



Respecting Student Speech and Expression

What rules apply when it comes to LGBTQ-friendly posters, presentations and gender nonconforming clothing – and does the same hold true for antigay slurs?

Protecting LGBTQ-supportive expression is not merely a matter of First Amendment rights — it also plays a crucial role in fostering a safe, welcoming environment for all students

Censoring LGBTQ students and their allies sends a hurtful message to the entire student body. Moreover, it can expose a school to greater liability in a lawsuit (see page 11).

What free speech rights do students have under the Constitution?

Public school students have a constitutional right under the First Amendment to express themselves at school. This includes not only the right to speak (or not speak) particular words, but also the right to share written materials with each other and to wear messages and images on clothing, buttons, or jewelry, without censorship or discrimination based on the ideas that the students wish to express. In most cases, the First Amendment also protects students' right to form groups like gay-straight alliances (GSAs, see page 22). It also protects students' right to self-identify as LGBTQ or as allies.

Schools may not discriminate based on particular ideas by imposing extra restrictions or procedural hurdles. For example, a public school would violate the First Amendment if it generally allowed

students to wear written messages on their T-shirts but required students to receive prior approval for T-shirts supporting LGBTQ equality.

Are there limits to students' freedom of speech at school?

Courts interpreting the First Amendment have recognized a few narrow categories of student speech that schools may restrict, including speech that is verbally abusive, promotes illegal drug use or is lewd or profane. Schools may also restrict student speech where school officials can show facts that reasonably lead them to conclude that the speech will cause an actual, substantial disruption to the school's operation. Schools may not simply *assume* that speech will be substantially disruptive. Nor may they label speech "substantially" disruptive merely because it could cause controversy, inconvenience or discomfort, or because other people respond to the student's speech in a disruptive way. If a group of students harasses a classmate because he or she wears a T-shirt supporting LGBTQ equality, the school must take disciplinary action against the harassers. It may not "solve" the problem by pressuring the student to wear a different shirt. As one federal court has explained in the context of gay-supportive speech, the First Amendment "does not tolerate mob rule by unruly school children."

Can LGBTQ-supportive expression be restricted if school officials find it inappropriately "sexual" in nature?

Schools occasionally attempt to silence student speech related to LGBTQ issues by claiming that such speech is inappropriately "sexual" for young people, or by claiming that such speech contravenes a school's abstinence-only curriculum.

There is nothing "sexual" about discussing inclusion and respect; nor is there anything "sexual" about opposing harassment, discrimination and violence. In 2008 and 2009, three federal courts flatly rejected

claims that LGBTQ-supportive student expression could be restricted because it was inappropriately sexual or interfered with an abstinence-only curriculum.

Can schools restrict access to their public address system, or limit the types of posters that students display on school property?

While schools have some leeway under the Constitution to decide whether they will allow student announcements on a public address system or allow students' posters on school property, rules must apply evenhandedly, without discrimination based on the ideas students want to express. So if students are allowed to announce support for a canned-goods drive through posters or announcements, schools must provide the same privilege to students who wish to announce an LGBTQ-related event. The only exceptions are those narrow exceptions to student free-speech rights discussed above.

What if a student is speaking as part of a class, or in a student or school publication?

Courts have allowed schools to exercise a greater degree of control over student expression where it forms part of the school's official curriculum. Student expression in school publications can fall into this category when the publication is tied to the curriculum, such as in a journalism class. However, even in this context of curricular speech, the First Amendment requires that restrictions on student expression be reasonably related to legitimate pedagogical concerns. Several courts have recognized, moreover, that restrictions aimed at suppressing particular ideas are unconstitutional even in the context of curricular expression. Thus, if a student is disciplined for presenting a critique of the president during an oral presentation to her class, the disciplinary action may violate the First Amendment if its purpose is to suppress or discourage the student's ideas. If, however, the same student is disciplined because she

disregarded the teacher's instruction that all presentations focus exclusively on the French Revolution, the First Amendment would provide the student with no defense, because the discipline was reasonably related to pedagogical interests. The First Amendment similarly would not apply if one of the earlier-described exceptions applied – for example, if the student expressed herself in a lewd or profane manner.

What other laws protect student speech?

The First Amendment provides only the minimum requirements that public schools must meet in respecting students' free speech rights. Other constitutional guarantees may provide additional protections in certain contexts. Moreover, several states, including Arkansas, California, Colorado, Iowa, Kansas, Massachusetts and Oregon, have enacted statutes that provide students with enhanced expressive freedom beyond what the First Amendment requires. For more information about a particular jurisdiction, contact a local attorney, the Student Press Law Center (www.splc.org) or Lambda Legal's Help Desk (866-542-8336 or visit www.lambdalegal.org/help/online-form).

What about antigay speech or speech opposing LGBT equality?

Students have a constitutional right to discuss political and social issues from all perspectives. But as discussed above, students do not have a constitutional right to substantially disrupt the educational environment, express themselves in a lewd or profane manner or inflict verbal abuse. As one federal appeals court explained, “[i]ntimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. There is no constitutional right to be a bully.”

Distinguishing between offensive but constitutionally protected speech and

unprotected verbal harassment may occasionally present a challenge. Courts have not yet settled on a single approach to borderline cases, and resolution often requires a fact-intensive inquiry. But there are ways to create a supportive school environment without infringing on any student's First Amendment rights.

The First Amendment may in some circumstances protect a student's right to voice, at school, his or her objection to homosexuality or LGBTQ rights. But nothing requires school officials to agree. Thus, if officials are concerned that a student's expression in opposition to LGBTQ equality could foster an intolerant environment or upset other students, school officials may take the opportunity to remind the student body that, while the school respects freedom of speech on these issues, the school itself remains committed to the full inclusion of, and respect for, all students, including LGBTQ students.

School officials might express this affirming message by, for example, making an announcement, or implementing or redistributing copies of an anti-harassment policy (see page 11). Schools can also make additional LGBTQ-supportive resources available to students, or encourage students who are upset to speak with a counselor.

Of course, school officials should not punish or otherwise discipline a student based on his or her constitutionally protected speech; nor should they permit LGBTQ-supportive students (or staff members) to harass the student with anti-LGBTQ ideas. But provided school officials prohibit such misconduct, they are entitled (and in some circumstances, required) to convey the school's institutional support for LGBTQ students and their allies.

Do public school teachers and staff members have free speech rights at school?

The First Amendment protects some types of expression for teachers and staff, but employers are allowed under the law to restrict the speech of employees in certain ways. The nature and scope of allowable restrictions depend highly on the context and the jurisdiction (see page 5). Public employees with specific questions should contact Lambda Legal or a local attorney.

Do private school students have free speech rights?

Students in private schools do not have a constitutional free speech right, because the Constitution is about limiting the actions of the government (including public schools). They may, however, have rights under certain federal and state laws. For information about private school student rights in a particular context or jurisdiction, contact Lambda Legal (866-542-8336 or visit www.lambdalegal.org/help/online-form) or a local attorney.

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DAYS OF ACTION

Questions about students’ expressive rights often arise in response to student “days of action,” such as the student-run National Day of Silence supported by the Gay, Lesbian and Straight Education Network (see page 34), or Allies Week. The principles discussed throughout this section apply to these days of action, protecting students’ rights to organize and participate in them. When students participate through an extracurricular group, they may have additional rights under the Equal Access Act (see page 22). A school’s support for LGBTQ-supportive events can help create a safe school environment and discourage harassment and discrimination.

