*, HERITAGE FOUND., <https://www.heritage.org/gender> (last visited Dec. 30, 2022); *The Heritage Foundation Solutions*, HERITAGE FOUND., <https://www.heritage.org/solutions> (last visited Dec. 30, 2022).

186. *Challenging Some Assumptions in the Gender Debate*, ALL. DEFENDING FREEDOM (Oct. 17, 2017), <https://adflegal.org/blog/challenging-some-assumptions-gender-debate>.

187. Daniel Preston Parker, CPAC: The Origins and Role of The Conference in the Expansion and Consolidation of the Conservative Movement 67 (2015) (PhD Dissertation, University of Pennsylvania) (on file with the University of Pennsylvania Scholarly Commons); David Weigel, *The Trailer: Why Republicans Keep Running Against Trans Rights*, WASH. POST (Mar. 2, 2021, 6:41 PM), <https://www.washingtonpost.com/politics/2021/03/02/trailer-why-republicans-keep-running-against-trans-rights/>.

188. Eckes, *supra* note 5, at 15.

have on transgender students.¹⁸⁹ To fulfill the promise of Title IX, the current sociopolitical context requires multilevel efforts to promote transgender student inclusion.¹⁹⁰ This work requires not only pushing back on regressive laws that address specific issues such as athletics but also moving beyond this myopic legal approach to reframing the issues and focusing on systemic oppression if the law is to promote justice for transgender and nonbinary students more broadly.¹⁹¹ As such, in this essay, we present strategies that harness the law in meaningful ways, while also emphasizing the need to radically shift our approach and look outside the boundaries set by the law. This shift in approach will be necessary to achieve full liberation for transgender people and to minimize the possibility for future movements that promote retrenchment.

Within the legal system, there are opportunities to counter laws that target transgender students. Researchers can use their expertise to engage in public-facing scholarship, such as participating in public hearings, being a part of the amicus brief process,¹⁹² providing expert testimony in court cases, and working with intermediary organizations and legislators to promote the use of research in law and policy.¹⁹³ Integral to this work, particularly in regards to passing and overturning legislation, are grassroots organizing and coalition building¹⁹⁴ that center the voices and experiences of minoritized students, in this case, transgender and nonbinary students.¹⁹⁵ Additionally, we support Singer's call for "agile and creative trans legal advocates to reduce harms to marginalized trans people and respond to the many ways that trans people

189. Joseph Kosciw et al., *The Effect of Negative School Climate on Academic Outcomes for LGBT Youth and the Role of In-School Supports*, 12 J. SCH. VIOLENCE 45, 45-46 (2013); Maria M. Lewis & Suzanne E. Eckes, *Storytelling, Leadership, and the Law: Using Amicus Briefs to Understand the Impact of School District Policies and Practices Related to Transgender Student Inclusion*, 56 ED. ADMIN. Q. 46, 47 (2020); Acklin, *supra* note 8, at 133.

190. Austin H. Johnson, *Tipping Points and Shifting Expectations: The Promise of Applied Trans Studies for Building Structural Competency*, 1 BULL. APPLIED TRANSGENDER STUD. 163, 172 (2022); McQuillan, *supra* note 37, at 336-37.

191. Kirkup et al., *supra* note 78, at 252.

192. See Lewis & Eckes, *supra* note 15, at 47.

193. Kevin G. Welner & Haggai Kupermintz, *Rethinking Expert Testimony in Education Rights Litigation*, 26 EDUC. EVAL. & POL'Y ANALYSIS 127, 128 (2014).

194. *Statement in Solidarity With Transgender, NonBinary, and Gendernonconforming Student Athletes*, GLSEN, <https://www.glsen.org/statement-in-solidarity-transgender-athletics> (last visited Dec. 30, 2022); Dean Spade, *Solidarity Not Charity*, 38 SOC. TEXT 131, 147 (2020); SPADE, *supra* note 76, at 131; Z. Nicolazzo, *Imagining a Trans* Epistemology: What Liberation Thinks Like in Postsecondary Education*, 56 URB. EDUC. 511, 518, 525-26 (2021).

