IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AMBER HATCHER, by and through her next friend, GREGORY HATCHER Plaintiff, vs. DESOTO COUNTY BOARD OF EDUCATION, et. al., Defendants.	)	Civil Action File No.:_____

PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM

Plaintiff Amber Hatcher ("Amber"), by and through her father and next friend Plaintiff Gregory Hatcher, moves this Court, pursuant to Fed.R.Civ.P. 65 and Local Rule 4.06, for a preliminary injunction against the enforcement of DeSoto County School District Board of Education's policies, practices and actions by its representatives that unconstitutionally restrain, regulate and chill student speech and expressive activities, and against retaining and/or disseminating Amber's school records reflecting disciplinary actions based on these unconstitutional policies, practices and actions.

INTRODUCTION

This case concerns the efforts of Amber Hatcher, a 15-year-old student at DeSoto County High School, to organize and participate in the annual National Day of Silence ("Day of Silence"), a student-led event that takes place in schools across the country in an effort to bring attention to the harms associated with bullying and harassment directed at lesbian, gay,

bisexual and transgender ("LGBT") students. Despite Amber's proactive efforts to ensure that her rights were respected, school officials refused to permit her to participate; threatened her with discipline if she defied their orders; suggested to her parents that they keep her home from school in order to silence her; and prevented her from taking part in both the peaceful, passive, non-disruptive event and her own expressive educational efforts by suspending her from school for most of the day because she refused to be bullied into surrendering her constitutional rights.

FACTUAL BACKGROUND

Every year on the third Friday of April, students across the country take part in the Day of Silence, a student-led expressive event that brings attention to the name-calling, bullying and harassment that LGBT students routinely endure in schools. The event was founded in 1996 by University of Virginia students who wanted to find a way to bring attention to anti-LGBT name-calling, bullying and harassment on campus. *See* Exh. 1. The event encourages students to take a vow of silence–communicating by other means and breaking their silence only when called upon to participate in class–to bring attention to the silencing effect of anti-LGBT harassment on LGBT students and to encourage change on their school campuses.

The need for, and motivation behind, Day of Silence is based on the reality of students' experiences in schools, where polls and surveys show that two of the top three reasons students are harassed in school are actual or perceived sexual orientation and gender identity or expression and that nearly 9 out of 10 LGBT students experience harassment at school. *Id.* The purpose of the Day of Silence is to make schools safer for all students, regardless of

sexual orientation and gender identity/expression. *Id.* Thousands of students across the country participate in the Day of Silence every year to bring attention to this problem, to let students who experience such bullying know that they are not alone and to ask schools to take action to address the problem. *Id.*

The Gay, Lesbian & Straight Education Network ("GLSEN") is a nonprofit organization established in 1990 and the leading national education organization focused on ensuring safe schools for all students. Although student-initiated and led, GLSEN helps students organize Day of Silence in their schools and, in 2001, became the official organizational sponsor for the event. As part of its efforts to help students initiate and participate, GLSEN hosts a website that lists pages of information, including, for example, Lambda Legal's "Freedom to Speak, Or Not," "Organizing Outline," and "ACLU Letter." Though it is not legally required, GLSEN advises "getting support from the school administration" and that "students interested in participating discuss their intentions with their administration and teachers long before the event." Exh. 1.

Amber decided to organize a Day of Silence at her school because she wanted to take a stand against homophobic bullying and in support of LGBT equality. She sought to minimize problems by following the suggestions on the GLSEN website with respect to getting support from the school administration and otherwise discussing her intentions to participate. Nearly a month before Day of Silence was scheduled to take place on April 20, 2012, Amber approached Defendant Principal Shannon Fusco ("Principal Fusco") to explain the purpose of, and her plans surrounding, Day of Silence and sought permission and assurance that she could organize the event and participate without adverse consequences. As part of her efforts,

Amber provided Principal Fusco with documents she had downloaded from the GLSEN website, including information about students' legal right to take part in the event, to augment her verbal description of Day of Silence. Principal Fusco repeatedly told Amber that she could not participate, "that peaceful protests are against District Policy" and that her request had been "denied" by Defendant DeSoto County School Superintendent Adrian Cline ("Superintendent Cline"). *See* Exhs. 2-4. Amber appealed this decision directly to Superintendent Cline.

On April 10, 2012, April 12, 2012, and again on April 13, 2012, Amber sent emails to Superintendent Cline in which she appealed Principal Fusco's denial; explained the purpose and importance of Day of Silence; and sought from him the assurance that she and other students could participate without adverse consequences or disciplinary action. Amber included in the emails to Superintendent Cline legal authority and school policies that should have protected her right to participate in the upcoming expressive event. Indeed, Amber succinctly summed up her simple request:

> Honestly, we are not asking for much. All that we desire is the cooperation of the administration and to be allowed to put up posters. Many of the students who plan to participate will do so, whether administration approves or not. I just want to save myself and my peers from disciplinary action and help our school.

Exh. 2-4.

On April 13, Amber resent the email to Superintendent Cline, marked "Urgent," and with the following post-script:

> I apologize for sending this email multiple times, but April 20th is approaching fast. Considering that this will be the third time I've sent this email, the next logical step would be to set up an appointment at your offices. I can only do

this as a last resort, but rest assured with the knowledge that I will do all I can to organize this event.

Exh. 4.

Superintendent Cline did not respond directly to Amber's multiple emailed appeals of Principal Fusco's decision. However, he directed his subordinate, Principal Fusco, to communicate to Amber his decision that it was against school "practice" to allow students to participate "in protests" and that Amber's request was therefore "denied." *See* Exh. 5. In executing Defendant DeSoto County School District Board of Education ("School Board") policy, practice and/or the decision by Superintendant Cline as the school board's final decision-maker, and in otherwise interfering with student speech activities, the School Board's agents and representatives embarked on a campaign to discourage Amber and other students from participating in Day of Silence. Among the tactics employed in achieving the goal of ensuring that no student participated in the expressive event were, without limitation, the following:

- Principal Fusco told Amber directly on multiple occasions that she could not take part in Day of Silence, communicating Superintendent Cline's position that doing so was against school policy and/or practice and would result in discipline. *See* V. Compl., par. 26-30; Exh. 6.
- Superintendent Cline acknowledged receipt of the documents Amber provided describing Day of Silence and appealing the decision and directed Principal Fusco to communicate to Amber that her request to participate in Day of Silence "is disapproved" by email dated April 12, 2012. *See* Exh. 5.
- On April 12, 2012, Principal Fusco notified Superintendent Cline by email that she had communicated his denial and that Amber continued to attempt to get assurance that her rights would not be infringed and "each time I have told her no and what the ramifications would be if the protest occurred." *See* Exh. 6.
- On April 12, 2012, Principal Fusco notified the Superintendent, pursuant to his directive, that she had relayed to Amber the school administration's position that

she could not participate in Day of Silence and the "ramifications" for doing so and also promised to "clarify the matter with her again tomorrow." *See* Exh. 6.

- Superintendant Cline refused to grant, or even respond to, Amber's appeal of the Principal's decision following her email on April 13, 2012, despite his knowing that the Principal intended to reiterate that Amber would not be allowed to participate in Day of Silence on April 20, 2012.
- Principal Fusco called Amber's house on April 19, 2012 and told her parents that Amber would be disciplined if she came to school and participated in the event and suggested they keep her home from instructive time in order to ensure that she did not take part in it.
- Principal Fusco and Superintendent Cline ignored a letter dated April 19, 2012 sent by electronic mail and facsimile, from counsel of record, a staff attorney at the national LGBT civil rights law firm Lambda Legal, setting out that students intended to take part in Day of Silence; the law supports their rights to do so; and interference with students' efforts to peacefully participate in Day of Silence could result in litigation. *See* Exh. 7.
- Despite all the above efforts, Principal Fusco sent an email directive to all DeSoto County High School teachers at 8:47 AM on April 20, 2012, directing them to notify administration of any student "they suspected of participating" in Day of Silence by "wearing placards" or "refusing to participate in class by taking part in a silent protest," claiming that doing so "is considered a disruption." *See* Exh. 8.

