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RE: Public Comment in Response to Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; 2024-2025 Free Application for Federal Student Aid (FAFSA®)

To Whom It May Concern,

On behalf of the Human Rights Campaign's more than three million members and supporters nationwide, we write in response to the above-captioned notice seeking comment on revised data collection measures proposed by the U.S. Department of Education (the "Department") for its Free Application for Federal Student Aid (the "FAFSA form").¹

The Human Rights Campaign (HRC) is America's largest civil rights organization working to achieve lesbian, gay, bisexual, transgender, and queer (LGBTQ+) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBTQ+ citizens and realize a nation that achieves fundamental fairness and equality for all. As an advocate for LGBTQ+ individuals, HRC believes that all students—including LGBTQ+ students—to be counted and have their lived experiences meaningfully considered as part of the federal government's efforts to research and advance equity in higher education. We therefore write with recommendations on how the Department should amend its proposal to ensure essential data on these students can be collected through the FAFSA form should they wish to provide it.

Background on the Proposed Revised Collection

Federal Student Aid (FSA) has long used the FAFSA form to collect information from individuals seeking aid through one of the government's federal student financial assistance programs. The FAFSA Simplification Act establishes the data elements that the Department is required to collect from these applicants, including their sex and race or ethnicity, but not explicitly their sexual orientation or gender identity.² FSA and the Department previously engaged in a pilot of revised demographic measures conforming with these requirements, and for

¹ Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; 2024-2025 Free Application for Federal Student Aid (FAFSA®), 88 Fed. Reg. 63,558 (Sept. 15, 2023).

² 20 U.S.C. § 1090(a)(2)(B)(ii)(VII).

“sex” specifically by asking applicants two questions: one about their “gender” and another on whether they identify as transgender. However, FSA’s proposal here retains only the question on gender, allowing students to identify themselves as male, female, nonbinary, or state that they prefer not to answer, and with a note encouraging transgender applicants to “select the gender with which they identify at the time this form is completed.”

Research on LGBTQ+ People and Their Experiences in Education

LGBTQ+ people are a growing population in the United States, living in every state and county and reflecting the breadth of diversity and lived experiences of the communities in which they live. Using data collected through the U.S. Census Bureau’s Household Pulse Survey, the Human Rights Campaign Foundation has estimated that at least 20 million adults in the U.S. identify as LGBTQ+.³ Various researchers have also found evidence that younger people are more likely to identify as LGBTQ+.⁴ LGBTQ+ people are a demographically diverse population, with the Williams Institute using Gallup Daily Tracking survey data from 2012–2017 to estimate that 58% of LGBT adults identify as female and that 42% identify among communities of color, including 1% of LGBT adults that identify as American Indian and Alaska Native.⁵ The Williams Institute has also reported on evidence that individuals belonging to certain communities of color appear more likely than their White counterparts to identify as transgender.⁶ And, data from the Behavioral Risk Factor Surveillance System indicate that LGBTQ+ adults, and transgender adults in particular, are significantly more likely than non-LGBTQ+ adults to self-report having at least one disability.⁷

Cisgender and transgender people can identify as non-binary, including non-LGB people. Available data have allowed for estimates on the population of non-binary LGBTQ adults in the U.S., with the Williams Institute reporting that 11.1% of LGBTQ adults (ages 18–60) identify as non-binary.⁸ Their data show that non-binary people comprise a larger proportion of the transgender adult population (32.1%) than of the cisgender LGBQ adult population (7.5%).⁹

³ HUMAN RIGHTS CAMPAIGN FOUND., WE ARE HERE: UNDERSTANDING THE SIZE OF THE LGBTQ+ COMMUNITY (2021), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/We-Are-Here-120821.pdf>.

