

A Playbook of Exclusion

An Overview of Anti-trans Legislation and Potential Routes to Relief

Suzy Marino and John Selent

More than 200 anti-LGBTQ+ bills have been filed across the U.S. in 2022. The majority of these bills target transgender individuals, and while each bill is different, many involve transgender youth sports bans (most frequently targeting trans girls).

In the recent 2022 Legislative Session, the Kentucky General Assembly passed Senate Bill (SB) 83, which prohibits transgender children from participating in girls' or women's school sports. Notably, SB 83 does not prohibit transgender children from participating in boys' sports; it expressly permits "any student to participate in an athletic activity or sport designated as 'boys' or 'coed[.]'"

Governor Beshear vetoed SB 83, reasoning that it "violates the equal protection rights afforded by the United States Constitution[.]" it "bans transgender children from participating in girls' or women's sports without presenting a single instance in Kentucky of a child gaining a competitive advantage as a result of sex reassignment[.]" and that "[t]ransgender children deserve public officials' efforts to demonstrate that they are valued members of our communities through compassion, kindness and empathy[.]"

Despite the glimmer of hope offered to those in the transgender community by Governor Beshear's veto, the General Assembly overrode the veto and enacted SB 83 into law. The onslaught of anti-trans legislation begs a few questions: Why is this happening? Will the law provide any protections for trans children? And finally, what effects do these transphobic laws have on the day-to-day lives of our community's children?

Why is this happening?

The first trans sports ban in the nation was crafted because its sponsor, an Idaho Representative, believed "students who are assigned male at birth but identify as a woman would be able to take women's spots and dominate competition."

The representative's decision to create the nation's first trans sports ban did not originate from any personal experiences or domination of women's sport in the state by transgender athletes. Instead, the representative recalls hearing "about high school state track meets in Connecticut that two transgender girls won[.]" Missing from the representative's justification is any mention of science, statistics or data to support this supposed need.

A Kentucky Senator, one of the co-sponsors of Kentucky SB 83, called the trans sports ban "a huge win for the integrity of women's sports[.]" The senator and other legislators enlisted the help of a cisgender University of Kentucky swimmer to bolster support for the law after she tied with a trans swimmer for fifth place in an NCAA championship race this year. The UK swimmer noted that, while sad about her own tie, she was happy that "the girls above [her]... conquered what was seemingly impossible by beating" a trans girl.

This mindset highlights the inherent transphobia driving the wave of anti-trans legislation across the country: when a cisgender girl beats another girl in sport, society says the cisgender girl won because she is a better athlete. But when a transgender girl beats another girl in sport, society says the transgender girl won because she is trans, classifying it as an unfair advantage.

Much of the fear over trans women's domination in sports stems from preconceived notions about advantages trans women purportedly have over cis women.

Essentially, "[o]ld stereotypes regarding athleticism, biology and gender are being directed at transgender girls, who are frequently told outright that they are not girls (and conversely transgender boys are told they are not really boys)." But the hormones that are seen as athletic advantages are frequently at negligible levels in trans girls on puberty blockers, and the physical traits that are seen as advantages are inherent in the biodiversity of humans. Moreover, there is debate and conflicting evidence surrounding whether these traits *actually* provide an athletic advantage.



Despite the claimed goals of ban proponents, blanket prohibitions of trans women participating in women's sport don't "level the playing field"—the biodiversity of human beings creates an uneven playing field in the first place.

There has never been a singular trait that equates to total athletic success; as one athlete put it, "[o]ne high jumper could be taller and have longer legs than another, but the other could have perfect form, and then do better[.]" And the world of sport already grapples with deciding how to approach the inherent biodiversity of athletes, reaching different results when, for example, cis women have heightened testosterone levels, or a cis man produces significantly less lactic acid than his competitors.

Despite the claimed goals of ban proponents, blanket prohibitions of trans women participating in women's sport don't "level the playing field"—the biodiversity of human beings creates an uneven playing field in the first place. The point of a sporting competition is to determine who the singular best athlete at a given sport is on a given day. Thus, parity of skill is being used to disguise hatred and bigotry.

Will the law provide any protections for trans children?

These laws will likely face scrutiny under Title IX of the Educational Amendments Act and the Equal Protection Clause of the Fourteenth Amendment. Multiple legal challenges have been brought against trans sports bans, and while most have yet to reach a final judgment on the merits, at least one District Court has found that a ban likely violates Title IX and the Equal Protection Clause.

Title IX commands that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" While regulations provide that athletic programs may operate "separate teams for members of each sex[.]" "[n]either the statute nor the regulations define the term 'sex[.]' [and a]lso absent from the statute is the term 'biological[.]'"

A District Court in West Virginia determined that a trans sports ban much like Kentucky's violated Title IX. First, the court concluded that a ban is a sex-based distinc-

tion because it "could not exclude [a trans girl] from a girls' athletics team without referencing her 'biological sex' . . . [thus, h]er sex 'remains a but-for cause' of her exclusion under the law."

The court went on to note that the ban permitted *all* other students—including "cisgender girls, cisgender boys, transgender boys, and students falling outside of any of these definitions"—"to play on sports teams that best fit their gender identity." Thus, under the ban, a trans girl is "treated worse than girls with whom she is similarly situated because she alone cannot join the team corresponding to her gender identity."

