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Submitted via reginfo.gov

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Office of Planning, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Avenue SW, LBJ, Room 6W201
Washington, DC 20202-8240

RE: Docket Number ED-2021-SCC-0158; Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection

Dear Ms. Valentine:

On behalf of the more than 3 million members of the National Education Association (NEA), we are pleased to submit the following comment in response to the U.S. Department of Education's Office for Civil Rights (OCR) notice published in the Federal Register on September 26, 2022, regarding a proposed Civil Rights Data Collection (CRDC) Information Collection Request (ICR) for the 2021–2022 and 2023-2024 school years. We were pleased to see much of the feedback we provided in our February 2022 letter incorporated into future CRDC collections. However, we believe there is space to include additional measures and we continue to advocate for annual collection.

The CRDC provides clear, transparent information about our nation's schools that is necessary to ensure equal opportunities to all students across race, background, ability, and ZIP code. The CRDC is critical to OCR's statutory responsibility to hold schools, districts, and states accountable for compliance with our civil rights laws. Section 203(c)(1) of the 1979 Department of Education Organization Act delegates to the Assistant Secretary for Civil Rights the authority to "collect or coordinate the collection of data necessary to ensure compliance with civil rights laws within the jurisdiction of the Office for Civil Rights" (20 U.S.C. § 3413(c)(1)). The NEA has relied heavily on these data since the collection began in 1968, and we believe these data are important in preserving the scope, frequency, and public accessibility of information to ensure equal educational opportunity and compliance with federal law. The collection is vital to keeping the public informed about how schools fare on quantifiable measures of school climate and resource equity. The CRDC has allowed education stakeholders and school communities to examine the various trends and identify which schools are working to provide equal educational opportunities for all students and which schools face continuing challenges.

We use the disaggregated data reported in the CRDC by race, ethnicity, native language, socioeconomic status, English Learner (EL) status, disability status, disability type, and sex (including sexual orientation and gender identity) to inform students' experiences in schools and whether all students across race, background, ability, and ZIP code have equal access to and benefit equitably from education. The CRDC is important in ensuring OCR takes its civil rights responsibilities seriously and provides schools with the tools they need to address disparities. Effective data collection and dissemination are necessary for evaluation and review of all other programs and activities. Any change that limits the scope, frequency, or public accessibility of the CRDC would hinder the ability of the Department to fulfill its legal obligations and would undermine our shared interest in the best education for every child.

Conduct the CRDC Annually

The Department should require schools and districts to collect and report data annually. Requiring such data collection would create clearer understanding of changes over time and would better represent individual annual snapshots. The Department, educators, families, students, policymakers, and advocates need access to regular, timely data to address issues and intervene quickly so that children do not lose access to educational opportunities. Moving the CRDC to an annual schedule will enhance the accuracy and timeliness of this critical tool for tracking potential civil rights violations and responding to discrimination and inequity in communities. The shift to an annual collection should also include additional resources to support school district and OCR staff to collect, review, and report the data to meet high accuracy and timeliness standards. The most recent dataset available to the public is the 2017–2018 CRDC—which was released in October 2020—and the 2020–2021 CRDC, which has not yet been released. In the President's Fiscal Year 2022 Budget Request, OCR announced their intent to collect the CRDC in the 2021–2022 school year and again in the 2022–2023 school year.¹ However, this notice does not include that same commitment to collecting data for the 2022–2023 school year.

To best serve students of every race, place, background, and ability across the country, we need a mechanism that reports data in a timely manner. By doing so, the education community can work to adequately address issues and provide prompt responses to ensure that every child receives educational opportunities. In October 2020, the Department released CRDC data from the 2017–2018 collection. The slow-moving nature of these data further hinders the timely release of information that reveals civil rights violations and inequities in communities. Working toward publishing data in a more efficient manner will enhance the effectiveness and timeliness of this critical tool for tracking potential civil rights violations and responding to discrimination and inequity in communities. We believe that an essential step in this process requires collection and release of data on an annual basis.

