



The Center for Civil Rights Remedies

at The Civil Rights Project | *Proyecto Derechos Civiles*

October 31, 2022

Stephanie Valentine
Office of Planning, Evaluation and Policy Development
U.S. Department of Education
Washington, DC 20002

Re: Mandatory Civil Rights Data Collection: OMB 1870-0504, ICR 202111-1870-001

Dear Ms. Valentine

The Center for Civil Rights Remedies (CCRR) is part of the Civil Rights Project at UCLA. This organization was originally affiliated with Harvard Law School and Harvard's Graduate School of Education. Daniel Losen, CCRR's director, authored these comments based on his frequent use of OCR's resources as a researcher, and extensive experience helping educational agencies to improve equity and outcomes for students of color in our nation's public schools. These efforts include providing technical assistance to over 40 large school districts from across the nation as an analytical expert regarding racial disproportionality in discipline and special education, among other areas.

CCRR produces descriptive reports for educators and policymakers documenting civil rights concerns with school discipline policies and practices as well as conducting more complex research to reveal the connections between outcome disparities, their impact on protected classes, and their contribution to the inequitable opportunity to learn. Besides revealing how different factors may contribute to the School to Prison Pipeline CCRR also conducts and helps disseminate research on promising practices and the effective use of data to flag potential remedies and to monitor progress. A combination of extensive data analysis, legal and policy expertise, and direct provision of technical assistance on the state and local levels informs the comments that follow.

With regard to OCR's directed questions: CCRR endorses the responses provided by the National Disability Rights Network. Generally speaking, CCRR endorses the additions and restorations, and does not object to the changes, except where explained below. We also appreciate that OCR responded to several concerns raised in our prior comments by adding some data to the CRDC.

The importance of tracking the data on informal removals for all students cannot be understated. We urge OCR to decide to collect and report data on a broad range of informal removals. But how those data are reported is of equal importance. We have heard advocates in both California and Massachusetts voice concerns that they perceived "informal removals" had increased in some districts that had been scrutinized during the implementation of local, state or federal policies intended to eliminate unjustified out-of-school suspensions. Therefore, we further suggest that all the data on days of lost instruction be cross tabulated by race, race with gender and race with disability status. While we agree with NDRN, that OCR should track informal removals that constitute a change of placement, we also urge OCR to collect and report on the removals that are less than a day. We would suggest that in addition to counting the incidents of informal removal, OCR should also consider adding a column to count days of lost instruction due to informal removals to appear in the file next to the data reported on days of lost-instruction due to out of school suspension. We would also recommend that a column providing a total of days lost due to all removals be added.

OCR should respond more vigorously to the rapidly rising bigotry in our nation's schools and society, including by exercising its authority to make the CRDC an annual and universal collection.

The remainder of our comments are about OCR's decisions and responses that are contained in their "Attachment B." We are dismayed OCR's decision not to make the CRDC an annual collection in light of the increasing numbers of individuals with blatantly racist agendas who appear to be part of organized efforts to influence state and local education policy decisions. These efforts include false claims that schools are teaching CRT and often call for reversing policies aimed at preventing or correcting inequity.

In such troubling times OCR should be engaged in doubling or tripling its efforts to protect children from all forms of bigotry and intolerance. Meeting this obligation has always included finding ways to improve the capacity of local advocates and educators to protect our children from unlawful discrimination, including when unjustified policies and practices can be shown to have a harmful and disparate impact on any groups of students who OCR has a duty to protect.

Unfortunately, several of OCR's recent decisions will predictably undermine OCR's civil rights enforcement in these times of trouble because they will perpetuate the serious delay that results from OCR's decision to collect data only biannually, and that allow an unusually long time to pass between the end of the school year and the CRDC submission deadline. Once the submission portal closes, it usually takes OCR at least an additional year before OCR publishes any of the data it receives. This long data collection and processing time period no doubt reflects the low budget OCR is allocated to meet all of its obligations.

Even so, there is no excuse for allowing this civil rights information vacuum to occur, especially in light of the rise in the numbers and the rapidly expanding influence of hate groups in our current society. OCR needs to know that its misguided decision to delay the 2019-2020 data until 2020-21, is compounded by the more recent decision to not collect any civil rights education data for the 23-24 academic year despite the fact that the Secretary has both the authority to do so, and the justification. CCRR urges OCR to do much more to boost the capacity of local educators,

parents, and civil rights lawyers to challenge unlawful policies and practices. Children's advocates at the state and local levels depend on using the most recent CRDC to reveal the impact of rising bigotry on our children attending public schools. In many states the CRDC is the only source of disaggregated and cross tabulated information that we need to reveal discriminatory patterns that are systemic in nature. The decision not to collect and report the CRDC annually is tantamount to denying thousands of state and local advocates the information they need to push back on discriminatory policies and practices that are systemic in nature.