School officials delivered on their threats to interfere with the planned speech activities and discipline students for attempting to take part in the event. As verified by Principal Fusco to Superintendent Cline's executive assistant, "two students received consequences from protesting for LGBT day of silence" and "[t]wo other students were asked to comply with removing their protest tags." Exh. 9.

Amber was one of the two students who received a "consequence" for "protesting for LGBT day of silence." Exh. 9. As admitted by Principal Fusco in an email to Superintendent Cline, Amber was disciplined because she "was dressed in a shirt protesting the occasion." *See Id.* Amber's shirt carried the message, "DOS April 20, 2012: Shhhhh." *See* V. Compl., 40. Although no disruption occurred as a result of Amber's expressive efforts in her first- and

second-period classes, Amber was called to the administrative office moments after her third-period class began. *See* V. Compl., paras. 42-43; Exh. 9. When she arrived, the Dean of Students, Defendant Ermatine Jones ("Dean Jones"), began the conversation by saying simply, "Principal Fusco told you not to do this." *See* V. Compl., para. 43. Dean Jones then gave Amber a choice between in-school suspension and out-of-school suspension for the day. *See* V. Compl., para. 43. Amber broke her silence by insisting that the school was violating her rights, and provided Dean Jones with her parents' phone numbers. *See* V. Compl., para. 44. As verified by Principal Fusco, Amber "was placed in the Intervention Room since they could not be reached." *See* Exh. 9.

R.M. was the other student referenced in Principal Fusco's admission that two students had received consequences for taking part in the Day of Silence. R.M. was sent to the office during his third-period class, where he was directed to remove the writing on his hand that said "DOS: Think of the voices you aren't hearing." *See* V. Compl., para. 48. According to Principal Fusco, because of Richard's expressive efforts, he "was sent home for the day." Exh. 9.

Both Amber and Richard were removed from instructive time and sequestered from the peers to whom they sought to communicate based solely or primarily on their expressive efforts to participate in Day of Silence. Defendants allow students at DeSoto County High School to express: 1) non-protest messages; 2) messages unrelated to Day of Silence; 3) messages unrelated to support for LGBT students; and/or 4) messages unrelated to protesting anti-LGBT bullying, through verbal and nonverbal communication, on t-shirts, and in writing without adverse consequences. Superintendent Cline ratified Principal Fusco's actions as

outlined above by admission and omission where he did not correct, clarify, overrule or otherwise overturn or amend the disciplinary actions taken by his subordinates, which actions were admittedly based solely on expressive activity, nor intervene in admitted efforts to dissuade and restrain student speech

Because Amber and other students at DeSoto County High School again seek to participate in Day of Silence this school year without interference from school officials, Plaintiff asks this Court for a preliminary injunction to enjoin Defendants from enforcement of their policies, practices and actions that unconstitutionally interfere with students' ability to participate in this upcoming expressive event on April 19, 2013, and to expunge Amber's school records of the discipline associated with the events giving rise to this action.

ARGUMENT AND AUTHORITY

A preliminary injunction is appropriate when the movant establishes: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not granted; (3) that the threatened injury to the plaintiff outweighs the harm an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest. *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd.*, 602 F. Supp. 2d 1233, 1234 (M.D. Fla. 2009) (citing *Teper v. Miller*, 82 F.3d 989, 992 n.3 (11th Cir. 1996)). Plaintiff satisfies each of these requirements.

I. Amber Has a Substantial Likelihood of Prevailing on the Merits of Her First Amendment and Equal Protection Claims.

A. Amber's Expressive Activities Were Non-Disruptive and Constitutionally-Protected Under the First Amendment.

The speech clause of the First Amendment protects two rights: (1) the right to freedom

of expression, and (2) the right to be free from compelled expression. *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1369 (S.D. Fla. 2010); (citing *Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004)). Defendants' policies and/or practice and actions violated Amber's rights as to both these protected constitutional rights. Superintendent Cline, as the Board's Chief Executive Officer and to whom the Board delegated final decisionmaking authority,[1] enforced and directed his subordinate Principal Fusco to enforce the School District's policy and practice that prohibited Amber's expressive activities. "A municipal governing body may be held liable for acts or policies of individuals to whom it delegated final decisionmaking authority in a particular area." *Holloman*, 370 F.3d at 1291 (citations omitted); *see also Gattis v. Brice*, 136 F.3d 724, 725 (11th Cir. 1998) ("If a county official holds final policymaking authority for the county in the subject area of the alleged constitutional violation, that official's decisions may constitute county policy.").

As set forth herein, preliminary relief is warranted, because Amber is substantially likely to prevail on the merits of her First Amendment claim.[2] It is well beyond debate that public school students have a constitutionally protected right to freedom of expression on school campuses. *See e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."). As the Supreme Court eloquently set out in that seminal case on student speech:

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[1] *See* FL Stat. §1001.48; FL. Stat. §§ 1001.32 (3); FL. Stat. §§ 1001.49 (14); DeSoto County School Dist. R. 70.02.

[2] In order to prevail in a First Amendment retaliation claim, a plaintiff must show that (1) [her] speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005).

Not only must school officials point to *evidence* that would forecast that the student speech they seek to suppress will cause disruption, they must meet the exacting standard of showing that the evidence supports a "well-founded" belief that the disruption would be "material and substantial." *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1373 (S.D. Fla. 2010) ("The key is whether the school administrators have a well-founded belief that a 'substantial' disruption will occur.") (citations omitted). The word "substantial" means "something more than the ordinary personality conflicts among [ ] students that may leave one student feeling hurt or insecure." *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1119 (C.D. Cal. 2010). The "mere fact that a handful of students are pulled out of class for a few hours at most, without more, cannot be sufficient. *Tinker* establishes that a material and substantial disruption is one that affects 'the work of the school' or 'school activities' in general." *Id.* (citing *Tinker*, 393 U.S. at 509, 514). As the *J.C.* court noted, "[t]he fear that students would 'gossip' or 'pass notes' in class simply does rise to the level of a substantial disruption." *Id.* 711 F. Supp. 2d at 1120 ("cases, including *Tinker*, have found that a general 'buzz' about a student's speech fails to meet the substantial disruption test") (citations omitted); *see also Layshock*, 496 F.Supp. 2d at 597 ("The government may not prohibit student speech based solely upon the emotive impact that its offensive content may have on the listener.").

Two recent Florida district court cases should be particularly instructive in their application of the *Tinker* standard to student expression in support of LGBT students and LGBT rights where speculative fears of disruption and interference with abstinence-only policies were proferred as justifications. In *Gillman*, students wore t-shirts and buttons expressing support for LGBT people after school officials punished and harassed a lesbian

student following that student's reporting anti-gay peer harassment. The school board issued a letter forbidding pro-LGBT apparel. The Northern District of Florida held that the school failed to meet the test announced in *Tinker*. 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008). In *Gonzalez*, the court was called upon to determine whether students could be prohibited from meeting as a gay-straight alliance ("GSA") club to discuss issues relevant to LGBT students. The Southern District of Florida answered in the negative "the pertinent question [of] whether the GSA's intent to gain recognition as a noncurricular student group [would] 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008) (citing *Tinker,* 393 U.S. at 509); *see also Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd.*, 602 F. Supp. 2d 1233 (M.D. Fla. 2009) (enjoining school from prohibiting GSA to meet under Equal Access Act analysis, where the court applied the *Tinker* analysis reasoning that "in enacting the EAA, Congress effectively codified the First Amendment rights of non-curricular student groups.").

