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Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
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Kun Mullan
PRA Coordinator
U.S. Department of Education
400 Maryland Ave SW
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RE: Docket ID ED–2022–SCC–0082, Agency Information Collection Activities; Comment Request; FAFSA Form Demographic Survey

Dear Secretary Cardona and Coordinator Mullan:

The National Women’s Law Center and the undersigned education and civil rights organizations appreciate the opportunity to comment on the Department of Education’s (“the Department”) FAFSA Form Demographic Survey (“the Survey”).¹ The Survey will collect sex and race/ethnicity demographic data, as required by the Consolidated Appropriations Act of 2021, which will help researchers identify critical information about sex and race/ethnicity disparities in higher education.²

This letter outlines the importance of inclusive collection of demographic data in identifying financial barriers to education. These financial barriers not only disproportionately impact women and girls,³ but LGBTQI+ people as well, who are more likely to have federal student loans than non-LGBTQ+ adults, with over half of transgender adults, almost half of LGB cisgender women, and over a quarter of LGB cisgender men having federal student loans.⁴ As such, we applaud the Department for furthering the goal

¹ Agency Information Collection Activities; Comment Request; FAFSA Form Demographic Survey, 87 Fed. Reg. 35745 (June 13, 2022), <https://www.federalregister.gov/documents/2022/06/13/2022-12674/agency-information-collection-activities-comment-request-fafsa-form-demographic-survey>.

² The current FAFSA application includes a sex question with male or female options only. It seems that this question is not for research purposes, but rather designed to prompt people assigned male at birth to register for the Selective Service System (if they have not already). Moreover, these response options are both limiting and invalidating to transgender, nonbinary, and gender non-conforming applicants. It is also unclear whether transgender applicants are to list their gender, or their sex assigned at birth.

³ As compared to men, women face barriers to educational access, frequently owed to the unaffordability of higher education. Women take on more student loans than do men, holding nearly two-thirds of the outstanding student debt in the United States. AAUW, *Deeper in Debt: Women and Student Loans* 1 (2020), <https://www.aauw.org/app/uploads/2020/03/DeeperinDebt-nsa.pdf>. And, because of the gender pay gap (where women with bachelor’s degrees or higher make 76% of what men do), women will take longer to pay off this debt. *Id.* See also Jacqueline DeMarco, *College-Educated Women Face Larger Gender Pay Gap, Even If Women Are More Likely to Enroll and Graduate Than Men*, Student Loan Hero (April 13, 2021), <https://studentloanhero.com/featured/education-gender-pay-gap-study/#:~:text=Women%20are%20more%20likely%20to%20enroll%20in%20college.since%201976%2C%20when%2050.1%25%20of%20students%20were%20women.>

⁴ See The Williams Institute, *Federal Student Loan Debt Among LGBTQ People* (July 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Student-Debt-Jul-2021.pdf>. See also Nat’l Ctr. for Transgender Equality, *National Transgender Discrimination Survey* 40 (2017), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (over a quarter of transgender and gender non-conforming respondents were forced to leave school for financial reasons, including for expenses relating to transition or inability

of identifying economic barriers to education by construing the sex demographic measure to include collecting data on the number of transgender and nonbinary students applying for federal financial aid.

At the same time, we recognize that there are still steps that must be taken to improve the utility of the Survey and ensure it is inclusive of all LGBTQI+ applicants by including measures of sexual orientation and intersex status. Accordingly, we offer current best practices on how to ask these questions. Finally, we urge the Department to take every possible precaution to protect the privacy of LGBTQI+ students completing the Survey, especially at a time when their rights are under attack across the country.⁵ Thus, we make the following recommendations to the Department:⁶

The Department should, after continued testing, implement and make permanent the proposed two-step approach to asking about gender and transgender status.

We commend the Department for developing a question that measures transgender and nonbinary status, which is essential to capture the financial obstacles to education these communities experience. We also support the Department’s two-step approach to the gender identity question, which will produce a more accurate count of the number of transgender applicants by allowing them to indicate both their gender and transgender status.⁷

This particular two-step approach also allows nonbinary people to indicate whether they describe themselves as transgender. “Nonbinary” is an umbrella term to describe those whose gender identity is not exclusively female or male; “transgender” is used to describe someone whose gender is different from what was presumed at birth. Many nonbinary people identify with the term transgender and thus also

to obtain financial aid or scholarship because of their gender identity); Andrew Pentis, *LGBTQ Student Loan Borrowers Face Rough Road*, STUDENT LOAN HERO (June 24, 2019), <https://studentloanhero.com/featured/lgbtq-student-loan-borrowers-survey-2019/> (in a survey of LGBTQ+ borrowers, 30% of respondents said their student debt is “unmanageable,” and 87% of respondents reported that student loans prevented them from attaining “key financial milestones,” including buying a home, starting a family, or getting married).

