December 15, 2025

Office of Information and Regulatory Affairs
Attn: Desk Officer for the Department of Education
725 17th Street NW
Washington, DC 20503

CC: Matt Soldner, Acting Director, Institution of Education Sciences and Acting Commissioner, National Center for Education Statistics, U.S. Department of Education; Ross Santy, Data Officer, Office of Planning Evaluation and Policy Development, U.S. Department of Education

RE: Admissions and Consumer Transparency Supplement (ACTS) to the Integrated Postsecondary Education Data System (IPEDS) 2024-25 Through 2026-27, Docket No. ED-2025-SCC-0382, OMB Control No. 1850-0582

Via regulations.gov and *NCESCommissioner@ed.gov*

Dear OIRA Desk Officer:

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") and the American Civil Liberties Union ("ACLU") submit this follow-up comment on the Department of Education National Center for Education Statistics ("NCES") 30-day notice ("Second Notice") of its proposed Admissions and Consumer Transparency Supplement ("ACTS") to the Integrated Postsecondary Education Data System ("IPEDS").

We again urge withdrawal of this proposed addition to IPEDS so that a new proposal can be developed that takes into consideration the issues discussed below, which were not fully addressed by the Second Notice.

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. We have deep knowledge of the issues presented in this data collection due to our role in supporting and protecting diversity in our country's universities and colleges, including by representing student-intervenors in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) ("*SFFA*"), arguing the case in the Supreme Court, representing student-amici in *SFFA v. Harvard*, and currently litigating on behalf of student-intervenors in *SFFA v. UT Austin*.[1]

For over 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the

[1] Dkt. No. 1:20-CV-00763-RP (W.D. Tex.).

Constitution and the law of the United States guarantee to everyone in the country. With more than six million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington D.C. for the principles of liberty and equality. In support of these principles, we have advocated for admissions policies that secure opportunity for all as direct counsel and amicus curiae at the local, state, and federal levels, including in *SFFA*, *Fisher v. Univ. of Texas at Austin* ("*Fisher II"*), 579 U.S. 365 (2016), *Fisher v. Univ. of Texas at Austin* ("*Fisher I"*), 570 U.S. 297 (2013), *Gratz v. Bollinger*, 539 U.S. 244 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

As we articulated in our first comment on the Department's 60-day notice of its initial proposal ("First Notice"), our organizations recognize the important goal of collecting accurate and comprehensive data to combat racial discrimination. But the flaws in the Department's initially proposed approach to achieving this goal have not been cured by the Second Notice, which perpetuates and exacerbates the deficiencies of its First Notice. Tellingly, in responding to the comments on its First Notice, the Department provides no reasoned justifications for the Survey's purpose, design, or development process, instead pointing repeatedly to President Trump's August 7 Memorandum ("Ensuring Transparency in Higher Education Admissions")[2] to support the need for this data collection, laying bare its politicized nature. This proposal makes clear that the Department's goal is not to expose unlawful admissions practices, but rather to constrain the efforts of institutions to advance educational opportunity and to undercut efforts to promote access to higher education for Black and Brown students.

The proposal remains legally deficient, methodologically unsound, and administratively impracticable. The proposal continues to rely on a misinterpretation of Title VI and *SFFA*; fails to meet core requirements of the Paperwork Reduction Act ("PRA") and OMB's implementing regulations; does not adequately address significant concerns regarding student privacy; and runs up against various other constitutional and statutory constraints.[3] For these reasons, OMB should not approve the collection as currently structured and should require that the Department withdraw the proposal based on its failure to meet constitutional, statutory, and regulatory standards.

I. THE DEPARTMENT'S PROPOSAL RELIES ON A FUNDAMENTAL MISREADING OF ANTI-DISCRIMINATION LAW.

The Equal Protection Clause of the Fourteenth Amendment prohibits governmental discrimination on the basis of race,[4] and Title VI of the Civil Rights Act of 1964 prohibits recipients of federal financial assistance from discriminating on the basis of race, color, and national origin.[5] Accordingly, institutions subject to the Equal Protection Clause and/or Title VI may not discriminate against applicants in admissions decisions based on race, color, or national

[2] Donald J. Trump, Memorandum on Ensuring Transparency in Higher Education Admissions (Aug. 7, 2025), https://www.whitehouse.gov/presidential-actions/2025/08/ensuring-transparency-in-higher-education-admissions/.
[3] OMB need not decide all of these issues, as the proposal's failure to satisfy PRA requirements and implementing regulations suffices to reject it in its current state, but we flag them to preserve these issues and because they underscore broader concerns with the proposal which, in many cases, flow from these narrower deficiencies.
[4] U.S. Const. amend. XIV, § 1.
[5] Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.