⁴ SHOSHANA K. GOLDBERG ET AL., HUMAN RIGHTS CAMPAIGN & BOWLING GREEN STATE UNIV., EQUALITY ELECTORATE: THE PROJECTED GROWTH OF THE LGBTQ+ VOTING BLOC IN COMING YEARS (2022), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/LGBTQ-VEP-Oct-2022.pdf>. The Williams Institute has previously estimated that at least 2 million youth ages 13–17 identify as LGBT in the U.S., including approximately 300,000 youth who are transgender. JODY L. HERMAN ET AL., WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>; KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

⁵ *LGBT Demographic Data Interactive*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

⁶ HERMAN ET AL., *supra* note 4, at 6.

⁷ Human Rights Campaign Found., *Understanding Disability in the LGBTQ+ Community*, HUMAN RIGHTS CAMPAIGN (Aug. 12, 2022), <https://www.hrc.org/resources/understanding-disabled-lgbtq-people>.

⁸ BIANCA D.M. WILSON & ILAN H. MEYER ET AL., WILLIAMS INST., NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf>.

⁹ *Id.*

Limited data exist on LGBTQ+ people and their rates of attending and experiences in higher education. However, the Williams Institute has analyzed data from a nationally representative sample of U.S. adults ages 18–40 and found that 58.3% of LGBTQ respondents ages 18–40 reported attending a four-year college at some point in their lives: a rate higher than what was reported by non-LGBTQ respondents (49.0%).¹⁰ Likewise, they also found that 32.7% of LGBTQ people ages 18–40 attended community college at some point in their lives.¹¹

Additionally, research has long shown that LGBTQ+ people are significantly more likely to be living in poverty than their straight and cisgender counterparts,¹² which is in turn likely impacting their ability to access postsecondary education alongside their experiences with discrimination and stigma both in K–12 schools¹³ and institutions of higher education.¹⁴ Among respondents to the Williams Institute’s nationally representative survey, 60.3% of LGBTQ people reported having their four-year-college educational expenses covered by financial aid they needed to repay, compared to only 51.3% of non-LGBTQ people.¹⁵ Likewise, over half of the transgender people (51.0%) in that sample reported being more likely than their cisgender LGBQ (33.1%) and non-LGBQ counterparts (23.2%) to have taken out federal student loans.¹⁶

Research on LGBTQ+-Related Data Collection

In general, we recommend following existing guidance, discussed further below, that encourages the consistent collection of data on sexual orientation and gender identity (SOGI) across all government-administered surveys already collecting other demographic information. While the FAFSA Simplification Act calls for the collection of data on “sex,” we have previously commended the Department for collecting data on students’ gender identity instead and would encourage that it keep doing so moving forward. At a minimum, we would encourage the Department to ensure that the FAFSA form maintains a response option allowing students to identify themselves as nonbinary, which the proposed question here does, in light of the fact that students can legally identify as nonbinary both within federal records and records maintained by their state and local educational agencies.

¹⁰ KATHRYN O’NEILL ET AL., WILLIAMS INST., EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS 11 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Grad-School-May-2022.pdf>.

¹¹ KERITH J. CONRON ET AL., WILLIAMS INST., COMMUNITY COLLEGE AND THE EXPERIENCES OF LGBTQ PEOPLE 7 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Community-College-May-2022.pdf>.

¹² M. V. LEE BADGETT ET AL., WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>; see also BIANCA D.M. WILSON ET AL., WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Poverty-COVID-Feb-2023.pdf> (using data from the Behavioral Risk Factor Surveillance System and the Census Bureau’s Household Pulse Survey to analyze poverty rates during the early days of the COVID-19 pandemic).

¹³ See, e.g., JOSEPH G. KOSCIW ET AL., GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

¹⁴ See, e.g., O’NEILL ET AL., *supra* note 10.

¹⁵ *Id.* at 51.