Disaggregate Data for 504 Status

The collection and analysis of suspension (both in-school and out-of-school) and expulsion data disaggregated by race, gender, grade level, offense, disability status, and disability type through the

¹ Department of Education. Office for Civil Rights. Fiscal Year 2022 Budget Request: "Given the continuing importance of measuring the impact of the pandemic, OCR will move forward with administering a 2020–21 CRDC as planned, followed by a 2021–22 collection, and depending on funding and other factors, an additional collection in school year 2022–23." Source: <https://www2.ed.gov/about/overview/budget/budget22/justifications/bb-ocr.pdf>

CRDC has been a useful tool in assisting districts and schools monitor and address disparities in their disciplinary policies and practices. However, while disaggregated data is available for IDEA and race across multiple data categories, the same is not true for students with disabilities who only receive services under Section 504. The lack of disaggregated 504-only data means that the public is not able to determine, for example, the percentage of 504-only Black students who have faced various disciplinary actions or been referred to law enforcement. This is a critical information gap for researchers and advocates who are trying to address the discriminatory discipline of students of color with disabilities. Accordingly, the next CRDC data collection should collect disaggregated discipline data with a cross-section of race with 504-only status. Specifically, the data on law enforcement referrals, arrests, corporal punishment, one or more in-school suspension, only one out-of-school suspension, more than one out-of-school suspension, expulsions with/without educational services, expulsion under zero tolerance, transfer to alternative school, and school days missed due to out-of-school suspension should be disaggregated along 504-only and race categories.

In addition to adding 504-only data that can be cross-sectionally analyzed across race, school days missed due to out-of-school suspension for IDEA and 504-only is currently disaggregated by gender only and cannot be cross-sectionally analyzed by race for either IDEA or 504-only students. Accordingly, this suspension data category should also be modified to collect race with disability cross-sectional data.

AP-enrolled students are disaggregated by 504-only students in total but not at the subject-level like other categories. 504-only disaggregation should also be extended to AP-enrolled students by subject for consistency.

Maintain College Preparation Courses

OCR has proposed the elimination of various questions related to college preparation courses; specifically, how many were taught by subject-certified teachers. These data are the richest cluster within the CRDC because they are the only set of questions aimed at understanding teacher shortages, which is an increasingly urgent issue. There were frequent, strong correlations with these data and various equity vectors (poverty, district median family income, city/suburban/town/rural, majority/minority, etc.).

While we understand the concern of administrative burden and applaud the addition of new items on FTE certified in math, science, special education, and ESL (though, missing from the Appendix), we would argue that it's not at all an even exchange. Both sets of data are vital because they supplement one another. For one thing, as proposed, we would have no denominator with the FTE data. We may learn there are three science-certified FTE, but we would not know how many science teachers there are; whereas with the existing questions, we have both the number of classes taught by subject-certified teachers and the number of each subject class taught—the denominator. These data enable the production of meaningful indicators (percentages) that the new items would not.

For the reasons shared above, the NEA urges OCR to reconsider the elimination of the following questions:

- Number of Algebra I classes in grade 7-8 taught by teachers with a mathematics certification.
- Number of math classes in grades 9-12 taught by teachers with a mathematics certification (Algebra I, Geometry, Algebra II, Advanced Math, Calculus).
- Number of science classes in grades 9-12 taught by teachers with a science certification (Biology, Chemistry, Physics).

- Number of computer science classes in grades 9-12 taught by teachers with a computer science certification.

Issue Guidance for Data Reporting to Ensure Accuracy in Collection

OCR should issue guidance regarding best practices for data reporting to the CRDC to ensure that state education agencies (SEAs) and local education agencies (LEAs) are providing full, accurate, and transparent data and are not suppressing data due to unfounded privacy concerns, as discussed below.

