

August 12, 2022

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Strategic Collections and Clearance Governance and Strategy Division
U.S. Department of Education
400 Maryland Ave. SW
LBJ, Room 6W208D
Washington, DC 20202-8240
Submitted via *regulations.gov*

RE: Agency Information Collection Activities; Comment Request; FAFSA Form Demographic Survey (RIN 2022-12674)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Department of Education (the “Department”) on its above-captioned information collection request, which seeks permission to gather demographic information in conjunction with the Department’s Free Application for Federal Student Aid (“FAFSA”) form through the proposed FAFSA Form Demographic Survey (the “proposed survey”). *See* 87 Fed. Reg. 35,745 (June 12, 2022).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity, including on the demographics of lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of sexual orientation and gender identity information on population-based surveys.¹

We write in response to the Department’s request for comments on the proposed survey, specifically to affirm that this collection is “necessary to the proper functions of the Department,” on the possible use and utility of the information to be collected, and on the Department’s calculation of the burden associated with this information collection request.² In support of our comments, below we provide a brief review of relevant research on LGBT people, including on their demographics and observed financial needs and disparities when compared to non-LGBT people, in light of the gender identity measures included in the proposed survey. We also discuss research on methods for measuring gender identity via surveys and other formats, including a brief review of existing practices of other federal agencies already collecting such information, such as the U.S. Census Bureau through its Household Pulse Survey.

¹ *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

² 87 Fed. Reg. at 35,745.

I. Relevant Research on LGBT People

As discussed in greater detail below, the proposed survey includes measures allowing for the identification of nonbinary and transgender applicants. Below, we offer a review of our relevant research on these populations, largely based on studies of LGBTQ³ people.

LGBT-identified people comprise approximately 4.5% of the U.S. adult population.⁴ We estimate that approximately 11 million adults in the U.S. identify as LGBT, including approximately 1.3 million adults who are transgender.⁵ In the U.S., younger populations are more likely to identify as LGBT. We estimate that at least 9.5% of the U.S. youth population (ages 13–17), or nearly 2 million youth, identifies as LGBT.⁶ We estimate that among youth ages 13–17 in the U.S., 1.4% (about 300,000 youth) identify as transgender.⁷ The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; for example, a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.⁸

Similar to the country as a whole, the population of LGBT adults in the U.S. is demographically diverse. For example, drawing from Gallup Daily Tracking data collected between 2015 and 2017, we’ve previously estimated that 58% of LGBT adults are female.⁹ Similarly, we estimate that 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, and 5% as more than one race.¹⁰ And, in a recent study, we documented evidence consistent with other population-based samples that Latinx people, American Indian or Alaska Native people, and biracial/multiracial groups appear more likely than White people to identify as transgender.¹¹

³ Consistent with the literature on sexual and gender minority people, “LGBTQ”—with the Q representing questioning or queer—is often used to capture individuals, generally youth, who identify their sexual orientation and gender identity using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their identifies and can identify as queer. See, e.g., *6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer*, WILLIAMS INST. (Jan. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release>. However, limited existing studies include measures to allow for the identification and analysis of LGBT adults who specifically identify as queer or questioning; hence, we generally use “LGBT” when discussing research on sexual and gender minority adults unless supported by the underlying study.

⁴ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

⁵ JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O’NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 4 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

⁶ KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

⁷ HERMAN, FLORES & O’NEILL, *supra* note 5, at 4.

⁸ BIANCA D.M. WILSON, SOON KYU CHOI, JODY L. HERMAN, TARA L. BECKER, & KERITH J. CONRON, WILLIAMS INST., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GNC-Youth-CA-Dec-2017.pdf>.

⁹ *LGBT Demographic Data Interactive*, WILLIAMS INST. (January 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

¹⁰ *Id.*

¹¹ HERMAN, FLORES & O’NEILL, *supra* note 5, at 6.

