

National Day of Silence: The Freedom to Speak (Or Not)

Frequently Asked Questions, Answered by Lambda Legal

March 2012

April 20, 2012 is the National Day of Silence, a student-led action sponsored by Gay, Lesbian and Straight Education Network's (GLSEN) in which thousands of students around the country will remain silent for all or part of the school day to call attention to the harassment and discrimination faced by lesbian, gay, bisexual and transgender youth.

Over the years, GLSEN and Lambda Legal have heard from hundreds of students, parents and allies who have encountered resistance from their schools and school officials in response to their efforts to participate in Day of Silence activities. Whether a school's actions are based on school officials' misunderstanding of the law, a desire to avoid controversy, or intended to blatantly discriminate against LGBT-supportive speech, they may be violating your rights even though they are less obvious forms of discrimination and censorship.

Do students have the right to participate in and advocate for the Day of Silence?

In most circumstances, yes. Under the Constitution, public schools must respect students' right to free speech.ⁱ The right to speak includes the right not to speak, as well as the right to wear buttons or T-shirts expressing support for a cause. This does not mean students can say—or not say—anything they want at all times. There are some limits on free speech rights at school.

For example, schools have some control over students' speech in the classroom or during other supervised, school-sponsored activities.ⁱⁱ If a teacher tells a student to answer a question during class, the student generally doesn't have a constitutional right to refuse to answer. Students who want to remain silent during class on the Day of Silence are less likely to encounter problems if they seek permission from their teachers beforehand.

However, school officials are NOT allowed to discriminate against you based on your message.ⁱⁱⁱ In other words, school officials may not censor a student just because they disapprove of the student's ideas, because the student's speech makes them uncomfortable or because they want to avoid controversy.^{iv} Outside of the classroom, in areas like hallways and cafeterias, students have a much broader right to free speech. Schools can't censor students unless they use lewd or foul language, promote illegal drug use, harass other students or substantially disrupt the school environment.^v

If you believe your right to freedom of expression has been violated, Lambda Legal may be able to help or advise you.

www.dayofsilence.org/legalhelp

Do students have a right to display posters and make announcements about the Day of Silence?

In many circumstances, yes. If a public school generally allows students or student organizations to display posters or make announcements on the public address system—the school may not deny or otherwise restrict your right to display posters or use the PA system based on your message or viewpoint (so long as you do not use lewd or foul language, promote illegal drug use, harass other students or substantially disrupt the school environment).^{vi} So if students are generally allowed to announce events and put up posters on school property, Day of Silence participants must be allowed to announce events and put up posters too.

If you believe your school is unlawfully restricting or censoring your right to freedom of expression, Lambda Legal may be able to help or advise you.

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Can a school justify banning speech by claiming it will be disruptive?

In most circumstances, no. If a public school wants to restrict student expression because it fears disruption, school officials have to show facts that reasonably lead them to believe that the speech will cause a substantial disruption to the school.^{vii} A school can't just assume that the Day of Silence or speech related to it will disrupt the school. And schools can't censor students just because other students might respond in a disruptive way. If students who disagree with a speaker's ideas create a disruption, the school can punish the disruptive students but can't punish the speaker.^{viii} So, for

example, if a Day of Silence participant puts up a poster and another student responds with name-calling and harassment, the solution must be to discipline the harasser and to protect, not censor, the Day of Silence participant.

If you believe you have been unfairly punished or censored based on the school's claim of "disruption," Lambda Legal may be able to help or advise you. www.dayofsilence.org/legalhelp

What if a school says it has to restrict Day of Silence activities so community members won't think the school is endorsing the event?

Schools have more control over student speech if other students or community members would reasonably believe the speech represents the school's own speech or viewpoint. For example, if a student helps write an official school publication, like a school newsletter, the school has some control over what the student says because people reading the publication may think the school endorsed the student's expression. But this doesn't give the school the right to control what students express on their own, or what they express through means generally open for independent student expression at school, like posters and morning announcements. Schools cannot discriminate against students based on their ideas in those situations because nobody could reasonably think that the student speech represents the school's speech. In the words of former Supreme Court Justice O'Connor, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated."^{ix}

If you believe your right to freedom of expression has been violated or that you are being unfairly censored based on your school's claim of "endorsing" Day of Silence, Lambda Legal may be able to help or advise you.

www.dayofsilence.org/legalhelp

Can a school restrict student speech because it offends other students or parents?

No. So long as student expression isn't lewd or profane, advocate violence or illegal activity and doesn't harass others, schools can't restrict it just because some students or parents find it offensive. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."^x

If you believe your right to freedom of expression has been violated, Lambda Legal may be able to help or advise you.

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Are there other ways in which schools might interfere with Day of Silence activities - aside from blatantly denying students the right to participate?

Yes. Although your school may allow you to participate in some DOS activities, they may also restrict or infringe on your ability to do so in a way that violates your rights. Examples from past years include:

- Not providing students with an opportunity to meet with the Principal, or otherwise attempting to avoid giving students permission to participate in Day of Silence activities and then telling students that "it is too late";
- Telling students that they cannot individually participate without a club to sponsor DOS;
- Attempting to rename the DOS "Diversity Day" or otherwise co-opt students' messages;
- Allowing students to use the PA system, but rewriting what the students want to say or providing a script;
- Providing students who do not want to be exposed to DOS messages an excused absence (a get-out-of-school-free pass);
- Allowing students to have a table to distribute materials, but requiring the table to be in a location or at a time where students rarely pass by.

If you feel that your school is unfairly restricting your ability to participate meaningfully in Day of Silence, Lambda Legal may be able to help. www.dayofsilence.org/legalhelp

More questions?

For more information about students' legal rights, contact one of Lambda Legal's regional Help Desks. Phone numbers and additional information are available at:

www.lambdalegal.org/help.

For more information about the Day of Silence, including tips on how to organize your own Day of Silence at your school, visit www.dayofsilence.org.

ⁱ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see also *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *id.* at 2636-38 (Alito, J., concurring); *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd. of Nassau Cty.*, 602 F. Supp. 2d 1233, 1235-38 (M.D. Fla. 2009).

ⁱⁱ See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 270-73 (1988).

ⁱⁱⁱ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Tinker*, 393 U.S. at 505-06; *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280 (5th Cir. 2003).

^{iv} *Tinker*, 393 U.S. at 509; *Gillman ex rel. Gillman v. Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359, 1365-75 (N.D. Fla. 2008); *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000).

^v *Morse*, 127 S. Ct. at 2625-29; *id.* at 2636-38 (Alito, J., concurring); *Gonzalez ex rel. Gonzalez v. Sch. Bd. of Okeechobee Cty.*, 571 F. Supp. 2d 1257, 1268-69 (S.D. Fla. 2008). Some courts may also uphold a school dress code that limits messages worn on clothing, so long as the dress code is evenhandedly applied and does not discriminate based on the content or viewpoint of a student's message.

^{vi} See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995); *Prince v. Jacoby*, 303 F.3d 1074, 1086, 1091-92 (9th Cir. 2002).

^{vii} *Tinker*, 393 U.S. at 514; *Pinard v. Clatskanie Sch. Dist.* 6J, 467 F.3d 755, 768 (9th Cir. 2006); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1075 (D. Nev. 2001).

^{viii} *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003); *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980); see also *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949).

^{ix} *Bd. of Ed. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (*plurality op.*).

^x *Texas v. Johnson*, 491 U.S. 397, 414 (1989).