

# Assessing Impacts of “Anti-Equity” Legislation on Health Care and Public Health Services

## Public Health and the Law

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**Abstract:** A deluge of state “anti-equity” legislative bills seek to reverse prevailing trends in diversity, equity, and inclusion; withdraw protections of LGBTQ+ communities; and deny access to gender-based care for trans minors and adults. While the political and constitutional fate of these acts is undetermined, profound impacts on patients and their providers are already affecting the delivery of health care and public health services.

Through an extensive series of bills leading into the key election year of 2024, legislators in multiple states seek to prohibit, avert, or rescind social protections centering on diversity, equity, and inclusion (DEI); lesbian, gay, bisexual, transgender, and queer plus (LGBTQ+) populations; and gender-based care (GBC). Reflective of social and political trends during the COVID-19 pandemic and spurred by the U.S. Supreme Court’s 2023 decision in *Students for Fair Admission, Inc. v. President & Fellows of Harvard College*,<sup>1</sup> largely rejecting race-based university admission policies on equal protection principles, the “anti-woke”

thrust of these bills is palpable. So are the potential impacts on affected, at-risk populations (especially minors), as well as health care and public health professionals dedicated to providing fair and equitable services to all Americans.

As described below, state legislative attempts to undo equity-based protections and allowances for specific populations can impair health outcomes. Some bills would reverse longstanding DEI efforts or LGBTQ+ protections. Resulting discrimination against individuals and groups lends to mental health harms<sup>2</sup> and potential acts of violence.<sup>3</sup> Among the most pronounced themes of these legislative movements, however, are direct attempts to limit or deny specific health services to trans and other at-risk populations.<sup>4</sup> Select legislatures including those in Alabama, North Dakota, and Oklahoma have already prohibited minors from accessing GBC prescribed by medical practitioners.<sup>5</sup> Additional states are proposing similar legislation (e.g., Virginia<sup>6</sup>) or changes in medical board standards (e.g., Florida<sup>7</sup>). Amid these legal trends, doctors, nurses, clinicians, and other providers in affected states are attempting to ascertain the lawful provision of health services that could affect their licensure, liability, and livelihoods.

**Panoply of Anti-Equity Legislative Bills.** Hundreds of state legislative bills introduced in the past year alone collectively seek to restrict specific benefits, services, or allowances of existing DEI programs, LGBTQ+

### About This Column

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protections, and GBC access. Long-standing public and private DEI programs aiming to “protect the health of underrepresented populations, [promote] health equity, and [eliminate] health disparities,”<sup>8</sup> have been supported through Attorney General opinions (e.g., Colorado<sup>9</sup>), state bar initiatives (e.g., New York<sup>10</sup>), and multiple other laws. These programs now face intense legislative scrutiny.<sup>11</sup> Contrary to President Biden’s affirmative DEI policies for the federal

Others propose restricting access to library books or other media as well as classroom instruction on critical race theory, gender identity, or sexual orientation (e.g., Florida, Georgia, Oklahoma).<sup>20</sup> Penalties include “downgrading” an offending school’s accreditation, reducing funding,<sup>21</sup> and allowing private complaints or suits from parents.<sup>22</sup> Upwards of 80% of teachers in impacted jurisdictions already report censoring their own classroom instruction to avoid

locker rooms (e.g., Missouri<sup>30</sup>), or “separate single-sex spaces” (e.g., Alabama<sup>31</sup>) based on biological sex. A Kansas state bill would require separate overnight accommodations for school children.<sup>32</sup> Restricting persons from participation in school athletic events based on their self-identified gender is popularized in manifold bills. Florida’s legislature recently limited participation in girls’ athletic teams based on sex at birth.<sup>33</sup> Invasive physical exams for prospective athletes are proposed in Kansas.<sup>34</sup> And in Minnesota a proposed bill would criminalize team participation for those not assigned female at birth.<sup>35</sup>

