



February 11, 2022

Via regulations.gov.

Director of Strategic Collections and Clearance
Office of the Chief Data Officer
Office of Policy, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Avenue SW
LBJ Building, Room 6W201
Washington, DC 20202-8240

Re: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, Docket No. ED-2021-SCC-0158

Dear Director of Strategic Collections and Clearance:

The Center for Democracy & Technology (CDT) is a nonprofit advocacy organization that champions civil rights and civil liberties in the digital age. Building on its 25-year history, CDT is committed to advancing these goals by shaping technology policy and architecture, including in education.¹ CDT's Equity in Civic Technology Project engages with educators, school administrators, and policymakers at all levels to ensure that schools can best serve families and their students while also protecting their privacy. That engagement includes ensuring that student data and technology in schools are used equitably and ethically.

CDT applauds the ongoing efforts of the U.S. Department of Education (ED) to ensure that all students have equitable educational opportunities. In response to ED's December 13 request for comments,² CDT calls on ED to address the role of technology in discipline practices by adding questions to the Civil Rights Data Collection about the equity and privacy impacts of invasive software that schools are implementing to monitor students' activity online.

¹ For more about CDT's policy priorities, please see our vision for the Biden Administration and the 117th Congress at <https://cdt.org/insights/cdt-recommendations-to-the-biden-administration-and-117th-congress-to-advance-civil-rights-civil-liberties-in-the-digital-age/>.

² Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 86 Fed. Reg. 70831 (Dec. 13, 2021), available at <https://www.federalregister.gov/documents/2021/12/13/2021-26873/agency-information-collection-activities-comment-request-mandatory-civil-rights-data-collection>.

An existing priority of the CRDC is obtaining data about school climate factors, including the disparate discipline of historically marginalized groups of students; however, it does not currently analyze the unprecedented growth of technology as a result of the pandemic and the significant impact of that technology use on student discipline practices. Student activity monitoring software permits schools unprecedented glimpses into students' lives, including analyzing students' browsing habits, scanning their messages and documents, and viewing or listening to activities in the home. According to research by CDT, 43 percent of teachers using student activity monitoring software report the software is used to "identify violations of disciplinary policy."³ We urge ED to generally collect data on the use of student activity monitoring software for student discipline and its impact on marginalized groups of students in particular.

CDT also supports ED's long-term efforts to better understand the education experiences of LGBTQIA+ students, including nonbinary and transgender students. CDT, however, encourages ED to proceed judiciously to ensure that its data collection does not jeopardize the privacy or safety of LGBTQIA+ students and that the CRDC fully represents the experiences of students of diverse gender identities. If necessary, ED should consider delaying the proposed collection of data on students' nonbinary identities to address foundational questions regarding students' privacy, safety, and inclusion.

Student Activity Monitoring Software Is Widespread and Has a Disproportionate Impact on Historically Marginalized Students

With the development of new algorithmic technologies and the expansion of remote learning, schools have increasingly deployed technically sophisticated means of monitoring students' online activity.⁴ Student activity monitoring software goes beyond the data collection and sharing necessary to get students connected. It may permit teachers, administrators, and other school staff to see what students have open on their computer screens, open websites on a student's laptop, switch tabs, block sites, access communications, or view browsing histories. It may utilize algorithms to scan students' message and documents,⁵ and security flaws have also permitted school personnel to access students' cameras and microphones even in their homes without students' permission or awareness.⁶

³ Center for Democracy & Technology, *Student Activity Monitoring Software: Research Insights and Recommendations 1* (2021), available at <https://cdt.org/insights/student-activity-monitoring-software-research-insights-and-recommendations>.

⁴ Dian Schaffhauser, *K–12 Data Privacy During a Pandemic*, T.H.E. Journal (Sept. 10, 2020), <https://thejournal.com/Articles/2020/09/10/K12-Data-Privacy-During-a-Pandemic.aspx>.

⁵ See Mark Keierleber, *Don't Get Gaggled*, The 74 (Oct. 18, 2020), <https://www.the74million.org/article/dont-get-gaggled-minneapolis-school-district-spends-big-on-student-surveillance-tool-raising-ire-after-terminating-its-police-contract>.

