

April 28, 2022

**VIA ELECTRONIC MAIL**

U.S. Department of Education  
Office of the Executive Secretariat  
FOIA Service Center  
400 Maryland Ave. SW, LBJ 7W106A  
Washington, D.C. 20202-4536  
EDFOIAManager@ed.gov  
ATTN: FOIA Public Liaison

**Re: FOIA Request: Records Related to the U.S. Department of Education’s 2022 Agency Equity Plan related to Executive Order 13985**  
(DFI FOIA No. 100-16-22)

Dear FOIA Public Liaison:

The Defense of Freedom Institute for Policy Studies, Inc. (“DFI”) is a 501(c)(3) nonprofit, nonpartisan organization dedicated to defending and advancing freedom and opportunity for every American family, student, entrepreneur, and worker and to protecting civil and constitutional rights at schools and in the workplace. For the benefit of the public, DFI’s mission includes obtaining records related to the consideration and implementation of policies imposed by the federal government and its officials on the American people.

On April 14, 2022, the U.S. Department of Education (“ED”) announced its “2022 Agency Equity Plan related to Executive Order 13985” (“AEP”) as its master plan for “provid[ing] the resources and tools to help [educators] meet students’ *holistic* needs, ranging from their academic growth to their social and emotional development, and their mental health.”<sup>1</sup> The plan ambitiously seeks to “guarantee that [ED’s] transformative changes last long beyond the life of Executive Order 13985” by using ED’s “processes, policies, strategies, and culture to ensure equity is the foundation upon which all decisions and protocols rest . . . .”<sup>2</sup>

Executive Order 13985 (“EO”), issued by President Joe Biden on January 20, 2021, decreed that federal agencies advance “an ambitious whole-of-government equity agenda,” while defining “equity” as the “consistent and systematic fair, just, and impartial treatment of all individuals” to include “underserved communities . . . denied such treatment . . . .”<sup>3</sup> Having designated the

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<sup>1</sup> See <https://www2.ed.gov/documents/equity/2022-equity-plan.pdf> (emphasis added) (“AEP”).

<sup>2</sup> See AEP, p.2.

<sup>3</sup> Executive Order 13985 declared that particular communities in America had been denied fair, just, and impartial treatment, to include “black, Latino, and Indigenous and Native American persons, Asian American and Pacific Islanders and other persons of color; members of religious



potential beneficiaries of his equity EO by race, religious background, sexual identity, disability, geography, and socioeconomic background, President Biden directed federal agencies to enact his equity-based agenda.

Acting accordingly, ED appears to have embraced the EO's command to use agency authority to both benefit and punish Americans based on race, religion, sexual identity, and other indicia previously regarded as violative of principles of equal treatment under the law.<sup>4</sup> The AEP only fleetingly referenced "achieving equal education [sic] opportunity," before turning its full attention to its new mission: a policy "reckon[ing]" with "long-standing disparities" faced by students from underserved communities.<sup>5</sup> ED's AEP uses the COVID-19 pandemic to justify (and execute) many of its new equity policies, including distribution of emergency funding<sup>6</sup> and collecting CRDC data to study the pandemic's effects on "students' academic, social, and emotional development."<sup>7</sup>

Extraordinary in its call to formulate policies to treat "students' *holistic* needs," which by definition includes every aspect of students' lives and development, the AEP demonstrates fealty only to the E.O., unconstrained by constitutional restraints that powers not granted to the federal government were the purview of the States and the people.<sup>8</sup> The AEP describes its enlistment of a "robust stakeholder engagement process" to guide its equity efforts ("[t]he Department has conducted many listening sessions with stakeholders to listen to top line priorities . . . [and] took steps to ensure that sessions were expanded to be inclusive of groups that have traditionally not had access to agency leadership."<sup>9</sup>

The AEP is replete with significant assumptions cited in passing (as if beyond dispute) to justify its profound equity-based policy excursions. One such assumption is that "[p]ostsecondary attainment continues to be an inequitable opportunity" for underserved populations.<sup>10</sup> Another assumption is that the previous FAFSA ("Free Application for Federal Student Aid") form, by

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minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality." See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

<sup>4</sup> Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in educational programs or activities receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.*

<sup>5</sup> See AEP, p. 1.