Closely tied to these measures are bills restricting gender-related health services provided to minors and adults despite contrary guidance from the American Medical Association and American Academy of Pediatrics.<sup>36</sup> These legislative proposals generally prohibit or limit medical interventions including prescription “puberty blockers” (e.g., Louisiana<sup>37</sup>), hormone therapy (e.g., Arkansas<sup>38</sup>), gender-affirming surgeries (e.g., Mississippi,<sup>39</sup> Kansas,<sup>40</sup> South Carolina<sup>41</sup>), and public health services (e.g., Florida<sup>42</sup>). A bill in Illinois proposes that health care workers report to the state health department any prescription for puberty blockers to minors (<18 years).<sup>43</sup> Another bill in the same state would require specific informed consent for anyone seeking gender-transition care.<sup>44</sup> Health care workers in Kansas would have to provide transgender services under standards of care specified by the legislature.<sup>45</sup> Mental health providers receiving state funds would be precluded from promoting medication or surgery as treatment options for minors.<sup>46</sup> In Tennessee, GBC clinics accepting state funds must also perform de-transition procedures.<sup>47</sup> Public universities and their associated healthcare facilities would be barred from providing GBC for minors in West Virginia.<sup>48</sup>

Other states propose restricting or criminalizing GBC based on age (e.g., minors<sup>49</sup>) or specific population (e.g., incarcerated persons.<sup>50</sup>) Nebraska’s 2023 law broadly prohibits gender-

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workforce,<sup>12</sup> these bills would forbid public entities, universities, and others from (1) requiring or accepting “diversity” or other ideological statements,<sup>13</sup> (2) offering comprehensive trainings promoting “divisive concepts,”<sup>14</sup> or (3) providing differential treatment to individuals or groups based on discrete protected categories.<sup>15</sup> A Tennessee law, for example, prohibits public universities from requiring trainings on “implicit bias.”<sup>16</sup> In Texas, a secondary-education act banning diversity offices, hiring statements, and trainings for faculty and staff<sup>17</sup> led the University of Texas at Austin to shutter its Multicultural Engagement Center.<sup>18</sup>

States have also introduced diverse bills targeting LGBTQ+ populations. Some bills blatantly attempt to limit free speech or rights to assemble, such as Tennessee’s ban on “adult cabaret performances” in public places.<sup>19</sup>

discussing political or social topics.<sup>23</sup> A related class of bills require parental permission (e.g., Washington<sup>24</sup>) or notification (e.g., California<sup>25</sup>) to use a student’s preferred pronouns or chosen name. In Arizona, the Republican-majority state legislature is attempting to avoid Governor Katie Hobbs’ (D) potential veto of similar measures through a ballot initiative bypassing legislative processes.<sup>26</sup>

Another class of state bills would restrict certain activities through policies separating individuals by biological sex. The “Women’s Bill of Rights,” introduced in states including Georgia, Iowa, and West Virginia, creates legal definitions for “man” and “woman” tied to their binary biological sex,<sup>27</sup> contravening federal public health definitions.<sup>28</sup> Additional bills would limit the use of public accommodations such as bathrooms (e.g., North Carolina<sup>29</sup>), gym facilities or

based prescription drugs and procedures for those under 19 years of age under rules<sup>51</sup> set by the state's chief medical officer.<sup>52</sup> Ohio's legislature passed House Bill 68, the Saving Adolescents from Experimentation (SAFE) Act, on December 13, 2023.<sup>53</sup> It banned manifold GBC services for minors (with some exceptions) and disallowed Ohio's Medicaid program from covering such care.<sup>54</sup> Governor Mike DeWine (R) vetoed the SAFE Act on December 29, 2023. Yet he subsequently issued an executive order seven days later on January 5, 2024 invoking emergency authorities to direct the Ohio Department of Health to administratively prohibit gender transition surgeries on minors.<sup>55</sup> Citing evidence of mental and physical harms of gender-related care for minors,<sup>56</sup> the Ohio legislature overrode Governor DeWine's veto on January 24. The SAFE Act took effect on April 24, 2024.<sup>57</sup>

### Prospective Impacts on Health Care and Public Health Services.

These politically-charged legislative trends carry significant impacts for health care providers and public health officials. Anti-DEI bills aiming to preclude future physicians or nurses from health equity instruction have the potential to bias the delivery of care for years ahead.<sup>58</sup> Legislative provisions focused on LGBTQ+ and trans populations carry pronounced effects for health services including substantial sanctions for violating providers and facilities. After final passage of the SAFE Act, Ohio's Legislative Service Commission forewarned that health care professionals may face investigations, complaints, and potential violations through occupational licensure boards.<sup>59</sup> Illinois House Bill 4096 allows for licensure revocations of a physician who "willfully or actively participates" in performing a "sex-reassignment procedure" on a minor. Hospitals and other providers could face their own licensure denials for non-compliance.<sup>60</sup>