origin. In *SFFA*, the Supreme Court held that generally, institutions could not consider an applicant's race in making admissions decisions; the Court explained that institutions could continue to consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[6] And crucially, as federal courts have reinforced,[7] the Court did not prohibit the use of race-*neutral* measures—such as those that take account of socioeconomic factors—to promote student body diversity.[8] On the contrary, three of the concurring opinions in *SFFA* signaled support for such measures.[9] Notably, such measures have been upheld by federal courts outside of the higher education context in decisions that the Supreme Court has declined to review in the wake of *SFFA*.[10]

Yet, the Department claims—without support—that the proposed ACTS Survey is necessary for the enforcement of the Supreme Court's decision in *SFFA* and relevant anti-discrimination laws.[11] In putting forth this view, the Department improperly assumes that the lack of a decline in Black and Brown student enrollment post-*SFFA* must mean civil rights law noncompliance, failing to account for non-discriminatory reasons for such stability, including outreach and recruitment efforts.[12] Even though concerns about the Department's approach were raised in response to its First Notice, the Department continues to rely on the incorrect view that the Supreme Court's *SFFA* holding dictates a particular method for admissions or requires monitoring of certain quantitative factors to detect potential non-compliance. For the reasons articulated in this comment, this represents a fundamental misreading and subversion of existing law.

II. THE PROPOSAL IMPERMISSIBLY IMPOSES NEW SUBSTANTIVE OBLIGATIONS.

The Department's proposal—masked as a mere data collection—imposes new substantive obligations on regulated entities. The proposed collection is situated within the Administration's broader campaign aimed at curtailing the ability of institutions to admit or support diverse classes of students, as evidenced by numerous Administration actions targeting the actions of institutions of higher education ("IHEs"), including the Department's now-vacated Dear Colleague Letter and

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[6] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

[7] *See, e.g.*, *Am. Fed'n of Tchrs. v. Dep't of Educ.*, 796 F.Supp.3d 66, *106 (D. Md. Aug. 14, 2025); *Nat'l Educ. Assoc. v. U.S. Dep't of Educ.*, No. 1:25-cv-00091, *199 (D.N.H. Apr. 24, 2025).

[8] Nor did it address scholarship decision-making processes, undermining the Department's alleged need for disaggregated data on IHEs' aid allocation.

[9] *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) (Kavanaugh, J., concurring; Thomas, J., concurring; Gorsuch, J., concurring).

[10] *See, e.g.*, *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 68 F.4th 864, 891 (4th Cir. 2023), *cert. denied*, 218 L. Ed. 2d 71 (2024); *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 61 (1st Cir. 2023), *cert. denied*, 145 S. Ct. 15 (2024).

[11] "Greater transparency through the collection of this type of information will help to expose unlawful practices, enable the Department to better enforece [sic] Title VI, and create good incentives for voluntary compliance." Agency Information Collection Activities; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2024–25 Through 2026–27, 90 Fed. Reg. 39,385 (Aug. 15, 2025).

[12] The design of and messaging surrounding the ACTS Survey presuppose that *SFFA* prohibits race-neutral measures such as these to promote student diversity. For example, President Trump alleges rampant use of "overt and hidden racial proxies" in his Presidential Memorandum to justify expanding IPEDS, indicating that ACTS seeks data on factors such as family income and parental education to reveal impermissible uses of such proxies.

Certification Requirement.[13] Federal courts have rejected the Department's characterization of such measures as unlawful.[14] Now, the Department seeks to indirectly target similar measures in the admissions context using this collection as a workaround.

Against this backdrop, our organizations are particularly troubled by the Department's unwillingness to collect disaggregated data on factors that disproportionately privilege white, affluent individuals, such as legacy, donor, and athlete recruitment status. This deliberate omission overrides the concern—raised by several commenters—that exclusion of such factors will bias the data collected (notably, a core PRA concern).

In imposing the Department's misguided interpretation of Title VI, the Department effectively attempts to dictate the admissions practices of institutions in a way that impermissibly infringes their core academic freedom.[15] In the Department's view, Title VI compliance is equated with static and narrow metrics assessed across racial groups. Yet, neither the Equal Protection Clause nor Title VI constrain an institution's ability to determine criteria for admission as the Department's proposal suggests. In imposing these new requirements, ACTS is a *de facto* legislative rule disguised as a routine information collection, and, as such, requires APA § 553 notice-and-comment rulemaking. ACTS effectively creates new compliance duties and has binding practical effect on regulated parties.[16] It also imposes sweeping new reporting obligations on IHEs, which incur legal obligations to submit the requested data on pain of fines and loss of Title IV funding.

