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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: Beth Grebeldinger

Re: Comment on the U.S. Department of Education’s Proposed Agency Information Collection Activities; Comment Request; 2026–2027 Free Application for Federal Student Aid (FAFSA®)
Docket Number: ED–2025–SCC–0011
Document Number: 2025-02191

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 debates concerning education law and policy, including the law governing the Department’s administration of the Free Application for Federal Student Aid (“FAFSA”).

On February 4, 2025, the Department published a notice in the *Federal Register* seeking public comments on its revised version of the FAFSA for the 2026–27 aid year.¹ In its “Summary of Enhancements” to the FAFSA, the Department indicates that, among its proposed changes, it plans

¹ U.S. Dep’t of Educ., *Agency Information Collection Activities; Comment Request; 2026–2027 Free Application for Federal Student Aid (FAFSA®)*, 90 Fed. Reg. 8929 (Feb. 4, 2025).



to update one of the application’s questions, which currently seeks the applicant’s “gender,”² to instead ask “What is the student’s sex?” and remove the “Nonbinary” and “Prefer not to answer” response options.³ The Department explains that these changes are “consistent with the recent Executive Order, Defending Women From Gender Ideology Extremism And Restoring Biological Truth To The Federal Government” (“EO 14168”).⁴ In its press release issued the same day, the Department confirmed that the change was made consistent with EO 14168 and to “rightfully reflect the biological reality that there are only two sexes: male and female.”⁵

As explained below, the Department’s decision to remove the “Nonbinary” category is consistent with the clear textual requirements of the Higher Education Act of 1965, as amended (“HEA”), recent federal court rulings interpreting “sex” as a matter of federal law, and the Trump Administration’s strong actions reversing its predecessor’s harmful schemes to erase the biological concept of sex from the law. DFI commends the Department for recognizing that “sex” does not mean and does not relate to the concept of “gender identity” and that radical gender ideology has no place on applications and other forms it makes available to the public.

HEA Requirements for the FAFSA

Section 483 of the HEA, which establishes the FAFSA, lists 20 categories (in some cases broken into subcategories) of information “[t]he applicant, and, if necessary, the parents or spouse of the applicant, shall provide the Secretary [of Education] . . . in order to be eligible for Federal financial aid under this title.”⁶ The law identifies “Sex” as one of these categories of information an applicant is required to submit to the Department through the FAFSA.⁷

Ignoring the plain meaning of this provision, the Biden Education Department did not seek information regarding the sex of applicants for federal student aid in the versions of the FAFSA it offered for the 2024–25 and 2025–26 aid years. Instead, both of these applications include the following question: “What is the student’s gender?” Its answer options are “Male,” “Female,”

² U.S. DEP’T OF EDUC., FED. STUDENT AID, FAFSA® FORM, JULY 1, 2025 – JUNE 30, 2026, at 9 (hereinafter “2025–26 FAFSA”), available at <https://studentaid.gov/sites/default/files/2025-26-fafsa.pdf>.

³ U.S. DEP’T OF EDUC., FED. STUDENT AID, SUMMARY OF ENHANCEMENTS TO THE FREE APPLICATION FOR FEDERAL STUDENT AID (FAFSA®) FORM FOR 2026–27, at 1, available at <https://www.regulations.gov/document/ED-2025-SCC-0011-0003> (document labeled “1845-0001 2026-2027 Summary of Enhancements”).

⁴ Exec. Order No. 14168, 90 Fed. Reg. 8615 (Jan. 30, 2025) (hereinafter “EO 14168”), available at <https://www.govinfo.gov/content/pkg/FR-2025-01-30/pdf/2025-02090.pdf>.

⁵ Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Improvements to the FAFSA® Form (Feb. 4, 2025), available at <https://www.ed.gov/about/news/press-release/us-department-of-education-announces-improvements-fafsar-form>.

⁶ 20 U.S.C. § 1090(a)(2)(B).

⁷ *Id.* § 1090(a)(2)(B)(ii)(VII).



“Nonbinary,” and “Prefer not to answer.” The form then explains that “‘Nonbinary’ refers to a student who does not identify exclusively as male or female.” The form specifies that “‘Nonbinary’ does not refer to a transgender student who identifies exclusively as either male or female” and directs “[t]ransgender students” to “select the gender with which they identify at the time this form is completed.”⁸

The Department in these versions of the FAFSA thus confirmed that “gender” is not the same as “sex” because sex is a binary, biological concept that cannot change based on the way an individual identifies.⁹ In the preamble to its final rule amending the implementing regulations of Title IX that was ultimately vacated by federal courts (as discussed below), the Biden Education Department itself recognized, in the context of federal civil rights law, that the concept of “gender identity” is not the same as an individual’s “sex.” In that rulemaking, the Department acknowledged that it “understands gender identity to describe an individual’s sense of their gender, *which may or may not be different from their sex assigned at birth.*”¹⁰

Thus, according to the Biden Education Department’s own interpretation of the terms “sex” and “gender,” asking a person to identify his or her “gender,” including an answer option of “Nonbinary,” and instructing applicants to make their selection based on “the gender with which they identify at the time this form is completed” plainly do not fulfill the requirement of the HEA to obtain applicant information regarding “Sex” on the FAFSA.

Federal Court Rulings Establishing the Meaning of “Sex”

The proposal of the Department to remove the “nonbinary” sex category from the FAFSA form finds support in federal court decisions in the past year declaring the scope of Title IX of the Education Amendments of 1972 (“Title IX”). These decisions have overwhelmingly agreed with our position (and that of the current Department) that “sex” as used in federal law does not refer to the fluid notion of “gender identity” that underlay the inclusion of the question on “gender” and the “Nonbinary” category on previous versions of the FAFSA.

