DFI Defense of Freedom Institute

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Ms. Stephanie Valentine
PRA Coordinator
Strategic Collections and Clearance, Governance and Strategy Division
Office of the Chief Data Officer
Office of Planning, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Ave. SW
Washington, DC 20202

Re: Comments on the U.S. Department of Education's Proposed Mandatory Civil Rights Data Collection
Docket ID Number: ED-2021-SCC-0158

Dear PRA Coordinator:

The Defense of Freedom Institute for Policy Studies ("DFI") is a national nonprofit organization dedicating to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting the civil and constitutional rights of Americans at school and work. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces.

On December 13, 2021, the U.S. Department of Education's ("ED") Office for Civil Rights ("OCR") published a notice concerning proposed revisions to OCR's Mandatory Civil Rights Data Collection ("CRDC").[1] ED proposes to create and collect data on a new "nonbinary" sex category (in addition to the current "male" or "female" sex categories) and to retire data collection that indicates the number (1) of high school-level interscholastic athletics sports in which only male

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[1] 86 Fed. Reg. 70831. This notice withdrew and replaced a notice published on November 19, 2021. 86 Fed. Reg. 64916. The earlier notice proposed the retirement of the collection of data concerning sexual predators in the nation's public schools, a collection initiated by OCR at the direction of former Secretary of Education Betsy DeVos. DFI commends ED for keeping this signature initiative directed by Secretary DeVos and for withdrawing its proposed retirement of these data elements. They are critical for the protection of victims of sexual assault that occur in public schools.

and female students participate, (2) of high school-level athletics teams in which only male or female students participate, and (3) of participants on high school-level interscholastic athletics sports teams in which only male or only female students participate. DFI strongly opposes these proposed changes to the CRDC and explains its position below.

CREATION AND ADDITION OF A "NONBINARY" CATEGORY TO THE MALE OR FEMALE SEXUAL CATEGORY

DFI offers its comments with a genuine appreciation for OCR's statutory mission to collect or coordinate the collection of data *necessary to ensure* compliance with civil rights laws *within its jurisdiction*.[2] DFI contends that the proposed changes to the CRDC exceed ED's statutory authority, as the proposed data collection changes are not necessary to ensure compliance with Title IX (or any other law within OCR's jurisdiction). Moreover, the surveys, interrogations, and inquiries by LEA staff on students proposed by ED will infringe student privacy and undercut parental rights and responsibilities. These surveys will also certainly lead to widespread violations of the Protection of Pupil Rights Amendment (PPRA).

The proposed data collection exceeds ED's statutory authority.

The Department of Education Organization Act[3] authorizes the Assistant Secretary for Civil Rights "to collect or coordinate the collection of data *necessary to ensure* compliance with civil rights laws *within the jurisdiction* of the Office for Civil Rights."[4] By including a "nonbinary sex" data collection, ED seeks to manufacture out of thin air and add a new category to the longtime CRDC question of whether a student is male or female. According to OCR, the "inclusion of a nonbinary sex category would allow OCR to capture data that would provide a greater understanding of the experiences of nonbinary students," which would then supposedly further its statutory mission.[5] But such an inquiry is in excess of ED's statutory authority. The collection of such "nonbinary" sex data is not "necessary to ensure compliance with" Title IX, which provides that no person "shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[6] The text of Title IX and ED's own regulatory interpretations support this view.

The text of Title IX demonstrates an understanding that "sex" is only binary—male or female.[7] Underscoring this understanding that "sex" is binary, the statute expressly authorizes separation

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[2] 20 U.S.C. § 3413(c)(1)
[3] 20 U.S.C. § 3401 *et seq*.
[4] 20 U.S.C. § 3413(c)(1) (italics added).
[5] *See* "Mandatory Civil Rights Data Collection, Supporting Statement, Part A: Justification" (December 2021), p. 9.
[6] 20 U.S.C. § 1681(a) (italics added).
[7] 20 U.S.C. § 1681(a)(2) (describing how an institution may change "from . . . . admit[ting] only students of one sex to . . . admit[ting] students of both sexes")

based on male or female "sex" in certain circumstances.[8] Along these lines, Title IX expressly allows for certain single-sex educational institutions and organizations[9] and does not prohibit educational institutions from "from maintaining separate living facilities for the different sexes."[10]

