

**REPORT**

# **State Preemption: Regulating School District Authority in the United States**

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# State Preemption: Regulating School District Authority in the United States

## BACKGROUND

Law plays an important function in large-scale social issues, such as education, health care, and public safety, all of which are linked to the public's health and well-being. Increasingly, state legislators are using the law to threaten public health through preemption and preemptive tactics that prevent localities from passing health-focused laws and experimenting with innovative laws and policies that could improve overall health and well-being.<sup>1</sup>

Preemption is a legal doctrine that allows a higher level of government to limit or eliminate the regulatory authority of a lower level of government. In the United States (US) governmental system, preemption occurs at multiple levels of government: federal law can limit both state and local governments from passing new laws or amending existing laws related to a specific legal issue, and states can block or limit local governments from passing or changing local ordinances by statutory or constitutional law. There are two primary types of preemption: express and implied. Express preemption occurs when a law explicitly limits or bans the lawmaking authority of a lower level of government through legislation. Implied preemption occurs when a government authority invalidates the authority of a lower level of government, but the explicit preemptory language is not included in the law itself.

Since 2019, Temple University's Center for Public Health Law Research (CPHLR), in partnership with the National League of Cities (NLC) and with the support of the Robert Wood Johnson Foundation, have been tracking state legal actions that impact the social determinants of health. More specifically, researchers at CPHLR collected proposed bills, newly enacted laws, amended laws, case law, and attorneys general opinions that preempted local authority in 15 domains from August 1, 2019, to November 1, 2022, in all 50 states. These 15 domains — Ban the Box, firearms, mandatory inclusionary zoning, municipal broadband, mandatory paid leave, rent control, full disclosure tax requirements, general revenue limits, general expenditure limits, property tax rate limits, tax assessment limits, tax levy limits, transgender rights, local law enforcement

budgets, and race and racism in school curriculum — encompass a broad spectrum of issues that impact the social determinants of health.

This report focuses on key findings in two domains that capture a recent and alarming increase in legislative tactics that target school and individual autonomy — transgender rights for students and student athletes (K-12 students) and race and racism in school curricula (K-12 and collegiate students).

## PREEMPTION IN SCHOOLS

Schools have often been at the center of controversy in US history, with laws and court cases dictating many aspects of the educational environment, including who is allowed to attend (e.g., desegregation),<sup>2</sup> what are allowed to be taught (e.g., the debate around intelligent design and evolution),<sup>3</sup> and what the school environment looks like (e.g., making schools gun-free zones;<sup>4</sup> prohibiting discrimination based on sex).<sup>5</sup> In recent years, state legislatures have expanded their reach by regulating transgender students and how race is discussed and taught in the classroom. While many of the attempts to enact these laws ultimately failed, the sheer volume and scope of these bills are noteworthy and concerning from a public health perspective.

### Transgender rights in schools

Transgender people are individuals whose gender does not match the sex they were assigned at birth. Transgender people are at a higher risk for being victims of violence and for experiencing mental health diagnoses, social isolation, and suicidal ideation,<sup>6</sup> and these risks are expounded by laws that further stigmatize and isolate transgender people. Recent bills and laws have attempted to make new distinctions and rules related to gender identity in sports, sex education, and in bathrooms — employing primarily implied preemption, states have sought to require school districts to recognize the “biological” gender of a student rather than the gender with which they identify.

## Race and racism in curricula

In the wake of the 2020 protests following George Floyd's murder, schools were inspired to expand their curricula to include more diverse historical teachings, to recognize Black history as US history, and to integrate it into the curricula. School districts are typically given broad discretion regarding what can be taught in relation to history and social justice movements. However, in response to these efforts to be more inclusive, several states introduced bills which, once enacted, prevent school districts across from making changes to school curricula to teach certain aspects of history as they relate to race and racism. Both the introduced bills and enacted laws create a chilling effect that stifles teachings related to race and racism in the classroom.<sup>7</sup>

