



The Law, K-12 Schools, and Sexual Diversity: A WASHINGTON STATE QUIZ

From the Safe Schools Coalition

In partnership with
[The American Civil Liberties Union](#) (ACLU) [of Washington](#)
[Legal Voice](#) (formerly Northwest Women's Law Center)



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1. Students have the right to form a Gay Straight Alliance.
 - a. True, but only in schools in King County
 - b. True, but only in public schools in Washington State
 - c. True, in federally-funded public secondary schools with other non-curricular clubs anywhere in the U.S.
 - d. False
2. School districts in Washington State must ban bullying based on what real or perceived characteristics?
 - a. Race, color, religion, ancestry, national origin, gender, disability, sexual orientation, and gender expression or identity
 - b. Race, color, religion, ancestry, national origin, gender, disability, and sexual orientation (but not gender expression and identity)
 - c. Race, color, religion, ancestry, national origin, gender, and disability (but neither sexual orientation nor gender identity)
 - d. None of the above; it is a local school board decision
3. Students in Washington State have a right to express their opinions about sexual orientation (pro or con) at school, unless their expression:
 - a. Physically harms a student or damages the student's property.
 - b. Has the effect of substantially interfering with a student's education.
 - c. Is so severe, persistent or pervasive that it creates an intimidating or threatening educational environment.
 - d. Substantially disrupts the orderly operation of the school.
 - e. A and C
 - f. all of the above
4. By law, all school districts in Washington State must teach about sexual diversity (biological sex, gender identity & expression, sexual orientation).
 - a. True, in all grades
 - b. True, in secondary schools
 - c. True, in public secondary schools
 - d. False; it is a local school board decision
5. A school may not discriminate against a student based on the student's gender nonconformity.
 - a. True, in Washington State.
 - b. True, in 12 other states but not in Washington.
 - c. True, anywhere in the United States.
 - d. A and probably C.
6. Do public school students have a legal right to participate in the Day of Silence?
 - a. Yes, in most circumstances. It's a matter of freedom of speech
 - b. No, unless the school approves the event in advance.
 - c. No, it's a disruption of the school environment



7. Does a school *have* to allow a student to take a same-gender date to prom?
 - a. Yes, it's a matter of free speech and equal treatment under law
 - b. Maybe
 - c. No, a school can prohibit that as a matter of safety
8. Do students have a right to come out (to tell people they're LGBTQ)?
 - a. Yes.
 - b. Yes, unless the school considers that unsafe
 - c. Only if they are at least eighteen.
 - d. No, it isn't a protected behavior
9. Can a teacher be fired or disciplined for telling his/her/their students that he/she/they are LGBTQ?
 - a. School districts must respond to the demands of the community and if the community does not want teachers to openly identify as LGBTQ, teachers who violate the community mores may be disciplined, up to and including being fired.
 - b. No. Federal law allows teachers to come out of the closet.
 - c. No. State law, prohibits a school from discrimination in connection with employment.
10. Do students have a legal right to hold hands with their same-gender girlfriend or boyfriend at school?
 - a. Yes, if heterosexual couples hold hands at school
 - b. No, there's no legal right to public displays of affection
 - c. No, but some districts' policies protect the right
 - d. A and B
11. Does a principal have a legal right to let parents know if a student comes out (as LGBTQ) at school?
 - a. Yes, and parents have a right to know if their child is LGBTQ
 - b. Yes, under Washington State law, but not federal law
 - c. Probably not.
 - d. No, the student has a right to privacy.
12. Does a student have a legal right in Washington State to use the bathroom that conforms to their gender identity?
 - a. More likely than not.
 - b. Yes, but only with parent or guardian written request.
 - c. No.
13. Is there a legal right to have graffiti about you or slurs about people of your race, religion, etc. removed from school property in a timely way?
 - a. Yes, under Washington State law.
 - b. Yes, under Federal law.
 - c. Yes, if it is about them personally, but not if it disparages a class of people.
 - d. No, but some districts provide that protection by policy.
 - e. It depends, but probably A, B. and D.
14. Do school employees have a legal responsibility to take action when they hear anti-LGBT slurs in the hallways or on the playground?
 - a. In most circumstances, yes, under both state and federal law
 - b. Not federally, but in Washington State that's the law
 - c. No, but some districts provide that protection by policy



The Law, K-12 Schools, and Sexual Diversity: A WASHINGTON STATE QUIZ Answer Key

1. Students have the right to form a Gay Straight Alliance.
 - c. **True, in federally-funded public secondary schools with other non-curricular clubs anywhere in the U.S.** (per the U.S. Equal Access Act¹)

2. School districts in Washington State must ban bullying based on what real or perceived characteristics?
 - a. **Race, color, religion, ancestry, national origin, gender, disability, sexual orientation, and gender expression or identity**
Every district must ban these kinds of harassment, per Washington State's 2002 anti-bullying law², which references the state's malicious harassment law³, which defines "sexual orientation," as of 2009, as including "gender expression and identity."