<sup>6</sup> See <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/>.

<sup>7</sup> See AEP, p. 14.

<sup>8</sup> U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

<sup>9</sup> See AEP, p. 5.

<sup>10</sup> See AEP, p. 5.



failing to be sufficiently simple, created “barriers to obtaining necessary financial resources” to low-income applicants, “especially students of color.”<sup>11</sup> Shocking in its race-based condescension, ED boasts that it simplified the form and announced a change in its (income) verification changes to “significantly reduce[]the likelihood” that low-income students would be selected for verification (noting that “the Department will properly balance the need to protect the federal fiscal interest with ensuring that eligible students can easily access the federal aid to which they are entitled”<sup>12</sup>).

ED’s “simplification” of the FAFSA includes additional data collections on “race, ethnicity” and “gender identity” (while eliminating questions about applicant drug convictions) so that “the Department will be able to *gain insight about certain sub-groups*.”<sup>13</sup> ED fails to explain the basis, if any, for collecting additional information about “certain sub-groups.” ED also notes its proposed revisions to its Civil Rights Data Collection (“CRDC”), which will similarly collect information from young students regarding their sexuality (male, female, or nonbinary) and will discontinue information collection that has historically ensured ongoing opportunities for girls and women to compete in scholastic athletic competitions with other girls and women.

ED describes its role as encouraging “states to provide for more equitable funding structures” as part of its “new vision” for making “inclusivity prestigious.”<sup>14</sup> At one point, the AEP claims that “[t]he Department is committed to taking action where institutions are failing students and taxpayers” but aims its Enforcement Office only at “for-profit colleges” without mention of holding to account underperforming community colleges, state-supported university systems, and private, nonprofit colleges and universities.<sup>15</sup>

In its equity action item for grades K-12, the AEP promises to “ensure that State educational agencies (SEAs) and local educational agencies (LEAs) use [ED] funding to *meet students’ social emotional, mental health, academic, and other needs . . .*”<sup>16</sup> The AEP identifies “[s]pecific stakeholder groups” that must be included in SEA and LEA “diverse and inclusive planning processes” and otherwise essentially requires that SEAs and LEAs mimic ED’s equity policies in order to receive funding.<sup>17</sup> The AEP briefly mentions that a “summative assessment data from the 2020-21 school year indicate declines in student proficiency in reading and math in many states”<sup>18</sup> but apparently only to note that ED funds will be targeted to reverse those declines, presumably in the schools where they occurred (pandemic-related school closures induced by teacher unions

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<sup>11</sup> See AEP, p. 6.

<sup>12</sup> See AEP, p. 7.

<sup>13</sup> See AEP, p. 7-8 (emphasis added).

<sup>14</sup> See AEP, p. 10.

<sup>15</sup> See AEP, p. 10.

<sup>16</sup> See AEP, p. 11 (emphasis added).

<sup>17</sup> See AEP, p. 12.

<sup>18</sup> See AEP, p. 13.



and their school board allies resulted in significant learning losses<sup>19</sup> and mental health damage to students<sup>20</sup>). In fact, ED’s equity policies seem designed to provide additional funding to schools that remained closed for longer periods of time.

