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U.S. Department of Education
Submitted via *reginfo.gov*

RE: Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Migrant Student Information Exchange (MSIX) Minimum Data Elements (MDEs) (RIN 2022-20031)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the U.S. Department of Education (the “Department”) regarding its above-captioned notice proposing modifications to its Migrant Information Exchange (“MSIX”) nationwide electronic records exchange mechanism. *See* 87 Fed. Reg. 56,938 (Sept. 16, 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 (“SOGI”), including on the demographics and experiences 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 SOGI information on population-based surveys.¹

We write in response to the request by the Department for comments on whether its proposed changes to the MSIX are “necessary to the proper functions of the Department” and on “how [] the Department [might] enhance the quality, utility, and clarity of the information to be collected” through that mechanism.² More specifically, we write in support of the Department’s proposal that the MSIX’s Minimum Data Elements (“MDEs”) be modified to allow a third acceptable value for MDE #9 (Sex), as doing so would create consistency with the practices of various school districts and would be inclusive of and equitable for nonbinary and other students who would otherwise be unable to have their gender identity reported accurately.

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 56,938.

As amended, the Elementary and Secondary Education Act requires that the Secretary of Education (the “Secretary”) establish the MSIX “for the purpose of electronically exchanging, among the States, health and educational information regarding all [eligible] migratory students . . .”³ That statute empowers the Secretary to determine the exact MDEs to be exchanged through the MSIX, but requires that the Secretary ensure that exchange occur in an “effective manner” and “utiliz[e] systems used by the States prior to, or developed after, December 10, 2015.”⁴ Currently, MDE #9 calls for information on students’ sex and provides two options for same, specifically “Male” and “Female.”⁵ The Department’s proposal here would allow for a third option, which we understand will be noted as “Other” within the MSIX, moving forward.

While Western cultures often conceptualize gender along a binary of male and female,⁶ many individuals, including within those cultures, identify outside of this binary, such as by being nonbinary and/or transgender.⁷ One’s gender identity is not defined by one’s sex traits, and can be temporally and contextually fluid.⁸ Standard binary measures of sex are therefore often seen as an “inadequate proxy” for the primary measurement of gender and sex traits, especially among LGBT populations.⁹

This context is notable as, under the terms of Executive Order 13985, federal agencies including the Department are mandated to engage in a “comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”¹⁰ In particular, agencies are mandated to, “consistent with applicable law, allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities.”¹¹ The order continues, expressly naming “lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons” among the populations that have historically experienced denials of “consistent and systematic fair, just, and impartial treatment” by laws, policies, and institutions.¹² “LGBTQ”—and its variations—is often used as an inclusive umbrella term to describe a broad range of diverse populations, including people identifying as

³ 20 U.S.C. § 6398(b)(2)(A).

⁴ *Id.*

⁵ 87 Fed. Reg. at 56,939.

⁶ We use the term gender here, rather than sex, consistent with existing research on best practices for the measurement of sex, sexual orientation, and gender identity. Specifically, a recent consensus report issued by a federally-funded, ad hoc panel formed by the National Academies of Sciences, Engineering, and Medicine recommends limiting the collection of information on sex as a biological variable to instances where information about physiological sex traits is relevant, and highlights the relevance of information on gender instead, “particularly for the purposes of assessing inclusion . . .” NAT’L ACADEMIES OF SCIENCES, ENGINEERING, & MED., MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION 8–9 (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexual-orientation>. While “male” and “female” are terms that conceptually refer to sex, researchers have found that collections of data—including those administered by the federal government—often conflate these two constructs as “most people do not recognize a conceptional distinction between sex terminology and gender terminology.” *Id.* at 39.

⁷ *Id.* at 20–21.

⁸ *Id.* at 20.

⁹ *Id.* at 44.

¹⁰ Exec. Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021).