⁵ Numerous anti-LGBTQI+ bills have been introduced between 2021 and 2022 preventing transgender, nonbinary, and intersex students from accessing sex-separated spaces in schools consistent with their gender identity; banning discussion of LGBTQI+ students’ very existence in the classroom; forcing school faculty to out LGBTQI+ students to their parents if they become aware of their sexual orientation or transgender status; and criminalizing adults seeking to protect the safety of LGBTQI+ youth. See ACLU, *Legislation Affecting LGBTQ Rights Across the Country*, <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country> (last updated July 1, 2022).

⁶ The recommendations put forth in this comment frequently allude to research conducted and best practices endorsed by the National Academies of Sciences, Engineering, and Medicine (NASEM) in their report, *Measuring Sex, Gender Identity, and Sexual Orientation*. It should be noted that NASEM’s research sample was limited to adult LGBTQI+ populations in the United States. See NAT’L ACADS. OF SCIS., ENG’G, & MED., *MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION* 31 (2022). As such, because the FAFSA form is routinely completed by minors, our recommendations are “tests” of otherwise well-researched questions for this younger population.

⁷ The two-step approach avoids forcing transgender applicants to choose between a confusing and invalidating array of mutually exclusive response options. For example, if a transgender woman is presented with a single gender question that forces her to choose *either* “female” *or* “transgender” to indicate her gender, and she selects the “female” option, she will not be counted as transgender—resulting in an undercount of transgender applicants. Similarly, if she chooses “transgender,” then she will not be represented in the count of female applicants. GLSEN has similarly noted the ways use of a single-question approach for demographic data collection both impedes the accuracy of data collection and invalidates transgender respondents. See GLSEN, *Considerations for Measuring Sexual Orientation and Gender Identity in Surveys of Secondary School Students* 4 (2022), https://www.glsen.org/sites/default/files/2022-05/GLSEN_LGBTQ_Data_Inclusion_Research_Brief.pdf. The Department’s proposed two-step question approach not only avoids this problem, but also undercuts the discriminatory myth perpetuated by hate groups that transgender women are not really women and transgender men are not really men. Rebutting this myth is now more important than ever, as this is the same discriminatory logic used by state lawmakers to bar transgender students from accessing sex-separated school spaces and programs in accordance with their gender identity. See *supra* note 5 and accompanying text.

describe themselves as such.⁸ However, there are also many nonbinary people who do not.⁹ The two-step approach avoids automatically counting nonbinary people as transgender and avoids forcing them to choose between transgender and nonbinary as mutually exclusive options in describing themselves—yielding a more accurate measure of transgender and nonbinary applicants.¹⁰ We urge the Department, after continued testing, to implement and make permanent this two-step approach.

The Department should test the gender and transgender status questions with definitions to avoid applicants misidentifying themselves.

We urge the Department to define the terms transgender and nonbinary on the FAFSA form. Including these definitions will ensure that applicants have agency in the response option they select. It will also improve the utility of the Survey by preventing applicants who are not nonbinary and/or transgender from erroneously selecting those options—which could drastically skew the data.

Specifically, we urge the Department to continue testing the two-step gender question accompanied by the following definitions clarifying the terms transgender and nonbinary:

What is your gender?

Male

Female

Nonbinary (*Meaning your gender is neither male nor female*)

Decline to answer

Are you transgender? (*Meaning your gender is different from the sex assigned to you at birth*)

Yes

No

Decline to answer

The Department should test a question that separately measures intersex status.

We urge the Department to advance development and testing of a standalone question to identify people with innate variations in their physical sex characteristics—also known as intersex people. There is little

⁸ See, e.g., Nat'l Ctr. for Transgender Equality, *Understanding Non-Binary People: How to Be Respectful and Supportive* (Oct. 5, 2018), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive>; *Sharing the Umbrella: The Crossover of Transgender and Nonbinary Terminology*, QUEER CULT (May 20, 2021), <https://queercult.org/2021/05/20/sharing-the-umbrella-the-crossover-of-transgender-and-nonbinary-terminology/>.