Finding that it has “insufficient vendor diversity” in its current contracting and procurement practices, the AEP indicates ED’s intention to “more effectively leverage the requirements of the Federal Acquisition Regulation (FAR) to establish equity-based guidelines . . . .”<sup>21</sup> ED promises to promote its equity goals through “various outreach and internal approaches” to include hosting quarterly “Equity Round Table Discussions” with ED’s designated representatives of underserved communities to “discuss areas of concern, identity barriers, and formulate realistic strategies” to address barriers (to equity in contracting and procurement).<sup>22</sup>

Similarly, regarding applications for ED’s seventy-nine discretionary grant programs (typically awarded to State, local, or Tribal governments), the AEP promises to increase “peer reviewer diversity” by “recruiting peer reviewers with broader experience . . . [to] ensure that applications are evaluated by individuals who represent diverse experiences and perspectives . . . .”<sup>23</sup> The AEP further indicates ED’s intent to “revise its regulations on the [grant] selection criteria used to evaluate applications submitted in a grant competition to *allow nonfederal peer reviewers to assess the way in which an applicant integrates equity* into its proposed project.”<sup>24</sup>

ED’s AEP appears designed to further divide Americans by race, ethnicity, religion, and sexual identity, among other socioeconomic identifiers. By design, the AEP injects these qualifiers into ED’s programmatic activities for every conceivable ED policy and, in so doing, reserves for itself the raw power to use “equity” to award grants and other funding to States and local governments (among other entities) that most closely adhere to the social-justice criteria favored by ED’s current political leadership. To meet its equity goals, ED will facilitate the input of favored stakeholders and even “nonfederal peer reviewers” to review whether applicants are sufficiently promoting ED’s equity mandates.

The AEP promises to “inform [ED’s] strategies for improving the grantmaking process” as it “continues to collect and analyze data on educational equity.”<sup>25</sup> Perhaps the most illiberal provision is ED’s plan to create an “Equity in Education Dashboard” that includes a “*single source*

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<sup>19</sup> Jessica Dickler, “Virtual school resulted in ‘significant’ academic learning loss, study finds,” CNBC (March 30, 2021), <https://www.cnbc.com/2021/03/30/learning-loss-from-virtual-school-due-to-covid-is-significant.html>.

<sup>20</sup> Jeffrey Kluger, “How the Closure of In-School Learning Damaged U.S. Children’s Mental Health During the Pandemic,” TIME (April 29, 2021), <https://time.com/5964671/school-closing-children-mental-health-pandemic/>.

<sup>21</sup> See AEP, p. 15-16.

<sup>22</sup> See AEP, p. 16.

<sup>23</sup> See AEP, p. 17-18.

<sup>24</sup> See AEP, p. 19 (emphasis added).

<sup>25</sup> See AEP, p. 19.



*of truth*” from which the public, ED officials, and other stakeholders can find “accurate information on equity in the nation’s education system.”<sup>26</sup>

Notably, ED’s AEP fails to address methods for improving academic achievement for underserved students – other than by steering taxpayer dollars to favored equity-agenda adherents. Indeed, at heart, the AEP appears to provide a socially-conscious veneer for impermissible funding of a spoils system for favored groups – with funding applications to be reviewed by the “peers” chosen by ED to implement its equity agenda.

Title VI of the Civil Rights Act of 1964<sup>27</sup> prohibits discrimination on the basis of race, color, and national origin in educational programs or activities receiving federal financial assistance. Despite Title VI’s clear prohibitions against race-based discrimination, ED’s 2022 Agency Equity Plan appears to mandate discrimination in favor of certain racial, ethnic, and sexual identity groups (among other identifiers) as determined by ED (inherently disfavoring individuals who are not identified as members of ED’s favored equity-agenda beneficiaries).

DFI is concerned that ED’s 2022 Agency Equity Plan directly contradicts federal civil rights law, particularly Title VI’s prohibitions against race-based discrimination (including mandating that State and local education agencies engage in discriminatory policies as part of ED’s equity plan in order to receive ED funding). DFI thus seeks records and information related to ED’s significant policy actions and proposals included in its “2022 Agency Equity Plan related to Executive Order 13985” since January 20, 2021.

