

## GLSEN's Day of Silence: The Freedom to Speak (Or Not) Common Questions, Answered by Lambda Legal

April 16, 2010 is the Gay, Lesbian and Straight Education Network's (GLSEN) National Day of Silence. 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.

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

**A** In most circumstances, yes. Under the Constitution, public schools must respect students' right to free speech.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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.

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.<sup>5</sup>

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

**A** In many circumstances, yes. If a public school opens up an opportunity for student speech — for example, by allowing students or student organizations to display posters or make announcements on the public address system — the school may not create restrictions based on the message or viewpoint that students want to express.<sup>6</sup> 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.

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

**A** 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.<sup>7</sup> 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.<sup>8</sup> 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.

**Q** *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?*

**A** 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 contexts 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."<sup>9</sup>

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

**A** No. So long as student expression isn't lewd or profane, 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."<sup>10</sup>

**Q** *More questions?*

**A** For questions about legal issues related to the Day of Silence, write to [Lambda Legal at schoolhelp@lambdalegal.org](mailto:schoolhelp@lambdalegal.org), or call (212) 809-8585 and ask for the Day of Silence Help Desk. 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](http://www.dayofsilence.org).

<sup>1</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); see *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007); *id.* at 2636-38 (Alito, J., concurring).

<sup>2</sup> *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).

<sup>3</sup> *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).

<sup>4</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 270-73 (1988).

<sup>5</sup> *Morse*, 127 S. Ct. at 2625-29; *id.* at 2636-38 (Alito, J., concurring); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002).

<sup>6</sup> 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).

<sup>7</sup> *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).

<sup>8</sup> *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).

<sup>9</sup> *Bd. of Ed. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (plurality op.).

<sup>10</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989).