## TRANSGENDER RIGHTS IN SCHOOLS

Bills preempting transgender rights in schools span a large number of topics that include establishing a “Parent’s Bill of Rights” restricting classroom instruction on sexual orientation or gender identity;<sup>8</sup> removing library books on these topics;<sup>9</sup> limiting access to sports<sup>10</sup> and bathrooms based on an individual’s affirmed gender;<sup>11</sup> and the usage of pronouns.<sup>12</sup> Bills explicitly prohibiting gender affirming care for minors have been introduced at a rapid rate, antithetical to the advice of medical professionals and evidence indicating that gender affirming care significantly improves mental health and reduces depression and

suicidal ideation in transgender people.<sup>13, 14</sup> While the express target of these bills are transgender people, any individuals not fitting into the male/female construct — such as gender nonconforming, intersex, or nonbinary people — may also be impacted.

## Regulation of transgender athletes

Title IX of the Education Amendments of 1972 was signed into law to prohibit discrimination in schools based on sex.<sup>15</sup> At the time Title IX was enacted, sex was equated with gender but since then the US has undergone many large-scale cultural shifts, including increased visibility and acceptance of the transgender community. While there have always been those who do not fit into the binary male/female dichotomy, an increased number of people in the United States are currently afforded safe spaces to acknowledge, explore, or express their true gender identities. This shift has exposed the flaws and inadequacies of the civil rights laws surrounding sex.

In 2022, a significant number of states introduced bills that discriminate against transgender athletes, preventing them from participating in sports that align with their gender. In all, 26 states (AK, AZ, DE, GA, IA, IL, IN, KS, KY, LA, MD, MN, MO, NH, NJ, OK, PA, RI, SC, SD, TN, TX, UT, VA, WA, and WY) introduced 37 bills that prevent transgender individuals from playing on the team that match their gender identity. These bills generally focus on preventing people assigned male at birth from participating on designated female sports teams.