⁶ Nader Issa, *CPS Teachers Could Look Inside Students' Homes — Without Their Knowledge — Before Fix*, Chicago Sun Times (Oct 5, 2020), <https://chicago.suntimes.com/education/2020/10/5/21497946/cps-public-schools-go-guardian-technology-privacy-remote-learning>.

Recent research by CDT⁷ underscores the impact of student activity monitoring, especially on historically marginalized students and families. Overbroad, systematic monitoring of online activity can reveal sensitive information about students' personal lives, such as their sexual orientation, or cause a chilling effect on their free expression, political organizing, or discussion of sensitive issues such as mental health.⁸ CDT's research has shown:

- **Monitoring is widespread and used outside school hours.** In polling research conducted by CDT, 81 percent of teachers reported that their schools use student activity monitoring software.⁹ Of those teachers, only one in four reported that monitoring is limited to school hours.¹⁰ Seventy-one percent report that monitoring takes place on school-issued devices, while only 16 percent stated that monitoring also occurs on personal devices.¹¹

The Supreme Court recently observed that courts should be skeptical of schools' efforts to regulate off-campus speech because "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day."¹² Similarly, we should be skeptical of schools' monitoring of students' personal or school-issued devices, because it could lead students to be monitored 24-hours a day, especially because many popular student activity monitoring software options monitor students around the clock by design.

- **Monitoring disproportionately affects historically marginalized groups of students.** In interviews with CDT, technology leaders in school districts with wealthier student populations reported that their students are more likely to have access to personal devices, which are subject to less monitoring than school-issued devices.¹³ In its polling research, CDT found that approximately two-thirds of rural, low-income, Hispanic, and African American students rely on

⁷ CDT, *supra* note 3; DeVan L. Hankerson et al., Center for Democracy & Technology, *Online and Observed 10-11* (2021), available at <https://cdt.org/insights/report-online-and-observed-student-privacy-implications-of-school-issued-devices-and-student-activity-monitoring-software>.

⁸ See Sidney Fussell, *Borrowed a School Laptop? Mind Your Open Tabs*, *Wired* (Oct. 7, 2021), <https://www.wired.com/story/borrowed-school-laptop-mind-open-tabs>; Mark Keierleber, *An Inside Look at the Spy Tech That Followed Kids Home for Remote Learning*, *The 74* (Sept. 14, 2021), <https://www.the74million.org/article/gaggle-spy-tech-minneapolis-students-remote-learning>.

⁹ CDT, *supra* note 3, at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2046 (2021).

¹³ Hankerson et al., *supra* note 7, at 10-11.

school-issued devices and may consequently be disproportionately subject to student activity monitoring.¹⁴

- **Monitoring is used to identify violations of disciplinary policy, which may involve intervention by law enforcement.** In CDT’s polling research, 43 percent of teachers using student activity monitoring software stated that their schools use the software to “[i]dentify violations of disciplinary policy.”¹⁵ Sixty percent of teachers and 65 percent of parents aware of monitoring in their schools believed that using student activity monitoring software for discipline could cause “long term harm to students.”¹⁶ The software is often designed to elevate alerts to law enforcement, especially outside of school hours.¹⁷ In light of recent CRDC data that students of color and students with disabilities are disproportionately disciplined, suspended, and referred to law enforcement,¹⁸ there is an urgent need to understand the disciplinary uses of student activity monitoring software.
- **Monitoring chills student expression.** Six in ten students in CDT’s polls agreed with the statement, “I do not share my true thoughts or ideas because I know what I do online is being monitored,” and 80 percent report being “more careful about what I search online when I know what I do online is being monitored.”¹⁹
- **Parents and teachers are concerned about monitoring.** Although approximately two-thirds of teachers and parents believe that the benefits of student activity monitoring software outweigh its risks, they nonetheless have concerns about its use. Fifty-one percent of teachers and 57 percent of parents who are aware of monitoring in their schools are concerned with the “unintended consequences” of monitoring software, such as the risk that LGBTQIA+ students may be outed.²⁰ As noted above, 60 percent of teachers and 65 percent of parents were

¹⁴ CDT, Research Slides: Key Views Toward Edtech, School Data, and Student Privacy 48 (2021), available at <https://cdt.org/insights/report-navigating-the-new-normal-ensuring-equitable-and-trustworthy-edtech-for-the-future/>.