The Williams Institute has previously conducted two large LGBTQ-specific population-based national surveys through the NIH-funded Generations (HD078526) and TransPop (HD090468) studies on sexual and gender minority people, respectively.¹² Using data collected through these surveys, we estimate that 11.1% of LGBTQ adults (ages 18–60) identify as nonbinary.¹³ While nonbinary-identified people are found among both cisgender and transgender LGBTQ populations—and some individuals who identify as nonbinary do not identify as LGBTQ—we find that they comprise a larger proportion of the transgender population (32.1%) than of the cisgender LGBTQ adult population (7.5%).¹⁴

Our research includes analyses of data on individuals' experiences attending institutions of higher education. Analyzing data collected through the Access to Higher Education Survey (“AHES”)—which asked a nationally representative sample of U.S. adults ages 18–40 to report on their lifetime experiences in schools—we found that nearly three in five (58.3%) LGBTQ people ages 18–40 reported that they had attended four-year college at some point in their lives, compared to half (49.0%) of non-LGBTQ people.¹⁵ Likewise, we found that nearly a third (32.7%) of LGBTQ people ages 18–40 attended community college at some point in their lives.¹⁶ Using government-collected data, we estimate that approximately 218,000 students ages 18–40 in the U.S. are transgender.¹⁷

Many LGBTQ students rely on financial aid to support their education. Among respondents to the AHES, 60.3% of LGBTQ respondents reported having their educational expenses for four-year college covered by aid which must be repaid, compared to 51.3% of non-LGBTQ respondents.¹⁸ Similarly, 34.0% of LGBTQ and 32.3% of non-LGBTQ respondents who attended community colleges reported accessing aid which must be repaid.¹⁹ Collected data on the specific sources of students' debt indicate that transgender people are more likely (51.0%) than their cisgender LGBTQ (33.1%) and non-LGBTQ counterparts (23.2%) to report having federal student loans specifically.²⁰ Among an estimated 2.9 million LGBTQ federal student loan holders, we found that about a third (32.0%) owe less than \$10,000, about half (51.7%) owe

¹² ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O'NEILL, WILLIAMS INST., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPop STUDIES 1 (2021),

<https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

¹³ BIANCA D.M. WILSON & ILAN H. MEYER, WILLIAMS INST., NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf>.

¹⁴ *Id.*

¹⁵ KATHRYN O'NEILL, KERITH J. CONRON, ABBIE E. GOLDBERG & RUBEEN GUARDADO, WILLIAMS INST., EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS 11 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Grad-School-May-2022.pdf>.

¹⁶ KERITH J. CONRON, KATHRYN K. O'NEILL & MICHELLE A. MARZULLO, WILLIAMS INST., COMMUNITY COLLEGE AND THE EXPERIENCES OF LGBTQ PEOPLE 7 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Community-College-May-2022.pdf>.

¹⁷ KERITH J. CONRON, KATHRYN O'NEILL & LUIS A. VASQUEZ, WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE 5 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

¹⁸ O'NEILL, CONRON, GOLDBERG & GUARDADO, *supra* note 15, at 51.

¹⁹ CONRON, O'NEILL & MARZULLO, *supra* note 16, at 32.

²⁰ CONRON, O'NEILL & VASQUEZ, *supra* note 17, at 12.

between \$10,000 to under \$50,000, and the remainder (16.3%) owe \$50,000 or more in federal student loans.²¹