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* and the implementing regulations of ED, 34 C.F.R. Part 5 (“Availability of Information to the Public”), DFI makes the following request for records within your possession and/or control:

### **Requested Records**

DFI requests that ED produce the following records within twenty (20) business days:

1. All non-deliberative communications of ED officials (see “Custodians” *infra*) within the Office of the Secretary, Office of the Deputy Secretary, Office for Civil Rights, Office of the General Counsel, Office of Communications and Outreach, Office of Legislation and Congressional Affairs, Office of Small and Disadvantaged Business Utilization, Industry Liaison Officer, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation, from January 20, 2021, through the date the search is conducted, which reference any of the following:
  - a. 2022 Agency Equity Plan related to Executive Order 13985
  - b. Agency Equity Plan

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<sup>26</sup> See AEP, p. 19 (emphasis added).

<sup>27</sup> 42 U.S.C. § 2000d *et seq.*



- c. Equity Plan
  - d. Executive Order 13985
  - e. 13985
  - f. Equity based agenda
  - g. Robust stakeholder engagement
  - h. FAFSA simplification
  - i. FAFSA verification
  - j. FAFSA verification melt
  - k. FAFSA data collection
  - l. FAFSA race, ethnicity, and gender data collection
  - m. FAFSA sub-group insights
  - n. FSA Enforcement Office
  - o. Enforcement Office
  - p. Equity-driven investment
  - q. K-12 ARP Funding
  - r. K-12 Equitable Impact
  - s. SEA Stakeholder Groups
  - t. LEA Stakeholder Groups
  - u. MoEquity
  - v. Maintenance of equity
  - w. Civil Rights Data Collection
  - x. Gender identity
  - y. Federal Acquisition Regulation (FAR) equity-based guidelines
  - z. Vendor diversity
  - aa. Equity Round Table
  - bb. Peer review diversity
  - cc. Peer review recruitment
  - dd. Nonfederal peer reviewers
  - ee. Equity in Education dashboard
  - ff. Equity dashboard
  - gg. Single source of truth
  - hh. Data storytelling
2. All records of ED officials (see “Custodians” *infra*) within the Office of the Secretary, Office of the Deputy Secretary, Office for Civil Rights, Office of the General Counsel, Office of Communications and Outreach, Office of Legislation and Congressional Affairs, Office of Small and Disadvantaged Business Utilization, Industry Liaison Officer, including but not limited to the following items and associated electronic mail (“email”), texts, letters, memoranda, and other documentation, particularly communications sent by, copied to, or received by ED officials from January 20, 2021, through the date the search is conducted, which reference any of the following:
- a. Date(s), time(s), and venue(s) for ED’s “listening sessions” (as referenced on AEP, p. 4) with “stakeholders”



- b. List of all stakeholders invited to the listening sessions (see “a”), by organization name (if any) and individual name
  - c. Exact copies of all invitations sent to each invitee for the listening sessions (see “a” and “b”)
  - d. All records of responses from invitees to the invitations (see “c”)
  - e. All ED officials’ responses to invitee responses (see “d”)
  - f. Agendas and all other written or electronic materials distributed by ED officials for each listening session
  - g. Recordings (audio and/or visual) of each listening session
3. All records of ED officials (see “Custodians” *infra*) within the Office of the Secretary, Office of the Deputy Secretary, Office for Civil Rights, Office of the General Counsel, Office of Communications and Outreach, Office of Legislation and Congressional Affairs, Office of Small and Disadvantaged Business Utilization, Industry Liaison Officer, including but not limited to electronic mail (“email”), texts, letters, memoranda, and other documentation, from January 20, 2021, through the date the search is conducted, which provided the evidentiary basis (and sources of such evidentiary basis) upon which ED relied in its determination that the Free Application for Federal Student Aid (“FAFSA”) created a barrier to enrollment in postsecondary education by “students of color.”
4. All records of ED officials (see “Custodians” *infra*) within the Office of the Secretary, Office of the Deputy Secretary, Office for Civil Rights, Office of the General Counsel, Office of Communications and Outreach, Office of Legislation and Congressional Affairs, Office of Small and Disadvantaged Business Utilization, Industry Liaison Officer, including but not limited to the following items and associated electronic mail (“email”), texts, letters, memoranda, and other documentation, particularly communications sent by, copied to, or received by ED officials from January 20, 2021, through the date the search is conducted, which reference any of the following:
  - a. Date(s), time(s), and venue(s) for ED’s “Equity Round Table Discussions” (as referenced on AEP, p. 16) with “representatives of underserved communities”
  - b. List of all “representatives of underserved communities” invited to the Equity Round Table Discussions (see “a”), by organization name (if any) and individual name
  - c. Exact copies of all invitations sent to each invitee for the Equity Round Table Discussions (see “a” and “b”)
  - d. All records of responses from invitees to the invitations (see “c”)
  - e. All ED officials’ responses to invitee responses (see “d”)
  - f. Agendas and all other written or electronic materials distributed by ED officials for each Equity Round Table Discussion
  - g. List of all speakers (whether in person or virtual)
  - h. Recordings (audio and/or visual) of each Equity Round Table Discussion



