



MEMORANDUM

1-800-835-5233

DATE: October 2013

RE: Students' Constitutional Rights to Participate in the Pro-Life Day of Silent Solidarity

Alliance Defending Freedom is an alliance-building legal ministry that advocates for the right of people to live out their faith freely. We seek to resolve disputes by educating public officials about the constitutional rights of our clients. When necessary, we litigate to secure these rights. We have participated in many of the recent court decisions governing students' religious and free speech rights in public schools, including *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001) (recognizing that the First Amendment protects students' religious speech).

On Tuesday, October 15, 2013, thousands of students in public schools across America will be taking a stand for life by participating in the [Pro-Life Day of Silent Solidarity](#). They'll do so by remaining silent throughout the day and wearing red duct tape, a red armband, or a pro-life t-shirt. When asked by their classmates why they refuse to speak, the students will hand them flyers explaining how over 4,000 innocent babies are permanently silenced in abortion mills every day.

The brief memo below sets out public school students' First Amendment rights to participate in the Pro-Life Day of Silent Solidarity. It is our hope that this information will clarify this important area of the law and allow school districts and school officials to avoid needless litigation.

Introduction

Students retain their First Amendment liberties while on campus. The Supreme Court has rightfully pointed out that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹

Students have the right to wear armbands, remain silent, share their beliefs, pray, read Scripture, and invite fellow students to participate in such activities so long as they are voluntary, student-initiated activities that are not disruptive or coercive. A school may not prohibit student expression during non-instructional time unless it (1) materially and substantially interferes with the discipline necessary to operate the school, or (2) infringes on the rights of other students.²

Importantly, the Supreme Court recently held that public schools cannot restrict religious speech simply because it may be perceived by some as “offensive” or “controversial” because “much . . . religious speech might be perceived as offensive to some.”³ The Third Circuit Court of Appeals has succinctly summarized this Supreme Court case law on this matter: “The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it.”⁴

¹ *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969); see also *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107–12 (3d Cir. 2013) (concluding that *Tinker* applies to elementary school students); *Morgan v. Swanson*, 659 F.3d 359, 385–87 (5th Cir. 2011) (same).

² *Tinker*, 393 U.S. at 506.

³ *Morse v. Frederick*, 551 U.S. 393, 409 (2007).

⁴ *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001).

Your Rights

1. *Can I wear a red armband to school?*

Yes. Students have the right to express themselves at school by wearing colored armbands so long as the expression does not cause a material and substantial disruption.

2. *Can I remain silent at school?*

You have the right to remain silent as long as it does not cause a material and substantial disruption. During class, if your teacher requires you to participate, you should obey so that there is no disruption. You should talk to your teachers beforehand about the “Pro-Life Day of Silent Solidarity” and ask if they will allow you to remain silent for the day. If students at your school are allowed to participate in the “other” Day of Silence, you should be allowed to participate to the same extent in the “Pro-Life Day of Silent Solidarity.”

3. *Can I pass out flyers about the “Pro-Life Day of Silent Solidarity” at school?*

Yes, to the same extent that students are permitted to pass out other literature or flyers. However, you should only pass them out during breaks, lunch, and before and after school—not during class time.⁵ If the materials (1) substantially interfere with the operation of the school, or (2) infringe on the rights of other students, then the school may prohibit them. But schools may not impose an outright ban on the distribution of religious or pro-life materials.⁶

Schools cannot claim that the so-called “separation of church and state” justifies banning religious materials on campus.⁷ Equally, schools may not ban pro-life materials simply because they might “offend” someone.⁸ The school does not endorse student speech, and federal courts have made it very clear that the school’s obligation is to educate the audience about the First Amendment, rather than silence the speaker out of fear that the audience will misperceive that the school, by allowing the speech, is endorsing it.⁹

4. *Can I pray at school?*

Yes. You may pray anytime you wish during non-instructional time. During class, you should always pay attention, but it is all right to pray silently so long as you are completing your class work and not causing a disruption.

5. *Can I bring my Bible to school?*

Yes. At a minimum, students have the same right to bring their Bible to school as they do to bring other personal items.¹⁰ For example, if the school allows students to bring their own books

⁵ See *K.A.*, 710 F.3d at 112–14 (upholding a preliminary injunction against school district’s policy preventing students from distributing flyers not related to school events); *Gilio ex rel. J.G. v. Sch. Bd. of Hillsborough Cnty.*, 905 F. Supp. 2d 1262, 1265 (M.D. Fla. 2012) (issuing preliminary injunction against school district’s ban on “proselytizing speech” and on “materials seeking to establish the supremacy of a particular religious denomination, sect, or point of view”).