¹⁵ CDT, *supra* note 3, at 7.

¹⁶ *Id.* at 8-9.

¹⁷ See Editorial, *Schools Are Tracking Your Kid’s Activity Online; It’s Meant To Help, But We Fear It Could Do More Harm Than Good*, Baltimore Sun (Oct. 12, 2021), <https://www.baltimoresun.com/opinion/editorial/bs-ed-1013-schools-monitoring-kids-online-20211012-7fglo2hdyrhilmqjm fu52qe76i-story.html>.

¹⁸ Office for Civil Rights, U.S. Department of Education, *An Overview of Exclusionary Discipline Practices in Public Schools for the 2017-18 School Year* (2021), available at <https://www2.ed.gov/about/offices/list/ocr/data.html>.

¹⁹ CDT, *supra* note 3, at 12.

²⁰ *Id.* at 8-9

concerned that student activity monitoring could cause “long-term harm to students” if it is used for discipline or out of context.²¹

ED Should Collect Data on Disciplinary Uses of Student Activity Monitoring Software

CDT’s research underscores that the use of student activity monitoring software is widespread, subjects historically marginalized students to disproportionate surveillance, and is being utilized for disciplinary purposes. To understand the role of student activity monitoring software in disciplinary matters and address potential disparate impact on marginalized groups of students, including students of color, LGBTQIA+ students, and students with disabilities, ED should add questions on the use of student activity monitoring software for disciplinary purposes, including the involvement of law enforcement, to the 2021-22 Civil Rights Data Collection.

Specifically, ED should add the following data groups to the CRDC, paralleling existing data groups regarding student discipline²²:

- **Proposed Data Group 1:** The number of students with disabilities who were disciplined during the school year as a result of the use of student activity monitoring software. A supplementary comment may clarify, “Student activity monitoring software is either of the following: (1) any technology that collects data on individual student’s online activity, including but not limited to a learning management system recording when students log on or a webapp scanning students’ emails, chat messages, or search history; or (2) any technology that allows for real-time access to activity on a device, including but not limited to viewing students’ screens, switching the applications they have open, or accessing a device’s microphone or camera.” As with existing data groups for discipline of students with disabilities,²³ schools will be asked to respond to three data category sets:
 - Category Set A: Discipline Method; Sex (Membership) or Sex (Membership)—Expanded; Racial Ethnic; Disability Status (IDEA)
 - Category Set B: Discipline Method; Sex (Membership) or Sex (Membership)—Expanded; Disability Status (Section 504 Only)
 - Category Set C: Discipline Method; Sex (Membership) or Sex (Membership)—Expanded; EL Status (Only)

²¹ *Id.*

²² Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 86 Fed. Reg. 70831, att. A-2, at A2-34–A2-35 (Dec. 13, 2021), *available at* <https://www.regulations.gov/document/ED-2021-SCC-0158-0043> [hereinafter Attachment A-2].

²³ *Id.* at A2-34.

- **Proposed Data Group 2:** The number of students without disabilities who were disciplined during the school year as a result of the use of student activity monitoring software. This data group should include the same supplementary comment and will ask schools to respond to two data category sets²⁴:
 - Category Set A: Discipline Method; Sex (Membership) or Sex (Membership)—Expanded; Racial Ethnic
 - Category Set B: Discipline Method; Sex (Membership) or Sex (Membership)—Expanded; EL Status (Only)

Collecting data on the use of student activity monitoring software in discipline and the involvement of law enforcement is essential for efforts to mitigate potential disparate impact and algorithmic bias stemming from the use of the software. Because algorithmic systems such as student activity monitoring are increasingly being used throughout education and have the potential to benefit, as well as to harm, students and families, it is important that ED collect data on which types of algorithmic systems can have disparate impacts on students of color, LGBTQIA+ students, and students with disabilities, what categories of training data can lead to discriminatory outcomes, and what mitigating steps can help reduce the potential for discrimination. Thus, research and factfinding will be essential components of ED’s efforts to protect students’ right to equitable educational opportunities.