Moreover, in imposing these new requirements, ACTS also runs up against constitutional constraints: Spending Clause principles require that grantees be given clear notice of conditions on the grant of federal funds at the time of consenting to them and not be surprised with retroactive conditions—especially conditions that undermine the very purpose of the relevant funding program.[17] ACTS drastically ratchets up the reporting obligations grantees originally consented to as a condition of Title IV funding to encompass vast swathes of new data tracking of the applicant-to-graduate pipeline in an unprecedented, disaggregated form and imposes extensive retrospective reporting requirements. Through ACTS, the Department also imposes a funding condition which is unrelated to Title IV funding purposes, violating the Spending Clause requirement of a nexus between a funding condition and the objectives of the federal funding program at issue.[18] The funding condition here—compliance with Survey reporting requirements—is aimed at deterring race-neutral and permissible measures to promote diversity,

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[13] *See Am. Fed'n of Tchrs. v. Dep't of Educ*., 796 F.Supp.3d 66, *106 (D. Md. Aug. 14, 2025) (appeal filed).

[14] *See, e.g*., *Am. Fed'n of Tchrs. v. Dep't of Educ*., 796 F.Supp.3d 66, *106 (D. Md. Aug. 14, 2025) (appeal filed); *Nat'l Educ. Assoc. v. U.S. Dep't of Educ*., No. 1:25-cv-00091, *199 (D.N.H. Apr. 24, 2025); *Nat'l Assoc. for the Advancement of Colored People v. U.S. Dep't of Educ*., 779 F. Supp. 3d 53, 67 (D.D.C. 2025).

[15] *See Sweezy v. New Hampshire*, 354 U.S. 234, *263 (1957) (Frankfurter, J., concurring in result) (imputing to a university "'the four essential freedoms . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'").

[16] *See Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside EPA guidance that, despite its label, compelled states and sources to expand monitoring and move from periodic to more frequent reporting—an effective rule change that required APA notice-and-comment).

[17] *See Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, *25 (1981).

[18] *See South Dakota v. Dole*, 483 U.S. 203 (1987) (funding condition must reasonably relate to federal interest in funding program at issue); 20 U.S.C. § 1070 (purpose of Title IV is to "mak[e] available the benefits of postsecondary education to eligible students").

whereas Title IV seeks to *expand* educational opportunity and promote institutional accountability to this end.[19]

III. THE PROPOSAL FAILS TO ACCOUNT FOR APPLICANT AND STUDENT PRIVACY CONSIDERATIONS.

As we articulated in our earlier comment, the proposed data collection raises significant concerns regarding student privacy.[20] Even in its Second Notice, the Department wholly fails to grapple with the legal requirements imposed by the Family Educational Rights and Privacy Act ("FERPA"), the Privacy Act of 1974 ("Privacy Act"), and relevant OIRA regulations.[21] The Department's cursory treatment of these concerns is characterized by the disregard for comments raising these issues and wholesale flouting of specific legal obligations.[22] In ignoring these important protections, the Department puts the privacy of applicants and students at risk.

IHEs risk violating FERPA by submitting data that may constitute personally identifiable information, depending on how ACTS results will be disclosed—a core issue that remains unaddressed by the proposed collection. Although IPEDS has traditionally only required submission of aggregate data, even aggregate data can reveal personally identifiable information if not properly vetted.[23] And crucially, the Department is now proposing to break with that tradition, mandating that schools complete "student-level files" and aggregate them either by using a Department-provided script or by uploading them to the Department's Aggregator Tool.[24] This radical departure from established practice will almost certainly implicate personal information, despite the Department's vague admonition that the student-level file be "free of direct student identifiers." Such detailed data regarding income, test scores, GPA, receipt of grant aid, and more will easily be traceable to specific students. Even the aggregated data envisioned by the Department will likely reveal personally identifiable information if it is subject to the requirement that race-sex pairs be disaggregated by test scores, GPA, income, and admission status.[25]

To the extent that the Department anticipates receiving students' personally identifiable information under FERPA's audit/evaluation exception, that exception requires detailed written

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[19] 20 U.S.C. § 1015c(a) (prohibiting any interpretation of the HEA to authorize a federal database of student-level personally identifiable information).