The NEA believes that OCR should encourage states to support districts with reporting CRDC data since SEAs typically have more capacity with data management and collection personnel. The Department should encourage SEAs to leverage that capacity to support LEAs with collecting and reporting data required for the CRDC. Encouraging SEAs to support districts with data collection and reporting could help improve comparability of data across districts within states; SEAs' increased data management capacity may also help improve quality and timeliness of submitted data. Resources and guidance with clear examples and FAQs are an important support that the Department can provide to SEAs.

Collect Data on School Resource Officers (SROs)/Law Enforcement on Campus

Currently, data is not being collected nationally on the prevalence of SROs or law enforcement on school campuses. This lack of national data makes it difficult to determine which schools have high proportions of law enforcement and which schools do not. To remedy this information gap, the CRDC should collect data on the number of SROs and/or law enforcement in schools.

In addition to collecting data on SROs and law enforcement on campus, we recommend that OCR takes a closer look at two specific definitions: “referral to law enforcement” and “school-related arrests.” Upon review, we believe that these two definitions leave too much room for interpretation by schools and districts. We would appreciate OCR adding explicit language to each of these definitions to ensure consistency in reporting. For “referral to law enforcement”, we recommend that OCR list out specific law enforcement agencies or officials beyond a school police unit. We would like to see SROs and security listed as well. For “school-related arrests,” we recommend that OCR list out who specifically is submitting the referral. Currently, the language only includes school officials, but this term varies based on school and we are unclear if this only includes school administration or if educators and adults in the building are also included. Additionally, we believe the term “referral” needs clarification as there is a lack of clarity on what actions specifically entail a referral. To ensure consistency in reporting and maintaining the integrity of data collection, we urge OCR to update these definitions.

Disaggregate Data by Grade

Upon review of the survey questions, we noticed that OCR does not intend to disaggregate certain questions by grade. We strongly urge OCR to reconsider including grade as a disaggregated category. Not doing so leaves researchers with no denominator for calculating percentages. For example, given the proposed survey, researchers would not be able to highlight the percentage of seventh graders who took Algebra I solely from the available data. Without these valuable disaggregated data, researchers are forced to use grade-level enrollment data from the National Center for Education Statistics (NCES) Common Core of Data (CCD) school universe survey, which creates multiple problems, such as missing schools and conflicting headcounts.

The section on retention presents another example of why disaggregation by grade would be beneficial. In the retention section, OCR is collecting data on “the number of students retained in specified grade, by grade (K–12) (disaggregated by race, sex, nonbinary, disability-IDEA; disability-Section 504 only, EL). (Nonbinary expansion optional for 2021–2022 CRDC).” Through this question, we learn how many students were retained—or held back—at each grade level, but we do not have the denominator. Given these data, we cannot compute the percentage of students who were retained without utilizing data from a different survey, which can produce nonsensical results. This means we do not have a valid and reliable way to make comparisons across schools or districts. For these reasons, we urge OCR to include the disaggregation of data by grade for all categories.

Retain All School Finance Items for Future Collections

We remain concerned about the previous elimination of all data involving school expenditures. These data can show how funds are distributed within a district and whether certain schools are receiving disproportionately less funding than others. To ensure that all students across race, place, background, and ability have access to a quality education, funding levels are of particular interest. Data about school expenditures is critical to understanding the resources a school has available. The previously collected CRDC school finance data elements are central to identifying inequities. We commend OCR for collaborating with the NCES to explore options for requiring SEAs to complete NCES’ School-Level Finance Survey (SLFS) beginning in the 2022–2023 school year; however, we strongly urge OCR to retain all the previous data elements in the school finance section for the 2021–2022 and 2023–2024 school years to collect this critical information as this transition occurs.

Broaden Data on Pre-K–12 Participation

One of the ways we believe OCR can increase our ability to support student access to programs and services is by broadening the categories of data collected on student participation. For example, we feel that understanding socioeconomic status, family structure, and even the education level of parents can provide meaningful data on who has access to Pre-K–12 programs. With prevalent issues in cultural competence, racial and social justice, and equity in the forefront of education, we believe there needs to be a focus on collecting related data to assist in identifying areas of need. By broadening the scope of data collected, advocates for public education can find meaningful ways to support student learning and access to programs.