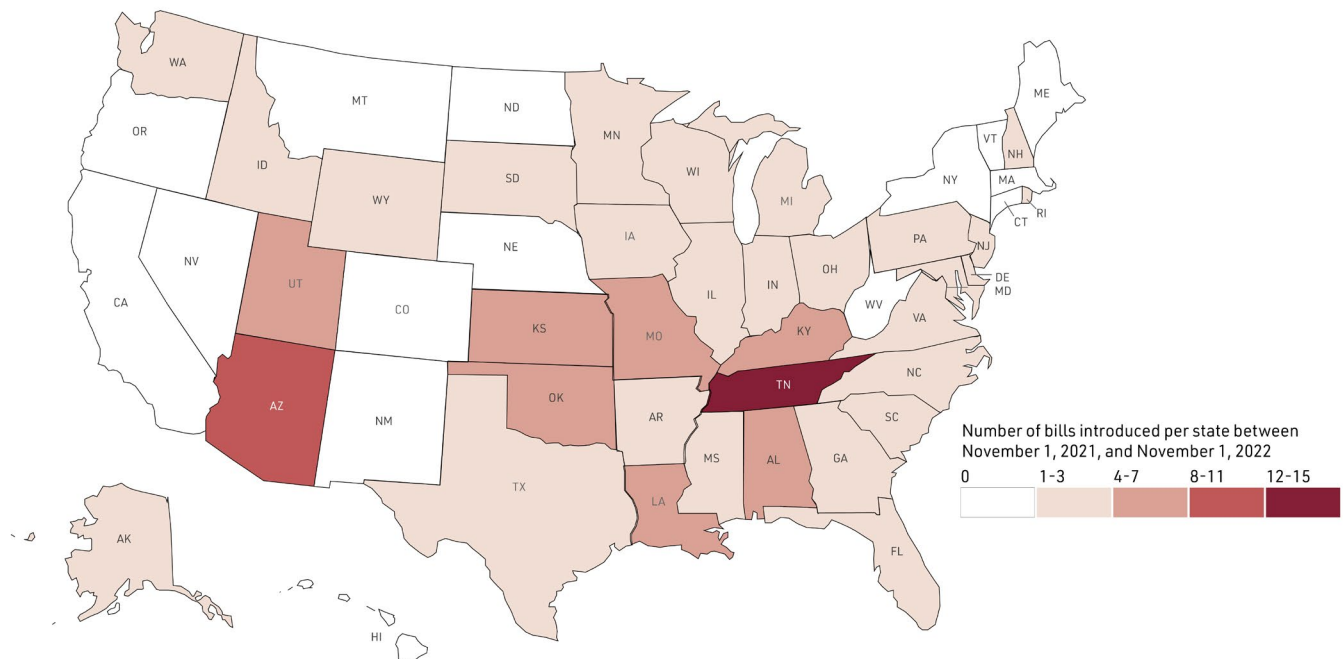


Figure 1: Bills introduced to restrict transgender rights between November 1, 2021, and November 1, 2022.

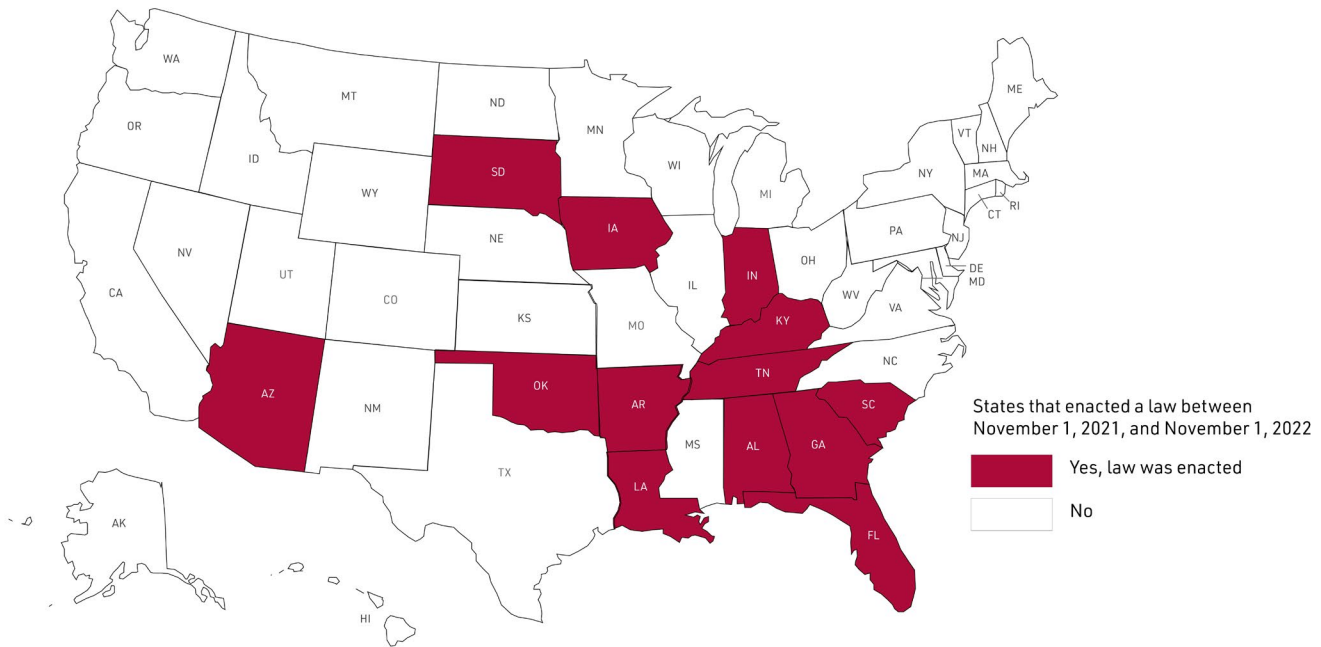


Figure 2: States that passed laws restricting transgender rights between November 1, 2021 and November 1, 2022.

