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PRA Coordinator
Strategic Collections and Clearance, Governance and Strategy Division
Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Avenue, SW, LBJ, Room 4C210
Washington, DC 20202–1200
Attention: Sala Green

Re: Comment on the Department’s Proposed Mandatory Civil Rights Data Collection
Agency/Docket Number: ED–2024–SCC–0128
Document Number: 2024–23892

Dear PRA Coordinator:

The Defense of Freedom Institute for Policy Studies (“DFI”) is a national nonprofit organization dedicated 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 in the workplace. DFI envisions a republic where freedom, opportunity, creativity, and innovation flourish in our schools and workplaces. Former senior leaders of the U.S. Department of Education (“Department”) who are experts in education law and policy founded DFI in 2021. DFI contributes its expertise to policy and legal debates concerning education law and policy, including the areas covered by the Department’s Mandatory Civil Rights Data Collection (“CRDC”).

On October 17, 2024, the Department’s National Center for Education Statistics published a notice concerning proposed revisions to the CRDC to be administered by the Office for Civil Rights (“OCR”) with respect to the 2025–26 and 2027–28 school years.¹ The Department proposes to collect additional information and move and modify certain elements in the CRDC for those

¹ U.S. Dep’t of Educ., Notice, *Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection*, 89 Fed. Reg. 83671 (Oct. 17, 2024).



years.² The Department proposes to continue to collect data on a “nonbinary” sex category (in addition to “male” and “female” sex categories).³ DFI opposes retaining a “nonbinary” sex category and recommends that OCR add new elements to the CRDC that would permit the Department to collect data on (1) policies at the local education agency (“LEA”) level targeted to prevent the hiring and retention of sexually abusive employees and (2) interscholastic athletics high school sports and teams designated for females in which biological males are permitted to participate.

The Department Must Not Retain a “Nonbinary” Category in Addition to “Male” and “Female” Sex Categories

In our February 11, 2022 comment on OCR’s proposed 2021–22 CRDC, DFI explained why the addition of a “nonbinary” sex category to the nationwide survey would exceed the Department’s statutory authority,⁴ intrude on student privacy and parental rights,⁵ and lead to widespread violations of the Protection of Pupil Rights Amendment (“PPRA”).⁶

Since we submitted that comment, many courts have agreed with our analysis of the federal civil rights law at issue—Title IX of the Education Amendments of 1972 (“Title IX”). Specifically, a panel of the U.S. Court of Appeals for the Sixth Circuit recently affirmed a federal district court’s grant of a preliminary injunction against the implementation of the Department’s notice of interpretation, adopted in 2021, declaring that it would enforce Title IX to prohibit discrimination on the basis of gender identity.⁷ Likewise, on June 13, 2024, in the first-in-the-nation lawsuit against the Department’s 2024 Title IX regulations filed by DFI and the States of Louisiana, Montana, Mississippi, and Idaho, the U.S. District Court for the Western District of Louisiana granted a preliminary injunction against the implementation of the regulations in those states in part because they are based on a misinterpretation of Title IX to prohibit discrimination on the basis of gender identity.⁸ Following that initial preliminary injunction against the regulations, seven other federal courts have preliminarily enjoined the Department from enforcing its Title IX

² U.S. Dep’t of Educ., Paperwork Reduction Act Submission, Mandatory Civil Rights Data Collection, Supporting Statement, Part A: Justification, 4–5 (Oct. 2024), https://downloads.regulations.gov/ED-2024-SCC-0128-0002/attachment_1.pdf.

³ *Id.* at 15–16.

⁴ <https://dfipolicy.org/wp-content/uploads/2022/04/Comment-CRDC-02.11.2022-ED-2021-SCC-0158-DFI-Comments.pdf> at 2–3.

⁵ *Id.* at 3–4.

⁶ *Id.* at 4.

⁷ *State of Tennessee, et al. v. U.S. Dep’t of Educ., et al.*, No. 22-5807, at 3, 5, 7 (June 14, 2024).

⁸ *State of Louisiana, et al. v. U.S. Dep’t of Educ., et al.*, No. 3:24-CV-00563 (June 13, 2024), <https://dfipolicy.org/wp-content/uploads/2024/06/Ruling-PI-in-Louisiana-v.-US-Department-of-Education.pdf>.



regulations in 22 other states and with respect to certain schools, colleges, and universities throughout the country for the same reason—the term “sex” in Title IX does not encompass “gender identity.”⁹

These rulings convey a clear message from the federal judiciary to the Department that this Executive Branch agency has no authority to redefine the term “sex” as adopted by Congress in Title IX in 1972. Thus, there is no basis in the enforcement of federal civil rights law to require LEAs to convey to the Department the number of their students who identify as “nonbinary.”

For these reasons, the Department should remove this “nonbinary” category from all CRDC questions and only require LEAs to break down their responses using a binary classification of sex—male and female—as contemplated in Title IX.

