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The Legal Implications of Anti-LGBTQ+ Curriculum Laws

Last March 2022, Florida's Governor Ron DeSantis passed and enacted the Parental Rights in Education Act, which then became known as the infamous "Don't Say Gay" bill.[1] The bill bans instruction on sexual orientation and gender identity "before the 4th grade and requires such instruction to be 'age-appropriate or developmentally appropriate.'"[2] The language of the bill itself is vague and broad and doesn't provide clarity about the law's compliance with non-discrimination and first amendment rights.[3] Critics argue that the statute doesn't define the meaning of "classroom instruction" or what constitutes "age-appropriate" or "developmentally appropriate" instruction, which leaves questions regarding the scope of the law.[4] The "Don't Say Gay" bill was based on the idea that parents have the fundamental right to make decisions regarding when and how their children should be introduced to certain topics, specially LGBTQ+ rights and history.[5] The law, by default, stigmatizes the identities of LGBTQ+ students, teachers and administrators and encourages them to hide who they are out of fear of retaliation by intolerant parents.[6] Furthermore, the "Don't Say Gay" bill inherently prevents teachers from educating children productively and introducing them to topics that are essential to their development.[7]

It is therefore critical to evaluate the legal implications of the "Don't Say Gay" bill which is part of a bigger issue; that issue being the rising number of anti-LGBTQ+ curriculum legislation in the United States.[8] Some of the legal implications include: (1) repression of freedom of speech and academic freedom; (2) targeted legal retaliation towards teachers and staff; (3) gender identity and sexual orientation based discrimination and harassment of educators, staff and students and; (4) more anti-LGBTQ+ curriculum laws being proposed at the national level.[9]

First, the bill infringes on teachers' and students' First Amendment rights because it requires censorship of any topic regarding sexual orientation and gender identity until the 4th grade.[10] Although public school teachers don't have absolute power over the school curriculum, their first amendment rights are certainly limited in the classroom context, regardless of their sexual orientation.[11] For instance, "What [happens] if a parent walks in the classroom and they're...a same-sex couple, "and somebody asks the teacher to explain that?"[12] Per the language of the bill, a teacher wouldn't be allowed to answer such a question, even if they're not encouraging a discussion because it could be construed as "instructing or teaching." [13] Nonetheless, even if the bill would not punish these sorts of questions, the law coerces teachers into censoring their speech to prevent legal retaliation by enraged parents.[14] Thus, the law discourages teachers from providing students with important information regarding queer issues such as sexual orientation and gender identity for fear of violating the law.[15] Moreover, the bill "restricts the ability of student[s]...to discuss topics related to sexual orientation and gender identity in class and related settings, and even restricts their ability to self-identify." [16]

Second, anti-LGBTQ+ curriculum laws encourage targeted legal retaliation towards teachers and staff that violate it because it directs parents to file complaints against the school and its employees concerning compliance with the law.[17] If the issues aren't resolved within 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." [18] This means that schools will pass the blame onto individual employees to avoid spending significant school resources on a lawsuit.[19] Furthermore, because school districts are mainly responsible for enforcing compliance with the law, non-compliance by educators may lead to termination or other

forms of disciplinary action.[20] As a result, this leaves teachers and educators at the mercy of bigoted parents and self-interested school boards.[21] Thus, parents will inevitably use the legal system and the courts to silence the individual freedoms of teachers and students as a way to utilize the system to oppress queer rights.[22] Therefore, “by opening the door to arbitrary and discriminatory enforcement against speech that favors...the inclusion...of LGBTQ+ individuals, the law arguably runs afoul of the First Amendment’s stringent prohibition on viewpoint discrimination and imposes an unconstitutional chilling effect on disfavored speech.”[23]

Third, the bill promotes discrimination and harassment of educators and students, especially those that are LGBTQ+.[24] The law itself may not contain language regarding such actions, but negating the topic and creating further stigma will embolden homophobic and transphobic people into harassing queer students and staff.[25] The “Don't Say Gay” law directly conflicts with federal anti-discrimination laws and Title IX protections.[26] Thus, the law cannot be enforced in a way “that results in discrimination or harassment of staff or students based on their sexual orientation or gender identity.”[27] Moreover, Title IX protects employees from being harassed by their employers based on their sexual orientation and it prohibits others from creating a hostile work environment for LGBTQ+ employees.[28] Passing and enforcing anti-LGBTQ+ curriculum laws signals to bigoted people that their opinions and discriminatory behaviors are welcomed. Thus, parents, employers and staff may be encouraged to harass queer educators as a way to remove them from their children’s school.[29]