OCR's decision not to collect and review the CRDC data annually also limits their own capacity to respond to outcome data that may reflect the rise in bigotry: We should not be surprised if those who campaign on messages of intolerance and get elected to public school boards of education go on to enact bigoted policies. Several school boards have fired teachers and principals for repeating statements like "Black Lives Matter" in the classroom. The problem is not just a local one. Several states have passed "anti-CRT" laws that will whitewash the teaching of historical facts about slavery, and the role of racism in our society. And increasingly, states have passed "don't say gay" laws, and more bigoted laws and policies should be anticipated.

Meanwhile, many of these same districts are planning to add police to patrol the hallways of our schools, despite concerning evidence that implicit and explicit biases frequently inform many policing decisions. The money used to add police and security detracts from the already inadequate response to the severe shortage of counselors, special educators, school psychologists and health care providers. I know OCR leaders share these concerns, but they may not see how their decisions about the CRDC and often acceptance of incomplete and inaccurate school policing data, hamstrings their own compliance reviews and monitoring efforts just as much as it limits the capacity of local advocates to confront systemic discrimination.

At every opportunity CCRR has asked DOED to collect and publicly report universal and annual CRDC discipline data. CCRR argues that doing so is a necessary first step toward fulfilling the Biden administration's commitment to end systemic racism. Not only does the administration already have the statutory and regulatory authority to do so, making the CRDC an annual and universal collection will be consistent with the *annual* data discipline data collection already required pursuant to the IDEA, and will also fulfill the intent of Congress when, in passing the ESSA, discipline data was made a required element of the *annual* state and district-level report cards.

OCR should take additional steps to ensure that the CRDC is collected and reported in a timely manner. CCRR has described how from the end of the school year to the reporting of the data to the public the process means that OCR often takes 2.5 years from the end of the school year, to make the CRDC public. This lengthy lag time seriously diminishes the utility of the data for use at the local level. Unfortunately, CCRR recently discovered guidance regarding the state and local report cards, and the inclusion of the CRDC data, posted on the DOED's website.

CCRR believes that DOED guidance, issued by the Trump administration in 2019, further ensures that there will be a substantial delay in the public access to the most current CRDC

discipline and policing data that are explicitly required to be included in state and local annual report cards.

In the attached justification OCR/OMB states,

"~~Additionally~~Relatedly, Sections 1111(h)(1)(C)(viii) and 1111(h)(2)(C) of the Elementary and Secondary Education Act (ESEA), as amended in 2015 by the Every Student Succeeds Act, requires state educational agencies (SEAs) and LEAs that receive Title I funds under the ESEA to include in their state and local report cards certain CRDC data. This obligation became effective on December 31, 2018 for the 2017–18 school year. Specifically, when collected by the CRDC, the ESEA requires that the report cards include information on measures of school quality, climate, and safety, such as information on the following...."

The above statement represents a reasonable summary of the legislative language which requires the annual report cards to include the discipline data "in accord with" the CRDC and *when it is collected*. Nothing in the statute indicates that districts should wait an additional year after submitting data to OCR before adding the CRDC data into their report cards. Even if there was no rapid rise in racism, the current 2.5-year lag time is hard to justify, yet this DOED guidance all but ensures that the access will be delayed.

The 2019 Trump administration guidance in question does clarify that states can annually collect and report in their report cards the same data the CRDC requires. States that collect and report the same data, but do so every year, as ESSA encourages, would be allowed to do so as long as the additional data was "in accord with" the CRDC data. However, along with this added detail DOED also made it crystal clear to states that DOED prefers they wait until DOED's OCR publishes the CRDC data on the federal webpage. The confounding problem is that for the years in which the CRDC data are collected by OCR, the DOED guidance *warns states against publication at the time of submission* to OCR and suggests that if they do so, they will almost certainly disclose personally identifiable information. The guidance, instead has the effect of calling on states to wait until OCR sends them back their own data, which would happen once OCR publishes the data on the DOED website.

Although the guidance is not legally binding, by issuing it, we believe the U.S. Department of Education violated the spirit of the ESSA which requires data on in and out of school suspensions, expulsions, referrals to law enforcement and school-based arrests be included on the annual state and local report cards. ESSA thereby encourages states to collect and report these data every year. Most states will instead follow the DOED guidance from 2019 which is currently posted on the DOED website. As a practical matter, given OCR's slow turn-around from collection to reporting, this means that although the CRDC will require the collection of policing and discipline data from the year that ended in 2022, and although ESSA requires these same data to be included in the report cards that will be posted during the current 2022-23 school year, the CRDC data won't be available when the 2022 report cards are posted. Instead, the public won't actually be able to access these 2021-2022 academic year CRDC data until April of 2024!

OCR stated that, *"OCR continually looks for ways to improve the efficiency of this process to ensure timelier access to the data without compromising the protection of individual student data."*

Lack of sufficient resources dedicated to the review of the CRDC may be the reason it takes so long, but there is no good technical reason that states are given to April of 2023 (or later) to send in their data to OCR for the school year ending June, or in some cases, August of 2022. As discussed, many states publish data, such as test scores, enrollment, and graduation rate data within several months of the school year concluding.