Increase Data for Early Childhood Education

While we know much progress has been made, we urge the Department to consider the addition of two items related to early childhood programs. We recommend that OCR collect data on IDEA students from birth to 5 years old to capture all early childhood students receiving services. Additionally, we recommend the inclusion of socioeconomic status of early childhood program applicants and participants. This information can be crucial to identifying early childhood programming needs.

Increase Data for Advanced Placement (AP), Dual Enrollment, and International Baccalaureate (IB)

Data to help understand the student populations targeted for AP, dual enrollment, and IB participation could help provide information around issues of equity and racial and social justice. We recommend that OCR collect socioeconomic status data for AP, dual enrollment, and IB course participants. These are areas that could help increase access to AP, dual enrollment, and IB courses within underserved communities.

We commend the Department for restoring the data collection on whether a school offers AP courses beyond math, science, and computer science. We believe that all students should have access to courses that prepare them for life after graduation, and this includes a well-rounded curriculum with rigorous courses outside of math, science, and computer science. In restoring this information, we will be able to see which schools are offering AP courses in other subjects, such as world language and history. To close opportunity gaps, we need to ensure that schools serving students of color also offer these courses. These data are critical to ensuring that we are providing all students access to rigorous courses.

Include Restraint and Seclusion Programs and Training

OCR should include data on restraint programs/techniques training and training status as well as information that identifies if restraints are performed by trained personnel. There should also be information that specifies the staff groups performing restraint and seclusion. The data collection should also include information regarding the personal safety of students and the types of injuries sustained (physical and emotional). Gaining an understanding of which processes are being used to document the types of restraint, any associated injuries, and the types of monitoring processes being used during the restraint can be extremely useful.

Frequency data is also important to understanding the nature of restraint and seclusion. This information leads to improvement in practices and identifying “how” and “why” the practice may be used within a school or district. OCR should and must continue to address the disparities that are happening with students who experience restraint and seclusion while also capturing more data on this matter. We urge OCR to keep all the current data elements regarding restraint and seclusion and include these additional items.

Include Additional School Discipline Items

The presence of school-based law enforcement is frequently harmful for the well-being and education of children—especially children of color, including children of color with disabilities, LGBTQ+ children of color, and children of color who have experienced additional forms of marginalization. The CRDC includes data elements that address referrals to law enforcement agencies and school-based arrests, but it should also include the instances of assaults students experience from school-based law enforcement. This additional data set will contribute to the collecting of more accurate and complete data on discipline data elements, providing students, families, educators, advocates, and policymakers with the information they need to address disparities, ensure equitable educational opportunity, and comply with nondiscrimination laws.

Collect Data About Instruction During the COVID-19 Pandemic

The COVID-19 pandemic has shed light on many inequities within the public education system, some with long-term impact. As advocates, we believe OCR has a duty to collect data on how the COVID-19 pandemic has disrupted public education systems and how schools worked to provide high-quality education to all students. To that end, we know that there has been significant variability in the number of hours of instruction provided to children. Some schools offered increased instruction, while others only provided a few hours of instruction in a given week. To gain a more holistic understanding of instructional time during the pandemic, we recommend that OCR include questions about instructional time disaggregated by student characteristics.

Similar to the need to better understand access to instructional time during the pandemic, there is also a need to know how content was delivered. We commend OCR for proposing the data elements focused on the amount of virtual instruction provided by teachers and the percentage of students who

received virtual instruction. However, to understand the extent to which various methods of instruction were provided to students, we believe OCR must collect and report information regarding method of instruction disaggregated by student characteristics for the 2021–2022 and 2023–2024 school years. We urge OCR to include the proposed data elements in the COVID-related items section.