3. Students in Washington State have a right to express their opinions about sexual orientation (pro or con) at school, unless their expression:
 - f. **all of the above** (per Washington State's 2002 anti-bullying law and constitutional free speech guarantees)
Under the First Amendment, public school officials wishing to restrict student speech based on a fear of disruption may not simply *assume* that expression about sexual orientation will disrupt the school or that it will interfere with other students' education. To censor speech for such reasons, school officials must show facts that *reasonably* lead them to conclude that the speech will cause a substantial disruption. Moreover, speech is not itself disruptive merely because other students *respond* inappropriately to it.⁴)

4. By law, all school districts in Washington State must teach about sexual diversity (biological sex, gender identity & expression, sexual orientation).
 - d. **False; it is a local school board decision**
Washington is largely a "local control" state in terms of elementary and secondary instruction.⁵ Some states actually prohibit positive portrayals of LGBTQ people in the schools; Washington **isn't** one of them. That said, "local control" doesn't supersede state standards. The 2007 Washington State Healthy Youth Act⁶ **does require** that, if a district chooses to teach about sexual health, they must do so in a way that is medically and scientifically accurate and "appropriate for students regardless of gender, race, disability status, or sexual orientation." And Washington State social studies standards – called

¹ See U.S. **Equal Access Act**, 20 U.S.C. § 4071 *et seq.*, available at <http://www.usdoj.gov/crt/cor/byagency/ed4071.php>

² See WA State's **anti-harassment, intimidation and bullying law** (RCW 28A.300.285) <http://apps.leg.wa.gov/rcw/default.aspx?cite=28A.300.285>

³ See WA State's **malicious harassment law** (RCW 9A.36.080) <http://apps.leg.wa.gov/RCW/default.aspx?cite=9A.36.080>

⁴ For more information on student speech rights, see Lambda Legal's **Out, Safe & Respected**, available at www.lambdalegal.org/osr. Click on the "Speak Out" section.

⁵ See **Funding Washington Schools** (last visited on November 16, 2009): www.fundingwaschools.org/index_files/Local_Control_SchoolBoards_Funding_WA_K12_Schools.htm

⁶ See WA State's **comprehensive sex ed law** (RCW 28A.300.475) <http://www.k12.wa.us/CurriculumInstruct/healthfitness/HealthyYouthact.aspx>



EALRs⁷ -- **do require** that, in primary grades, students learn to describe who can be in a family. They require that middle schoolers learn to recognize stereotypes, clichés and bias and to understand events and movements. They require that, in high school, people learn to identify and analyze major concepts, people and events in world history including challenges to human rights.

5. A school may not discriminate against a student based on the student's gender nonconformity.
 - d. **A and probably C** In 2006, Washington's Law Against Discrimination, which already prohibited various other kinds of discrimination in, among other things, employment and public accommodation [which includes public schools], was amended to prohibit discrimination based on sexual orientation and gender identity and expression. Washington also has two statutes that ban discrimination in education, (1) RCW 28A640 - Sexual Equality, which bans discrimination on sex and 92). RCW 28A642 - Discrimination prohibition bans discrimination on sexual orientation, which includes gender identity or expression.
Now at least 18 states, plus the District of Columbia, have statutes expressly protecting students against discrimination based on sexual orientation and gender identity and an additional three have prohibitions on discrimination based on sexual orientation only. In other states, students may find LGBT-inclusive antidiscrimination protections in administrative regulations, local ordinances, and/or board of education policies. Courts in various parts of the country have properly recognized that federal civil rights protections – including Title IX and the Constitution's Equal Protection Clause – prohibit irrational discrimination based on gender stereotypes in schools, regardless of what state law provides⁷. Unfortunately, not all courts have been receptive to claims alleging discrimination based on sex and gender stereotypes. The Supreme Court has only provided limited guidance on these issues.
6. Do public school students have a legal right to participate in the Day of Silence?
 - d. **In most circumstances, yes. It's a matter of freedom of speech.**
Students generally have the right to express their opinion at school, including by wearing messages expressing their ideas or by participating in events like the Day of Silence, during which they take a vow of silence for all or part of the school day.
Courts have said, however, that there are some limits on students' free speech rights at school [and more limits on employees' free speech rights]. For instance, *"if a teacher tells a student to answer a question during class, the student generally doesn't have a constitutional right to refuse to answer. Students who want to remain silent during class on the Day of Silence are less likely to encounter problems if they seek permission from their teachers beforehand. Outside of the classroom, in areas like hallways and cafeterias, students have a much broader right to free speech [and should be able to participate in the Day of Silence during non-instructional time without fear of discipline]."*⁸
Students participating in the Day of Silence also have a right of equal access to school facilities. For example, if a school allows students to display posters on campus about some events, it can't prohibit *this* event's posters based on their viewpoint. That