Here, as in *Gillman*, the fact that speech involving LGBT rights may be "likely to spur some debate, argument, and conflict" is of no consequence. As in *K.D. v. Fillmore Cent. Sch. Dist.*, mere complaints about a t-shirt "simply do not rise to the level of a 'disruption' much less a 'material and substantial interference' with [student]'s classes or the overall administration of the school. ... Certainly students do not have the right not to be 'upset' when confronted with a viewpoint with which they disagree." 2005 U.S. Dist. LEXIS 33871, 19-20 (W.D.N.Y. Sept. 2, 2005) ("There can also be no doubt that K.D.'s political expression was passive. He was simply wearing a T-shirt. Although defendants argue that the message is 'aggressive,' there is no evidence showing that K.D. did anything more than walk through the

hallways and attend his classes while wearing the T-shirt."). As this Court set out in *Yulee*, in dismissing the speculative claim that allowing a student group to call themselves a gay-straight alliance "would materially and substantially disrupt the operation of the school, or materially and substantially harm the well-being, or otherwise invade the rights, of others" where no evidence was produced save an incident involving one member of the proposed group who engaged in disruptive behavior at a gay rights demonstration a year earlier, "case law does not support Defendant's point." 602 Supp. F.2d at 1237.

Defendants cannot meet the demanding burden that *Tinker* requires. There simply is no evidence that Amber's expressive conduct created a "substantial and material disruption" in school activities or discipline as required by *Tinker*. Neither is there a suggestion anywhere in the record that would support that school officials here had "a well founded expectation of disruption." *Evans v. Bayer*, 684 F. Supp. 2d 1365, 1373 (S.D. Fla. 2010). DeSoto County school officials have presumably complied with state law in providing all records associated with Day of Silence 2012 and/or "any silent protests/or student protests of any type" in response to a request pursuant to the Florida Open Records Act, Fla. Stat. § 119.01. *See* Exh. 7. No reasons or evidence was provided in response to the Open Records Act request that would forecast disruption. Despite Amber's repeated efforts to avoid problems by communicating her intention to participate in Day of Silence, providing descriptive and legal information, and communicating directly with all appropriate school administrative personnel, neither Principal Fusco nor Superintendent Cline mentioned to her *any* reasons, incidents, or evidence that suggested that material disruption would take place if they allowed Amber and other students to participate in Day of Silence. Nor did they communicate any evidence upon

which they were basing their concerted effort to silence Amber and deter her from participating in Day of Silence. In contrast, the evidence reveals that school officials completely misapplied the law where Principal Fusco directed her staff that any student "they suspected of participating" in Day of Silence should be sent to the office and presumptively concluded that simply "wearing placards" or "refusing to participate in class by taking part in a silent protest ... is considered a disruption." *See* Exh. 8.

As in *Gonzalez*, here there is nothing to suggest that the "tolerance based message" of Day of Silence would materially or substantially interfere with discipline in the operation of the school. 571 F.Supp.2d. at 1269. Here, as in *Gillman*, "an outright ban on speech by students that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness, and support for not only a marginalized group, but more importantly, for [] fellow student[s]," 567 F. Supp. 2d at 1370, cannot be justified by the requisite level of evidence. Even if Defendants could point to actual or nonspeculative disruption caused by student response to Amber's speech, such evidence likely would not suffice. As this Court noted in *Yulee*, even where students protested the existence of a gay rights group, organized school boycotts, walkouts, and protests outside the school, the upheaval caused by the *protesting* students did not justify the exclusion of the group. 602 F. Supp. 2d at 1237 (M.D. Fla. 2009) (citing *Boyd County High Sch. Gay Straight Alliance v. Board of Educ. of Boyd County,* 258 F.Supp.2d 667, 688-91 (E.D. Ky. 2003); *see also Tinker*, 393 U.S. at 517 (student comments, warnings, the "poking of fun" and a teacher whose lesson period was practically "wrecked" chiefly by disputes with a protesting student not sufficient to justify banning speech).

Here, the evidence in the record plainly shows that Superintendent Cline did not rely on evidence of material and substantial disruption in communicating and ratifying the policy and/or practice that obstructed Amber's efforts and ability to take part in Day of Silence. Principal Fusco provided no support for her affirmative and unambiguous direction to teachers to send all students "suspected" of involvement in Day of Silence to the office to be "dealt with" because the mere act of "wearing a placard" or "taking part in a silent protest" constitutes "a disruption" worthy of suppression or punishment. Any proffered evidence at this point could amount to no more than "the typical background noise of high school" rejected in *Gillman*. "[W]here there is no finding and no showing that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school, the prohibition cannot be sustained." *Tinker*, 393 U.S at 509.

C. The District's Blanket Policy Against "Protests" Burdens a Fundamental Right and Creates an Unconstitutional Classification of Students Based on the Content of Their Speech.

Defendants cannot seek refuge by claiming they were not interfering specifically with Amber's speech, but merely enforcing a general "no-protest" policy. Where school officials claim their actions are justified by a blanket ban on particular types of speech, the Defendants collide with the demands of the Constitution's equal protection guarantee. Under the Equal Protection Clause, Defendants

> may not grant the use of a forum to people whose views they find acceptable, but deny its use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussion or debating in public facilities. There is an equality of status in the field of ideas and Defendants must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly

> or speaking by some groups, Defendants may not prohibit others from assembling or speaking on the basis of what they intend to say.

Police Dept. of the City of Chicago v. Moseley, 408 U.S. 92, 96 (1972) (citations omitted); *see also Castorina v. Madison County Sch. Bd.*, 246 F.3d 536. 542 (6th Cir. Ky. 2001) (school board cannot single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed).

Contrary to the teachings of *Mosely*, here, the School District's policymakers have deemed messages that urge tolerance for LGBT students and oppose discrimination and bullying based on sexual orientation, gender identity, or gender expression to fall within a class of messages that constitute "protests." Under the School District's policy and/or practice, these messages are considered categorically impermissible. Therefore, the School District's policy and/or practice creates a classification of students (those who seek to express these messages) and treats them differently and worse than other students by denying them freedom of expression and threatening them with discipline. The School District's policy and/or practice classifies impermissible speech and expression, not in terms of time, place and manner, but in terms of subject matter. The policy thus "slips from the neutrality of time, place and circumstance into concerns about content and viewpoint." *Mosely,* at 99 (internal citations omitted). Here, the Equal Protection Clause requires the District to justify its policy affecting First Amendment interests by demonstrating it is narrowly tailored to its legitimate objectives. *Mosely* 408 U.S. at 101; *Williams v. Rhodes*, 393 U.S. 23 (1968).

D. The School District's Policy Lacks Sufficient Justification to Withstand First Amendment or Equal Protection Scrutiny.