Lastly, Florida’s “Don't Say Gay” bill has motivated other states and even the legislature into proposing and passing more harmful anti-LGBTQ+ curriculum laws.[30] In October 2022, Republicans in Congress introduced the “Stop the Sexualization of Children Act of 2022.”[31] This law stipulated that the use of any federal funds to “develop, implement, facilitate, or fund any sexually-oriented program, event, or literature for children under the age of 10, and for other purposes” would be prohibited.[32] The language of this law is extremely dangerous for LGBTQ individuals and children alike.[33] The law would essentially apply to all federally funded facilities and programs such as public libraries, hospitals, military bases, and federally funded schools.[34] What about parents that wish to expose their children to queer topics before the age of 10? Are they not free to educate their children as they see fit? Ironically, this contradicts Florida’s version because its main justification is freedom of parental rights.[35] This trend is very dangerous because it affects *both* LGQTQ+ rights inside and outside of the classroom as it seeks to remove all exposure to queer topics below a certain age, regardless of the parents’ desire to expose them to it.[36] As a nation, we must push for protections and discourage the rise of these anti-LGBTQ+ discriminatory laws.

[1] Edward Swidriski, *Florida’s “Don’t Say Gay” Law Raises Serious Legal Questions*, AMERICAN BAR ASSOCIATION (Nov. 22, 2022),

https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/florida-do-not-say-gay-law/.

[2] Abbie E. Goldberg, *IMPACT OF HB 1557 (FLORIDA’S DON’T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA 1* (UCLA Williams Institute School of Law & Clark University 2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf>.

[3] Swidriski, *supra* note 1; Goldberg, *supra* note 2, at 3.

[4] Swidriski, *supra* note 1.

[5] Meredith Johnson, *The Dangerous Consequences Of Florida's "Don't Say Gay" Bill On Lgbtq+ Youth In Florida*, 23 GEO. J. OF GENDER & THE L., 1 (2020).

[6] Goldberg, *supra* note 2, at 3.

[7] *Id.*

[8] Jo Yurcaba & Jay Valle, *A national 'Don't Say Gay' law? Republicans introduce bill to restrict LGBTQ-related programs*, NBCNEWS (Oct. 19, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/national-dont-say-gay-law-republicans-introduce-bill-restrict-lgbtq-re-rcna53064>.

[9] *What You Need To Know About Florida's "Don't Say Gay" Law*, NATIONAL EDUCATION ASSOCIATION 1, 3 (2022); Swidriski, *supra* note 1; Johnson, *supra* note 5, at 2-3; Goldberg, *supra* note 2, at 3.

[10] Swidriski, *supra* note 1.

[11] Brooke Migdon, *Does Florida's 'Don't Say Gay' bill violate the First Amendment?*, THE HILL (Mar. 5, 2022), <https://thehill.com/changing-america/respect/equality/596981-does-floridas-dont-say-gay-bill-violate-the-first-amendment/>.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Danielle J. Brown, *Lawsuit: So-called 'Don't Say Gay' law may have free speech implications for FL students, teachers*, FLORIDA PHOENIX (Apr. 1, 2022), <https://floridaphoenix.com/2022/04/01/lawsuit-so-called-dont-say-gay-law-may-have-free-speech-implications-for-fl-students-teachers/>.

[16] *Id.*

[17] *What You Need To Know About Florida's "Don't Say Gay" Law*, NATIONAL EDUCATION ASSOCIATION 1, 1 (2022).

[18] *Id.*

[19] *Id.*

[20] *Id.* (Disciplinary punishments include termination of employment or suspension. Moreover, “[a] violation of the ‘Don't Say Gay’ law could expose educators to meritless proceedings to suspend or revoke their teaching certificates.”).

[21] Swidriski, *supra* note 1.

[22] *Id.*

[23] Swidriski, *supra* note 1.

[24] Goldberg, *supra* note 2, at 2 (“LGBTQ+ parents reported that their children had already experienced a variety of impacts of the bill. This included harassment and bullying at school because they had LGBTQ+ parents, not being able to talk about their parents or their own LGBTQ+ identities at school or outside of school, and fears about continuing to live in Florida.”).

[25] *Id.*

[26] *What You Need To Know About Florida's "Don't Say Gay" Law*, *supra* note 16, at 3.

[27] *Id.* at 2.

[28] *Id.*

[29] Goldberg, *supra* note 2, at 2

[30] Yurcaba & Valle, *supra* note 8.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Johnson, *supra* note 5.

[36] Madeline Carlisle, *What Florida's "Don't Say Gay" Bill Could Mean for LGBTQ Kids*, TIME (Feb. 9, 2022), <https://time.com/6146664/dont-say-gay-bill-florida-impact/>.