Collecting data on student activity monitoring software will support the CRDC’s goals and parallels its existing questions. The purpose of the CRDC is to “obtain vital data related to the civil rights laws’ requirement that public local educational agencies (LEAs) and elementary and secondary schools provide equal educational opportunity.”²⁵ To fulfill that purpose, the CRDC has asked about student discipline, schools’ fiber-optic connections, and student access to devices and Wi-Fi.²⁶ ED has similarly proposed adding questions related to virtual learning.²⁷ Collecting data on the use of student activity monitoring software for disciplinary purposes will further the CRDC’s goals by identifying whether and how the use of student activity monitoring technology may have a disparate impact on historically marginalized groups of students.

²⁴ See *id.* at A2-35.

²⁵ Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 86 Fed. Reg. 70831 (Dec. 13, 2021), available at <https://www.federalregister.gov/documents/2021/12/13/2021-26873/agency-information-collection-activities-comment-request-mandatory-civil-rights-data-collection>.

²⁶ Attachment A-2 at A2-81–A2-82, A2-84–A2-85, A2-96.

²⁷ *Id.* at A2-114–115.

ED Should Ensure that the CRDC Fully Represents all LGBTQIA+ Students and that the Collection and Release of Their Data Does Not Jeopardize Their Privacy or Safety

ED has also proposed collecting data on the experiences of nonbinary students from schools that already collect that data.²⁸ CDT supports ED's long-term efforts to better understand the education experiences of students of across gender identities, including discrimination or violence they may face due to their gender identities.

However, as with any collection of sensitive information, it is important to engage affected communities and incorporate their feedback into policy decisions and implementation guidance; otherwise, ED risks introducing new privacy and ethical risks for potentially vulnerable students while not achieving the outcome of better data-driven decision-making that is aimed at helping these students. For example, ED's proposal only includes non-binary students and not other gender identities like transgender students. While nonbinary identities have often been grouped under the umbrella term of "transgender," data shows that only 50% of youth who identify as nonbinary also identify as transgender; an additional 20% are not sure or questioning if they are transgender.²⁹ ED is proposing to administer this data collection December 2022 through March 2023.³⁰ That deadline leaves only a few months to resolve foundational questions and receive feedback that are necessary to ensure a useful, thoughtful collection that does not introduce unnecessary privacy risks and bad data collection precedents. Therefore, CDT encourages ED to remain firm in its commitment to collecting information on gender identities beyond male and female but extend the deadline for the planned collection of data on students' gender identities if necessary to protect student privacy and safety and address the scope of the collection.

When ED proceeds with collecting gender identities beyond male and female, CDT encourages ED to proceed judiciously to ensure that its data collection does not jeopardize students' privacy and safety. A recent study showed that 34.2% of LGBTQIA+ students have been physically harassed at school, and 81% have been verbally harassed.³¹ Transgender and nonbinary students were more likely to report feeling unsafe at school.³² Further, the experiences of LGBTQIA+ students have become the subject of

²⁸ Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 86 Fed. Reg. 70831, supp. statement, pt. A, at 9 (Dec. 13, 2021), *available at* <https://www.regulations.gov/document/ED-2021-SCC-0158-0042> [hereinafter Supporting Statement Pt. A].

²⁹ Trevor Project, Diversity of Nonbinary Youth 1 (2021), *available at* <https://www.thetrevorproject.org/research-briefs/diversity-of-nonbinary-youth/>.

³⁰ Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 86 Fed. Reg. 70831, att. A-1, at A1-5 (Dec. 13, 2021), *available at* <https://www.regulations.gov/document/ED-2021-SCC-0158-0043>.

³¹ GLSEN, 2019 School Climate Survey 28 (2020), *available at* https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf.

³² *Id.* at 95-95.

sometimes violent political asperity,³³ and LGBTQIA+ students—especially transgender and nonbinary students—are more likely to face discrimination by their schools.³⁴ Ensuring the privacy and safety of LGBTQIA+ students, including from discrimination, is essential.

Likewise, CDT encourages ED to engage students and communities to ensure that its data collection accurately represents the experiences of all LGBTQIA+ students. LGBTQIA+ students may identify with a broad range of evolving identities,³⁵ and even the term “nonbinary” may encompass a wide range of identities.³⁶ The Supreme Court,³⁷ the Department of Justice,³⁸ and ED³⁹ have all determined that gender identity is entitled to protection under civil rights laws; ED should ensure the CRDC—which seeks to further those laws—reflects the full range of students’ identities.