[20] 44 U.S.C. § 3506(e)(3)–(4) (requiring agencies to protect respondents' privacy and honor confidentiality pledges and to observe federal standards for data collection, analysis, documentation, sharing, and dissemination). The proposal confirms that this data will not be collected subject to a pledge of confidentiality, exacerbating privacy concerns. *See generally* U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *IPEDS 2024–25 through 2026–27: Public Comments and Responses* (OMB No. 1850-0582 v.33) (May 2024) (revised Oct. 2025) at 19.

[21] 5 C.F.R. § 1320.8(b)(3)(v) (requiring agencies to inform respondents of "the nature and extent of confidentiality …, if any"); 5 C.F.R. § 1320.5(d)(2)(viii): (providing that OMB will not approve a collection requiring confidential information unless the agency shows either statutory necessity or that it has instituted procedures to protect confidentiality to the extent permitted by law).

[22] This disregard for student privacy is further evidence that this collection is arbitrary and capricious.

[23] 76 Fed. Reg. 75603, 75610 (Dec. 2, 2011).

[24] Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Integrated Postsecondary Education Data System (IPEDS) 2025-26 Through 2026-27, Supporting Statement Part A: ACTS Change Package at 10-11, 90 Fed. Reg. 50940 (Nov. 13, 2025), available *at* https://downloads.regulations.gov/ED-2025-SCC-0382-3465/attachment_1.pdf.

[25] *Id.*

agreements with specific safeguards[26] not provided for in the proposal. The Department also risks violating the Privacy Act and Congressional prohibitions on a federal database of postsecondary students, depending on how it decides to use and disclose the data.[27] To the extent that the proposal requires disclosure of private information without providing adequate safeguards to prevent its disclosure, it risks violating applicants' and students' constitutional informational privacy rights.[28] The Department's failure to even address these applicable legal requirements calls into question whether it has fulfilled its obligation under the Administrative Procedure Act "to consider [each] important aspect of the problem."[29]

Most notably, the Department does not commit to safeguards to avoid re-identification of individuals at the dissemination stage—a pressing concern in light of its statutory obligations to publicize IPEDS results.[30] Given the granularity of the data sought, it will be possible to identify particular individuals based on the data released, particularly in the case of small programs or institutions.

The Department does not fully address the privacy concerns in its Second Notice, and it accounts only partially for how data, including from the student-level file, will be handled at the submission stage, not the dissemination stage. For example, it instructs IHEs to create de-identified student files and either run provided local scripts or upload them into the Aggregator Tool for aggregation. The Tool—developed under a compressed timeline for this collection—has never been used for IPEDS collection before, and the Department admits that, though only aggregate data will be turned over to the Department, the unit-level data submitted for aggregation by the Tool will be stored on a contractor server through the end of the submission period. These privacy concerns cut against the persuasiveness of the Department's reliance on the Tool as a burden-reduction strategy in the context of this collection.

IV. THE PROPOSAL FALLS SHORT OF REASONED DECISIONMAKING.

Congress has charged NCES with producing statistical information in a manner that is objective, neutral, racially unbiased, and free from partisan influence.[31] This proposal runs afoul

[26] 34 C.F.R. § 99.31(a)(3), (6); 34 C.F.R. § 99.35(a)(1), (a)(3), (b).

[27] Privacy Act of 1974, 5 U.S.C. § 552a(b) (prohibiting agency disclosure of records in a system of records absent written consent or a statutory exception); 20 U.S.C. § 1015c(a) (prohibiting any interpretation of the HEA to authorize a federal database of student-level personally identifiable information).

[28] *See Whalen v. Roe*, 429 U.S. 589 (1977) (recognizing a constitutional privacy interest "in avoiding disclosure of personal matters," and cautioning about government "accumulation" of personal information in computerized data banks; upholding statute requiring provision of copies of certain drug prescriptions to state only because statutory "security provisions" protected against public disclosure); *Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425 (1977) (acknowledging a privacy interest in avoiding disclosure of personal matters but upholding Act which preserved presidential records due to protections against "undue dissemination" and procedures limiting public release); *NASA v. Nelson*, 562 U.S. 134 (2011) (assuming, without deciding, a constitutional right to informational privacy, and upholding background checks where reasonable and subject to "substantial protections against disclosure").

[29] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, *43 (1983).

[30] *See* 44 U.S.C. § 3506(e)(6); 20 U.S.C. § 9543(a); 20 U.S.C. § 9511(3). The Department's vague, noncommittal allusion to NCES's use elsewhere of privacy protections "rarely used within the IPEDS program" does not satisfy applicable privacy standards. *Public Comments and Responses*, *supra* note 20, at 19.

