

What You Need to Know about Florida's “Don't Say Gay or Trans” Bill

The Florida legislature recently passed **HB 1557**, the notorious “Don't Say Gay or Trans” bill. If it is signed by Governor DeSantis, **it will take effect on July 1, 2022.**

What the Law Says and How it Will Be Enforced

The stated purpose of HB 1557 is to “prohibit[] classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner.” To that end, the legislation provides that:

Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.

In other words, “instruction . . . on sexual orientation or gender identity” – terms not defined by the legislation – is completely prohibited for students up to the third grade. Beyond the third grade, such instruction is permitted only to the extent that it is “age-appropriate or developmentally appropriate for students in accordance with state standards.” Because Florida state standards of instruction are fairly detailed, teachers should review the applicable state standards for their courses to determine to what extent such instruction is permitted in grades four and above. See, e.g., English Language Arts Standards for Grades K-5 at <https://www.fldoe.org/core/fileparse.php/5574/urlt/2021-K5E-LA.pdf>.

To enforce these prohibitions, HB 1557 requires schools to create a complaint procedure through which parents may raise “concerns” about compliance with the law. If those concerns are not resolved internally with the school, a parent may either (i) trigger an investigation by the Florida Department of Education, at the school’s expense or (ii) sue in court to obtain an injunction, damages, and/or attorney fees. These enforcement procedures are particularly problematic given the hostility of the Florida Department of Education to honest education generally, as evidenced by its administrative

action banning instruction on “critical race theory” and The 1619 Project, and equating these topics with Holocaust denial. See Fla. Admin. Code R. 6A-1.094124(3)(b).

As a result of the complaint process, and school districts seeking to avoid liability in court, if HB 1557 is signed and made law, individual educators could face serious consequences for violating HB 1557’s restrictions. School districts are “primarily responsible” for ensuring compliance with the law. See Fla. Stat. § 1008.32. A school could decide that discipline or termination is appropriate for violations of the law. The danger of enforcement against individual educators is amplified by the fact they enjoy relatively few job protections. For educators hired after 2011, tenure protections are nonexistent, and they can be dismissed at the end of their annual contracts without cause. Id. § 1012.335. And, while tenure protections are available for those hired before 2011, schools may still attempt to portray violations of the Florida Parental Rights Rule as “gross insubordination” or “willful neglect of duty” that would provide cause for discipline or dismissal. Id. § 1012.33.

It is also possible that a violation of the “Don’t Say Gay or Trans” bill could expose educators to proceedings to suspend or revoke their teaching certificates. State law provides that such action can be taken against any educator who “ha[s] violated the Principles of Professional Conduct for the Education Profession.” Id. § 1012.795(1)(j). The Principles of Professional Conduct, in turn, contain several restrictions—including, failure to “protect the student from conditions harmful to learning and/or to the student’s mental . . . health” and “intentionally violat[ing] or deny[ing] a student’s legal rights.” Fla. Admin. Code R. 6A-10.081(2); see also id. (“Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator’s certificate”). While we do not believe that charges under any of these provisions would have merit, it is possible that educators could be charged under them. Indeed, it is theoretically possible, that educators could be vulnerable to discipline or action against their teaching certification even for a mere failure to inform on a colleague they suspect of violating the

“Don’t Say Gay or Trans” restriction. That is because the Principles of Professional Conduct for the Education Profession mandate educators to “report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules.” Id. R. 6A-10.081(2)(c)(14).

If the Legislation is Signed; Legal Challenges Will Certainly Follow

NEA stands for the civil rights of LGBTQ families, students and staff not to be silenced or marginalized. Should the Governor sign this damaging bill that attempts to ban equal rights to LGBTQ people to say who they are and to shame LGBTQ students, staff members, and families, NEA will work with allies to defeat any attempt to enforce this misguided bill or violate the civil rights of students and educators.

There are multiple legal problems with the bill. As a threshold matter, the key terms of the bill are impermissibly vague because the phrase “instruction . . . on sexual orientation or gender identity” is poorly defined and could expose educators to possible discipline or licensure action. For example, if an educator cannot mention sexual orientation or gender identity in any way, can she teach books that recognize the mere existence of same-sex couples? For that matter, can she teach books that recognize the existence of any couples and their sexual orientation or that reference an individual’s gender in any way?

More fundamentally, if the law were applied to prohibit LGBTQ educators – and only LGBTQ educators – to disguise their identity in the presence of students, this

discriminatory difference in working conditions may violate Title VII, almost certainly causes harm on the basis of sex discrimination in violation of Title IX, and amounts to intentional discrimination in violation of the Equal Protection Clause under the Supreme Court’s recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Similarly, if the law were applied to prohibit LGBTQ students from equally participating in class discussions about their views, or to prohibit students with same-sex parents from equally participating in class discussions about their families, the law would almost certainly cause harm in violation of Title IX’s prohibition against discrimination on the basis of sex. The U.S. Department of Education has provided notice that it will enforce Title IX according to its terms, and following the logic of the *Bostock* decision, to prohibit the differential treatment of students or staff based on their gender identity or sexual orientation. And following the passage of the “Don’t Say Gay or Trans” bill, the U.S. Secretary of Education Cardona pointedly wanted Florida that the Department “stands with our LGBTQ+ students in Florida and across the country,” and urged “Florida leaders to make sure all their students are protected and supported.”

For more information on Title IX Protections for LGBTQ educators and staff see [NEA’s Toolkit on Combating Harassment and Discrimination](#) and [What You Need to Know About State Laws Attacking Transgender Youth](#).