To protect student privacy and safety and ensure that the CRDC accurately represents students’ identities, ED should consider three steps:

- **ED should provide guidance to schools on how to safely and privately collect, secure, and report on the education experiences of all LGBTQIA+ students.** Collecting data on nonbinary students may provide an opportunity to address the needs of those students; however, it may also pose a threat to those students’ safety and wellbeing if their nonbinary status is disclosed in a breach or used out of context. Fifty-five percent of nonbinary adults have been physically attacked, and 83.4 percent have been “verbally insulted or abused.”⁴⁰ Nonbinary—and

³³ *E.g.*, Associated Press, *Parents Sue Wisconsin School District Over Gender Transition Policy*, NBC News (Nov. 18, 2021), <https://www.nbcnews.com/news/us-news/parents-sue-wisconsin-school-district-gender-transition-policy-rcna5965>; Joseph Pimentel, *Parents Want to Recall Los Alamitos School Board After Teacher Asks Students Their Preferred Pronouns*, Spectrum News 1 (Sept. 29, 2021), <https://spectrumnews1.com/ca/orange-county/education/2021/09/29/a-los-al-teacher-asked-students-their-preferred-pronouns--now-parents-want-to-recall-the-school-board->.

³⁴ GLSEN, *supra* note 31, at 41, 95-97, 103.

³⁵ *Id.* at 10 (“Over the last 20 years, sexual orientation and gender identities have changed and evolved. . . . As new identity terms arose through the years, and as youth began to endorse them, our survey adapted to account for the current sexual orientation and gender identity labels being endorsed by LGBTQ youth.”).

³⁶ Trevor Project, *Diversity of Nonbinary Youth 1* (2021), *available at* <https://www.thetrevorproject.org/research-briefs/diversity-of-nonbinary-youth/>.

³⁷ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

³⁸ U.S. Department of Justice, *Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972* (2021), *available at* <https://www.justice.gov/crt/page/file/1383026/download>.

³⁹ U.S. Department of Education, *Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637 (June 22, 2021), *available at* <https://www.federalregister.gov/documents/2021/06/22/2021-13058/enforcement-of-title-ix-of-the-education-amendment-s-of-1972-with-respect-to-discrimination-based-on->.

⁴⁰ Bianca D.M. Wilson & Ilan H. Meyer, *UCLA School of Law, Nonbinary LGBTQ Adults in the United States 11* (2021), *available at* <https://williamsinstitute.law.ucla.edu/publications/nonbinary-lgbtq-adults-us/>

transgender—students are more likely to report feeling unsafe in school than their peers.⁴¹ A student’s nonbinary identity is particularly sensitive, and ED should ensure that schools are prepared to collect that data and protect it from unauthorized disclosure and use. Further, as described in the next bullet, ED should ensure that the CRDC represents the education experiences of all LGBTQIA+ students, while protecting their privacy and safety in the process.

Preparing schools to collect, secure, and report that data may require ED to update and reissue prior guidance on protections for LGBTQIA+ students. ED’s 2016 Dear Colleague Letter on Transgender Students⁴² provided valuable guidance for schools on how to process the data of transgender students privately and ethically. In particular, the letter underscored students’ legal rights to be called by names and pronouns that align with their gender identities,⁴³ to change their school records to reflect a legal change in their names or genders,⁴⁴ to otherwise request amendment of their school records,⁴⁵ to receive the same procedural rights as all other students,⁴⁶ and—critically—to the privacy of their transgender or nonbinary status.⁴⁷ ED should reissue that guidance in updated form to ensure that students may exercise their rights to privacy.

Updates to the 2016 letter to help schools collect and report data on nonbinary students privately and safely should include:

- Establishing procedures and legal grounds for protecting data on a student’s sexual orientation and gender identity from disclosure, even when putatively required by local or state law, such as one bill that would have required schools to report a student’s gender identity to their parents, regardless of the student’s safety.⁴⁸
- Expanding the 2016 letter to expressly include nonbinary students and other gender identities.

⁴¹ GLSEN, *Improving School Climate for Transgender and Nonbinary Youth 1* (2021), available at <https://www.glsen.org/research/improving-school-climate-transgender-and-nonbinary-youth>.