The Equal Protection Clause also merits mention. Because trans sports bans necessarily rely on sex-based classifications, the bans will likely be analyzed under "heightened scrutiny, as sex 'frequently bears no relation to the ability to perform or contribute to society.'" Under this standard, "the burden rests with the state to demonstrate that its proffered justification" for the sex-based distinction "is 'exceedingly persuasive.'" "This requires the state to show that the 'classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" The Supreme Court has instructed that the state's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."

States may have a difficult time justifying their trans sports bans, and equal difficulty demonstrating that they are substantially related to promoting fairness in sport. First, states will have to explain the objectives their bans serve, which will likely require them to define the specific advantage trans girls supposedly have over cis girls in sports. Given "the inability of . . . state legislatures to identify any existing problems with transgender children participating in their respective state's school sports[.]" it seems likely that states will struggle to find an "exceedingly persuasive" justification for their bans.

If states reason that they want to exclude girls with higher testosterone levels from girls' sports, the trans sports bans could be struck down as under and over inclusive. They are under inclusive because there are unquestionably cis girls with heightened testosterone levels who would still be permitted to play in girls' sports under most states' versions of the trans sports ban. They could be over inclusive because trans girls' testosterone levels are frequently at or lower than those of cis girls, but they would still be prohibited from playing in girls' sports. If the goal is the regulation of testosterone levels in women's sport, the bans are plainly an inefficient means of meeting it.

Conversely, if states reason that they wish to exclude girls with physical traits that could provide an advantage in sports, the bans are an equally under and over inclusive means of achieving this goal. A ban would be under inclusive because it would not exclude cis girls with "favorable" physical traits (such as tall height or a large wingspan) from sports. The bans would also be over inclusive because they would necessarily exclude trans girls with "less favorable" physical traits than their cis counterparts.

If a women's basketball team included a 5' 6" trans girl and a 6' 0" cis girl, the bans would prohibit the trans girl from playing while permitting the cis girl to play, despite the cis girl having what could be seen as a more

“favorable” physical build for the sport. This hypothetical reveals the simple truth of these bans: they are less about preventing biological advantages than they are about policing trans girls’ bodies and participation in society.

Equal Protection challenges against these bans will force states to define their stated justification for the bans and will require the bans to be substantially related to those justifications. States will struggle to make this showing.

Recently, in *Bostock v. Clayton County*, Justice Gorsuch, writing for the majority of the U.S. Supreme Court, declared that “[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex.” The Court accordingly held that employment discrimination against a homosexual or transgender individual based on their sexual orientation or gender identity is discrimination on the basis of sex. While the specific question before the Court was in the employment context under Title VII, the Bostock opinion reveals that at least some of the legal prohibitions on sex-based discrimination could provide a route for relief because the exclusion of trans

people necessarily requires the use of a sex-based distinction.

What effects do these transphobic laws have on the day-to-day lives of our community’s children?

Louisville Youth Group (LYG) is the primary nonprofit providing resources and brave spaces for “gender and sexuality diverse young adults” in Kentuckiana. They offer programming, leadership development opportunities, retreats and outreach to external partners such as school systems and health-care providers.

LYG Executive Director Elena Rosenberg pointed out that anti-trans legislation harms trans children even before it is enacted into law, because it makes their humanity the subject of public debate. “The intention is not just to keep trans girls from playing sports,” Rosenberg says. “The intention is for those girls to see their existence debated... It is a matter of calling into question, in these young peoples’ minds, whether they should even exist on this planet.”

The negative effects can be profound. “Our young folks already have immense amounts of anxiety and stress that they deal with,

whether they’re in a supportive environment or not. Being ‘different’ than what the world says you should be is stressful,” Rosenberg said. In 2021, more than half of transgender and nonbinary youth seriously considered attempting suicide. Rosenberg believes suicide rates for LGBTQ+ youth are impacted by the debate surrounding anti-trans legislation.

This legislation also harms how youth view and learn about their own identities. “It pushes folks back in the closet. If you’re a young person trying to think about whether or not this is you... [y]ou might not go to your coach, who could be the one supportive school staff member that you know,” Rosenberg says. In her view, while LGBTQ+ youth today have better resources compared to prior generations, “with that also comes a rise in hate, and the acceptance of being visible with your hate.”

Rosenberg challenges us to lift up the trans children in our communities.

“What I have experienced anecdotally, and what we see from various resources and researchers is that a supportive environment—supportive adults in your school, in your home, in your community—that makes the difference. Whatever issue you are facing as a young person, an adult you can go to who

understands, and who can connect you to other resources and to peers, that’s key. That’s why things like LYG exist, is to provide that space and make sure someone’s doing that.”

When we listen to and support our trans youth, it can make the difference between suicidality and survival. “There’s a reason we talk about chosen families in this community,” Rosenberg says. “That is survival: finding the folks that love you for who you are.” But children tend to believe “that if they don’t see it, it doesn’t exist. So, without the opportunity, without the bit of support, without the visibility of somebody like them, how do they hold that truth for themselves?”

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Editor’s note: the article’s original citations were omitted for formatting purposes. ■



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