⁷ See **Social Studies standards:** <http://www.k12.wa.us/SocialStudies/EALRs-GLEs.aspx>

⁸ See Lambda Legal's publication **Out, Safe and Respected: Your Rights at School** <http://www.lambdalegal.org/publications/out-safe-respected/> and also http://www.dayofsilence.org/content/getinformation_faqs.html



would violate the First Amendment to the U.S. Constitution, and in some cases, the Equal Access Act as well.⁹

Some administrators have argued that they need to prevent disruption. The courts are unconvinced. Lambda Legal explains, “schools can’t censor students just because other students might respond in a disruptive way. If students who disagree with a speaker’s ideas create a disruption, the school can punish the disruptive students but can’t punish the speaker.”¹⁰

As for getting advanced approval from the school, students generally don’t need to seek permission to participate in the Day of Silence by remaining silent during their free time at school. Still, many students find that they have a more successful event if they explain the Day of Silence ahead of time to teachers and administrators, who may not understand the event or know that students have a First Amendment right to participate. Moreover, in some school contexts – like the classroom – students have much more limited rights, as explained above, so seeking advance permission can be useful. There’s generally no constitutional right to refuse to answer a question in class.

7. Does a school *have* to allow a student to take a same-gender date to prom?

d. **Yes, it’s a matter of free speech and equal treatment under law.**

Back in 1980, when Aaron Fricke sued his high school for the right to bring his boyfriend to prom, the court found in his favor on the basis of the free speech argument. The First Amendment to the U.S. Constitution protected his freedom of expression. In 1996, in another case involving peer-on-peer harassment, when Jamie Nabozny sued his middle and high school principals for treating his bullying less seriously because he was gay, the courts found in his favor on the basis of equal protection. They said that the U.S. Constitution guarantees that the government, including a public school administration, can’t change the rules for one group of people without a rational basis. Jamie won almost a million dollars.¹¹ As for the safety argument, courts have said that a school can and must take steps to protect a student attending prom, rather than punishing the student for other students’ beliefs.)

8. Do students have a right to come out (to tell people they’re LGBTQ)?

d. **Yes.**

See what we said about safety in #7, above. That’s not a legitimate excuse for abridging student speech. Otherwise, a student has significant rights. The ACLU says, “Sometimes schools try to silence students who are open about their sexual orientation. But you have a Constitutional right to be out of the closet at school if you want to be. Sometimes schools punish students for talking about being gay. Sometimes schools censor students for wearing gay-themed t-shirts, even when the shirts aren’t obscene and other students are allowed to wear t-shirts expressing their views on political or cultural issues. In *Tinker v. Des Moines*, over 30 years ago, the U.S. Supreme Court ruled that students don’t ‘shed their constitutional rights to freedom of speech at the schoolhouse gate.’”¹²

⁹ See the **Bill of Rights** http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html. See also note 1, above.

¹⁰ For more information on the **Day of Silence**, go to www.lambdalegal.org/day-of-silence, and click on “frequently asked legal questions.”

¹¹ See Lambda Legal’s **Youth Prom Sample Demand Letter** <http://www.lambdalegal.org/assets/pdf/youth-prom-sample-demand-letter.html>

¹² See the ACLU’s **Know Your Rights! A Quick Guide for LGBT High School Students** http://www.aclu.org/images/asset_upload_file494_28337.pdf; see also The ACLU of Washington State, **Know**



Of course, regardless of what students choose to say, they don't have a right to express themselves in a way that causes substantial disruptions to the school. [See Question 3].

9. Can a teacher be fired or disciplined for telling his/her/their students that he/she/they are LGBTQ?

c. No. State law, prohibits a school from discrimination in connection with employment.