⁴² See U.S. Department of Education & U.S. Department of Justice, *Dear Colleague Letter on Transgender Students* (2016), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [rescinded].

⁴³ *Id.* at 3.

⁴⁴ *Id.* at 3, n.11 (citing Resolution Agreement at 2, *In re Cent. Piedmont Cmty. Coll.*, NC, OCR Case No. 11-14-2265 (2015), available at www.ed.gov/ocr/docs/investigations/more/11142265-b.pdf).

⁴⁵ *Id.* at 5.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ S.B. 514, N.C. Gen. Assemb., 2021 Sess., sec. 1.(a), § 90-21.143(c) (N.C. 2021), available at <https://ncleg.gov/Sessions/2021/Bills/Senate/PDF/S514v0.pdf>; see H.B. 1, Ala. Legis., 2021 Reg. Sess., sec. 5(2) (Ala. 2021), available at <https://alison.legislature.state.al.us>; S.B. 10, Ala. Legis., 2021 Reg. Sess., sec. 4(2) (Ala. 2021), available at <https://alison.legislature.state.al.us>.

- Clarifying whether a school may report a student’s nonbinary status on the CRDC, regardless of the sex or gender listed on the student’s legal documentation, or if the school is limited to reporting the sex or gender listed in the student’s school records, state identification, birth certificate, or other legal documentation.
- Resolving conflicting responses from parents and students regarding a student’s gender identity.
- Procedures for retaining and deleting this data.
- Streamlining responses to the CRDC and other ED data collections such as EdFacts, which does not provide schools with the ability to report nonbinary genders.⁴⁹

ED previously provided comprehensive guidance on the collection of racial data, including the role of self identification and observer identification and the roles of parents and students in identifying a student’s race.⁵⁰ ED should provide similarly thorough guidance for schools on the collection of students’ nonbinary status, and, if necessary, delay collection of data on nonbinary students—and other gender identities—to do so.

- **ED should create an inclusive process to engage students, families, and community organizations on the scope of gender identities included in ED data.** ED’s proposal currently includes only students’ nonbinary identity and does not address other aspects of gender identity or sexual orientation.⁵¹ ED should engage students, families, and community organizations on collecting data on a broader range of gender identities and sexual orientations. That engagement may provide fuller insight into the education experiences of nonbinary, transgender, gay, lesbian, bisexual, and gender-nonconforming students, including discrimination, harassment, or violence they may face.⁵² That fuller insight “hypothetically might include a deep well of options, from androgyne to omnigender,”⁵³ and should be developed in consultation with students, families, and community organizations to ensure that ED’s data

⁴⁹ Agency Information Collection Activities; Comment Request; ED Facts Data Collection School Years 2022-23, 2023-24, and 2024-25 (With 2021-22 Continuation), 86 Fed. Reg. 63007, att. A (Nov. 15, 2021), available at <https://www.regulations.gov/document/ED-2021-SCC-0159-0003>.

⁵⁰ National Forum on Education Statistics, Managing an Identity Crisis: Forum Guide to Implementing New Federal Race and Ethnicity Categories 28, 35 (2008), available at <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008802>.

⁵¹ Supplemental Statement Pt. A at 9.

⁵² Center for Democracy & Technology, Written Comments on Title IX (2021), available at <https://cdt.org/insights/cdt-comments-on-protecting-privacy-rights-and-ensuring-equitable-algorithmic-systems-for-transgender-and-gender-non-conforming-students/>.

⁵³ Benjamin Herold, *Students Embrace a Wide Range of Gender Identities. Most School Data Systems Don’t*, Education Week (Jan. 4, 2022), <https://www.edweek.org/leadership/students-are-embracing-a-wide-range-of-gender-identities-most-school-data-systems-dont/2022/01>.

reflects the full range of their identities and is conducted in an ethical and privacy-protective manner.⁵⁴

- **With small cell sizes likely, ED should consider disclosure avoidance measures to enable the public release of data on the experience of LGBTQIA+ students while protecting their privacy.** Data from the CRDC is publicly released. However, “[a]ny release of demographic or performance information derived from students’ education records, even in aggregate form, carries some level of risk of disclosure of PII.”⁵⁵ To reduce the risk of disclosure, ED and other entities apply “disclosure avoidance” methods such as suppressing, rounding, or “perturbing” the data, especially for small demographic groups where it may be easier to identify individual students, even in aggregate data⁵⁶—as they are required to by law.⁵⁷ According to one survey by the Centers for Disease Control and Prevention, nonbinary students make up around two percent of the high school population,⁵⁸ necessitating measures to protect nonbinary students from inadvertent disclosure in this data collection.