¹⁶ KERITH J. CONRON ET AL., WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 5 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

Federal agencies, including the Department, have long been collecting information on LGBTQ+ people.¹⁷ For decades, government and other researchers have researched SOGI and found that it is more than possible to measure these concepts and obtain quality data; and likewise that respondents largely do not find this information to be so sensitive that they would not provide it.¹⁸ In a recent report on the collection of SOGI information in the survey context, the Office of Management and Budget (OMB) highlighted guiding principles that have emerged out of that work to support the ongoing collection of SOGI information, including that collected data should have utility, be in support of an agency's mission, and be done with emphasis on protecting respondents' confidentiality.¹⁹ Recent recommendations issued by a panel formed by the National Academies of Sciences, Engineering, and Medicine on SOGI measurement in federal surveys and other instruments (the "NASEM Panel") include well-tested measures for both sexual orientation and gender identity and echo OMB's recommendations.²⁰

Consistent with the Department's aforementioned pilot of questions on students' gender identity to satisfy the FAFSA Simplification Act's mandate for data on sex, we note that the NASEM Panel recommends that agencies shift away from collecting information on sex unless information on that construct as a biological variable is necessary.²¹ When that type of collection is indeed necessary, the NASEM Panel recommends that such collection "be accompanied by collection of data on gender,"²² echoing OMB's recommendation that "respondents should not be asked to provide their sex assigned at birth unless they are also given the opportunity to provide their current gender identity."²³ These recommendations are consistent with longstanding best practices for identifying transgender and other gender minority respondents on surveys, via what is known as the two-step method.²⁴

The two-step method, which the Department previously employed through its pilot FAFSA form questions, ensures that data on transgender people can be disaggregated from that of their cisgender counterparts. While LGBTQ+ people as a population report various disparities and widespread encounters with discrimination and exclusion when compared to non-LGBTQ+ people, research has long shown that the experiences of LGBTQ+ subpopulations can vary greatly based on sexual orientation and gender identity alone. Transgender people often report significant disparities even when only being compared to their cisgender LGBTQ+ counterparts and so should be able to be studied by the Department independent of other populations. However, the questions proposed here would not allow transgender students to be identified

¹⁷ See generally NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexualorientation>.

¹⁸ *Id.* at 52–55, 67.

¹⁹ OMB, RECOMMENDATIONS ON THE BEST PRACTICES FOR THE COLLECTION OF SEXUAL ORIENTATION AND GENDER IDENTITY DATA ON FEDERAL STATISTICAL SURVEYS 3 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/SOGI-Best-Practices.pdf>.

²⁰ NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *supra* note 17.

²¹ *Id.* at 8.

²² *Id.*

²³ OMB, *supra* note 19, at 4.

²⁴ GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>.

within collected data whatsoever, and so we highly recommend that the Department reconsider its proposal to restore the two-step approach and empower students who wish to identify themselves as transgender to do so.

We understand that the Department may have chosen to move away from this two-step approach in light of concerns that collections of SOGI information are in need of additional privacy and safety controls not currently available for the FAFSA form. However, we would assert that SOGI information is not particularly sensitive and in many ways, SOGI information is not different from other forms of sensitive demographic information already collected by the Department through its data collections, including information on race and ethnicity as is being proposed here.²⁵ SOGI items have performed well across a range of contexts and over time, with researchers reporting response rates for those measures similar to other demographic items. The proposed FAFSA form clearly indicates that respondents are providing information on their gender, as well as their race and ethnicity, for research purposes only, which should encourage some students who might otherwise have felt uncomfortable providing this information out of fear of potential misuse to do so. Likewise, the Department proposing to allow individuals who “prefer not to answer” such questions to indicate that preference and move on with their submission would likely help ameliorate the concerns of students who cannot or may not wish to provide that information, but nonetheless wish to provide as much accurate information on their submission as possible in the hopes of accessing all available federal aid. We recommend that these practices continue through to the finalized FAFSA form issued by the Department, and believe that same could be done through a restored version of the Department’s piloted two-step approach for measuring student’s gender identity and transgender status.

Thank you for the opportunity to submit comments in favor of this critical step toward ensuring LGBTQ+ people are consistently and safely included in the government’s data collection efforts.

²⁵ See NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *supra* note 17, at 10 (“We note that sex assigned at birth, gender identity, and sexual orientation are not the only types of potentially sensitive information that need to be collected respectfully and confidentially and used appropriately . . .”).