[31] 20 U.S.C. § 9541(b)(3)(A)–(B) (directing NCES to collect and report education statistics in an objective, secular, neutral, and nonideological manner, free of partisan political influence and racial or other bias, and to ensure the information is relevant and useful to practitioners, researchers, policymakers, and the public).

of that mission as evidenced by the fact NCES jettisoned standard processes in favor of meeting an Administration directive. In issuing this proposal, NCES bypassed pilots and technical review panels ("TRPs") which would have facilitated peer review and stakeholder consultation. The reason is evident in President Trump's August 7 Memorandum, which directed that the data collection be initiated within 120 days.[32] In justifying the data collection, the Department offers unsubstantiated assertions and executive edicts. Neither are adequate justifications, nor do they reflect the reasoned decision making required of the Department. As such, the Department's decision making is arbitrary and capricious.

The Department's justifications stem from the same fundamental misreading of applicable law discussed above. The Department states—without support—that "DEI has been used as a pretext to advance overt and insidious racial discrimination" and that "four-year institutions who utilize selective college admissions . . . have an elevated risk of noncompliance with the civil rights laws."[33] Further, the Department repeatedly justifies the content of the ACTS Survey and key decisions about implementation with unwarranted deference to the Presidential Memorandum and Secretary McMahon's implementing directive.[34] The Department repeats a form response citing these political directives as justification in responding to key criticisms,[35] with respect to purpose,[36] burdens, [37] privacy risks,[38] and scope.[39] In other words, the Department makes clear through these responses that its choices are motivated by politics, not evidence.[40]

The Department's unsupported justifications and highly irregular process for developing and expediting this proposal reveal that enforcement of civil rights law is serving as a pretextual justification[41] for backdoor policymaking. In any case, seeking to comply with an executive action does not enable an agency to bypass its legal duty to consider commenters' legitimate concerns. Yet that is precisely what the Department did here. Commenters stressed the significant reliance interests that stand to be severely disrupted by this IPEDS expansion.[42] And further, commenters

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[32] https://www.whitehouse.gov/presidential-actions/2025/08/ensuring-transparency-in-higher-education-admissions/.
[33] 90 Fed. Reg. 39384 (Aug. 15, 2025), https://www.federalregister.gov/documents/2025/08/15/2025-15536/agency-information-collection-activities-comment-request-integrated-postsecondary-education-data. *Am. Fed'n of Tchrs. v. Dep't of Educ.*, 796 F.Supp.3d 66, *106 (D. Md. Aug. 14, 2025) ("[W]here [the government] seeks to use [its] viewpoints to alter the legal landscape and to impose new obligations on regulated persons, it must consider evidence and demonstrate appropriate consideration of relevant facts.").
[34] U.S. Dep't of Educ., Secretary's Directive: Ensuring Transparency in Higher Education Admissions (Aug. 7, 2025).
[35] *See generally Public Comments and Responses*, *supra* note 20.
[36] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Admissions and Consumer Transparency Supplement (ACTS) Package: 2025–26 and 2026–27 Data Collections* (OMB No. 1850-0582 v.33) 5 (Oct. 2025).
[37] *Public Comments and Responses*, *supra* note 20, at 16.
[38] *Public Comments and Responses*, *supra* note20, at 19.
[39] *ACTS Package*, *supra* note 36, at 62.
[40] *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983) (agency explanation for agency action must offer a rational connection between relevant facts and choice made).
[41] *Dep't of Commerce v. New York*, 139 S. Ct. 2551 (2019) (pretextual explanations for agency action are inconsistent with reasoned decision-making requirement of the Administrative Procedure Act ("APA")). Even granting that "it is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy," this does not excuse agency action that is not adequately explained by, and is misaligned with, the agency's proffered rationale. *Dep't of Commerce v. New York*, 139 S. Ct. 2551, *2574 (2019).
[42] *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 591 U.S. 1 (2020) (failure to address reliance interests, including by weighing them against policy concerns and considering accommodations, renders agency action arbitrary

noted—to no avail—that much of the requested retrospective data is unavailable and/or not reasonably accessible because it has not historically been collected. As a result, the data will be cumbersome, and sometimes infeasible, to gather and produce. The Department's burden estimate for ACTS—of 200 hours maximum per institution in its inaugural year—is unrealistic and misaligned with the estimates of experienced stakeholders. This estimate—uninformed by TRPs, pilots, or stakeholder consultations—lacks objective support.[43] Even assuming this estimate *were* accurate, the Department gives short shrift to IHEs' inability to plan for these burdens given the late notice and rushed timeline of this rollout.