195. Several groups have pushed back on legislation, including the American Civil Liberties Union (www.aclu.org), and the Human Rights Campaign (www.hrc.org).

intersect with the law.”¹⁹⁶ Singer argues that this includes the need for legal practitioners to broaden their strategies beyond human rights arguments and build alternative, pragmatic pathways that recognize the needs of trans people.¹⁹⁷

Focusing solely on the law as an avenue for redress presents significant limitations because the law does not always capture the lived experiences of minoritized communities.¹⁹⁸ Achieving equity and inclusion for transgender students requires resistance to policy distractions and “changing the institutional conditions producing normative systems of gender that allow sexist, homophobic, and transphobic behaviors to go unchecked.”¹⁹⁹ As a part of this discourse, the work also involves challenging gender norms and dispelling myths related to transgender and nonbinary people in public and private discourse and interactions. Given the role of the law, the current context presents implications for training and professional development of lawyers, judges, policymakers, teachers, and educational leaders. In particular, it is critical for legal training to stress the role of legal professionals in dismantling systemic oppression and discrimination.²⁰⁰ This training has the potential to impact proposed legislation, decisions to challenge exclusionary laws through litigation, and judicial opinions. Legal training should involve the integration of social science research, emphasis on centering the voices of minoritized communities, and the role of power and language in the law.²⁰¹

Adults who make decisions about whether transgender students will be excluded from school activities also need to understand where they have discretion in interpreting the law to be more inclusive of marginalized

196. Singer, *supra* note 77, at 296.

197. *Id.* at 302.

198. Dean Spade, *Laws as Tactics*, 21 COLUM. J. GENDER & L. 40, 40-41 (2011); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1248 (1991).

199. Elizabeth J. Meyer et al., *Transgender Students and Policy in K-12 Public Schools Acknowledging Historical Harms and Taking Steps Toward a Promising Future*, NAT’L EDUC. POL’Y CTR. 13 (2002).

200. See Karen Sloan, *Law Students Face Mandatory Bias Training Under Proposed ABA Rule*, REUTERS (Feb. 3, 2022, 4:02 PM), <https://www.reuters.com/legal/government/law-students-face-mandatory-bias-training-under-proposed-aba-rule-2022-02-03/>; see also *Penn State Law Pilots Law and (In)Equity Course*, PENN. STATE L. SCH. (Jan. 10, 2022), <https://pennstatelaw.psu.edu/news/penn-state-law-pilots-law-and-inequity-course>; *From Words to Action: Dickinson Law Course Examines Roots of Systemic Racism*, PENN STATE DICKINSON L. SCH. (Apr. 13, 2021), <https://dickinsonlaw.psu.edu/words-action-dickinson-law-course-examines-roots-systemic-racism>.

201. See Maria Lewis et al., *A Case Study of Education Law and The Implications for Re-Envisioning the Law School Curriculum for Racial Justice 14-16* (under review) (on file with author).

students.²⁰² Practitioners need resources that will be specific enough to be useful to their daily practice in order to effectively interpret the law.²⁰³ As such, leadership and teacher preparation programs should emphasize conversations that highlight power, privilege, and a critical reflection around gender identity and gender expression. Teacher and leadership pre- and in-service training should include trans-informed social science research in their curricula so practitioners understand the ways in which policies and practice reify restrictive notions of gender identity, and how that reification stifle students' academic, social, and emotional well-being.²⁰⁴ Indeed, educators have expressed that they want and need more training related to gender diversity in pre-and in-service programs.²⁰⁵ At the same time, educators identified the need for ongoing self-reflective conversations among school personnel about gender diversity and social justice.²⁰⁶ In professional development with teachers, Staley and Leonardi observed that discussions about gender diversity need to be an ongoing part of the school mission.²⁰⁷ Unfortunately, some findings suggest that school leaders might avoid such conversations about gender due to the political climates in the school and community.²⁰⁸ Further, some educational leaders overtly participate in the bullying and "othering."²⁰⁹ Educational and health researchers suggest ensuring leaders understand how student safety and health can be compromised when educators avoid conversations about gender and sexuality.