In June 2024, a panel of the U.S. Court of Appeals for the Sixth Circuit affirmed a federal district court’s grant of a preliminary injunction against the implementation of the Department’s notice of

⁸ U.S. DEP’T OF EDUC., FED. STUDENT AID, FAFSA® FORM, JULY 1, 2024 – JUNE 30, 2025, at 9, available at <https://studentaid.gov/sites/default/files/2024-25-fafsa.pdf>; 2025–26 FAFSA, *supra* note 2, at 9.

⁹ See, e.g., *Sex*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/sex> (last visited Apr. 4, 2025) (“either of the *two* major forms of individuals that occur in many species and that are distinguished respectively as *female or male* especially on the basis of their reproductive organs and structures”) (emphases added).

¹⁰ U.S. Dep’t of Educ., *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 89 Fed. Reg. 33474, 33809 (Apr. 29, 2024).



interpretation, adopted in 2021, declaring that it would enforce Title IX to prohibit discrimination on the basis of “gender identity.”¹¹

In June and July 2024, federal district courts and courts of appeals across the country blocked the implementation and enforcement of the Department’s unlawful Title IX regulations issued on April 29, 2024 (the “2024 Title IX Rule”), which purported to redefine “discrimination on the basis of sex” in Title IX as referring to “discrimination on the basis of gender identity.”¹²

On January 9, 2025, the U.S. District Court for the Eastern District of Kentucky vacated the 2024 Title IX Rule in full because, among other unlawful aspects of the rule, it misinterpreted the word “sex” in Title IX to apply to “gender identity.”¹³

On February 19, 2025, the U.S. District Court for the Northern District of Texas also vacated the 2024 Rule on many of the same grounds, including that “expanding the meaning of ‘on the basis of sex’ to include ‘gender identity’ turns Title IX on its head.”¹⁴

Prior to this vacatur of the 2024 Title IX Rule by two federal district courts, the U.S. Supreme Court weighed in on the rule’s unlawful interpretation of Title IX to apply to discrimination on the basis of “gender identity.” On August 16, 2024, in denying an application for a stay of two preliminary injunctions against the 2024 Rule issued by lower courts, a *per curiam* opinion of the U.S. Supreme Court noted that, “[i]mportantly, all Members of the Court today accept that the plaintiffs [challenging the rule] were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity.”¹⁵

These court decisions all relied on an interpretation of the term “sex” in Title IX as applying to biological sex at birth to block or invalidate improper interpretations of the Biden Education Department extending the term to “gender identity.” There is no reason why this term should be

¹¹ *State of Tennessee, et al. v. U.S. Dep’t of Educ., et al.*, No. 22-5807, at 3, 5, 7 (June 14, 2024).

¹² See *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024); *Louisiana v. Dep’t of Educ.*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024); *Arkansas v. Dep’t of Educ.*, No. 4:24-CV-636-RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024); *Carroll Indep. Sch. Dist. v. Dep’t of Educ.*, No. 4:24-cv-00461-O, 2024 WL 3381901 (N.D. Tex. July 11, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342 (N.D. Tex. July 11, 2024); *Kansas v. Dep’t of Educ.*, No. 24-4041JWB, 2024 WL 3273285 (D. Kan. July 2, 2024); *Tennessee v. Cardona*, No. 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024); *Louisiana v. Dep’t of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024).

¹³ *Tennessee v. Cardona*, No. 2:24-cv-00072-DCR-CJS, at 4–7 (E.D. Ky. Jan. 9, 2025).

¹⁴ *Carroll Indep. Sch. Dist. v. Dep’t of Educ.*, No. 4:24-cv-00461-O, at 5, 8 (N.D. Tex. Feb. 19, 2025).

¹⁵ *Dep’t of Educ. v. Louisiana*, No. 24A78, slip op. at 2 (U.S. Aug. 16, 2024).



interpreted more broadly in the context of the HEA than it is in Title IX; in both cases, “sex” is an immutable, binary, biological characteristic. The Department now recognizes this plain meaning of “sex” in the FAFSA provisions of the HEA and rightly proposes to make its FAFSA questions consistent with the obligations of the law.

Trump Administration’s Proper Understanding of the Law

President Trump recognized this proper, biologically based interpretation of “sex” in federal law when, on January 20, 2025, he signed EO 14168.¹⁶ In that order, the President declared that “[i]t is the policy of the United States to recognize two sexes, male and female,”¹⁷ and defined “sex” for the purpose of Executive Branch interpretation and application of federal law as referring “to an individual’s immutable biological classification as either male or female.”¹⁸ EO 14168 then directs all federal agencies and employees to “enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes,” giving all instances of “sex” and related terms the definitions set forth in the EO “when interpreting or applying statutes, regulations, or guidance”¹⁹

Importantly, EO 14168 also orders executive agencies to “remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages.”²⁰ Instead, forms “shall list male or female, and shall not request gender identity.”²¹

Through EO 14168, the President has directed federal agencies to carry out their duties in line with the plain meaning of “sex” in federal law—as opposed to the inverted and indefensible interpretation of the law reflected in the Biden Administration’s interpretations of federal statutes. The Department’s proposed FAFSA question seeking an applicant’s sex and removing the “Nonbinary” category from the answer options is consistent with the President’s order, judicial precedent, and the plain meaning of the FAFSA provisions of the HEA.

Conclusion

We appreciate the opportunity to comment on the FAFSA changes and, for the reasons provide above, support the decision by the Department to remove the question on “gender” and the “Nonbinary” answer option from the FAFSA form.

¹⁶ EO 14168, *supra* note 4.

¹⁷ *Id.* at 8615.

¹⁸ *Id.*

¹⁹ *Id.* at 8616.

²⁰ *Id.*

²¹ *Id.*



Sincerely,

/s/ Paul F. Zimmerman

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