As recently as 2020, ED's regulations also made clear the binary nature of the protections provided by Title IX: "Title IX and its implementing regulations include provisions that presuppose sex as a binary classification."[11] The agency also expressly allows programs covered by Title IX to "provide separate toilet, locker room, and shower facilities on the basis of sex," as long as the "facilities provided for students of *one* sex" are "comparable to such facilities provided for students of the *other* sex."[12] ED also correctly interprets Title IX to permit such programs to "operate or sponsor separate teams for members of *each* sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport" and requires universities to consider male or female sex in allocating athletic scholarships.[13]

Under the guise of gathering a "greater understanding" of "nonbinary" students, ED's proposed data collections create out of whole cloth a new suspect or quasi-suspect protected class without the requisite statutory authority so to do. This is the bailiwick of Congress, not administrative agencies. Title IX simply does not encompass a "nonbinary sex" category and clearly understands only a binary—male or female—understanding of "sex." ED's proposed data collection is simply not necessary for OCR's enforcement of Title IX (or any other law under OCR's jurisdiction). The proposed data collection sits outside of ED's statutory authority.

The proposed data collection intrudes upon student privacy and parental responsibilities.

The proposed ICR notes that "[n]onbinary would be defined as students who do not identify exclusively as male or female" and that "[t]he definition would not refer to transgender students who identify exclusively as either male or female." It also notes that OCR will mandate future collection of other data for nonbinary students ("e.g., participation in certain classes; suspensions; experience of harassment or bullying"), although reporting of that information to OCR would be optional for the 2021-22 CRDC.[14] By ED's design, the CRDC would collect information beyond knowing the biological sex of the student, which has previously been the basis of ED's data inquiry (*e.g.*, male or female, even if achieved through surgical or other medical processes). In exceeding that question, ED now hopes for LEAs to probe the minds and developing perceptions of pre-adolescent and adolescent students. Such changes to the CRDC are an obnoxious intrusion upon

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[8] 20 U.S.C. § 1681(a)(6)(B) (referring to ''Men's'' and ''Women's'' associations and organizations for ''Boy[s]'' and ''Girl[s],'' "the membership of which has traditionally been limited to persons of one sex").
[9] 20 U.S.C. § 1681(a)(1)-(9).
[10] 20 U.S.C. § 1686
[11] 85 Fed. Reg. 30,178 (May 19, 2020).
[12] 34 C.F.R. § 106.33 (italics added).
[13] 34 C.F.R. §§ 106.41(b) (italics added) and 106.37(c)
[14] *Id.*

student privacy and family life. Even if anonymously provided, the changes will require students to provide their highly personal information to an interrogating LEA. It is not the role of ED or LEAs to force students across a wide spectrum of age and physiological and psychological development to form such self-assessments.

Additionally, ED's presumption of the qualifications and willingness of LEA staff to engage in the collection of this information is, likewise, troubling, regardless of the care given to the design of the reporting surveys through which students would be asked to submit this information. The introduction of surveys asking for this additional identifying information will likely provoke questions by students to the staff tasked with the data collection. Such surveys to students are unwarranted intrusions into private family life. Authorizing LEAs to collect this information is simply an effort by ED to push schools into matters that are within the exclusive province of parents and guardians.

The proposed data collection will lead to widespread violations of the PPRA.

The PPRA ensures the right of each parent to inspect, upon request, instructional materials if it is funded at least in part as part of a program administered by ED. Significantly, with reference to unemancipated minors, the PPRA also provides that, without *prior* parental consent, "[n]o student shall be required . . . to submit to a survey, analysis, or evaluation that reveals information concerning: (1) *political* affiliations or *beliefs of the student or the student's parent*; (2) mental or psychological problems of the student of the student's family; (3) *sexual behavior or attitudes*; (4) illegal, antisocial, self-incriminating, or demeaning behavior; (5) critical appraisals of other individuals with whom the student has close family relationships; (6) legally recognized privileged or analogous relationships, such as those with lawyers, physicians, and ministers; (7) *religious* practices, affiliations, or *beliefs of the student or student's parent*; or (8) income level (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program)."[15]