Additional Elements Regarding Policies to Prevent Employee Sexual Misconduct

In the 2020–21 CRDC, the Department added a number of data elements appropriately aimed at collecting more information on sexual misconduct in K–12 schools and responses by schools and LEAs to such misconduct, including by requiring LEAs to report information regarding the final disposition of investigations of employees over allegations of sexual misconduct.¹⁰ As DFI documented in our 2023 report, entitled *Catching the Trash*, reassigning employees accused of sexual misconduct to a different position or to a different school, or allowing them to retire or resign pending completion of a sexual misconduct investigation, are disturbingly common ways in which school administrators and school district officials seek to avoid public attention and lawsuits regarding the sexual abuse of children in their schools while allowing abusers to continue to harm children.¹¹ DFI thus commends the Department for retaining these data elements, which are critical to prevent and address sexual assault in public schools.

In line with these data elements, DFI calls on the Department to bolster its ability to enforce Title IX’s requirements by adding the following two questions to the CRDC:

1. “Whether an LEA has a written policy or policies that prohibit any school employee from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual knows, or has probable cause to believe, that such school employee,

⁹ See, e.g., <https://www.k-12legalinsights.com/2024/10/title-ix-litigation-tracker-where-do-things-stand-two-months-after-implementation/#:~:text=June%2013%2C%202024%3A%20Preliminary%20injunction,the%20preliminary%20injunction%20pending%20appeal>.

¹⁰ See <https://civilrightsdata.ed.gov/assets/downloads/2020-21-crdc-school-form.pdf> at 84–88.

¹¹ <https://dfipolicy.org/wp-content/uploads/2023/05/Catching-the-Trash-FNL.pdf>



contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law.”

2. “Whether an LEA has a written policy or policies that prohibit any school or LEA employee from expunging information regarding allegations or other findings of sexual misconduct from employee records.”

The first proposed question would track the language of section 8546 of the Every Student Succeeds Act (“ESSA”), which amended the Elementary and Secondary Education Act (“ESEA”) to require that LEAs receiving federal funding adopt policies preventing the aiding and abetting of sexual predators in obtaining new employment.¹² Although this requirement is located in the ESEA and not in federal civil rights law, its inclusion in LEA policies is instrumental in preventing sexual abuse that denies students an equal opportunity to benefit from education programs and activities in public schools on the basis of sex—in violation of Title IX.

The second proposed question, which seeks information from LEAs about policies preventing the suppression of information about allegations or other findings of sexual misconduct from employee records in ways that impede the ability of prospective K–12 school employers from finding out about an applicant’s sexual abuse of a minor or student, is as important as the first. Absent a policy prohibiting the removal of information about sexual abuse findings or allegations from employee files, school administrators and school district officials can keep prospective employers in the dark about responsibility determinations for sexual misconduct against their current or former employees or persistent patterns of allegations surrounding these employees by scrubbing personnel files of any trace of such findings or allegations.

The Department has a great interest in protecting the civil rights of students and employees in public schools pursuant to Title IX by ensuring that recipients of federal education funds have both of these policies preventing the passing of sexual predators from school to school and district to district. For this reason, DFI respectfully requests that the Department add these questions to its CRDC for the 2025–26 and 2027–28 school years.

Additional Elements Regarding Biological Males Who Compete on Female Teams

On May 15, 2020, OCR issued a letter of impending enforcement action against the Connecticut Interscholastic Athletic Conference (“CIAC”) and various Connecticut school districts interpreting Title IX to prohibit these entities from forcing female student-athletes to compete against boys in

¹² Pub. L. No. 114-95, 129 Stat. 2120 (Dec. 10, 2015) (codified at 20 U.S.C. § 7926).



sports designated for girls.¹³ This understanding of Title IX—to protect athletic opportunities for girls and women by preventing schools from forcing them to compete against biological males—is consistent with the original meaning of the statute and complies with the statute’s recognition that ensuring equal access to education programs and activities at times requires schools to provide separate opportunities, programs, and facilities to each sex. The Department should thus use its CRDC to collect information on LEAs and schools that are not complying with this proper interpretation of Title IX.

The CRDC for the 2025–26 and 2027–28 school years, as currently proposed, includes questions about the number of interscholastic athletics high school sports and teams broken down by male-only, female-only, and all-student sports.¹⁴ DFI respectfully requests that the Department add a data element to this section of the CRDC requiring LEAs to identify the number of interscholastic athletics high school sports and teams they offer that are designated for females in which individuals who are biological males at birth compete or participate beyond merely training or practicing with female teams.

Conclusion

DFI appreciates the opportunity to comment on the proposed CRDC and requests that the Department (1) remove the “nonbinary” category of sex from all questions, (2) add questions regarding LEAs’ adoption of policies aimed at preventing the hiring and retention of sexual predators in K–12 schools, and (3) add questions to determine the prevalence of the participation by biological males in sports and on teams designated for women and girls. If you have any questions, please feel free to contact me.

Sincerely,

/s/ Paul F. Zimmerman

Paul F. Zimmerman

Senior Counsel, Policy & Regulatory

Defense of Freedom Institute for Policy Studies

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<https://adfmedialegalfiles.blob.core.windows.net/files/SouleDOEImpendingEnforcementLetter.pdf>

¹⁴ Supporting Statement at 30.