⁹ *Id.*

¹⁰ There is research that suggests, in the medical context, inquiring about respondents' assigned sex at birth before asking about transgender or nonbinary status can be invalidating to transgender and nonbinary people, and moreover, frequently irrelevant in treating them. Similarly, collecting demographic data about applicants' assigned sex at birth in the context of completing a FAFSA form is irrelevant to determining a person's eligibility for financial aid. See Ash B. Alpert et al., *Rethinking sex-assigned-at-birth questions*, 373 BRITISH MED. J. 1 (2021), <https://pubmed.ncbi.nlm.nih.gov/34031025/> (explaining that “no evidence exists that clinicians with knowledge of assigned sex provide better care,” and that research shows that most transgender people do not want to be asked for their assigned sex at birth). The National Academies of Sciences, Engineering, and Medicine (NASEM), however, acknowledges that an inquiry about a respondent's assigned sex at birth *can* be helpful to identify differences “that may have roots in biology, social norms, or some combination of the two,” and that it can be useful to ensure that cisgender and transgender/nonbinary respondents are being counted accurately. That is, asking about assigned sex at birth can help identify cisgender and transgender respondents in a two-step question approach by requiring them to first indicate their assigned sex at birth, then their gender identity in a subsequent question. See NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 6, at 103-104. Our recommendation seeks to fulfill this goal by indirectly posing the assigned sex at birth inquiry through accompanying the transgender status question with a definition that explains to respondents that the term “transgender” includes individuals whose gender does not match their assigned sex at birth. Thus, our recommendations are part of an ongoing conversation about the usefulness of inquiring about a person's assigned sex at birth, with our recommendation attempting to balance accurately measuring cisgender and transgender applicants with considerations about the ways the assigned sex at birth inquiry can be invasive and invalidating to transgender and nonbinary respondents. We also acknowledge that more testing and research may be necessary to fully understand the impacts of asking respondents about their assigned sex at birth.

demographic data on intersex people, creating a gap in identifying the educational barriers they face.¹¹ The data that does exist suggests socioeconomic disparities that pose obstacles to educational attainment: in one study, nearly half of intersex respondents reported often worrying about meeting expenses, and over one-quarter had an annual household income of less than \$20,000;¹² another survey found that, compared to non-intersex LGBTQ+ respondents, LGBTQ+ respondents who were also intersex reported more frequently that discrimination impacted their ability to keep their jobs and their overall financial wellbeing.¹³ While intersex people experience discrimination that overlaps with the experiences of others in the LGBTQ+ community, these experiences and their impacts cannot be assumed to be equivalent, as this data shows. Thus, it is essential to collect demographic information about the number of intersex people applying for federal financial aid to understand the nature and extent of the economic barriers they face to accessing higher education.

Although anti-intersex discrimination is often rooted in the same biases as transphobia, being intersex is not the same as being transgender or nonbinary, as it is not a gender identity.¹⁴ Some intersex people are also transgender or nonbinary; some are cisgender women or men.¹⁵ Because intersex status refers to having innate variations in sex characteristics, questions that measure gender or transgender status are not appropriate mechanisms to capture intersex respondents. And, since not all people with intersex traits will identify with the term “intersex,” or even be familiar with it, it is considered best practice to ask whether people have intersex traits, include synonymous phrases like “variations in sex characteristics,” and offer a descriptive definition.¹⁶ Accordingly, the National Academies of Sciences, Engineering, and Medicine (NASEM) recommends using a standalone question to measure intersex status with careful wording to reflect this reality.¹⁷ Thus, we urge the Department to test an intersex question with the following wording:

Were you born with variations in your sex characteristics (also known as “intersex” traits), or did you develop such traits later in life? (*Meaning you were born with or naturally developed genitals, chromosomes, hormone function, and/or internal organs that may be perceived as not fitting binary definitions of male or female*)

Yes

No

Decline to answer¹⁸

The Department should test a question that measures sexual orientation.

¹¹ CHARLOTTE J. PATTERSON, MARTIN-JOSÉ SEPÚLVEDA & JORDYN WHITE, EDS., NAT’L ACADS. OF SCIS., ENG’G, & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS (2020), <https://www.nap.edu/read/25877/chapter/1>. See also interACT: Advocates for Intersex Youth, *Intersex Data Collection: Your Guide to Question Design* (Aug. 24, 2020), <https://interactadvocates.org/intersex-data-collection/>; Sugee Tamar-Mattis, et al., *Identifying and Counting Individuals with Differences of Sex Development Conditions in Population Health Research*, 5 LGBT HEALTH 320 (2018).

¹² Amy Rosenwohl-Mack et al, *A National Study on the Physical and Mental Health of Intersex Adults in the U.S.*, 15 PLOS ONE 10 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7546494/pdf/pone.0240088.pdf>.

¹³ Caroline Medina & Lindsay Mahowald, *Key Issues Facing People With Intersex Traits*, CAP (Oct. 26, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>.