As noted above, because the School District's policy employs a classification affecting First Amendment interests, to withstand constitutional scrutiny under both the First and Fourteenth Amendment, it must be narrowly tailored to further legitimate and substantial governmental interests. This specifically includes meeting the requirements in *Tinker* in order to justify a preemptive ban. *See Heinkel v. Sch. Bd.*, 194 Fed. Appx. 604 (11th Cir. 2006) *Gillman v. Sch. Bd. for Holmes County*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

To the extent the school seeks to hide behind a generalized conclusion that "protests" are inherently disruptive, its policy or practice is presumptively unconstitutional because such a policy constitutes a prior restraint of speech that is both viewpoint- and content-based, without sufficient governmental justification. A "no-protest" policy is a content-based restriction on speech, as any policy or practice prohibiting or disapproving of "protests" is inherently based on the content of speech, *i.e.,* whether or not the speech is in support of, or in protest of, an issue. *See Papish v. Board of Curators of the Univ. of Missouri*, 410 U.S. 667 (1973) (holding that disciplinary action may not be based on the disapproved content of protected speech); *Heinkel,* 194 Fed. Appx. 604 (11th Cir. 2006) (school policy prohibiting all religious and political symbols was a content-based restriction). A content-based regulation is presumptively invalid, and the government has the burden to rebut that presumption. *Occupy Fort Myers v. City of Fort Myers*, 2011 U.S. Dist. LEXIS 131778, 23 (M.D. Fla. Nov. 15, 2011) (citations omitted). With a content-based restriction, the government must show: (1) that the regulation is necessary to serve a compelling state interest; and (2) that regulation is narrowly drawn to achieve that end. *Id.* (citing *Boos v.*

Barry, 485 U.S. 312, 321-22 (1988)). The "no protest" policy at issue here fails to meet each of these requirements.

A purported "no-protest" policy is also a prior restraint on speech,[4] traditionally the form of regulation most difficult to sustain under the First Amendment. *See, e.g., Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713-20 (1931). "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." *United States v. Frandsen*, 212 F.3d 1231, 1236-7 (11th Cir. 2000). "Prior restraints are presumptively unconstitutional and face strict scrutiny," *Occupy Fort Myers*, 2011 U.S. Dist. LEXIS at 32, requiring that the "government must use the least restrictive means of advancing a compelling state interest[]." *White v. Baker*, 696 F. Supp. 2d 1289, 1306 (N.D. Ga. 2010) (citing *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1547-48 (11th Cir. 1993)). School campuses are no exception to these important principles concerning prior restraints on speech. *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960, 973 (5th Cir. 1972) ("[E]ven reasonably forecast disruption is not *per se* justification for prior restraint or subsequent punishment of expression afforded to students by the First Amendment."). Indeed, courts have recognized that students who seek to reasonably exercise their freedom of expression "should not be restrained or punishable at the threshold" even if there were evidence that "a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance." *Id.*

[4] When the restriction upon student expression takes the form of an attempt to predict in advance the content and consequences of that expression, it is tantamount to a prior restraint and carries a heavy presumption against its constitutionality. *University of Southern Mississippi Chapter, etc. v. University of Southern Mississippi*, 452 F.2d 564 (5th Cir. 1971); *see also Gillman,* 567 F.Supp. 2d at 1369 ("when censorship constitutes a 'prior restraint' on speech - a ban on speech that has not yet been expressed - the law is clear that a school board bears a 'heavy burden' to justify its ban") (citing *Healy v. James*, 408 U.S. 169, 184 (1972); *Shanley*, 462 F.2d at 969).

Likewise, where students may speak in support of an issue but not in protest of it, the policy or practice would be viewpoint-based because it would allow speech on only one side of each issue. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-829 (1995); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 120 (2001) (viewpoint discrimination violates the Free Speech Clause).

Not only can the Defendants not overcome the heavy burdens involved in justifying a policy or practice that is a viewpoint- and content-based prior restraint on speech, but the Supreme Court has expressly and definitively ruled that a school protest involving "silent, passive expression of opinion" is specifically protected. *Tinker*, 393 U.S. at 508. Indeed, the facts before this court are eerily similar to those at issue in *Tinker*. As summarized by the Supreme Court in *Morse v. Frederick*:

> *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended.

551 U.S. at 403 (citing *Tinker,* 393 U.S at 504). The similarities are glaring. This case involves a group of high school students who decided to participate in Day of Silence (to support LGBT students) and to protest LGBT harassment and unfair treatment. School officials learned of the plan and communicated a policy prohibiting students from taking part in Day of Silence or otherwise protesting anything. When several students nonetheless attempted to participate in Day of Silence in school, they were suspended. Whether framed as

an isolated incident aimed at silencing Amber in her efforts or generalized enforcement of a "no-protest" policy, the result is the same. Defendant school officials trampled Amber Hatcher's right to free expression and equal protection.

II. Amber Has Suffered, and Will Continue to Suffer, Irreparable Harm Without Injunctive Relief.

An injunction is further warranted because Amber has demonstrated irreparable harm from the quashing of her First Amendment right to freedom of speech. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "B]ecause chilled speech cannot be compensated by monetary damages, an ongoing violation of the First Amendment constitutes irreparable injury." *University Books & Videos, Inc. v. Metropolitan Dade County*, 33 F. Supp. 2d 1364, 1373 (S.D. Fla. 1999) (citing *Northeastern Fla. Chapter of Ass'n of Gen Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)).

Here, as in other cases involving students obstructed in their efforts to discuss LGBT issues in school, "the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *Gay-Straight Alliance of Yulee High Sch. v. Sch. Bd.*, 602 F. Supp. 2d 1233, 1238 (M.D. Fla. 2009); *see also McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699, 705 (N.D. Miss. 2010) (having found that school district policies infringed upon student's First Amendment rights, "therefore, there is a substantial threat that irreparable harm will occur").

Adding to her injury, Amber is a bright student with a future that could be dimmed by the release of her school records revealing disciplinary actions resulting from merely attempting to take part in an important debate and to bring awareness to a real problem

affecting students in her school. She was kept out of school for a day, subjected to humiliation, caused to suffer emotional distress, and continues to suffer harm for simply having sought to express her support for LGBT students and disapproval of bullying directed at students who are or who are perceived to be LGBT.

Finally, Amber seeks to organize Day of Silence on April 19th of this year and is foreclosed from being able to do so without an injunction. Instead of enjoying her sophomore year of high school, she carries the burden of standing up for her rights to no avail, with a disciplinary mark against her and the inability to meaningfully organize and participate in Day of Silence this year, which she sincerely seeks.

III. The Balance of Hardships Weighs in Amber's Favor, and Granting Preliminary Relief Serves the Public Interest.

The First Amendment is a fundamental component of American democracy, and its very essence is the principle that government may not avoid controversy by silencing speakers. The "protection of constitutional rights is always in the public interest." *Int'l Soc. for Krishna Consciousness v. Kearnes*, 454 F. Supp. 116, 125 (E.D. Cal. 1978). As the Supreme Court has observed, in matters involving "First Amendment rights . . . which must be carefully guarded against infringement by public office holders, we judge that injunctive relief is clearly appropriate . . . ." *Elrod*, 427 U.S. at 373; *McMillen.*, 702 F. Supp. 2d at 705 (noting that the "threat of injury to [lesbian student] clearly outweighs the threat of injury that injunctive relief may cause [school district where student's] threat of injury includes loss of her First Amendment rights to freely express her social and political viewpoints....").

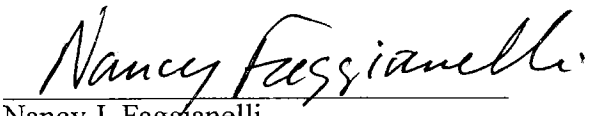
The entry of a preliminary injunction in this case will serve the public interest. "[I]t is in the public's interest to protect rights guaranteed under the Constitution of the United States."