## Custodians

The search for records described in Item 1 should be limited to “ED officials” within the Office of the Secretary, Office of the Deputy Secretary, Office of Elementary & Secondary Education, Office of Postsecondary Education, Office of Federal Student Aid, Office of the General Counsel, Office for Civil Rights, Office of Small and Disadvantaged Business Utilization, Industry Liaison, Office of Communications and Outreach, and Office of Legislation and Congressional Affairs, who are classified as any of the following or referenced with the following job title:

- a. “PAS” (Presidential Appointments Requiring Senate Confirmation)
- b. “PA” (Presidential Appointments Not Requiring Senate Confirmation)
- c. “NC-SES” (Non-Career Senior Executive Service)
- d. “SES” (Career Senior Executive Service)
- e. “SC” (Schedule C Confidential or Policymaking Positions)

## Definitions

Absent contrary statutory directives, words and phrases contained herein should be accorded their usual, plain, and ordinary meaning. Please note the following statutory definition:

“**Records**” are defined at 44 U.S.C. § 3301(a)(1-2) as including “all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them” and further “includes all traditional forms of records, regardless of physical form or characteristics, including information created, manipulated, communicated, or stored in digital or electronic form, such as emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack.

## Identification and Production of the Requested Records

FOIA imposes a burden on ED, as a covered agency under 5 U.S.C. § 551(1), to timely disclose requested agency records to the requestor<sup>28</sup> if ED (1) created or obtained the requested materials,

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<sup>28</sup> FOIA requires the disclosure of nonexempt agency records to any person, which includes an individual, partnership, corporation, association, or public or private organization other than an agency. 5 U.S.C. § 551(2).



and, (2) is “in control of the requested materials at the time the FOIA request [was] made.”<sup>29</sup> Upon request, ED must “promptly” make the requested records available to the requester.<sup>30</sup> Notably, covered agency records include materials provided to ED by both private and governmental organizations.<sup>31</sup> Upon receipt of a FOIA request that “reasonably” describes the records sought and is in compliance with ED’s published rules regarding the time, place, any fees, and procedures to be followed,<sup>32</sup> ED must conduct a search calculated to find responsive records in ED’s control at the time of the request.<sup>33</sup> In addition, the records produced by ED are required to be provided in “any form or format requested . . . if the record is readily reproducible by the agency in that form or format.”<sup>34</sup>

Upon receipt of this request, ED has twenty business days to “determine . . . whether to comply with [the] request” and “shall immediately notify” the requester of its determination and the reasons therefor,” the right to seek assistance from the agency’s FOIA public liaison, and the requester’s right to appeal any “adverse determination” by ED.<sup>35</sup>

Consistent with FOIA guidelines, DFI requests the following regarding the provision of the requested records:

- ED should immediately act to protect and preserve all records potentially responsive to this request, notifying any and all responsible officials of this preservation request and verifying full compliance with the preservation request. This matter may be subject to litigation, making the immediate initiation of a litigation hold on the requested materials necessary.
- ED should search all record systems that may contain responsive records, promptly consulting with its information technology (IT) officials to ensure the completeness of the records search by using the full range of ED’s IT capabilities to conduct the search. To constitute an adequate search for responsive records, ED should not rely solely on a search of a likely custodian’s files by the custodian or representations by that likely custodian, but should conduct the search with applicable IT search tools enabling a full search of relevant agency records, including archived records, without reliance on a likely custodian’s possible deletion or modification of responsive records.
- ED should search all relevant records and information retention systems (including archived recorded information systems) which may contain records regarding ED’s business operations. Responsive records include official business conducted on unofficial

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<sup>29</sup> *Department of Justice (DOJ) v. Tax Analysts*, 492 U.S. 136 at 144-45 (1989).

<sup>30</sup> 5 U.S.C. § 552(a)(3)(A).

<sup>31</sup> *Id.* at 144.

<sup>32</sup> 5 U.S.C. § 552(a)(3)(A)(i).

<sup>33</sup> *Wilbur v. C.I.A.*, 355 F.3d 675, 678 (D.C. Cir. 2004).

<sup>34</sup> 5 U.S.C. § 552(a)(3)(B).

<sup>35</sup> 5 U.S.C. § 552(a)(6)(A)(i).



systems which may be stored outside of official recording systems and are subject to FOIA. ED should directly inquire, as part of its search, if likely custodians have conducted any such official business on unofficial systems and should promptly and fully acquire and preserve those records as ED's official records. Such unofficial systems include, but are not limited to, governmental business conducted by employees using personal emails, text messages or other direct messaging systems (such as iMessage, WhatsApp, Signal, or Twitter direct messages), voice mail messages, instant messaging systems such as Lync or ICQ, and shared messages systems such as Slack. Failure to identify and produce records responsive to this request from such unofficial systems would constitute a knowing concealment by ED calculated to deflect its compliance with FOIA's requirements.

- ED should timely provide entire records responsive to this request, broadly construing what information may constitute a "record" and avoiding unnecessarily omitting portions of potentially responsive records as they may provide important context for the requested records (*e.g.*, if a particular email is clearly responsive to this request, the response to the request should include all other emails forming the email chain, to include any attachments accompanying the emails).
- ED should narrowly construe and precisely identify the statutory basis for any constraint which it believes may prevent disclosure.
- If ED determines that any portions of otherwise responsive records are statutorily exempt from disclosure, DFI requests that ED disclose reasonably segregable portions of the records.
- For any responsive records withheld in whole or part by ED, ED should provide a clear and precise enumeration of those records in index form presented with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA"<sup>36</sup> and provide a sufficiently detailed justification and rationale for each non-disclosure and the statutory exemption upon which the non-disclosure relies.
- Please provide responsive records in electronic format by email, native format by mail, or PDF or TIF format on a USB drive. If it helps speed production and eases ED's administrative burden, DFI welcomes provision of the records on a rolling basis. Responsive records sent by mail should be addressed to the Defense of Freedom Institute for Policy Studies, 1455 Pennsylvania Avenue NW, Suite 400, Washington, D.C. 20004.

## Fee Waiver Request

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<sup>36</sup> *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979).



Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.33 and 34 C.F.R. § 5.32(b)(1)(ii), DFI requests a waiver of all fees associated with this FOIA request for agency records.

**Disclosure of the requested records is in the public interest.**

Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and because disclosure of the information contained within the requested records is not primarily in the commercial interests of DFI.

The disclosed materials are likely to contribute significant information to the public's understanding of ED's 2022 Agency Equity Plan related to Executive Order 13985, which encompasses wide-ranging ED policies (including but not limited to student loan debt, pandemic relief, "holistic" student needs, academic, emotional, and financial support, Public Service Loan Forgiveness, FAFSA verification, equitable funding structures, K-12 ARP funding, Civil Rights Data Collection, insufficient vendor diversity, peer review diversity, and single source of truth) that are highly relevant to the interests of students, families, and taxpayers. Disclosure of the requested materials will illuminate ED's Equity Plan policies and planning (*e.g.*, rulemaking and enforcement decisions). Further, the requested information does not otherwise appear to be in the public domain (in duplicative or substantially identical form).