¹⁴ See interACT: Advocates for Intersex Youth, *supra* note 11. See also interACT: Advocates for Intersex Youth, *FAQ: Intersex, Gender, and LGBTQIA+* (last updated May 18, 2020), <https://interactadvocates.org/faq/intersex-lgbtqia/>.

¹⁵ *Id.*

¹⁶ interACT: Advocates for Intersex Youth, *supra* note 11.

¹⁷ NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 6, at 142.

¹⁸ Formulating the question in this way—as opposed to asking applicants if they consider themselves to be intersex—ensures the Department can collect as broad a swath as possible of demographic information from people with the lived experience of being intersex without excluding applicants who, for example, may have intersex traits and the lived experiences of being intersex, but do not identify with the term “intersex.” Also, by avoiding language that implies that a medical diagnosis is necessary to be considered intersex, this formulation of the intersex question also allows applicants with intersex traits (who may not have a formal medical diagnosis) to identify themselves as such.

While we applaud the Department for including a question that measures transgender and nonbinary applicants, we urge the Department to develop and test a question that measures applicants' sexual orientation. As stated above, not only do transgender, nonbinary, and intersex individuals face significant financial barriers to education, but so do LGBTQ students. Moreover, because the term "sex" in federal civil rights statutes has been interpreted to bar discrimination on the basis of both gender identity and sexual orientation,¹⁹ it seems self-evident that the Department should construe the sex demographic question to necessitate collecting data from both transgender, nonbinary, and intersex applicants *and* LGBTQ applicants to help identify the economic obstacles to higher education faced by the entire LGBTQI+ community.

Sexual orientation measures have long been included on surveys and administrative forms and have undergone extensive cognitive interview and testing. For example, these questions have been included in the CDC's National Health Interview Survey since 2013.²⁰ As such, we recommend the Department adopt a separate question to capture demographic data about the number of LGBTQ students applying for financial aid to help identify and dismantle the financial barriers to education they face.

We ask the Department to test this question in the following formulation:

Your sexuality or sexual orientation describes who you are attracted to. Which of the following best represents how you think of yourself?²¹

Lesbian or gay

Straight, that is, not gay or lesbian

Bisexual

Pansexual

Queer

Asexual

Other

Decline to answer

The Department should clarify how to protect LGBTQI+ applicants' privacy.

Finally, in addition to ensuring the Survey accurately measures LGBTQI+ applicants, we urge the Department to issue informal guidance or technical assistance that outlines how to safeguard their privacy. While we acknowledge that there is a "decline to answer" response that LGBTQI+ applicants may select, we still urge the Department to consider implementing additional privacy protections to both improve the utility of the Survey and incentivize applicants to complete it accurately and safely.

Finally, in crafting this guidance, we urge the Department to take into account the vastly different safety concerns LGBTQI+ applicants (many of whom are minors) must contend with based on the school they attend or the state they live in—especially if they live in a state with laws requiring faculty to out LGBTQI+ students to their parents.²² To that end, the Department should ensure that any privacy

¹⁹ See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Title IX and Sex Discrimination*, U.S. Dep't of Educ., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

²⁰ See CDC, Nat'l Ctr. for Health Statistics, *National Health Interview Survey* 104 (2013), https://ftp.cdc.gov/pub/Health_Statistics/NCHS/Dataset_Documentation/NHIS/2013/srvydesc.pdf.

²¹ We recommend testing this question by asking applicants how they think of themselves—rather than asking what term best describes their sexual orientation—along with a definition of "sexual orientation," because, as stated above, doing so can help prevent applicants from misidentifying themselves and skewing the resulting data. Moreover, in the event that an applicant doesn't understand what sexual orientation is, they will not need to in order to answer this question accurately. This suggestion also mirrors the approach NASEM has endorsed. NASEM has explained that it is best practice for a survey to ask respondents what terms they "consider" or "think of" themselves as, and further, that the use of the term "sexual orientation" was often "too technical" for the general population to understand. NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 6, at 76.

²² See *supra* note 5 and accompanying text.

measures it implements are appropriate for any student, in any jurisdiction. Our recommendations are as follows:

1. Consider safety measures and website security settings to protect LGBTQI+ applicants' privacy

To protect LGBTQI+ applicants who might share computers with family members, the Department should consider providing informal guidance or technical assistance that instructs high schools to provide students with school time to complete their FAFSA applications individually in a private location, like a guidance counselor's office.

Also, because many schools may not be safe spaces to complete the Survey in, we urge the Department to ensure the FAFSA application website has the following security settings: a setting that prevents keystrokes from being captured; a setting that prevents a subsequent user from reloading the previous page to see a prior user's application; and a fast exit button that directs the user to a neutral website, such as a search engine.