⁶ See *J.S. ex rel. Smith v. Holly Area Schools*, 749 F. Supp. 2d 614, 623 (E.D. Mich. 2010) (issuing preliminary injunction against “school district’s outright prohibition upon [elementary school student’s] distribution of religious flyers to his classmates”); *M.B. ex rel. Martin v. Liverpool Cent. Sch. Dist.*, 487 F.Supp.2d 117, 142 (N.D.N.Y. 2007) (striking down a school policy that banned all literature distribution that was not related to the school’s “pedagogical concerns”); *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp.2d 98, 114 (D. Mass. 2003) (finding that “[i]t is now textbook law” that students carry rights of expression, including the right to distribute literature).

⁷ *Bd. of Educ. of Westside Cmty. Schools v. Mergens*, 496 U.S. 226, 248 (1990) (student religious speech does not violate the Establishment Clause); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

⁸ See *Morse*, 551 U.S. at 409; *Saxe*, 240 F.3d at 215.

⁹ *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418 (6th Cir. 2004); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993); *Hills v. Scottsdale Unified Sch. Dist. No. 48*, 329 F.3d 1044 (9th Cir. 2003).

¹⁰ Excluding otherwise acceptable materials or activities based solely on the religious viewpoint is unconstitutional. *Good*

from home to read during a free silent reading period or during breaks, the school cannot prevent students from choosing to read their Bible at these times.

6. *Can I wear religious or pro-life t-shirts, clothing or jewelry to school?*

Yes. Schools may not single out religious or pro-life clothing for unfavorable treatment.¹¹ Students may wear such clothing to school to the same extent that other similar articles of dress are permitted. For example, if the school allows students to wear t-shirts with messages on them, they cannot prevent a student from wearing a t-shirt with a pro-life message. Additionally, the wearing of clothing or jewelry bearing a pro-life message is considered student speech, which cannot be restricted unless it (1) substantially interferes with the operation of the school, or (2) infringes on the rights of other students.¹² A student may not wear clothing with a pro-life message if the school requires students to conform to a dress code that does not allow any messages to be displayed on clothing.

7. *Can I talk to people at school about abortion or share my faith?*

Yes. Though the “Pro-Life Day of Silent Solidarity” is about remaining silent, if you have the opportunity to talk to someone, you certainly have the right to, provided it is not during instructional time and is not disruptive. If your teacher gives your class free time during which talking not related to the curriculum is permitted, you may also talk about those topics in class.

8. *What should I do if I get in trouble, or the school tells me to stop distributing literature or to take the armband/tape off?*

If a principal, teacher, or someone else in authority asks you to stop, stop immediately but politely request that they immediately check with a supervisor to see if you can continue your activity. If they continue to insist that you stop, or if the supervisor affirms their decision, stop immediately. Then write down what happened and who told you to stop so that you can give us these important details. Afterwards, please call 1–800–835–5233, so that we can help resolve the situation quickly. Please be prepared to give your name, the name of your school, and the names of officials who required you to stop. If you are under the age of 18, we will also need to talk to your parents to get their permission to help you.

Conclusion

We hope this information is helpful to you in understanding the rights of public school students to participate in the Pro-Life Day of Silent Solidarity. If you think that your rights have been violated as a result of participating in the Pro-Life Day of Silent Solidarity, please contact our Legal Intake Department so that we may review your situation and possibly assist you. You can reach us at 1–800–835–5233, or visit our website at www.AllianceDefendingFreedom.org and select the “Get Legal Help” button to submit a request for legal assistance. Since each legal situation differs, the information provided above should only be used as a general reference and should not be considered legal advice.¹³

News Club, 533 U.S. 98; *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

¹¹ See *Good News Club*, 533 U.S. 98; *Lamb’s Chapel*, 508 U.S. 384.

¹² *Tinker*, 393 U.S. at 506.

¹³ Disclaimer: The information contained in this document is general in nature and is not intended to provide, or be a substitute for, legal analysis, legal advice, or consultation with appropriate legal counsel. You should not act or rely on information contained in this document without seeking appropriate professional advice. By printing and distributing this document, Alliance Defending Freedom is not providing legal advice, and the use of this document is not intended to constitute advertising or solicitation and does not create an attorney-client relationship between you and Alliance Defending Freedom or between you and any Alliance Defending Freedom employee.