Provision of the requested records will not commercially benefit DFI (a nonprofit, nonpartisan organization interested in the transparency of ED operations and governance), but will benefit the general public and other groups and entities with non-commercial interests in ED's operations and governance.

DFI will review and analyze the requested records and make the records and analyses available to the general public and other interested groups through publication on DFI's website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation's largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel also frequently offer commentary and analyses on radio and television news programs and in various public forums).

Federal law makes clear that when the disclosure is in the public interest and the information contained within the disclosed records is not primarily in the commercial interests of the requester (here, DFI), statutory fee waiver is appropriate.

**DFI is a representative of the news media.**



In addition to the fee waiver request based upon the public interest, DFI also requests a fee waiver on the basis that DFI is a **representative of the news media**, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 34 C.F.R. § 5.32(b)(1)(ii).

FOIA (as amended) provides that a representative of the news media is “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that to an audience.”<sup>37</sup> DFI provides exactly this service to the general public and other audiences with an interest in those materials and analyses. Upon receipt of the requested materials from ED, DFI will review and analyze those materials and will extract and otherwise distill particularly useful information from those materials for the benefit of the general public and other interested audiences.

DFI will provide its analyses to the general public and other interested audiences through publication on DFI’s website and social media platforms such as Facebook and Twitter (distribution functions it has already demonstrated a capacity to provide since its formation in September 2021, including a detailed news story on ED policies widely distributed by one of the nation’s largest news providers in February 2022 and more recently, a March 2022 analysis of DOJ policies distributed by a leading news magazine. DFI personnel have also offered commentary and analyses on radio news programs and in various public forums).

As a qualified non-commercial public education and news media requester with demonstrated ability to review and analyze publicly-available information and to provide insight regarding that information, DFI is thus entitled to a fee waiver under FOIA as a representative of the news media.

## **Conclusion**

The subject of this request regards identifiable operations and activities of ED and, more specifically, its impactful “2022 Agency Equity Plan related to Executive Order 13985,” which, according to ED, will “embed” equity throughout its operations and mission” and addresses “students’ holistic needs,” ranging from academic growth to social and emotional development and mental health. Provision of the requested records will meaningfully inform the general public about significant developments in ED’s wide-ranging equity policies and rulemaking, which affect millions of American students, their families, and taxpayers. These are significant issues with tremendous impact on the general public and worthy of transparency in service of the public’s right to know.

DFI is an independent 501(c)(3) nonprofit organization without a commercial purpose primarily engaged in the dissemination of information about government policies to the public. DFI is engaged in the collection, analysis, and dissemination of information to educate the public about

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<sup>37</sup> See *Cause of Action v. FTC*, 799 F.3d 1108, at 1115-16 (D.C. Cir. 2015).



government policies that impact the civil and constitutional rights of American families, students, entrepreneurs, and workers. DFI actively publishes information and related analyses on its public website and promotes access to that information and analyses on social media platforms, including but not limited to distribution via Facebook and Twitter.

DFI appreciates ED's prompt attention to this request for records pursuant to FOIA, which will provide important information to the American people regarding ED's 2022 Agency Equity Plan, which policies and related rulemaking are of tremendous interest to students, families, and taxpayers.

Please contact me immediately if DFI's request for a fee waiver is not granted in full.

If you have any questions or I can further clarify DFI's request, please contact me at your earliest convenience at [paul.moore@dfipolicy.org](mailto:paul.moore@dfipolicy.org).

Sincerely yours,

*/s/ Paul R. Moore*

Paul R. Moore, Senior Counsel

Defense of Freedom Institute for Policy Studies, Inc.