Finally, even with these privacy measures, many applicants will have to show their FAFSA applications to their parents in order to fulfill the parental signature requirement and to input their parents' financial information. We urge the Department to consider how these requirements will endanger LGBTQI+ youth living with family members who may be unsafe to disclose their LGBTQI+ status to.²³ As such, we recommend the Department equip the FAFSA application website with a setting that prevents parents from viewing demographic information when signing the form or filling out their income information. This setting should hide *all* demographic information to avoid raising parental suspicion as to why the only answers hidden are the ones selected in response to the gender identity, sexual orientation, and intersex demographic questions.²⁴

2. Limit the extent to which LGBTQI+ demographic data is shared

When sharing demographic data for research purposes, we urge the Department to consider limiting the extent to which it is shared. Federal Student Aid's Privacy Policy explains that one of the ways the Department routinely uses an applicant's data may include sending their "information to other federal agencies through computer matching programs to...minimize and prevent waste, fraud, and abuse in the federal student aid programs."²⁵ The Department's Supporting Statement for the FAFSA Form's Demographic Survey explains that these agencies include "law enforcement agencies, the Office of Management and Budget, the Department of Justice, the Government Accountability Office, Congress, and other entities."²⁶ We urge the Department to consider limiting the way this statement applies to an applicants' demographic data. We believe that no demographic data should be shared with law

²³ Many LGBTQI+ youth face a significant risk of homelessness resulting from familial rejection after coming out; it is estimated that over half of LGBTQ youth are over twice as likely to risk homelessness as compared to non-LGBTQ youth due to these familial tensions. See, e.g., Chapin Hall at the University of Chicago, *Missed Opportunities: LGBTQ Homelessness in America* 3 (2018), <https://www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf>; The Trevor Project, *Homelessness and Housing Instability Among LGBTQ Youth* 5 (2022), <https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf> (noting that "family conflict around youths' LGBTQ+ identities is a driving factor in LGBTQ+ youth homelessness"). See also HRC, *2018 LGBTQ Youth Report* 4-5 (2018), https://assets2.hrc.org/files/assets/resources/2018-YouthReport-NoVid.pdf?_ga=2.213851549.885232345.1588877721-476157681.1588877721 (78% of LGBTQ+ youth respondents were not out for fear they would be ostracized by their families, with one respondent stating: "if my parents found out I'm gay, they would disown me and kick me out.")

²⁴ We make this recommendation in light of the fact that, according to Federal Student Aid, over 99% of applicants complete their FAFSA applications electronically, with the remaining percent using paper applications. See Federal Student Aid, U.S. Dep't of Educ., *2021-2022 Federal Student Aid Handbook*, <https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2021-2022/application-and-verification-guide/ch1-application-process-fafsa-isir>.

²⁵ Federal Student Aid, U.S. Dep't of Educ., *Privacy Policy for StudentAid.gov*, <https://studentaid.gov/notices/privacy>.

²⁶ Federal Register, *Supporting Statement for Paperwork Reduction Act Submission FAFSA Form Demographic Survey*, (2022), <https://www.regulations.gov/document/ED-2022-SCC-0082-0002>.

enforcement agencies, as the sharing of this data is unnecessary to prevent fraud or abuse in the Federal Student Aid program.

In addition, transparency of the uses and non-uses of demographic data could be enhanced by expanding the information box appearing on the Survey (which states that an applicant's answers will not be used for aid calculations) to also stipulate why this data is being collected. That is, the Department should explain that it is collecting demographic data to ascertain the nature and extent of sex and race/ethnicity disparities in higher education, as well as the financial barriers to education experienced by these populations.

Finally, to enhance the quality and utility of the demographic data collected, we urge the Department to open another comment period after the 2023-2024 pilot of the Survey to obtain feedback about the effectiveness of these privacy measures before the Survey is fully implemented for the 2024-2025 award year.

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Inclusive data collection is the first step towards identifying and breaking down the economic obstacles LGBTQI+ people face to accessing education. Thank you for considering our recommendations to make the Survey reflective of the experiences of LGBTQI+ applicants. If you have questions about this comment, please contact Sarah Javaid (sjavaid@nwlc.org) or Hunter F. Iannucci (hiannucci@nwlc.org).

Sincerely,

The National Women's Law Center, *joined by*

Center for LGBTQ Economic Advancement & Research (CLEAR)

GLSEN

interACT: Advocates for Intersex Youth

Movement Advancement Project

National Center for Transgender Equality

The Trevor Project

Whitman-Walker Institute