



Re: Title IX Dear Colleague Letter

Dear School Administrators and Board Members:

On May 13th, the U.S. Departments of Education and Justice issued a “Dear Colleague” Letter claiming that Title IX requires your school district to treat students consistent with their gender identity, including allowing students to access locker rooms, restrooms, and similar facilities of the opposite sex. This would allow a male student who asserts that he is female to immediately gain access to girls’ locker rooms and restrooms, and vice versa.

The “Dear Colleague” Letter is wrong. The advice conflicts with Title IX and the rulings of several federal and state courts, and it violates your students’ constitutional right to privacy.

Title IX authorizes schools to maintain separate locker rooms and restrooms on the basis of biological sex, without placing federal funding at risk.

- Title IX states that “nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.” 20 U.S.C. § 1686.
- Title IX’s regulations further state that “[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex.” 34 C.F.R. § 106.33.

5 out of 6 courts have ruled that it does not violate Title IX to maintain separate restrooms and locker rooms on the basis of sex (and the one outlier case is currently being appealed).

- Under Title IX, “institutions may have separate toilet, shower and locker room facilities.” *Jeldness v. Pearce*, U.S. Court of Appeals for the Ninth Circuit (1994).
- “[T]he University’s policy of requiring students to use sex-segregated bathroom and locker room facilities based on students’ natal or birth sex, rather than their gender identity, does not violate Title IX’s prohibition of sex discrimination.” *Johnston v. University of Pittsburgh*, Federal Court for the Western District of Pennsylvania (2015).
- A female student has “no existing, clear, unconditional legal right which allows [her] to access restrooms or locker rooms consistent with [her male] gender identity.” *R.M.A. v. Blue Springs R-IV Sch. Dist.*, Missouri Court of Appeals (2015).

The West Virginia, Arizona, Kansas, Nebraska, Texas, Utah, Mississippi, and South Carolina Attorneys General determined that sex-specific facilities do not violate Title IX.

These six attorneys general recently filed friend-of-the-court briefs in the case of *G.G. v. Gloucester County School Board*. In their briefs, they conclude that Title IX allows separate

restrooms and locker rooms on the basis of biological sex and that nothing in Title IX “extends beyond discrimination based on biological sex.”

Your students have a constitutional right of privacy, and you have a duty to protect it.

- “An individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other private parts are not involuntarily exposed.” *G.G. v. Gloucester Cty. Sch. Bd.*, U.S. Court of Appeal for the Fourth Circuit (2016).
- “Shielding one’s unclothed figure from the view of strangers, particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” *Michenfelder v. Sumner*, U.S. Court of Appeals for the Ninth Circuit (1988).

Your Board can take a principled stand for student privacy without putting its federal education funding at risk.

Many school officials like you are rightfully upset by the federal government’s actions. Not only does this “Dear Colleague” letter threaten to strip students of their right to privacy and conflict with over 40 years of how courts across the country have interpreted Title IX, but it is yet another example of the federal government dictating policy to local schools and threatening to strip away vital funding that your students, teachers, and schools need.

Don’t be bullied into submission. Alliance Defending Freedom is assisting school boards in your area who are taking a principled stand for their students. We are working towards filing a federal lawsuit on behalf of these school boards to make the case that all students’ privacy must be protected. But we need as many school boards as possible to join the lawsuit to show the court the breadth of the opposition to this federal mandate.

Because Alliance Defending Freedom is a non-profit law firm, we do not charge for our services. Nor do you place your federal funding at risk by joining this lawsuit. Title IX allows school districts to have their day in court to explain why having policies and practices that protect student privacy by maintaining sex-specific facilities do not violate Title IX. In fact, the White House recently announced in regard to the North Carolina lawsuit over the states’ Title IX funding that “the administration will not take action to withhold funding while this enforcement process is playing out in the courts.”¹

If you are interested in learning more about how your board can defend student privacy and local control over its operations, without risking Title IX funding, contact us at **1-800-835-5233**. You can also visit www.safebathrooms.org to find additional legal resources that explain Title IX, your students’ right to privacy, and that answer common questions about this subject.

Sincerely,



Jeremy D. Tedesco, Senior Counsel

¹ Matt Zapotosky, “White House won’t keep funds from North Carolina before court battle over transgender rights is resolved,” THE WASHINGTON POST (May 12, 2016) available at <https://www.washingtonpost.com/news/post-nation/wp/2016/05/12/white-house-wont-keep-funds-from-north-carolina-before-court-battle-over-transgender-rights-is-resolved/>.