ED's proposed CRDC "survey" clearly asks students a PPRA-protected question regarding their "sex behavior or attitudes" (male, female, or nonbinary); such a survey may also wade into political and religious beliefs of the student or his or her parents or family. These areas of inquiry are directly prohibited by the PPRA without having obtained the *prior* written consent of the student's parent. Despite the PPRA's clear requirements, the materials provided by ED in support of the Proposed Mandatory Civil Rights Data Collection contain no provision to ensure PPRA compliance. ED's complete and total disregard for parents and the lack of basic guardrails to protect student privacy rights are troubling. Widespread violations of the PPRA are certain to occur.

[15] 20 U.S.C. § 1232h.

REMOVAL OF MALE OR FEMALE SEX CATEGORIES FOR INTERSCHOLASTIC ATHLETIC SPORTS

The proposed ICR offends in another ways. Incredibly, ED proposes to retire data collection that seeks the number (1) of high school-level interscholastic athletics sports in which only male and female students participate, (2) of high school-level athletics teams in which only male or female students participate, and (3) of participants on high school-level interscholastic athletics sports teams in which only male or only female students participate.[16] ED thus curiously proposes to jettison a data collection that is necessary to its enforcement of Title IX —ensuring and preserving equal athletic opportunities for female students at educational institutions—and to add one that relates to issues outside of its statutory mission—the collection of information concerning "nonbinary" students. Curiously, ED also proposes to remove data collection that has previously assisted OCR in protecting the right of female students to participate equally in interscholastic athletic sporting activities.

Availability of this data has enabled OCR to enforce the civil rights of female students to participate in school athletics. For decades, Title IX has ensured equal athletic opportunities for female students wishing to participate in sex-segregated (male or female) athletic teams. OCR's self-described mission includes the vigorous enforcement of Title IX through the evaluation, investigation, and resolution of complaints alleging sex-based discrimination. Retiring the collection of data concerning the participation of males and females in interscholastic athletic sports would gut those enforcement efforts, which have been so beneficial to preserving athletic opportunities for female athletes. OCR's investigations would have to rely on far less complete data, resulting in enforcement and compliance decisions based on significantly less information.

DFI strongly opposes the retirement of these data elements because they are essential to ensuring continued enforcement of Title IX's prohibition on sex-based discrimination against female athletes. ED's proposal along these lines is utterly inexplicable.

UNDUE BURDEN ON LOCAL EDUCATION AGENCIES

The proposed data collection would be unduly burdensome to LEAs. ED admits this, as it estimates increased annual burden and respondent costs that add an additional 122 work hours per respondent, creating an additional $111,621,926 aggregate burden on respondents.[17] These added responsibilities would also take effect during the current school year, adding considerable additional administrative burdens for LEAs working to educate students during a pandemic.

Such additional data collection burdens on LEAs will occur at a time when some elementary and secondary schools continue to operate virtually; although most schools have opened for classroom

[16] *See* "Mandatory Civil Rights Data Collection, Supporting Statement, Part A: Justification" (December 2021) and Attachment A-2, pages 53-5 (Data Groups 937, 938, and 939).

[17] *See* "Mandatory Civil Rights Data Collection, Supporting Statement, Part A: Justification" (December 2021), p. 26.

instruction, many schools maintain masking requirements and physical barriers between teachers and students. Reported staff shortages faced by schools and school districts will also impede the ability of LEAs to comply with ED's new onerous data collection requirements.

In short, the proposed ICR would unnecessarily rush the collection of revised data from LEAs with a myriad of administrative capabilities, burdens, and expense at a time when those capabilities are already especially stressed as a result of the pandemic and other controversies. For this reason alone, ED should withdraw the proposed changes to the CRDC.

CONCLUSION

The proposed changes are contrary to law, are poorly conceived, fail to take account of student privacy interests and statutory protections favoring parental rights, jettison longstanding collections that assist in the enforcement of Title IX, and impose unduly onerous requirements on schools and school districts.

DFI urges ED to withdraw its proposed changes to the CRDC.

Sincerely,

/s/ *Paul R. Moore*
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