202. See Elizabeth J. Meyer & Bethy Leonardi, *Teachers' Professional Learning to Affirm Transgender, Non-Binary, and Gender-Creative Youth: Experiences and Recommendations from the Field*, 18 *SEX EDUC.* 449, 449, 456-57 (2018); Bethy Leonardi & Sara Staley, *What's Involved in 'The Work'?* *Understanding Administrators' Roles in Bringing Trans-Affirming Policies into Practice*, 30 *GENDER & EDUC.* 754, 755 (2018).

203. McQuillan, *supra* note 37, at 337-38.

204. Melinda M. Mangin et al., *Editors' Introduction: Toward Trans Studies in K-12 Education*, 51 *EDUC. RESEARCHER* 302, 302 (2022).

205. See Lee Airton & Austen Koecher, *How to Hit a Moving Target: 35 Years of Gender and Sexual Diversity in Teacher Education*, 80 *TEACHING & TCHR. EDUC.* 190, 191 (2019); Emily A. Greytak et al., *Educating the Educator: Creating Supportive School Personnel Through Professional Development*, 12 *J. SCH. VIOLENCE* 80, 81 (2013); Mollie T. McQuillan & Jennifer Leininger, *Supporting Gender-Inclusive Schools: Educators' Beliefs About Gender Diversity Training and Implementation Plans*, 47 *PROF. DEV. EDUC.* 156, 171 (2021).

206. Meyer & Leonardi, *supra* note 202, at 456-57.

207. Sara Staley & Bethy Leonardi, *A Pretty Queer Thing: Thinking Queerly About Teachers' Gender and Sexual Diversity-Focused Professional Learning*, *J. TCHR. EDUC.* 511, 516 (2020).

208. Elizabeth C. Payne & Melissa J. Smith, *Refusing Relevance: School Administrator Resistance to Offering Professional Development Addressing LGBTQ Issues in Schools*, 54 *EDUC. ADMIN. Q.* 183, 184 (2018); McQuillan et al., *supra* note 176, at 203.

209. Mollie McQuillan & Cris Mayo, *School Leaders and Transphobia: Direct, Facilitative, and Resistant Forms of Bias and Bullying* (under review) (on file with author).

For practitioners, doing active, reflective work is critical to counter repressive legalism and external political pressures that may undermine equity for transgender and nonbinary students.²¹⁰ For example, in states with discretion written into the law, it is crucial for educational professionals, policymakers, and attorneys to promote inclusion to the maximum extent permissible under the law, rather than acting in unnecessarily restrictive ways to avoid litigation or political backlash (i.e., repressive legalism).²¹¹ Interpreting the law in this way provides a meaningful pathway towards inclusion of marginalized youth, rather than exclusion, and aligns with the inclusive intent of Title IX.²¹²

On the fiftieth anniversary of Title IX, this review of the literature and legal landscape serves as a reminder of the current regressive movement that centers on the exclusion of marginalized students based on gender. In bridging the legal, education, and health scholarship concerning transgender student-athletes, this essay provides a roadmap to continue the legacy of Title IX, a law intended to provide more equitable learning environments for students marginalized under the current system. The legal landscape is rife with exclusionary state laws and practitioners' interpretations of the law. Yet, the health and education literature clearly point to the significant positive contribution of athletic participation and inclusive policies in the lives of students—and the negative impact of excluding transgender student-athletes from school-based activities. Systemic changes that would continue the legacy of Title IX in expanding access to school-based athletics require more active engagement from policymakers, attorneys, judges, educators, and administrators to create more just school environments for all youth.

210. Lewis et al., *supra* note 108, at 57.

211. *Id.*

212. *Id.* at 57-58.