Freelance Entm't, LLC v. Sanders, 280 F. Supp. 2d 533, 547 (N.D. Miss., 2003). Protecting the rights of Amber and other students at DeSoto County High School to participate peacefully and in solidarity with students nationally in Day of Silence 2013 is in the public interest because it is generally accepted that American society at large benefits from peaceful expression and the exchange of ideas. *Terminiello v.City of Chicago*, 337 U.S. 1, 4 (1949) ("The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.") (citations omitted). *See also Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he public interest favors protecting core First Amendment freedoms."); *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 837 (M.D. La. 2006) ("It is undoubtedly in the public interest to protect First Amendment liberties."); *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech.") (citations omitted).

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully asks this Court to enter an order preliminarily enjoining Defendants from enforcing their "no-protest" or other policies infringing on students' speech rights without facts upon which to reasonably forecast material and substantial disruption and otherwise interfering with the right of Amber Hatcher, and other students at DeSoto County High School, to organize and participate in Day of Silence 2013.

Respectfully submitted,



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Elizabeth Lynn Littrell (GA Bar No. 454949)*
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Southern Regional Office
730 Peachtree Street, N.E., Suite 1070
Atlanta, GA 30308-1210
Telephone: (404) 897-1880
Email: BLittrell@lambdalegal.org
*Motion for Admission Pro Hac Vice filed February 26, 2013

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AMBER HATCHER, by and through her next friend, GREGORY HATCHER Plaintiff, vs. DESOTO COUNTY SCHOOL DISTRICT BOARD OF EDUCATION, *et. al.* Defendants.	)	Civil Action File No.:_____

INDEX TO EXHIBITS IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

Exhibit 1	GLSEN "Truth About Day of Silence"
Exhibit 2	Email, Hatcher to Cline, April 10
Exhibit 3	Email, Hatcher to Cline, April 12
Exhibit 4	Email, Hatcher to Cline, April 13
Exhibit 5	Email, Cline to Fusco, April 12
Exhibit 6	Email, Fusco to Cline, April 12
Exhibit 7	Lambda Legal Letter to Cline and Fusco, April 19
Exhibit 8	Email, Fusco to Staff, April 20
Exhibit 9	Email, Fusco to Barnwell, April 23

EXHIBIT 1

The Truth about the Day of Silence

http://www.dayofsilence.org/truth/index.html

Every year, more and more students participate in the Day of Silence, which began 13 years ago when University of Virginia students wanted to find a way to bring attention to anti-LGBT name-calling, bullying and harassment on campus. As the day's popularity and exposure have increased, many misperceptions have spread about what the Day of Silence is, why the day exists and what participating in it means. Here are 4 truths that address common misinformation about the Day of Silence.

1

The Day of Silence's purpose is to bring attention to anti-LGBT name-calling, bullying and harassment and effective responses. The goal of the Day of Silence is to make schools safer for all students, regardless of sexual orientation and gender identity/expression. In a Harris Interactive study on bullying, students said two of the top three reasons students are harassed in school are actual or perceived sexual orientation and gender expression. Additionally, nearly 9 out of 10 LGBT students experience harassment at school. Students across the country participate in the Day of Silence to bring attention to this problem, let students who experience such bullying know that they are not alone and ask schools to take action to address the problem.

2

Hundreds of thousands of students of all beliefs, backgrounds and sexual orientations participate in the Day of Silence. Anti-LGBT bullying and harassment affects all students. Slurs such as "faggot" and "dyke" are commonplace in school. The Day of Silence is an example of students, from middle school to college, working together proactively to bring attention to the anti-LGBT name-calling, bullying and harassment experienced by LGBT and straight students alike. GLSEN, the Day of Silence's organizational sponsor, encourages participants to be counted by registering at www.dayofsilence.org. Students from nearly 8,000 middle and high schools registered for the 2008 Day of Silence. GLSEN protects the privacy of students and does not publish a list of students who have registered or their schools. Many students who participate also belong to Gay-Straight Alliance student clubs, of which nearly 4,000 are registered with GLSEN. The first GSA was created by a straight student over 20 years ago, in the fall of 1988.

3

Day of Silence participants encourage schools to implement proven solutions to address anti-LGBT name-calling, bullying and harassment. Adopt and implement a comprehensive anti-bullying policy that enumerates categories such as race, gender, ethnicity, religion, sexual orientation and gender expression/identity. Provide staff trainings to enable school staff to identify and address anti-LGBT name-calling, bullying and harassment effectively and in a timely manner. Support student efforts to address

anti-LGBT bullying and harassment on campus, such as the formation of a Gay-Straight Alliance. Institute age-appropriate, factually accurate and inclusive curricula to help students understand and respect difference within the school community and society as a whole.

4 The day is a positive educational experience. The Day of Silence is an opportunity for students to work toward improving school climate for all students. GLSEN advises students interested in participating to discuss their intentions with their administration and teachers long before the event. The day is most successful when schools and students work together to show their commitment to ensuring safe schools for all students. Many schools allow students' participation throughout the day. Some schools ask students to speak as they normally would during class and remain silent during breaks and at lunch. There is no single way to participate, and students are encouraged to take part in the way that is the most positive and uplifting for their school.

For the latest GLSEN findings about anti-LGBT bullying and harassment and the school experience go to: www.glsen.org/research

EXHIBIT 2

Cline, Adrian

From: Amber Hatcher <amberh720@hotmail.com>
Sent: Tuesday, April 10, 2012 7:37 AM
To: Cline, Adrian
Subject: National Day Of Silence

Dear Mr. Cline,

This year, the National Day Of Silence (DOS), an anti-bullying campaign and peaceful protest, falls on April 20th, 2012. I, despite being a student (and a Freshman at that!), have been attempting to organize the DOS with Mrs. Fusco for about a week. Unfortunately, Mrs. Fusco informed me that peaceful protests are against District Policy and that you denied permission for us to participate at DHS. Thankfully, I've been able to find out District Policy, which specifically *gives us* the right to peacefully assemble.

According to Student Rights And Responsibilities (http://desotoschools.com/Home/school_info/Student%20Rights%20and%20Responsibilities.pdf); students have the right to " Hear, examine, and express divergent points of view, including freedom of speech, written expression, and symbolic expression," granted that we, "consider and respect the divergent point of view of others," and," Be sure that personal expressions (speech, written, or symbolic) do not infringe on the rights of others." We also have the right to, "assemble peacefully on school grounds," as long as we," assemble do as not to disrupt the educational process." Also, According to Lambada Legal (The attorney's office that has dealt with the legal side of DOS); " Under the Constitution, public schools must respect students' right to free speech. 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. 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. 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 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."

Mr. Cline, allowing us to participate in the DOS will do no harm. Our goal is to make students aware of bullying and try to stop it. Here are seven reasons that allowing us the participate in the DOS would be beneficial to you:

1.) Allowing students to participate on April 20th, which coincedentally falls on National Marijuana Appriciation Day, removes the day's theme of drug appriciation and replaces it with a theme of acceptance.

2.) Allowing students to participate will make them more aware of bullying, and also gives a message that ***any*** type of bullying is unacceptable.

3.) Allowing students to participate gives members of our community a sense that the administration cares.

4.) Allowing students to participate will give the school a sense of unity.

5.) Allowing students to participate on that day will make classes quieter. We may even be able to deter disruption!

6.) Allowing students to participate gives a chance to spread awareness.

7.) Participants may be a "sounding board," a non-judgemental party for students to relate to and speak out against their antagonists.

Honestly, we aren't asking for much. All that we desire is the cooperation of administration and to be allowed to put up posters. Many of the students who plan to participate will do so, whether administration approves or not. I just want to save myself and my peers from disciplinary action and help our school. Thank you for your time.

Sincerely, Amber Hatcher,

A hopeful student.