For example, Oklahoma’s House Bill 4245, which passed committee but ultimately failed, would have required parents or guardians of students who compete on a school athletic team to sign an affidavit acknowledging the biological sex of the student at birth prior to each school year and notify the school within 30-days of any change in the status of the biological sex of the student.<sup>16</sup>

Of the 26 states that introduced bills regulating transgender athletes, 11 of these states (42.3%) — AZ, IA, IN, KY, LA, OK, SC, SD, TN, TX, and UT — succeeded in passing the discriminatory legislation. These laws vary in the grade levels they regulate; some only apply to public K–12 schools (Alabama)<sup>17</sup> or to higher education (Tennessee),<sup>18</sup> while South Carolina’s law applies to all levels of education (elementary, secondary, and post-secondary).<sup>19</sup> Like the bills, the laws also tend to focus more on prohibiting “biological males” (those who were assigned male at birth or issued male birth certificates) from participating in sports teams designated for females.

Some states take the regulation of transgender athletes a step further by including institutional or legal consequences when schools or districts fail to abide by the law.

- **Virginia (introduced bill SB 766; legislature adjourned without bill passing):** If passed, this bill would have prevented people assigned male at birth from participating on female-designated teams and created a cause of action for injunctive relief or damages for any student who had been deprived of an athletic opportunity or suffered any direct or indirect harm because of a school knowingly violating this ban.
- **Texas (introduced bill HB 23; legislature adjourned without bill passing):** The Save Women’s Sports Act would have required students to participate on the team that matches the biological sex on their birth certificate and would have added a cause of action for injunctive relief, damages, attorneys’

### STATE IN FOCUS: UTAH

Utah’s ban on transgender athletes became effective on July 1, 2022 and has a narrow exception allowing students who have undergone or are undergoing a gender transition to participate in gendered activities that do not correspond with the sex designated on the student’s birth certificate after notification of the transition to the athletic association and approval by the School Activity Eligibility Commission. The Commission will then decide if the “student’s assertion of a gender” is aligned with the statutory definition, if there will be implications for the student’s mental health, whether a student’s participation would be a safety risk, or if the student would have a “material competitive advantage.”<sup>20</sup> As part of the eligibility determination, the Commission has a closed meeting with the student, the student’s parents or guardians, the members and necessary staff of the Commission, and any medical professionals or other witnesses the student chooses to include to help make their case.<sup>21</sup> The Commission is also granted the authority to request medical information including diagnostic assessments.<sup>22</sup>

fees, and costs for students deprived of an athletic opportunity because of a violation by the school.

- **Tennessee (passed into law; effective July 1, 2022):** This law authorizes the Commissioner of Education to withhold a portion of the state's education finance funds for failure to comply with its transgender athlete ban.<sup>23</sup>
- **Oklahoma (passed into law; effective March 30, 2022):** This law permits students to bring a cause of action for legal relief (i.e., injunctive relief or damages) if they believe they have been deprived of an athletic opportunity or suffered harm, as a result of the school not enforcing the law.<sup>24</sup>

Overall, the regulation of transgender athletes further isolates transgender students from their peers and creates the potential for significant damage to their mental health.<sup>25</sup>

### Regulation of Bathrooms and Locker Rooms

Bathroom bills are used as a way to deny transgender people access to bathrooms and other public spaces that align with their gender identity, such as the 2016 law passed by North Carolina, House Bill 2 (HB2), which preempted municipalities from establishing their own ordinances to regulate discriminatory practices in places of public accommodation.<sup>26, 27</sup> While North Carolina's law is no longer in effect, other states have continued to introduce and pass similar laws. In 2022, both Alabama<sup>28</sup>

and Oklahoma<sup>29</sup> passed laws that prevent transgender individuals from accessing and using bathrooms and changing facilities that match their gender identities. Similar bills were introduced in Arizona,<sup>30</sup> and South Dakota,<sup>31</sup> though they ultimately failed to be enacted. All four instances applied to multiple occupancy restrooms and changing facilities in public schools.

