Legislation Would Create Less-Welcoming School Environment for LGBTQ Youth and Leave School Districts Vulnerable to Frivolous Lawsuits

Overview

On March 28, 2022, Gov. Ron DeSantis signed into law HB 1557, one of the most contentious bills in recent Florida legislative history, entitled “Parental Rights in Education” and labeled the “Don’t Say Gay” Act by opponents. By pairing vague language with a new right for parents to sue and receive damages over the provisions in HB 1557, the act creates a “chilling effect” on the discussion or mentioning of sexual orientation or gender identity in Florida classrooms, and has strong potential to create less-welcoming environments in schools for LGBTQ youth and families.

A lack of clarity around the act’s definitions of “instruction” and “age-appropriate,” along with other uncertainties, will only be answered through litigation or new guidance from the Florida Department of Education (DOE). In the meantime, teachers, students, and their families are left fearful of the harmful impact that the constant threat of costly lawsuits will have on their classroom environments and already fiscally constrained school districts. Opponents also point to the act’s sole focus on sexual orientation and gender identity as unnecessarily targeting and stigmatizing the LGBTQ community.

HB 1557 has three main functions:

1) **Banning instruction related to sexual orientation and gender identity.** The bill includes the following language: “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.”

   Importantly, “instruction” is not defined for the purposes of this provision; neither is “age-appropriate,” the vagueness of which broadens the ban beyond just K-3 grades. Lawmakers purposely left the language vague — amendments that would have narrowed the language all failed during the legislative process. The type of classroom activity that would fall into the instruction category could ostensibly include things like teacher-involved discussions of different family types or reading materials provided by a teacher that center well-known LGBTQ historical figures. While these examples were debated in committee hearings, the final bill language did not explicitly exempt them from the ban.

   The ban on instruction on sexual orientation and gender identity is not limited to teachers and the classroom activities that they lead — it also extends to include “third parties,” often community nonprofit organizations that provide supports and prevention programming to students, such as antibullying workshops and classes. The act’s language could be interpreted as a ban on programs provided by these groups aimed at reducing bullying or supporting the mental health of LGBTQ youth, who are known to be at risk of suicide, depression, and anxiety. While it is hopeful that these programs would be explicitly exempted from the ban via litigation, the outlook for court decisions remains uncertain.
2) **Creating a new parental right to sue and receive damages if schools run afoul of provisions of HB 1557.** The act creates a new right for parents to sue if they feel their school has run afoul of the many provisions of HB 1557, including “instruction . . . on sexual orientation or gender identity.” Specifically, the act dictates that school districts shall adopt procedures for parents to notify their school’s principal regarding concerns related to HB 1557 and the school must resolve those concerns in seven days. If that concern is not resolved within 30 days, the parent can ask for a “special magistrate” at the school’s expense to resolve the issue, or the parent can sue and get injunctive relief, and a court may award damages and award attorney fees, also at the school’s expense.

By adding a provision that allows parents to sue and receive damages over perceived infractions of the provisions of HB 1557, lawmakers extended power of enforcement of the act to parents rather than relying on duly elected school boards and the DOE to ensure adherence, as they do with other areas of the state’s curriculum and parent protections written into law.

3) **Creating new parental rights regarding health services and records; requiring that student support services trainings adhere to DOE guidelines.** The act also contains several new requirements and restrictions for schools related to student mental health care, health records, and personnel trainings.4

Under HB 1557, schools:

a. Must notify a student’s parent if there is a change in services or monitoring related to the student’s mental, emotional, or physical health or well-being.

b. Must encourage a student to discuss issues related to his or her well-being with his or her parent.

c. Must not withhold from a parent, or encourage a student to withhold, information related to a student’s mental, emotional, or physical health or well-being, while making an exception for a reasonable belief that disclosure would subject the student to abuse, abandonment, or neglect.

d. Must notify parents of all health care services offered at their student’s school and provide parents the opportunity to individually consent to, or decline, each service. Additionally, schools may not administer a well-being questionnaire or health screening form to a student in kindergarten through grade 3 without first receiving consent from the student’s parent.

e. Must adhere student support services trainings to guidelines and standards of the DOE.5

**HB 1557 and Title IX Considerations**

Title IX of the federal Education Amendments of 1972 includes protections against discrimination based on sex in educational programs and services that receive federal financial assistance (all school districts in
Florida receive federal funding). The U.S. Department of Education has confirmed these protections against discrimination extend to sexual orientation and gender identity.6 Relatedly, in a statement responding to the signing of HB 1557 into law, U.S. Secretary of Education Miguel Cardona stated: “we will be monitoring this law upon implementation to evaluate whether it violates federal civil rights law.”7

By banning discussions and resources related to sexual orientation and gender identity in kindergarten through grade 3 (and likely beyond), Florida lawmakers have put schools between a rock and hard place — HB 1557 on one side, and Title IX on the other. While they may be at risk of losing funds to lawsuits from parents, they may also be at risk of losing federal funds if found to discriminate against students based on sexual orientation or gender identity.

For more info:
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1 HB 1557 passed the House on February 22, 2022, 69-47, and the Senate on March 8, 2022, 22-17; in a relatively rare occurrence, members of both parties voted in opposition in both chambers.
2 The Florida Department of Education (DOE) recently rescinded guidance to school districts aimed at reducing bullying of LGBTQ youth; subsequently, opponents of the Act question the reliability of DOE to publish guidance that protects and supports the rights and well-being of LGBTQ students. (See: Renzo Downey, “Anti-bullying page, including pro-LGBTQ links, removed from Education Department website,” Florida Politics, Dec. 6, 2021, https://floridapolitics.com/archives/477905-anti-bullying-page-including-pro-lgbtq-links-removed-from-education-department-website/.)
3 While not included in the law’s actual language, the preamble for HB 1557 states that the law “prohibit(s) classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner;” (emphasis added). Litigators use bill preambles at times to build context and legislative intent.
4 These provisions act as lawmakers’ response to a lawsuit against Leon County Schools, wherein a parent contends the school did not consult them before treating their child, who was questioning their gender, in a gender-confirming way.
5 As stated in endnote 2, the DOE’s recent actions around anti-bullying guidance and other actions created doubts for act’s opponents about the agency’s commitment to creating a safe and inclusive environment for LGBTQ youth. (See: LITTLEJOHN et al v. SCHOOL BOARD OF LEON COUNTY et al, https://dockets.justia.com/docket/florida/flndce/4:2021cv00415/416818.)