

What You Need to Know about Florida's “Don't Say Gay” Law

This spring, Florida Governor Ron DeSantis signed into law [HB 1557](#), the notorious “Don’t Say Gay” bill. The law takes effect July 1, 2022. The “Don’t Say Gay” law was immediately challenged as unconstitutional on multiple grounds in a [lawsuit](#) filed on behalf of LGBTQ+ advocacy organizations, Equality Florida and Family Equality, and several students, parents and educators. No immediate ruling is expected in this important case. This short overview is intended to provide immediate guidance for members and allies confronting efforts to enforce the “Don’t Say Gay” law in their schools and classrooms.

What the Law Says and How it Will Be Enforced

The “Don’t Say Gay Law” states that its purpose is to “prohibit[] classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner.” To that end, the law provides:

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 in the law – 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.” The vagueness of the law raises numerous questions. Does it mean, for example, that an educator can use books with LGBTQ+ characters so long as the discussion of those books does not focus on their sexual orientation or gender identity? Does it mean that all discussion of families and

the many different ways families are formed must be avoided altogether in grades K-3? The Florida Department of Education has so far failed to give any guidance on these or countless other questions about how the law will be applied. It is important to know, however, that Florida law must give way to the non-discrimination protections of federal civil rights law that are detailed below. Accordingly, efforts by school administrators to enforce the “Don’t Say Gay” law in a way that prohibits only LGBTQ+ educators from discussing their family status or prohibits only children of same-sex marriages from discussing their families, violate those non-discrimination mandates and should be countered using the complaint procedures detailed below.

The “Don’t Say Gay” law itself 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. As a result of the complaint process, and school districts seeking to avoid liability in court, individual educators could face serious consequences for violating the state law’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 that 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 law 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” law could expose educators to meritless 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). Indeed, it is theoretically possible that educators could be subjected to such actions for simply failing to report a colleague they suspect of violating the “Don’t Say Gay” restriction (see id. R. 6A-10.081(2)(c)(14) requiring educators to “report to appropriate authorities any known allegation of a violation of the Florida School Code or State Board of Education Rules”), although given the uncertainties as to the law’s scope such actions appear to be unlikely.

Despite the uncertainties and vagueness of the law, as we head into a new school year, the Florida Education Association (FEA) has provided and will continue to update members with guidance on steps to take to navigate these difficult issues, and the FEA Legal Department will defend all FEA members in employment related actions.

Federal Law Prohibits Discrimination and Harassment Against LGBTQ+ Staff and Students


Although many questions remain to be answered about how the “Don’t Say Gay” law will be interpreted and applied, and it will take some time for legal challenges to the law to be resolved, it is important to know that federal anti-discrimination laws govern over conflicting state law. Federal civil rights laws prohibit Florida’s “Don’t Say Gay” law from being enforced by school districts in a way that results in discrimination or harassment of staff or students based on their sexual orientation or gender identity. That means, for example, that a school district may not prohibit only LGBTQ+ educators from answering students’ questions about their families, may not prohibit recognition and

discussion in class only of LGBTQ+ families, and may not require that only LGBTQ+ students hide their sexual orientation or gender identity at school.

Public (and private) school employees are protected under Title VII of the Civil Rights Act (Title VII), which prohibits discrimination against employees based on numerous characteristics, including sex, inclusive of gender identity and sexual orientation. This means that employers cannot consider an employee’s sexual orientation or gender identity when deciding who to hire, fire, or promote, or in assigning responsibilities, setting salary, providing benefits, or determining any other significant aspect of employment. Employers also cannot harass employees based on their LGBTQ+ status or allow others to create a hostile work environment for LGBTQ+ employees. Educators who have been discriminated against or harassed based on their LGBTQ+ status may file a complaint with the [Equal Employment Opportunity Commission \(EEOC\)](#).

Title IX of the Education Amendments of 1972 (Title IX), prohibits discrimination on the basis of sex in schools, including discrimination on the basis of gender identity and sexual orientation. That has been the determination of the U.S. Department of Justice and the U.S. Department of Education as to the appropriate interpretation of Title IX in light of the Supreme Court’s landmark 2020 *Bostock v. Clayton County* decision. Although Title IX is typically thought of as protecting students, it also applies to school employees, and like Title VII, prohibits employment discrimination, including sex-based harassment. Title IX also protects against forms of discrimination not specifically included in Title VII (such as discrimination in fringe benefits; selection and financial support for training and conferences; employer-sponsored activities, including those that are social or recreational; and leave related to pregnancy, childbirth and termination of pregnancy, see 34 CFR § 106.51(b)). Educators may seek redress under Title IX by filing a complaint with the [U.S. Dep’t of Education’s Office of Civil Rights \(OCR\)](#).

Title IX also protects students from harassment and discrimination based on sexual orientation or gender



identity. That means schools cannot discriminate against students by, for example, prohibiting access to extracurricular activities, school sports, or bathrooms consistent with a student's gender identity. Schools also may not harass, or permit others to harass LGBTQ+ students, by, for example, consistently refusing to call them by their chosen name or pronouns or repeatedly allowing other students to harass or bully them. Title IX also protects students and educators from retaliation for complaining about such discrimination or harassment. Students may seek redress under Title IX by filing a complaint with the [U.S. Dep't of Education's Office of Civil Rights \(OCR\)](#).

For steps schools can take to confront anti-LGBTQ+ discrimination and harassment in schools and ex-

amples of such harassment, see this [guidance](#) from the U.S. Department of Education and the U.S. Department of Justice. Harassment and discrimination can be reported to the U.S. Department of Education Office of Civil Rights, [here](#), or to the U.S. Department of Justice, [here](#)

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