

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

## Frequently Asked Questions

April 2023

April 14, 2023 is this year's National Day of Silence, a student-led action sponsored by the Gay, Lesbian and Straight Education Network (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.

The purpose of this FAQ is to provide information about the rights of students to participate in the Day of Silence and what to do if school officials interfere with those rights.

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

**In most circumstances, yes.**

Public schools must respect students' Constitutional 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. School officials are not allowed to discriminate based on a student's message, disagreement with a student's ideas, or in an effort to avoid controversy.<sup>2</sup>

This does not mean students can say - or not say - absolutely anything they want at all times. There are some limits on free speech rights in general, and in schools.<sup>3</sup>

Students who want to remain silent during class on the Day of Silence are less likely to encounter issues with teachers (who may ask that they speak or answer questions in class) if they seek permission beforehand.

*For more information on the Day of Silence, including tips on how to organize at your school, please visit:*

<https://www.glsen.org/day-of-silence#snt--5>

**Do students have the right to display posters, or 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, Day of Silence participants must be allowed to announce events and put up posters, too. That ability cannot be restricted just because of message or viewpoint.<sup>4</sup>

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

**In most circumstances, no.**

If a public school wants to restrict student speech because it fears controversy, school officials need to show facts that support a reasonable belief that the speech will cause a substantial disruption in school.<sup>5</sup>

Kinds of speech that may be restricted include lewd or foul language, promotion of illegal drug use, or harassment of other students. The content must be inherently offensive - speech cannot be restricted simply because other students respond to a message in a disruptive manner.<sup>6</sup>

If another student responds with name-calling and harassment, the solution must be to discipline the harasser, not the Day of Silence participant.<sup>7</sup>

Can a school restrict Day of Silence activities, so that the community doesn't think the school is endorsing the event?

**In most circumstances, no.**

Schools have more control over student speech if members of the community would reasonably believe that speech represents the school's own viewpoint, such as in a school-sponsored publication or newsletter.

However, if a school is generally open to independent student expression, then schools cannot discriminate against student speech based on their ideas - because no reasonable member of the community would think that all student speech represents the viewpoint of the school.<sup>8</sup>

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

**In most circumstances, no.**

So long as student speech is not lewd or profane, advocating violence or illegal activity, or harassing other students, schools cannot restrict it just because some students or parents may find it offensive.

Just because some individuals may respond with offense does not make a student's speech inherently offensive on its own.<sup>9</sup>

Are there other ways in which schools may try to interfere with Day of Silence activities?

**Yes. Examples include:**

- Denying students' opportunities to seek permission to participate in Day of Silence.
- Delaying permission or approval until the last minute, then telling students it is too late.
- Requiring students to have a student club to sponsor Day of Silence, and not permitting individual participation.
- Attempting to re-name Day of Silence or otherwise co-opt students' messages.
- Re-writing student announcements, or providing an edited script for announcements made.
- Allowing students to have a table to distribute materials, but requiring it be placed in a hidden or inaccessible location.

The degree to which these actions are unlawful may vary depending on the specific circumstances, and the relevant rules of your jurisdiction.

For more information on your legal rights, or help accessing local resources, please visit:

<https://www.lambdalegal.org/helpdesk>

**This document provides information on general principles only and is not intended as legal advice. For legal assistance, please contact a local attorney.**

1. *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).
2. *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)
3. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267, 270-73 (1988).
4. 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).
5. *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).
6. *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.*
7. *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).
8. *Bd. of Ed. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 250 (1990) (*plurality op.*).
9. *Texas v. Johnson*, 491 U.S. 397, 414 (1989).