EXHIBIT 3

Cline, Adrian

From: Amber Hatcher <amberh720@hotmail.com>
Sent: Thursday, April 12, 2012 7:24 AM
To: Cline, Adrian
Subject: [Urgent] National Day Of Silence

Importance: High

From: amberh720@hotmail.com
To: adrian.cline@desoto.k12.fl.us
Subject: National Day Of Silence
Date: Tue, 10 Apr 2012 11:36:47 +0000

Dear Mr. Cline,

This year, the National Day Of Silence (DOS), an anti-bullying campaign and peaceful protest, falls on April 20th, 2012. I, despite being a student (and a Freshman at that!), have been attempting to organize the DOS with Mrs. Fusco for about a week. Unfortunately, Mrs. Fusco informed me that peaceful protests are against District Policy and that you denied permission for us to participate at DHS. Thankfully, I've been able to find out District Policy, which specifically *gives us* the right to peacefully assemble.

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7.) Participants may be a "sounding board," a non-judgemental party for students to relate to and speak out against their antagonists.

Honestly, we aren't asking for much. All that we desire is the cooperation of administration and to be allowed to put up posters. Many of the students who plan to participate will do so, whether administration approves or not. I just want to save myself and my peers from disciplinary action and help our school. Thank you for your time.

Sincerely, Amber Hatcher,
A hopeful student.

EXHIBIT 4

Cline, Adrian

From: Amber Hatcher <amberh720@hotmail.com>
Sent: Friday, April 13, 2012 6:34 PM
To: Cline, Adrian
Subject: FW: [Urgent] National Day Of Silence

Importance: High

From: amberh720@hotmail.com
To: adrian.cline@desoto.k12.fl.us
Subject: [Urgent] National Day Of Silence
Date: Thu, 12 Apr 2012 11:23:54 +0000

From: amberh720@hotmail.com
To: adrian.cline@desoto.k12.fl.us
Subject: National Day Of Silence
Date: Tue, 10 Apr 2012 11:36:47 +0000

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Sincerely, Amber Hatcher,
A hopeful student.

(I apologize for sending this email multiple times, but April 20th is approaching fast. Considering that this will be the third time I've sent this email, the next logical step would be to set up an appointment at your offices. I can only do this as a last resort, but rest assured with the knowledge that I will do all I can to organize this event.)

EXHIBIT 5

Cline, Adrian

From:	Cline, Adrian
Sent:	Thursday, April 12, 2012 8:15 PM
To:	Fusco, Shannon
Subject:	National Day Of Silence
Attachments:	Adrian H Cline.vcf
Signed By:	adrian.cline@desoto.k12.fl.us
Importance:	High

Principal Fusco:

Please clarify my position with Miss Hatcher. I indicated the following in an email to you on April 2, 2012:

- It is inconsistent with the district's past practice to approve student protests on any of our campuses. The attached is disapproved.

I did not refer to a specific policy. Since this is classified as a protest, as evidenced by the submitted documents, I will not approve the activity on our campuses. This *past practice* position needs to be discussed with Miss Hatcher on April 13, 2012.

Adrian H. Cline

Adrian H. Cline
Superintendent
School District of DeSoto

(863) 494-4222 x110
adrian.cline@desoto.k12.fl.us

Post Office Drawer 2000
Arcadia, Florida 34265

From: Amber Hatcher [mailto:amberh720@hotmail.com]
Sent: Thursday, April 12, 2012 7:24 AM
To: Cline, Adrian
Subject: [Urgent] National Day Of Silence
Importance: High

From: amberh720@hotmail.com
To: adrian.cline@desoto.k12.fl.us
Subject: National Day Of Silence
Date: Tue, 10 Apr 2012 11:36:47 +0000

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Sincerely, Amber Hatcher,
A hopeful student.

EXHIBIT 6

Cline, Adrian

From:	Fusco, Shannon
Sent:	Thursday, April 12, 2012 8:38 PM
To:	Cline, Adrian; Fusco, Shannon
Subject:	RE: National Day Of Silence

Mr. Cline,

I addressed this issue with Miss Hatcher immediately after you responded to my email on the matter. She has come to me twice since with documentation on why it should be allowed, and I have each time told her no and what the ramifications would be if the protest occurred.

I don't think she plans to disobey, but she was insistant that she could convince you otherwise and was making an appointment.

I will clarify the matter with her again tomorrow morning.

Thank you,
Shannon Fusco

From: Cline, Adrian
Sent: Thursday, April 12, 2012 8:14 PM
To: Fusco, Shannon
Subject: National Day Of Silence

Principal Fusco:

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I did not refer to a specific policy. Since this is classified as a protest, as evidenced by the submitted documents, I will not approve the activity on our campuses. This *past practice* position needs to be discussed with Miss Hatcher on April 13, 2012.

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Sent: Thursday, April 12, 2012 7:24 AM
To: Cline, Adrian
Subject: [Urgent] National Day Of Silence
Importance: High

From: amberh720@hotmail.com
To: adrian.cline@desoto.k12.fl.us
Subject: National Day Of Silence
Date: Tue, 10 Apr 2012 11:36:47 +0000

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According to Student Rights And Responsibilities (http://desotoschools.com/Home/school_info/Student%20Rights%20and%20Responsibilities.pdf); students have the right to " Hear, examine, and express divergent points of view, including freedom of speech, written expression, and symbolic expression," granted that we, "consider and respect the divergent point of view of others," and," Be sure that personal expressions (speech, written, or symbolic) do not infringe on the rights of others." We also have the right to, "assemble peacefully on school grounds," as long as we," assemble do as not to disrupt the educational process." Also, According to Lambada Legal (The attorney's office that has dealt with the legal side of DOS); " Under the Constitution, public schools must respect students' right to free speech. 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. 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. 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 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."

Mr. Cline, allowing us to participate in the DOS will do no harm. Our goal is to make students aware of bullying and try to stop it. Here are seven reasons that allowing us the participate in the DOS would be beneficial to you:
1.) Allowing students to participate on April 20th, which coincedentally falls on National Marijuana Appriciation Day, removes the day's theme of drug appriciation and replaces it with a theme of acceptance.
2.) Allowing students to participate will make them more aware of bullying, and also gives a message that ***any*** type of bullying is unacceptable.

3.) Allowing students to participate gives members of our community a sense that the administration cares.
4.) Allowing students to participate will give the school a sense of unity.
5.) Allowing students to participate on that day will make classes quieter. We may even be able to deter disruption!
6.) Allowing students to participate gives a chance to spread awareness.
7.) Participants may be a "sounding board," a non-judgemental party for students to relate to and speak out against their antagonists.

Honestly, we aren't asking for much. All that we desire is the cooperation of administration and to be allowed to put up posters. Many of the students who plan to participate will do so, whether administration approves or not. I just want to save myself and my peers from disciplinary action and help our school. Thank you for your time.

Sincerely, Amber Hatcher,
A hopeful student.

EXHIBIT 7

Lambda Legal
making the case for equality

April 19, 2012

Sent by electronic mail and facsimile transmission
(866) 370-2471
(863) 494-7867
adrian.cline@desoto.k12.fl.us

Adrian H. Cline, Superintendent
Desoto County School District
Post Office Drawer 2000
Arcadia, FL 34266

Re: Day of Silence and allegations of unlawful interference with student speech

Dear Adrian H. Cline:

We have been advised by several students who seek to participate in Day of Silence activities at Desoto County High School tomorrow, April 20, 2012, that they have been severely hampered by your administration in their efforts to do so. In particular, it is our understanding that students have been informed that they may not distribute materials, wear T-shirts or otherwise participate in the national Day of Silence, which is a day designed to show support for lesbian, gay, bisexual and transgender (LGBT) students. As the oldest and largest national legal organization committed to achieving full recognition of the civil rights of LGBT people and their allies, Lambda Legal has extensive experience with issues related to students' rights, including their right to free speech. We write on behalf of students in your school wishing to participate in Day of Silence, to put the school on notice that failure to allow these students to exercise their right to free speech and equal treatment implicates constitutional violations that can create both individual and institution liability.