The Washington Law Against Discrimination, prohibits discrimination based on sexual orientation or gender identity. If other teachers are allowed to disclose information about their personal lives (i.e., that they are married to an opposite-sex spouse or that they are heterosexual or CIS gendered) then the same rights exist for other parents. Additionally WAC 392-190-0591 - Public school employment and contract practices—

Nondiscrimination prohibits any contractual or other relationship that directly or indirectly has the effect of subjecting any person to discrimination in connection with employment. See WAC 392-190-0591(3). A requirement to conceal sexual orientation or gender identity would likely violate these provisions.

10. **There may also be protections in collective bargaining agreements.** Do students have a legal right to hold hands with their same-gender girlfriend or boyfriend at school?

d. A and B.

There's no legal right to public displays of affection, but there **is** a right to equal treatment by staff in a public school. It's a matter of "equal protection" under the U.S. Constitution that the government cannot have different rules for one group of individuals than for another.

11. Does a principal have a legal right to let parents know if a student comes out (as LGBTQ) at school?

c. Probably not.

In 1997, a federal appeals court found that police officers violated a teen's right to privacy under the U.S. Constitution when they even *threatened* to tell the teen's family he was dating a boy.¹³ Then in 2006, another federal court found that a student had a protected privacy interest in the "non-disclosure of her sexual orientation" to her family. However, the court also held that school officials did not violate the student's privacy rights under the specific circumstances of that case, because the student's sexual orientation was only revealed to her mother in the context of disciplinary action after the student had engaged in prohibited public displays of affection at school.¹⁴

12. Does a student have a legal right in Washington State to use the bathroom that conforms to their gender identity?

a. More likely than not.

To date, there has not been a case on this issue in Washington. Courts in California have found that their anti-discrimination law covered bathroom access. In the K-12 setting, OSPI has issued guidelines that school districts should allow a student to use the restroom that is consistent with the student's gender identity. The second option is that if a student, transgender or not - who has a need or desire for increased privacy, regardless of the underlying reason, should be provided access to an alternative

Your Rights: A Guide for Public School Students in Washington (June 2007): http://www.aclu-wa.org/library_files/Guide%20for%20Public%20School%20Students.pdf

¹³ *ibid*

¹⁴ See **Nguon v. Wolf**, 517 F. Supp. 2d 1177 (C.D. Cal. 2007); see also ACLU's profile of *Nguon v. Wolf* <http://www.aclu.org/lgbt/youth/22177res20051205.html>



restroom (e.g., staff restroom, health office restroom), but no should be required to use an alternative restroom because they are transgender or gender nonconforming.

13. Is there a legal right to have graffiti about you or slurs about people of your race, religion, etc. removed from school property in a timely way?

e. It depends, but probably A, B, and D

Students generally don't have an affirmative right to have graffiti removed, public school officials do violate federal law and state law if they deliberately ignore severe, pervasive and objectively offensive peer harassment based on sexual orientation. In some cases, anti-LGBT graffiti may be one component of such harassment, in which case school officials may have a legal obligation to remove it. Moreover, if a school generally has a policy or practice of removing graffiti, but allows anti-LGBT graffiti to remain, that policy or practice could constitute illegal discrimination.

14. Do school employees have a legal responsibility to take action when they hear anti-LGBT slurs in the hallways or on the playground?

c. In most circumstances, yes, under both state and federal law.

Public school employees have no freestanding constitutional obligation to take action against name-calling. However, if school employees take action against some kinds of harassment (as they almost always do when they're aware of it), they can't irrationally choose to ignore other kinds of mistreatment. This means they cannot treat harassment less seriously just because it is anti-LGBT in nature.¹⁵ Non-discrimination with respect to sexual orientation and gender identity is also a matter of Washington State law.¹⁶ That said, failure to respond to a *single incident* of anti-LGBT name-calling is not likely to result in a finding that a student's rights were violated, either under state or federal law. Discriminatory harassment generally must reach a certain level of severity and/or pervasiveness before a school or its officials can be held liable for failing to address it.

¹⁵ **Court cases** applying these principles include *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003); *Nabozny v. Podlesny*, 92 F.3d 446 (1996); *Seiwert v. Spencer-Owen Comm'y Sch. Corp.*, 497 F. Supp. 2d 942 (D. Ind. 2007); and *Montgomery v. Independent School Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000). See also this page from the ACLU of Washington about a **lawsuit** brought by former high school student Mark Iversen: www.aclu-wa.org/detail.cfm?id=174

¹⁶ **Washington Revised Code** §§ 49.60.010, 49.60.040, 49.60.215. See also The **Washington State Human Rights Commission** page about the complaint process: www.hum.wa.gov/complaintProcess/