However, for such small populations, ED’s current disclosure avoidance measure of perturbing⁵⁹ the data in the CRDC may not adequately protect students’ privacy and safety, while also making the public data less useful for understanding the experiences of nonbinary students. Perturbing data involves “making small, random adjustments to the data” and, in the case of the 2017 CRDC, involved adding or subtracting “one case to blur the data” and random data swapping.⁶⁰ The Census Bureau has found that techniques such as perturbation and random swapping may still permit reidentification of individuals from aggregate data while also potentially having a “significant impact on statistics at lower levels of geography,” such as towns or schools with smaller populations.⁶¹ Further, the exact methods of swapping and perturbation

⁵⁴ See generally Elizabeth Laird & Hannah Quay-de la Vallee, Center for Democracy & Technology, *Data Ethics in Education and the Social Sector: What Does It Mean and Why Does it Matter?* (2021), <https://cdt.org/insights/report-data-ethics-in-education-and-the-social-sector-what-does-it-mean-and-why-does-it-matter>.

⁵⁵ Letter from Kathleen M. Styles, U.S. Department of Education, to John C. White, Louisiana Department of Education 2 (Apr. 21, 2016), available at <https://studentprivacy.ed.gov/resources/spo-response-louisiana-enrollment-data-and-disclosure-avoidance>.

⁵⁶ Privacy Technical Assistance Center, U.S. Department of Education, *Frequently Asked Questions—Disclosure Avoidance 1-2, 3* (2013), available at <https://studentprivacy.ed.gov/resources/frequently-asked-questions-disclosure-avoidance>.

⁵⁷ Confidential Information Protection and Statistical Efficiency Act of 2002, 44 U.S.C. § 3572(c).

⁵⁸ Andrew Ujifusa, *Schools Could Count Nonbinary Students Under Biden Proposal*, *Education Week* (Nov. 18, 2021), <https://www.edweek.org/policy-politics/schools-could-count-nonbinary-students-in-biden-proposal/2021/11>.

⁵⁹ U.S. Department of Education, *CRDC 2017-18 Technical Documentation 8* (2021), available at <https://ocrdata.ed.gov/resources/datanotes>.

⁶⁰ *Id.*

⁶¹ Simson Garfinkel, John M. Abowd & Christian Martindale, U.S. Census Bureau, *Understanding Database Reconstruction Attacks on Public Data*, 72 *Comms. of the ACM* 46, 52-53 (2019), available at <https://cacm.acm.org/magazines/2019/3/234925-understanding-database-reconstruction-attacks-on-public-data/fulltext>.

must remain confidential to protect against reverse engineering the underlying database, meaning “that the practice is not transparent to data users, which prevents data users from assessing the impact of those protections on the published data.”⁶² Consequently, ED should consider alternative measures of disclosure avoidance to improve both student privacy and the utility of the publicly released data.⁶³

CDT supports ED’s efforts to better understand the education experience of students and to identify discriminatory practices in the education system. CDT encourages ED to further understand how technology used for disciplinary purposes may disproportionately impact historically marginalized students and to protect student privacy while collecting data on nonbinary students.

Sincerely,

Elizabeth Laird
Director, Equity in Civic Technology, CDT

Cody Venzke
Senior Counsel, Equity in Civic Technology, CDT

⁶² U.S. Census Bureau, *Disclosure Avoidance for the 2020 Census: An Introduction* 3, 6 (2021) (“Differential privacy is transparent, unlike prior data protection methods such as data swapping. The programming code and decisions for differential privacy are available to the public”), *available at* <https://www2.census.gov/library/publications/decennial/2020/2020-census-disclosure-avoidance-handbook.pdf>.

⁶³ For example, the Census Bureau has provided recommendations and considerations for using redistricting data for smaller geographic areas. *Id.* at 1, 19.