Protection of Students Rights to Freedom of Expression

The Supreme Court has long recognized that public school students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[1] Under the First Amendment, schools may not restrict student speech merely to avoid controversy or to avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint."[2] Nor may schools suppress or discriminate against student speech simply because they disapprove of or disagree with the speaker's ideas.[3] The Constitution allows schools to control student speech only in very narrow circumstances,

[1] *Morse v. Frederick*, 127 S. Ct. 2618, 2622 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

[2] *Tinker*, 393 U.S. at 509; *see also Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1141 (C.D. Cal. 2000); *Morrison v. Bd. of Educ.*, 419 F. Supp. 2d 937, 941 (E.D. Ky. 2006) ("The private, noncurricular speech of students is entitled to almost blanket constitutional protection.") affirmed by *Morrison v. Bd. of Educ.*, 521 F.3d 602 (6th Cir. 2008).

[3] *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *see also Prince v. Jacoby*, 303 F.3d 1074, 1091 (9th Cir. 2002).

none of which are present here.[4]

With respect to any justifications to censor the pro-gay speech at issue here based on "distraction" or "disruption," the Supreme Court has allowed restrictions on student speech only where school officials have *reasonably* concluded that the speech will "'materially and substantially disrupt the work and discipline of the school.'"[5] A school may not simply assume, however, that disruptions will occur; rather, the school must justify restrictions on speech by showing *facts* that reasonably lead it "to forecast substantial disruption of or material interference with school activities."[6] Accordingly, the school may not censor a student simply because it believes that some students or community members hearing the speech will respond in a disruptive manner.[7] If students who oppose the speaker's message disrupt the school, the school must direct its disciplinary measures at those students, not at the speaker.[8] In the words of one federal court, the First Amendment "does not tolerate mob rule by unruly school children."[9]

As the Supreme Court explained, the mere fact that a particular issue may be controversial or politically sensitive does not permit school authorities to censor "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the speakers themselves]."[10] In an educational environment, student expression that does not disrupt school activities should be a subject of discussion and debate, not censorship. Indeed, where school officials in a school for grades six through twelve had prohibited students from wearing messages at school such as "Gay? Fine by Me," "I Support My Gay Friends," and "I Support Equal Marriage Rights."[11] the court held that the restrictions violated the Constitution and the federal judged wrote that it was "extraordinary" that the school would ban

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[4] For example, the Constitution allows schools to censor speech expressed in an obscene, lewd or profane manner, as well as speech encouraging illegal drug use. *Morse*, 127 S. Ct. at 2629 (2007); *Barr v. Lafon*, 538 F.3d 554, 564 (6th Cir. 2008).

[5] *Morse*, 127 S. Ct. at 2626 (quoting *Tinker*, 393 U.S. at 513); *Barr*, 538 F.3d at 564; *Morrison*, 419 F. Supp. 2d at 941 ("Further limiting the restriction of speech is the requirement that the there be a specific fear of significant disruption.").

[6] *Pinard v. Clatskanie School Dist. 6J*, 467 F.3d 755, 768 (9th Cir. 2006) (citation and internal quotation marks omitted).

[7] *See Morrison v. Bd. of Educ.*, 521 F.3d 602, 623 (6th Cir. 2008)

[8] *See Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be . . . punished or banned, simply because it might offend a hostile mob."); *see also* B*oyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 690 (E.D. Ky. 2003) ("Assuming arguendo that the anti-GSA faction at BCHS was sufficiently disruptive to 'materially and substantially interfere with the requirements of appropriate discipline,' Defendants are not permitted to restrict Plaintiffs' speech and association as a means of preventing disruptive responses to it.. The Court further finds that the 'heckler's veto' rule does not limit Defendants' authority to maintain order and discipline on school premises or to protect the well-being of students and faculty. ... *Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.") (citing *Tinker*, 393 U.S. at 509).

[9] *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980).

[10] *Tinker*. at 580; *see also Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3rd Cir. 2001)("[T]inker requires a specific and significant fear of disruption, not just some remote apprehension of disturbance.")

[11] *Gillman ex rel. Gillman v. School Bd. for Holmes County, Fla.*, 567 F.Supp.2d 1359, 1362 (N.D. Fla. 2008).

speech "that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness and support for . . . a marginalized group [and] for a fellow student."[12]

Nor does the First Amendment allow the school to dilute or alter the student message. In *Franklin Central Gay/Straight Alliance v. Franklin Tp. Community School*, 2002 WL 32097530, (S.D. Ind. Aug. 30, 2002), an Indiana federal court rejected the school's argument that it could force a GSA to "dilute its message by accommodating others, such as overweight students." The court ruled that forcing the GSA to become a "diversity" club was "not content-neutral. The speaker has the right to tailor his or her own message." *Id.* (citing *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)). With respect to Day of Silence activities, please be advised that while students understand that failure to verbally respond to a school official's question may have an effect on their class participation grade for the day, any aggressive or disproportionate discipline, or questioning that requires verbal responses from students who have communicated their participation in tomorrow's silent protest, may be viewed as chilling a student's speech and/or as unconstitutional retaliation for the exercise of constitutionally protected rights.

Additionally, please be advised that any retaliation aimed at students for exercising their rights with respect to expression on campus or contacting organizations to report interference with their rights **will subject the school and school officials to additional liability** because the law is clear that school officials may not interfere with students in their pursuit of constitutional rights hinder – through intimidation or otherwise. To be clear, "government action which chills constitutionally protected speech or expression contravenes the First Amendment, " *Wolford v. Lasater*,[13] and "threats accompanied by a 'chilling effect' that deny or hinder the exercise of a constitutional right have been deemed cognizable." *Sterling v. Borough of Minersville* 232 F.3d 190 (3rd Cir. 2000) (holding officials liable for threatening to reveal citizen's sexual orientation to family members).[14]

Hopefully, the information contained herein will lead to an immediate resolution of these issues so that no further action will be necessary to ensure that students may participate in Friday's Day of Silence activities without further discrimination or censorship. However, please be advised that we are closely monitoring the situation to ensure that these students rights are not further violated and will be discussing with them the possibility of remedial efforts which may include a federal lawsuit.

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[12] *Id.* at *9.

[13] 78 F.3d 484, 488 (10th Cir.1996)

[14] *See also Citizens Action Fund v. City of Morgan City*, 154 F.3d 211, 216 (5th Cir.1998) ("[t]hreats of unconstitutionally enforcing laws against individuals can lead to a chilling effect upon speech, silencing voices and opinions which the First Amendment was meant to protect.").

Should you wish to discuss this matter, please do not hesitate to contact us directly.

Sincerely,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By: _____
Beth Littrell
Staff Attorney

cc: Shannon Fusco, Principal

Beth Littrell/Lambda

04/19/2012 06:27 PM

To adrian.cline@desoto.k12.fl.us

cc shannon.fusco@desoto.k12.fl.us

Subject Day of Silence and allegations of unlawful interference with student speech

Please see attached and below.

Desoto HS.pdf

April 19, 2012

Sent by electronic mail and facsimile transmission
(866) 370-2471
(863) 494-7867
adrian.cline@desoto.k12.fl.us

Adrian H. Cline, Superintendent
Desoto County School District
Post Office Drawer 2000
Arcadia, FL 34266

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avoid the "discomfort and unpleasantness that always accompany an unpopular viewpoint." Nor may schools suppress or discriminate against student speech simply because they disapprove of or disagree with the speaker's ideas. The Constitution allows schools to control student speech only in very narrow circumstances, none of which are present here.