## RACE AND RACISM IN THE CLASSROOM

In 2020, schools began to recognize the importance of more inclusive curricula.<sup>32</sup> In response, some states launched preemptive efforts to thwart these inclusive changes in education. One of the most frequently preempted curriculum frameworks is Critical Race Theory (CRT), an academic movement predominately found in law schools that analyzes the ways in which race and racism are structurally configured in society.<sup>33</sup> Although there is precedent for states to direct school curricula, recent state legislative efforts seek to make teaching on subjects related to race and racism increasingly difficult, if not impossible. The anti-CRT movement has lobbied legislators to limit how topics related to race and racism are taught in schools, undermining diversity, equity, and inclusion efforts in the public sector. This stands in stark contrast to how invaluable the CRT lens has become for population health.<sup>34</sup>

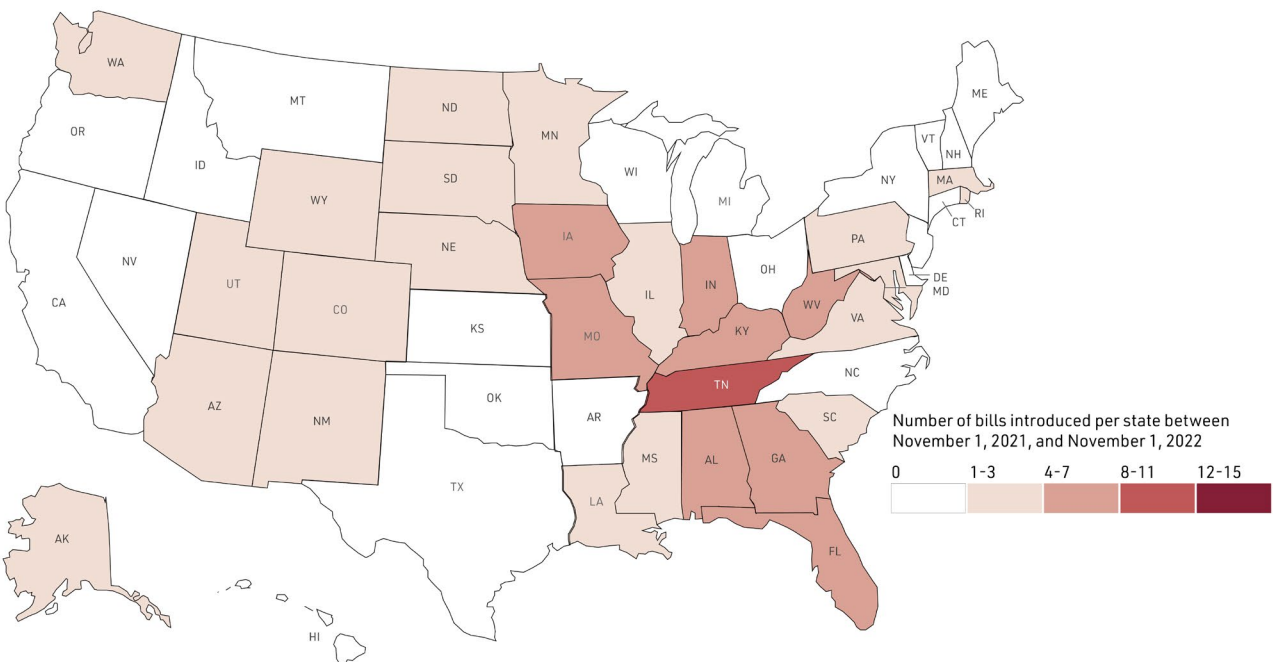


Figure 3: Bills introduced to restrict race and racism education in school curriculum between November 1, 2021 and November 1, 2022.