OIRA regulations require information collections to be the "least burdensome necessary."[44] The magnitude of data sought here, including data that is unrelated to legitimate *SFFA* enforcement purposes,[45] belies this requirement. The request for retrospective data is also in tension with OMB rules that disfavor approving an information collection that requires respondents to retain certain records for more than three years.[46] As commenters stressed in response to the First Notice, this burden will fall inequitably on under-resourced institutions, including public IHEs, community colleges, HBCUs, HSIs, and tribal colleges. We welcome the Department's decision to limit the Survey's scope in response to comments on its initial proposal, but limiting the scope to IHEs that admit 100% of applicants is arbitrary in light of the collection's purported aims. For example, it still sweeps in non-selective IHEs that only reject applicants for reasons unrelated to qualifications (e.g., failure to submit transcripts)—further evidence of unreasoned decision-making.

V. THE DATA COLLECTION RAISES ACUTE DATA VALIDITY, RELIABILITY, AND UTILITY CONCERNS.

Information collections must be designed to produce valid and reliable results that can be generalized to the universe of study.[47] ACTS falls short of this standard in several respects.

For one, the decision not to conduct disaggregated data on additional, relevant factors such as legacy, athlete recruitment, and donor status will skew analysis of the data collected. More generally, deficiencies in collected data—due to data being unavailable, inaccessible, or not

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and capricious); *Drs. for Am. v. Off. of Pers. Mgmt*., No. 25-cv-322-JDB, 766 F.Supp.3d 39, **52-53 (D.D.C. Feb. 11, 2025) (finding likelihood of success on claim that agencies' removal of certain webpages was arbitrary and capricious where they failed to consider medical providers' longstanding and continued reliance on the webpages when removing them to comply with an executive order and OPM memorandum implementing the order).

[43] 5 C.F.R. § 1320.8(a)(4) (requiring, as part of the review of each collection of information required before submission to OMB, "[a] specific, objectively supported estimate of burden . . . .").

[44] 5 C.F.R. § 1320.5(d)(1)(i).

[45] The Department's latest justification for ACTS is more subtle than its original: "The data to be collected from ACTS are intended to capture information that *could* indicate whether institutions of higher education are using race-based preferencing in their admissions processes." Even assuming the legitimacy and veracity of this proposed justification, the burdens ACTS imposes far outweigh the utility speculated here.

[46] 5 C.F.R. § 1320.5(d)(2)(iv) ("Unless the agency demonstrates that the requirement is necessary to satisfy statutory requirements or other substantial need, OMB will not approve a collection … [r]equiring respondents to retain [certain kinds of] records … for more than three years.").

[47] 5 C.F.R. § 1320.5(d)(2)(v) (providing that, absent statutory requirements or other substantial need, OMB will not approve a statistical survey "that is not designed to produce valid and reliable results that can be generalized to the universe of study."); 20 U.S.C. § 9541(b)(1) (requiring NCES "to collect and analyze education information and statistics in a manner that meets the highest methodological standards").

standardized across institutions or programs—will affect data validity, accuracy, relevance, objectivity, and utility.[48] IHEs are instructed to code for and explain any gaps, and omit data they do not consider in admissions. At best, this resolves *whether* IHEs must report certain data but leaves unresolved concerns about the accuracy and utility of the results. Further, collecting narrow quantitative metrics, such as GPAs and test scores—unbalanced by contextualizing factors accounted for by admissions officers—ignores the fundamental nature of selective admissions and renders the data vulnerable to misinterpretation. Other data utility concerns abound—for example, variability across institutions and programs (especially at the graduate level) means that requested inputs will not be consistently available or comparable. And switching existing IPEDS reporting conventions (e.g., quartiles to quintiles) threatens continuity and longitudinal analysis. The proposed use of the Aggregator Tool to coalesce, clean, and summarize data submitted by individual IHEs poses severe risks of exacerbating these accuracy and validity issues—and introducing new ones—if not designed and tested carefully.

Additionally, IHEs' reporting obligations remain impermissibly ambiguous and unclear. For example, IHEs must submit GPAs on a 4.0 scale, but that ignores that high schools differ in the range of GPAs they adhere to and even the numerical score assigned to different grades. Other definitions, such as parental college attainment and financial aid types, remain ambiguous as well. This ambiguity is consequential. As the Department has repeatedly warned, IHEs face fines of up to $71,545 per violation and can lose Title IV funding altogether for failure to comply with ACTS.[49] For many public IHEs, the loss of Title IV funding poses an existential threat, triggering coercive funding condition concerns.[50]

The Department relies on Help Desks, coding guidance, and explanation boxes to address data gaps and uncertainties,[51] and exempts certain data from reporting requirements.[52] But it remains unclear whether and how good-faith uses of these mechanisms and exceptions will affect compliance determinations. For example, the Department recently characterized as "unlawful" the practice of eliminating standardized testing requirements to increase racial diversity.[53] Given that new (and legally unsupported) position, IHEs may reasonably fear that omitting data like test scores—even if they are not used in admissions decision-making and are therefore ostensibly exempt—will expose them to enforcement. This provides incentives to overcorrect by retreating from equitable admissions practices.