With respect to any justifications to censor the pro-gay speech at issue here based on "distraction" or "disruption," the Supreme Court has allowed restrictions on student speech only where school officials have reasonably concluded that the speech will "'materially and substantially disrupt the work and discipline of the school.'" A school may not simply assume, however, that disruptions will occur; rather, the school must justify restrictions on speech by showing facts that reasonably lead it "to forecast substantial disruption of or material interference with school activities." Accordingly, the school may not censor a student simply because it believes that some students or community members hearing the speech will respond in a disruptive manner. If students who oppose the speaker's message disrupt the school, the school must direct its disciplinary measures at those students, not at the speaker. In the words of one federal court, the First Amendment "does not tolerate mob rule by unruly school children."

As the Supreme Court explained, the mere fact that a particular issue may be controversial or politically sensitive does not permit school authorities to censor "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of [the speakers themselves]." In an educational environment, student expression that does not disrupt school activities should be a subject of discussion and debate, not censorship. Indeed, where school officials in a school for grades six through twelve had prohibited students from wearing messages at school such as "Gay? Fine by Me," "I Support My Gay Friends," and "I Support Equal Marriage Rights." the court held that the restrictions violated the Constitution and the federal judged wrote that it was "extraordinary" that the school would ban speech "that is not vulgar, lewd, obscene, plainly offensive, or violent, but which is pure, political, and expresses tolerance, acceptance, fairness and support for . . . a marginalized group [and] for a fellow student."

Nor does the First Amendment allow the school to dilute or alter the student message. In Franklin Central Gay/Straight Alliance v. Franklin Tp. Community School, 2002 WL 32097530, (S.D. Ind. Aug. 30, 2002), an Indiana federal court rejected the school's argument that it could force a GSA to "dilute its message by accommodating others, such as overweight students." The court ruled that forcing the GSA to become a "diversity" club was "not content-neutral. The speaker has the right to tailor his or her own message." Id. (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995)). With respect to Day of Silence activities, please be advised that while students understand that failure to verbally respond to a school official's question may have an effect on their class participation grade for the day, any aggressive or disproportionate discipline, or questioning that requires verbal responses from students who have communicated their participation in tomorrow's silent protest, may be viewed as chilling a student's speech and/or as unconstitutional retaliation for the exercise of constitutionally protected rights.

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Hopefully, the information contained herein will lead to an immediate resolution of these issues so that no further action will be necessary to ensure that students may participate in Friday's Day of Silence activities without further discrimination or censorship. However, please be advised that we are closely monitoring the situation to ensure that these students rights are not further violated and will be discussing with them the possibility of remedial efforts which may include a federal lawsuit.

Should you wish to discuss this matter, please do not hesitate to contact us directly.

Sincerely,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

By:

Beth Littrell
Staff Attorney
Lambda Legal
730 Peachtree St., NE, Suite 1070
Atlanta, GA 30308
404-897-1880, ext. 231 | 404-897-1884 fax
blittrell@lambdalegal.org
www.lambdalegal.org

Lambda Legal: Making the Case for Equality

EXHIBIT 8

Fusco, Shannon

From: Fusco, Shannon
Sent: Friday, April 20, 2012 8:37 AM
To: DHS Teachers; DHS Staff
Subject: protesting

Importance: High

Teachers:
Please note that we have a group of students today who have an intention of protesting. The district has an absolute policy against protesting on school campuses.

If you have students who are wearing placard in protest of an issue or disrupting the hallways or classrooms, please notify the dean or administration, and we will handle it.

If a student refuses to participate in class by taking part in a silent protest, that is considered a disruption. Again, please notify the administration, and we will handle it.

Thank you,
sdf

Shannon D. Fusco
Principal, DeSoto High School
"To empower all students to become life-long learners able to compete in today's society."

EXHIBIT 9

Fusco, Shannon

From: Fusco, Shannon
Sent: Monday, April 23, 2012 9:56 AM
To: Barnwell, Melba
Cc: Fusco, Shannon
Subject: Friday's protest

Melba,

On Friday only two students received any consequences from protesting for LGBT day of silence.

Amber Hatcher was dressed in a shirt protesting the occasion. When her teacher sent her up to the office she was belligerent to the Dean. She initially refused to answer then refused to step into IR. She was talked to and did finally give the phone numbers of her parents. She was placed in IR for the day as they could not be reached. That is the extend of her discipline.

The other student, Richard Maybell, was refusing to talk in class and was sent home for the day on the consent of his grandmother, Linda Howell.

Two other students were asked to comply with removing their protest tags and answer questions. They both did so.

Thank you,
sdf

Shannon D. Fusco
Principal, DeSoto High School
"To empower all students to become life-long learners able to compete in today's society."

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AMBER HATCHER, by and through her next friend, GREGORY HATCHER Plaintiff, vs. DESOTO COUNTY SCHOOL DISTRICT BOARD OF EDUCATION et. al., Defendants.	)	Civil Action File No.:_____

PLAINTIFF'S PROPOSED PRELIMINARY INJUNCTION

Plaintiff, by and through her next friend Gregory Hatcher, filed a Verified Complaint and a Motion for Injunctive Relief pursuant to Section 42 U.S.C. §1983 and 28 U.S.C. §1343(a)(4), seeking entry of a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 4.06.

The Court has considered the pleadings, memoranda, declarations, and exhibits filed in connection with the Plaintiff's motion as well as the argument of counsel, and finds that:

1. This Court has jurisdiction of the subject matter of this case and over all named parties;

2. Venue lies properly with this Court;

3. The Complaint states a claim upon which relief may be granted;

4. Plaintiff is substantially likely to prevail on her First and Fourteenth Amendment claims;

5. Plaintiff will suffer irreparable injury if Defendant Board of Education and its representatives are not enjoined;

6. No one will suffer substantial harm if a preliminary injunction is granted;

7. Plaintiff has established that an Order for preliminary injunctive relief is necessary to enjoin Defendant Board of Education and its representatives from continuing to enforce its policies, customs and/or practices against the Plaintiff in suppression of the rights guaranteed to Plaintiff by the First and Fourteenth Amendments to the Constitution of the United States of America, and in particular to enjoin enforcement of its policies, customs and/or practices against the Plaintiff so that she may organize and participate in Day of Silence on April 19, 2013; and

8. Plaintiff has established that any and all records regarding Plaintiff's attempt or desire to participate in the Day of Silence, including but not limited to, her suspension and any other disciplinary actions taken against her, must be stricken, expunged and eliminated from her records.

IT IS THEREFORE ORDERED THAT:

Plaintiff'S Motion for a Preliminary Injunction against Defendant Board of Education and its representatives is HEREBY GRANTED, and Defendant Board of Education and its representatives are hereby enjoined from:

(a) Enforcing policies and/or practices that effect a blanket ban on "protests".

(b) Enforcing policies and/or practices that prohibit -- or expose students to disciplinary sanctions for -- expression in opposition to anti-LGBT bullying.

(c) Enforcing policies and/or practices that prohibit -- or expose students to disciplinary sanctions for -- constitutionally protected speech as part of participation in national Day of Silence on April 19, 2013.

(d) Retaining and/or disseminating any and all records regarding Plaintiff's attempt or desire to participate in the Day of Silence, including but not limited to, her suspension and any other disciplinary actions taken against her.

DONE AND ORDERED at Fort Myers, Florida, this _____ day of _____, 2013.

_____

Copies: Counsel of record