Likewise, our research on the impact of the COVID-19 pandemic on U.S. adults suggests that LGBT adults, particularly LGBT people of color and gender minority people, have been disproportionately experiencing its negative economic effects—²² which may in turn influence current and incoming students’ borrowing needs. For example, in one study, we found that LGBT respondents were more likely than their non-LGBT counterparts to be laid off (12.4% vs. 7.8%) or furloughed (14.1% vs. 9.7%) from their jobs; to report problems affording basic household goods (23.5% vs. 16.8%); and to report problems paying their rent or mortgage (19.9% vs. 11.7%).²³ LGBT people of color were more than twice as likely to report that their ability to pay for household goods got worse (28.7% vs. 14.2%) and were over three times as likely to report that their ability to pay their rent or mortgage (26.3% vs. 8.8%) got worse as compared to non-LGBT White people.²⁴ More than half (63.1%) of LGBT people of color reported being very concerned about their ability to pay their bills, as compared to 42.4% of LGBT White and 33.2% of non-LGBT White people.²⁵ Similarly, analyzing data collected by the U.S. Census Bureau through its Household Pulse Survey between June and October 2021, we found that transgender people were three times more likely than cisgender people to report facing food insufficiency during the pandemic.²⁶ Indeed, we found that, “[a]cross several indicators of socioeconomic status, larger proportions of transgender adults were disadvantaged as compared to their cisgender counterparts,” including in reported rates of employment, poverty, and difficulty in paying for usual household expenses—including but not limited to student loans.²⁷

Our research suggests that accurately identifying sexual and gender minority people is critical, as doing so allows for the study and addressing of disparate needs and outcomes among those populations when compared to their non-LGBT counterparts. Specifically, the body of research outlined here suggests that data on the disparate financial aid needs of nonbinary and transgender applicants should be collected by the Department to ensure it, Congress, and other stakeholders can enable students’ meaningful access to federal student aid consistent with the purposes of the FAFSA form. It is our opinion that the value of the information to be collected would therefore outweigh any burden associated with the proposed survey.

²¹ KERITH J. CONRON, WINSTON E. LUHUR, KATHRYN O’NEILL & MATHEW SANTIAGO, WILLIAMS INST., FEDERAL STUDENT LOAN DEBT AMONG LGBTQ PEOPLE 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Student-Debt-Jul-2021.pdf>.

²² See also Thom File & Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html> (noting the U.S. Census Bureau’s similar findings, based on data collected during the initial waves of the Household Pulse Survey that included SOGI measures).

²³ BRAD SEARS, KERITH J. CONRON & ANDREW R. FLORES, WILLIAMS INST., THE IMPACT OF THE FALL 2020 COVID-19 SURGE ON LGBT ADULTS IN THE US 3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf>.

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ KERITH J. CONRON & KATHRYN K. O’NEILL, WILLIAMS INST., FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC 3 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Dec-2021.pdf>.

²⁷ *Id.*

II. Research on Measuring Sex and Gender Identity

As noted by the Department in its proposal, the FAFSA Simplification Act recently amended existing law to require that students applying for financial aid through the FAFSA form provide information on their sex and race or ethnicity,²⁸ though the law leaves the term “sex” undefined and provides no options or other details to inform the Department’s collection of required data.²⁹ In its proposal, the Department indicates it has opted to collect data on sex through two measures: first, by asking students about their “gender,” and second, by asking if students identify as transgender.³⁰

Researchers have found that while sex and gender are interrelated concepts, they are ultimately conceptually distinct and may differ from each other.³¹ Nonetheless, surveys—including those administered by the federal government—often conflate the two concepts as “most people do not recognize a conceptional distinction between sex terminology and gender terminology.”³² Gender, like sex, is a multidimensional concept, meaning single measures are unlikely to capture the complexity through which respondents can conceptualize their gender, including along lines of gender identity, expression, and social status and norms.³³ While Western cultures often conceptualize gender along a binary of male and female, many individuals, including within those cultures, identify outside of this binary, such as by being nonbinary and/or transgender.³⁴

One’s gender identity is not defined by one’s sex traits, and like gender expression it can be temporally and contextually fluid.³⁵ Standard binary measures of sex are therefore often seen as an “inadequate proxy” for the primary measurement of gender and sex traits, especially among sexual and gender minority populations.³⁶ In light of this context, a federally-funded, ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine (the “NASEM Panel”) on methodological issues related to the measurement of sex, sexual orientation, and gender identity recently recommended a two-step approach centering the collection of information on gender identity in its recent consensus study report.³⁷ The NASEM Panel recommended limiting the collection of information on sex as a biological variable to instances where information about physiological sex traits is relevant, and highlighted the relevance of information on gender, “particularly for the purposes of assessing inclusion”³⁸

²⁸ 87 Fed. Reg. at 35,745.