The Survey definitions and instructions are not only an "important aspect of the problem," they are core to the collection itself.[54] Without clear definitions or instruction, the data fails to be

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[48] 44 U.S.C. § 3506(e)(1) (requiring agencies to "ensure the relevance, accuracy, timeliness, integrity, and objectivity of information collected or created for statistical purposes").

[49] U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *Appendix B: IPEDS 2024–25 Communication Package (including 2025–26 ACTS Communications)* (OMB No. 1850-0582 v.33) 89 (Feb. 2024) (revised May 2025; revised Oct. 2025).

[50] *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (financial inducement may rise to level of impermissible coercion when federal funds at stake constitute major portion of regulated states' budgets).

[51] *See, e.g.*, *ACTS Package*, *supra* note 36, at 21–22.

[52] *See, e.g.*, *ACTS Package*, *supra* note 36, at 63.

[53] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard (Feb. 14, 2025), https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf.

[54] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, *43 (1983).

valid or useful. The Department's failure to adequately address obvious gaps and deficiencies in these definitions and guidance reinforces that this collection is arbitrary and capricious in violation of APA § 706(2)(A).

These flaws are preventable—and curable. Despite the extraordinary IPEDS expansion at issue, this proposal skipped standard stakeholder engagement and methodological vetting mechanisms historically used for IPEDS changes, including TRPs, piloting, and phased rollouts[55] to meet an arbitrary, politicized timeline. The Department's gutting of NCES staff and reported cuts to implementation partners such as RTI International[56] raise serious doubts about NCES's capacity to manage the collection, provide technical assistance, and perform data validation and suppression appropriately, further undermining compliance with NCES's duty of efficient and effective information management.[57] In light of these developments, the Department's repeated referral of concerned IHEs to support resources, such as Help Desk personnel, and reliance on error reviews to catch issues with data collection, fail to reassure. The Department should withdraw this proposal until it has made preparations commensurate to this undertaking.

VI. STAKEHOLDERS HAVE BEEN DEPRIVED OF A MEANINGFUL OPPORTUNITY TO COMMENT.

The PRA provides for two rounds of notice and comment on collections such as this to solicit stakeholder input.[58] But the skeletal proposal included in the Department's First Notice frustrated this requirement by omitting critical information, including exactly the data fields to be included, definitions of data fields, Survey instructions, specific burden estimates, any mention of the Aggregator Tool, and even the Survey itself.[59] Stakeholders who would have commented on these foundational issues now have only 30 days to do so while scrambling to prepare for the competing demands of an imminent and unexpected collection.

Though the updated proposal fills some gaps, it is riddled with others and thus still fails to provide a "functional description of the information to be collected."[60] The ACTS website and data submission template are evidently still under development,[61] requiring stakeholders seeking to prepare for and/or comment on them to piece together what final materials will look like using scattered content diffused throughout this docket. Moreover, fundamental questions—such as how

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[55] *See* 5 C.F.R. § 1320.8(a)(6) (requiring, as appropriate, a pilot test of the information collection).

[56] Jessica Blake, *Trump Ends Vital Higher Ed Data System Training*, INSIDE HIGHER ED (June 9, 2025), https://www.insidehighered.com/news/government/politics-elections/2025/06/09/department-education-discontinues-ipeds-training; Jill Barshay, *Inaccurate, Impossible: Experts Knock New Trump Plan to Collect College Admissions Data*, KQED MINDSHIFT (Aug. 18, 2025), https://www.kqed.org/mindshift/65717/inaccurate-impossible-experts-knock-new-trump-plan-to-collect-college-admissions-data.

[57] *See* 5 C.F.R. § 1320.8(a)(7) (requiring, as appropriate, a plan for the efficient and effective management and use of the information, including necessary resources).

[58] 44 U.S.C. § 3506(c)(2)(A) (60-day initial comment period); 44 U.S.C. § 3507(b) (30-day comment period).

[59] 5 C.F.R. § 1320.8(d)(2); 44 U.S.C. 3506(c)(2) (requiring agencies to publish a 60-day Federal Register notice that includes the proposed survey and related instructions or, if not included, to explain how the public can obtain them without charge or provide more than 60 days' notice to ensure timely receipt).