Include Data on Harassment Based on Gender Identity, Sexual Orientation, and Sex Characteristics

We strongly support the Department enumerating gender identity and sexual orientation in the proposed definition of harassment on the basis of sex, consistent with the Bostock ruling, which the Department of Justice² and Department of Education³ affirm and apply fully to Title IX. We ask that the Department further strengthen this measure by defining “on the basis of sex” to encompass harassment or bullying based on transgender status and gender expression, the latter of which was removed—along with all references to gender—in the 2020–2021 CRDC. We commend OCR for proposing the data element focused on the number of reported allegations of harassment or bullying of K–12 students on the basis of gender identity and retaining a comparable measure for allegations for harassment or bullying on the basis of sexual orientation. The Department should also collect data on the number of students who report and who were disciplined for harassment or bullying on the basis of sexual orientation or gender identity. The CRDC is a critical source of data on disparities that may indicate discriminatory school practices. LGBTQ+ students experience harassment and bullying at disproportionate rates⁴ and national survey research indicates that school practices can play a role in fostering school climates hostile to LGBTQ+ students. Therefore, we urge the Department to include sexual orientation and gender identity as two additional permitted values in the “Civil Rights Data Category (Counts)” data element.

Intersex students often face harassment, discrimination, and privacy infringements as well as curricula that erase or stigmatize bodies like theirs at school.⁵ These experiences contribute to educational, health, and other disparities.⁶ We commend the Department for defining “on the basis of sex” to encompass “sex characteristics,” consistent with the Department of Justice’s Title IX Legal Manual.⁷ Increasing debate and scrutiny surrounding students’ sex characteristics—including scrutiny mandated by school sports legislation passed in several states and proposed in many more—

² Memorandum of Principal Deputy Assistant Attorney General Pamela S. Karlan, Civil Rights Division, “Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972” (March 26, 2021). (“The Bostock Court concluded that Title VII’s prohibition of discrimination ‘because of’ sex includes discrimination because of sexual orientation and transgender status. ... [T]he best reading of Title IX’s prohibition on discrimination ‘on the basis of sex’ is that it includes discrimination on the basis of gender identity and sexual orientation.”)

³ U.S. Department of Education. (2021). 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. 117. <https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf>.

⁴ Johns, M. M., Lowry, R., Haderxhanaj, L. T., Rasberry, C. N., Robin, L., Scales, L., Stone, D., & Suarez, N. A. (2020). Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students - Youth Risk Behavior Survey, United States, 2015-2019. MMWR supplements, 69(1), 19–27. https://www.cdc.gov/mmwr/volumes/69/su/su6901a3.htm?s_cid=su6901a3_w.

⁵ Jack D. Simons, Jose-Michael Gonzalez & Melissa Ramdas, Supporting Intersex People: Effective Academic and Career Counseling, 14 J LGBTQ Issues Couns. 91-209 (2020); Brief of interACT: Advocates for Intersex Youth, et al., as Amicus Curiae in Support of Respondent, Gloucester County School Board v. G.G. ex rel. Grimm, No. 16-273 (U.S. Mar. 2, 2017); interACT, What We Wish Our Teachers Knew (2018), <https://interactadvocates.org/wp-content/uploads/2018/07/BROCHURE-interACT-Teachers-final.pdf>.

⁶ Mandy Henningham & Tiffany Jones, Intersex students, sex-based relational learning & isolation, Sex Educ. (2021), DOI: 10.1080/14681811.2021.1873123; Rosenwohl-Mack A., et al., A national study on the physical and mental health of intersex adults in the U.S., 15 PLoS ONE e0240088 (2020); Tiffany Jones, The needs of students with intersex variations, 16 Sex Educ. 602 (2016).

⁷ US Department of Justice, Title IX Legal Manual (Aug. 2021), <https://www.justice.gov/crt/title-ix#Bostock> (“The reasoning in these interpretations applies with equal force to discrimination against intersex people”).

may increase the risk of harassment for intersex students.⁸ In accord with its priorities and protections for intersex students,⁹ the Department should also collect data on the number of harassment or bullying allegations reported by students on the basis of sex characteristics, including intersex status.