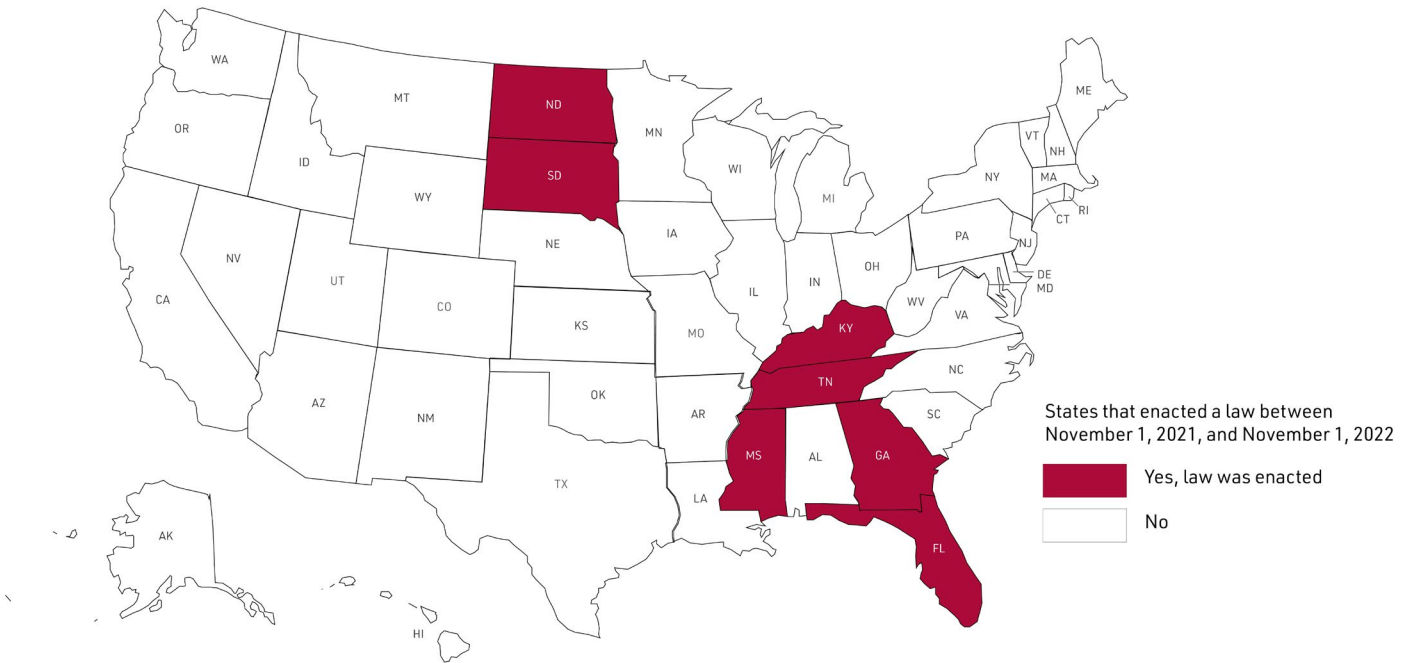


Figure 4: States that passed laws restricting race and racism in school curriculum between November 1, 2021 and November 1, 2022.

## Divisive Concepts

Prior to 2021, only one state (Arizona) had passed a law restricting the teaching of specific concepts related to race and racism<sup>35</sup> and that law had been deemed unconstitutional in 2017.<sup>36</sup> Since April 2021, 16 states have passed laws that prohibit teaching “divisive concepts” like CRT and systemic racism. For example, Arizona passed a law, Ariz. Rev. Stat. § 15-717.02, prohibiting the use of public money for instruction that “presents any form of blame or judgment on the basis of race, ethnicity or sex.” Again, this law was later found in violation of the state constitution, not on the substance of the bill but rather that the enacting bill, House Bill 2898, violated the single subject rule that prohibits combining different measures into one bill.<sup>37</sup>

The introduction and passage of these bills and laws gained significant momentum and in 2022 alone, 26 states introduced 54 bills restricting educators from teaching specific topics related to race and racism.<sup>38</sup> Some of the bills that passed into law went as far as to prohibit the phrase “Critical Race Theory” altogether.<sup>39</sup> These prohibitions have led to books related to race and racism being banned from schools<sup>40</sup> and several states taking actions to review, and potentially remove, Advanced Placement African-American Studies from the curriculum.<sup>41</sup> These efforts could erase marginalized communities in the education setting and eliminate key

mechanisms for advancing cultural consciousness and health equity.