Additional criminal and civil penalties are proposed elsewhere. Kansas' legislature would criminalize GBC services for anyone under 21

years of age who was not born with "a medically verifiable disorder of sex development."<sup>61</sup> States like Arizona<sup>62</sup> and Wyoming<sup>63</sup> would allow civil claims against providers by patients or parents. Threats of criminal or civil sanctions carry chilling effects that may disincentivize medical professionals from providing care. In some states, however, the legislature seeks to empower providers' discretion to avoid specific care, assimilating denounced federal protections for conscientious objections.<sup>64</sup> A bill in Kentucky allows a "medical practitioner, health care institution, or health care payer" to refuse to participate in or pay for any health care service contrary to their "sincerely-held religious, moral, or ethical principles."<sup>65</sup> Persons standing in the way of providers exercising their conscientious choices may face civil claims. In Virginia, persons alerting the Attorney General or federal or state agencies of violations of its legislatively-proposed ban of trans surgeries would be entitled to whistleblower protections.<sup>66</sup>

### Navigating Tempestuous Legal Trends.

State legislative bills seeking to curb or reverse DEI, LGBTQ+, and GBC trends have unquestionable potential to directly influence health care and public health services, but not without political and legal resistance. Despite the deluge of new bills, the great majority of these measures introduced this past year have not been enacted.<sup>67</sup> Some passed bills have faced gubernatorial vetoes (e.g., Arkansas, Ohio). Specific measures may be preempted given direct conflicts with federal laws (e.g., anti-discrimination protections under the Affordable Care Act).<sup>68</sup> Some states are working to protect access to GBC by preventing laws passed elsewhere from interfering with care provided within their jurisdictions (e.g., Minnesota<sup>69</sup>), proposing constitutional amendments to assure access to GBC (e.g., Oregon<sup>70</sup>), or legislatively declaring "sanctuary state" status (e.g., Washington<sup>71</sup>).

Additional legal actions in courts nationally aim to obviate measures inhibiting health care providers in varying settings. Consistent with

Eighth Amendment prohibitions of "cruel and unusual punishment,"<sup>72</sup> for example, some courts have determined that prisoners are entitled to GBC services,<sup>73</sup> subject to limits on the scope of services provided.<sup>74</sup> Health care providers, patients, and parents have raised constitutional arguments grounded in equal protection, due process, and free speech violations. On these grounds, a federal district court in Arkansas invalidated a law preventing medical practitioners from providing or referring GBC for minors on June 20, 2023.<sup>75</sup> On December 26, 2023, a district court in Idaho similarly blocked a state law restricting GBC treatment.<sup>76</sup> The so-called "Vulnerable Child Protection Act"<sup>77</sup> outlaws the provision of certain GBC services for minors, including administration of puberty blockers, testosterone, and estrogen.<sup>78</sup> The court found that the law likely violated equal protection and due process by discriminating on the basis of sex and transgender status and infringing fundamental parental rights to make medical decisions for children.<sup>79</sup>

Other courts have ruled inappositely. On September 28, 2023, the Sixth Circuit Court of Appeals rejected due process and equal protection challenges to GBC service restrictions for minors in Tennessee and Kentucky, deferring to "accountable elected officials" to "sort[] out these medical, social, and policy changes."<sup>80</sup> In *L.W. v. Skremetti*, the court suggested parental rights do not extend to "obtain[ing] reasonably banned treatments for their children" and that sex discrimination did not arise because the bans equally deprived care to biologically male and female children alike.<sup>81</sup> It also declined to recognize transgender individuals as a suspect class sufficient to trigger strict scrutiny under equal protection. Invoking strict scrutiny would require government to demonstrate its actions are narrowly tailored to serving compelling governmental interests through the least restrictive means possible.<sup>82</sup> Most laws subjected to this standard of review are deemed unconstitutional. Ultimately, the fate of "anti-



equity” legislation in the 6th Circuit and beyond may lie within the marbled halls of the U.S. Supreme Court, which is considering reviewing the *Skremetti* decision.<sup>83</sup> The Court’s decision on the constitutional issues at stake may reverberate nationally in regards to patients’ access to GBC services and the efforts of health care professionals attempting to provide them.

#### Note

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