²⁹ See 20 U.S.C. 1090(a)(2)(B)(ii)(VII).

³⁰ 87 Fed. Reg. at 35,745.

³¹ NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION 39 (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexual-orientation>.

³² *Id.*

³³ *Id.* at 41.

³⁴ *Id.* at 20–21.

³⁵ *Id.* at 20.

³⁶ *Id.* at 44.

³⁷ *Id.*

³⁸ *Id.* at 8–9.

It is our opinion that the Department’s proposal to collect required data on “sex” specifically through the measurement of gender identity via a “pilot, voluntary survey format”³⁹ is therefore reasonable, given years of research and investment in the measurement of gender identity on surveys. While distinct, we note that questions measuring sexual orientation have been included on federal surveys for over two decades,⁴⁰ including in large-scale, population-based surveys administered by the U.S. Census Bureau and by other agencies.⁴¹ Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both sexual orientation and gender identity questions, including in federal surveys, over the last decade.⁴² Research on these federal implementations of these measures suggests that respondents are unlikely to consider such information to be particularly sensitive, and would therefore provide such information if asked.⁴³

The federal government has long engaged in its own review of best practices for the measurement of sexual orientation and gender identity, including through its Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.⁴⁴ The federal government has also supported others’ research on this topic, including by funding the research of the NASEM Panel.⁴⁵ The NASEM Panel’s recent consensus study report offers guidance and best practices for collecting these data in population-based surveys, as well as clinical and administrative settings.⁴⁶ The NASEM Panel’s report also provides guiding principles for such data collection, specifically inclusiveness, precision, respecting autonomy, collecting only necessary data, and a dedication to confidentiality.⁴⁷

As scholars with experience in measurement development and testing, we would recommend that the Department assess the performance of its proposed survey and demographic

³⁹ 87 Fed. Reg. at 35,745.

⁴⁰ See FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 3 (2016), https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf.

⁴¹ Thom File & Jason-Harold Lee, *Phase 3.2 of Census Bureau Survey Questions Now Include SOGI, Child Tax Credit, COVID Vaccination of Children*, U.S. Census Bureau (Aug. 05, 2021), <https://www.census.gov/library/stories/2021/08/household-pulse-survey-updates-sex-question-now-asks-sexual-orientation-and-gender-identity.html>; 2019 BRFSS Survey Data and Documentation, CDC.GOV (Aug. 31, 2020), https://www.cdc.gov/brfss/annual_data/annual_2019.html; Questionnaires | YBRS, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

⁴² Williams Institute Scholars, Comment Letter on Proposed Basic Demographic Items for the Current Population Survey (March 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-CPS-Mar-2021.pdf>.

⁴³ See, e.g., Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, 9 PLOS ONE 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4157837/pdf/pone.0107104.pdf>; see also Nancy Bates et al., *Are Sexual Minorities Hard-to-Survey? Insights from the 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey*, 35 J. OFFICIAL STATS. 709 (2019), <https://sciencemag.org/article/10.2478/jos-2019-0030>.

⁴⁴ See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGL.asp>.

⁴⁵ *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last accessed Aug. 09, 2022).

⁴⁶ NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., *supra* note 31.

⁴⁷ *Id.* at S-4.

items, and that it make revisions as needed. We recommend this include consideration of longstanding research on gender identity measurement as described here, alongside the Department's current proposal to use collected feedback on the proposed survey to "inform the development of the questions for full implementation within the FAFSA form for the 2024–2025 award year."⁴⁸ Likewise, we note our concern with potential harm to respondents due to breach of confidentiality and request that the Department ensure that all data are collected and reported using all appropriate privacy standards. All entities responsible for the proposed data collection ought to ensure the confidentiality of applicants' information.

III. Conclusion

Thank you for your consideration. Please direct any correspondence, including questions, to vasquezl@law.ucla.edu.

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⁴⁸ 87 Fed. Reg. at 35,745.

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