Some states invoke the Civil Rights Act and use specific anti-racist language to take a sweeping approach to preempting school curriculum on race and racism and to ignore the very real impact of racial disparity and inequality. For example, Pennsylvania introduced House Bill 2521, titled the Anti-Indoctrination in Teaching Act, which prohibits “compel[ing] a person to adopt, affirm, adhere to or profess an idea in violation of Title IV and Title VI of the Civil Rights Act of 1964,” including the idea that people “cannot and should not attempt to treat others equally and without regard to age, sex, gender identity, sexual orientation, race, creed, color, marital status, familial status, mental or physical disability, religion or national origin.” The legislature adjourned without passing the bill.

Other states use vague language to regulate CRT. For example, Alabama House Bill 8 prohibits teaching specific “divisive concepts,” such as prohibiting discrimination, stereotyping, or scapegoating based on race or sex. While not included in the definition of “divisive concepts,” CRT is given as an example in the bill’s synopsis. These imprecise and far-reaching terms have a chilling effect on educators,<sup>42, 43</sup> prompting them to refrain from teaching anything related to race and racism under fear it may be illegal.<sup>44</sup>

## CENSORSHIP IN THE CLASSROOM

Some states have introduced broad “Parent’s Bill of Rights” bills that may affect many different aspects of a student’s educational journey — from immunizations to the right to religious education — but primarily these bills grant parents the right to review and control school curricula. These bills require schools to publicize their curricula and explicitly give parents the ability to question content they find objectionable, which is another path states have taken to regulate gender and race in schools across the country.

### STATE IN FOCUS: TENNESSEE



On January 24, 2022, Tennessee Senate Joint Resolution 862 was introduced to propose amending the state constitution to protect fundamental parental rights and the “liberty of parents to know, access, and direct the upbringing, education, and care of their children.”<sup>45</sup> Ultimately, the resolution did not pass.

Further, some bills require parental permission or an opt-out provision for any material provided to students related to sexual conduct.<sup>46, 47</sup> In 2022, Arizona, Florida, Georgia, and Virginia passed laws including Parent’s Bills of Rights or requiring permission prior to teaching lessons related to sexual orientation or gender identity. Nine states — KA, MS, MO, NH, NC, OH, SC, TN, and VA — proposed statutes that would include Parental Bills of Rights, none of which were ultimately signed into law.

These bills have also focused on curricula that address race and racism. Illinois introduced House Bill 5505, the Parental Access and Curriculum Transparency Act, giving parents the right to object to curriculum related to race and racism and obligated the school board to review any objections. The bill explicitly states that the wishes of the student’s parents shall take priority wherever and whenever possible. The legislature adjourned without passing the bill.

## CONCLUSION

Transgender rights and race and racism in education are two very large and complex topics that have been a near


constant presence in the news since 2020. State legislatures have introduced and, in some states, enacted a wave of bills and laws that stifle local autonomy to regulate and support gender and race in classrooms and schools. Frequently, these bills and laws have sought, directly and indirectly, to regulate a student’s personhood, relationship with their parents and caregivers, and their education, as well as a school’s relationship with parents and caregivers. These laws, while not all expressly preemptive, supersede the authority of local governments and local school boards from making rules and regulations that support and address transgender rights and race and racism in education.

The rapid introduction and passing of laws that target transgender individuals in schools and athletics, and limit education on sexual orientation, gender, race, and racism expose the gaps in the civil rights laws that were enacted to prevent discrimination based on sex and race. While many bills did not ultimately pass, their existence and support within state legislatures is alarming and the laws that did pass set a dangerous precedent. They are damaging to the mental health of vulnerable groups, and they prevent our society from achieving health equity.<sup>48</sup> Furthermore, they remove the ability of schools to create safe environments and to develop curricula that is responsive to their student bodies and communities. Overall, the states that are introducing bills and enacting laws not only prevent an education that is both inclusive and historically accurate, but they present concerning attempts to limit speech and personhood. ○



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