ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

Under current law, neither states nor school districts will lose Title IX funding for enacting laws and policies that require students to use the restrooms and locker rooms of their biological sex.

Opponents of laws that require students to use the restrooms and locker rooms of their biological sex argue that states and local school districts would risk losing federal funding if such laws are enacted. Under current law, this is FALSE.

Title IX and its regulations specifically allow schools to maintain separate facilities (including dormitories, restrooms and locker rooms) on the basis of sex without putting their 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.

Thus, under the plain language of Title IX, schools and colleges can have separate restrooms, locker rooms, and showers for boys and girls without jeopardizing funding.

Every federal court to examine the issue has concluded that it does not violate Title IX to maintain separate restrooms and locker rooms on the basis of sex.

- "[T]he School Board did not run afoul of Title IX by limiting G.G. to the bathrooms assigned to his birth sex." *G.G. v. Gloucester County School Board*, Federal Court for the Eastern District of Virginia (Sept. 17, 2015).

- "[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 (Mar. 31, 2015).

The Attorneys General of South Carolina, West Virginia, Mississippi and Arizona have concluded that having separate restrooms on the basis of biological sex does not violate Title IX.

On November 30, 2015, these four Attorneys General (along with the Governors of North Carolina and Maine) filed a friend-of-the-court brief in the case of *G.G. v. Gloucester County School Board*. In their brief, 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."

The "cases" cited by opponents are voluntary settlement agreements between school districts and the U.S. Department of Education.

Opponents of laws that protect student privacy often cite the "cases" involving the Arcadia school district in California and the Palatine school district in Illinois. But neither of these were actual "cases" ruled upon by a federal court. Rather, they were voluntary settlement agreements (made before a lawsuit was ever filed) between the school districts and the U.S. Department of Education—the federal agency that is wrongly telling schools that they must allow students to use the restrooms and locker rooms of the opposite sex.[1]

Every time a school district or university has defended a student privacy policy in federal court, it has won and has not jeopardized its federal funding. The U.S. Department of Education's threats are empty threats. The Department seeks to bully schools and states into complying with their wrongful interpretation of Title IX, because when schools stand up to the Department, the Department loses in court.

No school district, university, or state has ever lost Title IX funding.

In the 40 years since Title IX was enacted, no educational institution or state has ever lost its federal funding for noncompliance with Title IX.[2] Additionally, if the Department of Education threatens a school's funding, that school is entitled to a hearing before an administrative law judge and review by a federal court. If a school fights and ultimately loses, the school is still given 30 days to comply and keep its Title IX funding. 20 U.S.C. § 1682; 28 C.F.R. § 42.111.

CONCLUSION

The loss of federal funding is, thus, an extremely remote possibility for at least two reasons. First, as discussed above, Title IX does not require a school to open its restrooms to students of the opposite sex. So, as several federal courts have held, the Department of Education's basis for threatening schools with loss of funding is meritless. Second, states and schools continue to receive federal funding even while they take a principled stand and fight for their students' rights in court. And they are given plenty of time to comply if the court issues an adverse decision. Given these facts, legislators and school boards have nothing to lose and everything to gain from enacting laws that protect all students' right to privacy.

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[1] Copies of these voluntary settlement agreements, which state that there is no admission of "unlawful conduct" or "violation of federal law or regulations" by the school districts, are available at https://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf and http://www2.ed.gov/documents/press-releases/township-high-211-agreement.pdf.

[2] *See* http://www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college; http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html.