Disaggregate by Nonbinary, Where Available

We commend the Department for adding a nonbinary measure for student enrollment records and disaggregation across all CRDC measures where “sex (membership)” —or simply, gender—is currently collected for K–12 students. The absence of a nonbinary reporting option has led to problematic data collection practices that create a burden for LEAs and SEAs that have adopted more inclusive student enrollment records. To support implementation of this measure, we urge the Department to provide robust technical assistance and guidance that supports SEAs and LEAs that have adopted more inclusive data collection of students’ genders. Additionally, it will be important to prioritize safety and privacy when reporting results and communicate clearly about barriers that will result in underreporting of nonbinary students.

Expand Data Collection on Sexual Assault

The CRDC should preserve the staff-on-student “sex offenses” data groups that were originally proposed for deletion (Data Groups 1026–1029) because they provide important information on how schools are responding to reports of staff-on-student sexual assault, not merely the number of reports they receive. For the same reason, the CRDC should add analogous data groups for student-on-student sexual assault to capture school responses to reports of these incidents. All these data groups should be revised to include off-campus incidents, consistent with Supreme Court case law,¹⁰ two decades of Department guidance, and the current Title IX regulations.¹¹ Furthermore, the definitions of rape and sexual assault should be updated to be more consistent with the Clery definitions, which include a focus on lack of “consent” rather than requiring “force.”¹²

We have relied heavily on CRDC data since the collection began, and we believe it is important to preserve the scope of, frequency of, and public accessibility to this information in ensuring equal educational opportunity and compliance with federal law. The collection is vital to keeping the public informed about how schools fare on quantifiable measures of school climate and resource equity. These include information around preschool enrollment and discipline, school spending, advanced coursework, and educator experience and certification. The CRDC has allowed education stakeholders and school communities to examine the various trends among schools and identify which schools are working to provide equal educational opportunities for all students and which schools face continuing challenges.

⁸ See, e.g., *Hecox v. Little*, Brief for Amicus Curiae interACT: Advocates for Intersex Youth, Nos. 20-35813; 20-35815 (9th Cir., filed Dec. 21, 2020); Ala. Acts 285 (2021); Ark. Acts 461 & 953 (2021); Miss. SB 2536 (2021); Tenn. Pub. Ch. 40 (2021); W.V. Code §18-2-25d (2021); Ark. Acts 626 (2021).

⁹ <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>; 86 FR 70612, 70460 (Dec. 10, 2021).

¹⁰ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998) (schools may be liable for money damages under Title IX, even if the harassment at issue occurred “never on school property”).

¹¹ 34 C.F.R. § 106.44(a); Department of Education, Office for Civil Rights, Questions and Answers on the Title IX Regulations on Sexual Harassment (July 2021), at 8-10 (July 20, 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.

¹² 34 C.F.R. App’x A to Subpart D of Part 668 (defining “rape” as “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ, without the consent of the victim” and defining “fondling” as “[t]he touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity”) (emphases added).

The CRDC is important in ensuring OCR appreciates the weight of its civil rights responsibilities and provide schools with the tools they need to address disparities. Effective data collection and dissemination are necessary for evaluation and review of programs, practices, services, and activities. Any change to limit the scope of, frequency of, or public accessibility to the CRDC would hinder the ability of the Department to fulfill its legal obligations and would undermine our shared interest in the best education for every child.

The NEA is committed to fulfilling the promise of education to prepare every student to succeed and recognizes the efforts of the U.S. Department of Education to ensure that schools have the resources to adequately serve our students' needs. Further, the CRDC provides vital information to ensure that schools have the tools and resources necessary to address educational disparities.

The NEA respectfully submits the above comments for consideration and ask that the Department work to ensure that a richer data set is available to highlight those critical areas creating barriers to opportunity for students. Please do not hesitate to contact Bianca Singh at bsingh@nea.org should you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Tom Zembar".

Tom Zembar
Manager, Education Policy and Implementation Center
National Education Association