¹¹ *Id.*

¹² *Id.*

nonbinary (which can itself be used as an umbrella term for a variety of identities that do not fall within the gender binary).¹³

The best available data indicate that a substantial and growing population of young people identifies as nonbinary. LGBT-identified people comprise approximately 4.5% of the U.S. adult population.¹⁴ Using data collected through our NIH-funded Generations (HD078526) and TransPop (HD090468) studies on sexual and gender minority people, respectively, we have previously estimated that 11.1% of LGBTQ adults (ages 18–60) identify as nonbinary—an estimated 1.2 million US adults in that age range.¹⁵ While nonbinary-identified people are found among both cisgender and transgender LGBTQ populations, we find that they comprise a larger proportion of the transgender population (32.1%) than of the cisgender LGBQ adult population (7.5%).¹⁶ Younger populations are more likely to identify as LGBT, and likewise are more likely than older age groups to identify as nonbinary.¹⁷ We estimate that at least 9.5% of the U.S. youth population (ages 13–17), or nearly 2 million youth, identifies as LGBT.¹⁸ We estimate that among youth ages 13–17 in the U.S., 1.4% (about 300,000 youth) identify as transgender.¹⁹ 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.²⁰

Under current regulations for the MSIX, school districts are required to share certain demographic and enrollment information on migratory students, including their sex, using their existing records.²¹ In recent years, at least ten states—in addition to the District of Columbia and various school districts within other states—have moved to allow their school districts to provide a third, nonbinary gender category, such as “X,” for use within those records.²² The Department’s proposal here would therefore ensure that the MSIX is consistent with the

¹³ See generally *Key Terms and Concepts*, YOUTH.GOV <https://youth.gov/youth-topics/lgbtq-youth/key-terms-and-concepts> (last visited Oct. 13, 2022).

¹⁴ 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>.

¹⁵ 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>.

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ 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>.

¹⁹ 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>.

²⁰ 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>.

²¹ See Title I—Improving the Academic Achievement of the Disadvantaged (Migrant Education Program), 81 Fed. Reg. 28,944 (May 10, 2016) (codified at 34 C.F.R. § 200.85); *Consolidated Student Report Sample*, MSIX.ED.GOV, https://msix.ed.gov/msix/trainingCorner/resources/consolidatedrecordsamples/Consolidated_Student_Report_sample.pdf (last visited Oct. 13, 2022).

²² See Kae Petrin, *Nonbinary Students Aren’t Reflected in Federal Civil Rights Data. That Might Change.*, CHALKBEAT (May 10, 2022), <https://www.chalkbeat.org/2022/5/10/23063639/nonbinary-student-federal-civil-rights-data-collection>.

approach taken by these states in allowing for students to be accurately categorized using their self-reported gender identity.

As scholars with extensive experience studying LGBT populations, it is our opinion that the data collection proposed here is necessary and reasonable. Given the possibility that migratory students may identify beyond the gender binary and may attend school districts that allow their records to reflect such a nonbinary gender identity, any additional burden created by the Department's proposed modifications would be offset by the benefits to equity gained through ensuring the full inclusion of nonbinary and other students within the MSIX. Likewise, it will decrease the quality of data collected through the MSIX if respondents are required to select a binary gender identity for students whose records indicate a non-binary identity, which we understand the Department has at times suggested be done for those engaging in other records exchanges when the federal mechanism only provides binary response options.²³

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

Respectfully Submitted,

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²³ See, e.g., OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, 21APR NEW GPRA ITERATIVE IMPLEMENTATION GUIDE v1.4 at 10 (2021) (proposing that, “[i]n the case of students who are identified as non-binary or another category that is not collected, the student should be reported as either male or female. The LEA should make the determination as best it can.”). The Department has already begun shifting away from this approach even in these other contexts. See Andrea Jackson, *Response To Comments Received For 21st Century Community Learning Centers Annual Performance Report*, OMB.REPORT (Nov. 22, 2021), <https://omb.report/icr/202107-1810-006/doc/115634800> (amending that implementation guide to include the response option “Not Reported in Male or Female” and therefore “allow[] a State that collects data for categories in addition to male and female to include this data in the collection.”).

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