‘Don’t Say Gay’ Bill Vulnerable to Legal Challenges On Many Fronts

03/17/22

(Excerpts from this story were originally published in Washington Blade)

With Gov. Ron DeSantis expected to sign the “Don’t Say Gay” bill, legal experts are already seeing myriad ways to challenge the measure in court from multiple angles under federal law and the U.S. Constitution — and a lawsuit may emerge shortly after the Florida governor pens his name to the measure.

Legal challenges could emerge given the measure’s impact on LGBTQ students and families as well as LGBTQ teachers under the federal civil rights law on employment and education, such as Title VII of the Civil Rights Act of 1964 or Title IX of the Education Amendments of 1972. Cases could be made under the U.S. Constitution, experts say, given arguable threats to freedom of speech under the First Amendment as well as the singling out of LGBTQ families under the Equal Protection Clause in the Fourteenth Amendment.

Key portions of the “Don’t Say Gay” bill, titled HB 1557, reveal the potential penalty for the slightest hint of talk about LGBTQ kids and families in schools, therefore the potential for challenging the measure in court as a discriminatory law. The possibilities for legal challenges would come at great expense to the state if it were to defend the law in court.

Under the legislation, schools for children in kindergarten through grade 3 may not engage in “instruction” about sexual orientation and gender identity, or generally throughout the education system “in a manner that is not age-appropriate or developmentally appropriate for students.” Although the legislation allows for internal review and resolution if a parent brings a complaint against the school for violating the measure, the “Don’t Say Gay” bill also empowers a parent of a student who feels the law was violated to “bring an action against a school district” in court to seek damages.

Proponents of the bill downplay it as a parental rights measure aimed at preventing K-3 students from being taught sex education or teachers engaging in critical general theory writ-large in the Florida school system, but the measure contains no limiting principle restricting its impact to those concepts.

David Flugman, a lawyer at the New York-based Selendy & Gay PLLC whose practice includes LGBTQ rights, said restrictions of the measure on speech in schools make the protections under the First Amendment a possible choice for "a serious challenge" to the "Don't Say Gay" measure.

"I do think that there are First Amendment grounds to challenge this on from the perspective of teachers," Flugman said. "The state has a pretty strong interest in what's taught in schools and what ages. Now, usually that goes through the Department of Education or something like that as opposed to the legislature doing it this way. But the fact that you're basically barring an entire topic of conversation, that on its face seems like it's content-based speech regulations, which is usually subject to strict scrutiny under First Amendment law."

Flugman also said he could "definitely see" a clear-cut case based on Title VII against the "Don't Say Gay" measure from LGBTQ teachers in Florida who feel the need to keep quiet about their sexual orientation or gender identity.

"Title VII is pretty broad in that; it's not just hiring or firing, but it's the terms of employment and how someone is treated at work and the benefits and all of that. And so, if someone is basically being forced to hide their identity in a school in Florida as a result of this bill, I think that you absolutely could see a claim under Title VII against the school district for that."

Flugman went on to say he could see a lawsuit against the measure based on a right to education similar to a case his team litigated in the Sixth Circuit, although he conceded he doesn't know the case law is developed within the 11th Circuit, which has jurisdiction over Florida.

"The case in the Sixth Circuit came up in the context of race discrimination in certain Michigan schools in Detroit," Flugman said. "But could you make an argument like along those lines? It's a lot more inchoate. There's not a firmly established right there, a creative plaintiff could frame the claim there as well and try and get some traction."

Read the full article in Washington Blade.

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