[60] 5 C.F.R. § 1320.8(a)(2) (requiring, as part of the review of each collection of information required before submission to OMB, a "functional description of the information to be collected").

[61] *ACTS Package*, *supra* note 36, at 3. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, *IPEDS 2025–26 Keyholder Handbook* (OMB No. 1850-0582 v.33) 16 (Feb. 2024).

the Department plans to avoid re-identification when publishing Survey results,[62] and when and how it plans to release results[63]—remain unanswered. Remarkably, IHEs may expect *no* notice of what privacy safeguards, if any, will be applied at the publication stage before they turn over the requested data, as this will be determined *after* collection. This gap alone should prove fatal to approval of ACTS, as NCES must provide notice of "[t]he nature and extent of confidentiality to be provided."[64] Without disclosure of such safeguards, OMB cannot review their adequacy and IHEs cannot determine whether they will violate FERPA by reporting the data.[65]

VII. RECOMMENDATIONS AND CONCLUSION

We appreciate OMB's careful review of this proposal. To satisfy the PRA, statistical agency standards, and applicable constitutional and privacy constraints, OMB should not approve the updated ACTS proposal and require the Department to withdraw the proposal based on its failure to meet constitutional, statutory, and regulatory standards. When addressing the concerns discussed in this comment, the Department should:

- Conduct robust stakeholder engagement (including through using a TRP) and pilot testing before any nationwide rollout.

- Align the collection to uphold NCES's objectivity and impartiality obligations.

- Establish and disclose, before implementation, robust privacy safeguards, including FERPA-compliant written agreements for any audit/evaluation use, cell suppression rules, and other tools to mitigate re-identification risks.

- Narrow the scope to data that are consistently available and comparable;[66] collect data on legacy, donor, and athlete-recruitment preferences and other factors that promote accurate, balanced results; provide precise definitions of data fields; ensure continuity with existing IPEDS conventions; and articulate specific, objectively supported burden estimates and tested burden reduction strategies.

- Reassess feasibility and capacity constraints at NCES and among implementation partners; delay collection until resources are sufficient to ensure valid, reliable statistical products.

Absent these changes, OMB should determine that the proposed collection lacks practical utility, fails to use effective statistical methodology, does not adequately protect confidentiality,

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[62] *Public Comments and Responses*, *supra* note 20, at 19.
[63] *Supporting Statement Part A*, *supra* note 24, at 35.
[64] 5 C.F.R. § 1320.8(b)(3)(v).
[65] *See* 20 U.S.C. § 1232g(b)(1)–(2) (requiring written consent before an educational institution discloses personally identifiable information ("PII") from student records). Whether submitted data constitutes PII depends in part on what other information is available – in this case, to the public, given the public disclosure of results. *See* 34 C.F.R. § 99.3.
[66] The Department's failure to consider feasible, more measured, and less burdensome Survey designs further underscores the arbitrariness and capriciousness of this proposal. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983) (holding agency rescission arbitrary and capricious where agency failed to consider obvious alternatives); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal*., 591 U.S. 1 (2020) (setting aside agency rescission as arbitrary and capricious for not considering obvious, feasible, narrower options and for failing to reasonably address, including by considering accommodations for, reliance interests).

and imposes excessive and inequitable burdens in violation of the PRA and OMB's implementing rules. A legally grounded and methodologically sound collection can and should be developed to support civil rights enforcement—a goal which is also at the heart of our organizations' work—without compromising important statutory, regulatory, and constitutional standards and values.

If you have any questions or need additional information, please contact Michael Pillera, Director of the Educational Opportunities Project, at mpillera@lawyerscommittee.org, or Leah Watson, Senior Staff Attorney at ACLU, at LWatson@aclu.org.

Respectfully submitted,

/s/ Michael Pillera
Michael Pillera, Director
Lawyers' Committee for Civil Rights Under Law
Educational Opportunities Project
mpillera@lawyerscommittee.org

/s/ Maya Brodziak
Maya Brodziak, Senior Counsel
Lawyers' Committee for Civil Rights Under Law
Educational Opportunities Project
mbrodziak@lawyerscommittee.org

/s/ Leah Watson
Leah Watson, Senior Staff Attorney
American Civil Liberties Union Foundation
Racial Justice Program
LWatson@aclu.org

/s/ ReNika Moore
ReNika Moore, Director
American Civil Liberties Union Foundation
Racial Justice Program
RMoore@aclu.org

/s/ Alexis Alvarez
Alexis Alvarez, Staff Attorney
American Civil Liberties Union Foundation
Racial Justice Program
AlexisA@aclu.org