Although OCR lacks jurisdiction over ESSA requirements, they should be part of the DOE's decision making regarding guidance that impacts access to the CRDC data. OCR should call this problem to the attention of the Secretary of Education and other relevant federal administrators, as well as the assistant secretary for data and policy. We recommend that the relevant portions of the Trump guidance should be rescinded or revised so that when districts submit their data to OCR, considering that they are required to also certify that the data are accurate when they submit, they should also be *required* to submit it to their state for use in the state and district report cards. If ignored, this Trump administration guidance on when to publish the CRDC data in state and local report cards will impede access by educators, parents, local community groups and civil rights advocates.

Meanwhile, OCR should consider starting and ending the collection period much sooner and cutting the time before publication so that the CRDC data from 2021-22 are released to the public well before the 2022-23 academic year is over. Even if the CRDC is not made annual, for collection years, OCR should invest the resources necessary to ensure that the most recent discipline data from the CRDC can appear in the state and district report cards within a year of the end of the academic year.

OCR should take additional steps to ensure that the data on school policing are accurate: CCRR applauds OCR's decision to expand the data collection and reporting with regard to all aspects of school policing, but we urge additional collection and action. We do believe the additional data categories counting incidents of referrals and arrests could provide vitally important information on the involvement of law enforcement officers in our schools. However, not enough has been done by OCR (or DOJ) to address the concerns about the failure of schools and districts to report accurate data on referrals and arrests. We agree that OCR has improved the tools used for the CRDC however we discovered last year that there were no systemic data checks applied to the school-policing data. For example, a number of CCRR reports have pointed out that some districts had reported more arrests than referrals which should not happen if, applying OCR's definitions, a student arrested must also be counted as having been referred. Some confusion likely arises when on-campus officers initiate contacts with students on campus that result in arrests for school-related activities. If they are not responding to a call for service, many officers, even those employed by the school district, may not regard the student to have been "referred" to them.

Likewise, we found OCR's comments on threat assessment to lack sufficient clarity. Under all the models of threat assessment, school police are included on the threat assessment team. Whenever a student's misconduct is reported to law enforcement, they may decide that they are obligated to act. We appreciate that OCR has proposed creating guidance on referrals and support that action.

OCR stated that, "... to clarify what actions entail a referral, OCR proposes providing guidance to LEAs that clarifies that a student referred to law enforcement includes a student sent to meet with a law enforcement agency or official because of a school-related incident, a student reported to law enforcement because of a school-related incident, and a student who has direct interactions with law enforcement because of a school-related incident. OCR also proposes to clarify that referrals include formal referrals and informal referrals that are not part of an official report."

However, we don't agree where OCR suggests that it will wait before addressing the problems that threat assessments pose. We urge OCR to act now and state that a threat assessment that includes the observation and/or active participation of law enforcement should count as a referral to law enforcement regarding school-related conduct. Referrals to threat assessment teams should be counted as referrals to law enforcement whenever law enforcement are present because under no model of threat assessment do police officers relinquish their authority to act. OCR's revised definition of these terms does not state how threat assessments involving police should be categorized.

Another concern should be clarified now and then further explained in guidance. Specifically, in our July 2021 comments we pointed out that if a parent called the police, we would think it should be counted as a referral, but we referenced earlier DOED guidance that suggested calls to police about misconduct at a school not made by staff members would not necessarily be counted. For example, if a parent made the call, even if their referral resulted in an arrest of a student for school-related misconduct, both the arrest and incident might not get reported. It is also unclear how referrals made by non-staff members, such as volunteers on campus would be reported, if at all. It would be important to know for the purpose of protecting children from unlawful discrimination to what extent police involvement with students results from referrals made by parents and other community members who are not staff members. Further, schools that want to avoid having to report such data might actively encourage parents or other non-staff members to call police about school related misconduct even when the appropriate response might be for the school principal or counselor to intervene. Doing so would artificially deflate the counts of referrals if calls from parents and others, and/or the arrests resulting, are not reported by schools.

Further, an outgrowth of the decision against making the CRDC an annual collection is that the concerns about the harmful impact of school policing will remain difficult for local advocates to bring forward because often the OCR data are the only school policing data that members of the public will have access to. Despite the improvements to the CRDC collection regarding the addition of the incident data, OCR has, in our opinion, failed to appropriately respond to problematic impact of the increasing presence of police on our public-school campuses.

Moreover, although OCR has made some important improvements to the CRDC to include more data on students with disabilities, we believe that OCR failed to take into account the extremely high and disparate rates of discipline of students with disabilities, when it decided not to take our recommendation to collect data on whether students with disabilities are given behavioral assessments, provided with behavioral intervention plans, or provided with manifestation determinations before being subjected to long-term suspensions. The Secretary of Education has the authority under the IDEA as well as for civil rights protections to require these data.

Despite our deep concerns with OCR's inactions CCRR appreciates the detailed response it provided to our comments and those of others. We remain committed to helping OCR meet its civil rights enforcement obligations and welcome any opportunity to provide further assistance to the agency.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel J. Losen". The signature is fluid and cursive, with the first name "Daniel" and last name "Losen" being clearly distinguishable.

Daniel J. Losen
Director, Center for Civil Rights Remedies
The Civil Rights Project, UCLA