



11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

October 31, 2022

Submitted via Regulations.gov

Stephanie Valentine
Office of Planning, Evaluation and Policy Development
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-8240

Re: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED-2021-SCC-0158, at 87 Fed. Reg. 58342 and 59405)

To Whom It May Concern:

The National Women's Law Center (NWLC) submits the following comments on the U.S. Department of Education's ("the Department" or "ED") Notice for the 2021-22 and 2023-24 Mandatory Civil Rights Data Collection (CRDC). In an effort to keep this comment concise, we have provided a summary of our feedback below and include references to our much longer [February 2022 comment](#), which is included as a link and attachment to this comment, for the full details and rationale behind our recommendations.¹

I. Overall Recommendations on the CRDC

A. The CRDC should be annual, universal, disaggregated, and cross-tabulated.

The Department should continue to implement an annual CRDC after 2021-22. The Department has explained that it is proposing an annual CRDC in 2020-21 and 2021-22 to "help gauge the impact the pandemic has had on students' access to education."² But, as we explained in our previous comment,³ regardless of whether there is a pandemic, the reality is that children and teens experience great bursts in academic, social, and emotional development over a relatively short period of time, and annual data is necessary to intervene quickly, so that they do not lose access to educational opportunities—even if only for a year. This is especially relevant when CRDC data is not reported in a timely manner. For example, the 2017-18 CRDC was not released until October 2020, and more than four years after its collection, it remains the most recent CRDC data available. Returning to an annual CRDC will ensure that the Department, educators, families, and advocates can best understand how to protect students' civil rights in schools.

We support the Department's proposal to continue conducting a universal collection.⁴

¹ Letter from the National Women's Law Center to the Department of Education, *Re: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED-2021-SCC-0158, at 86 Fed. Reg. 70831)* (Feb. 11, 2022), <https://nwlc.org/wp-content/uploads/2022/02/CRDC-comment-2.11.22-vF.pdf> [hereinafter NWLC Comment Feb. 2022].

² Department of Education, Office for Civil Rights, Mandatory Civil Rights Collection, *Attachment B: CRDC Data Set for School Years 2021-22 and 2023-24: Response to First Round Public Comment* (Sept. 2022), at 15 [hereinafter Attachment B].

³ NWLC Comment Feb. 2022, *supra* note 1, at 2.

⁴ Attachment B, *supra* note 2, at 15.

We appreciate that the Department “may consider” our recommendations regarding further disaggregation and cross-tabulation of data in future CRDCs.⁵ In particular, we support the Department’s plans to address student privacy concerns in order to further disaggregate racial and ethnic subcategories (including AANHPI data) in the next CRDC after the 2021-22 CRDC.⁶

B. The Department should ensure LEAs’ and coordinators’ full and accurate compliance with the civil rights laws and the CRDC.

We support the Department’s continued proposal to collect civil rights coordinators’ email addresses, the decision not to stop collecting coordinators’ names, and the new proposal to add a directional indicator on whether an LEA has a civil rights coordinator.⁷

As we detailed in our previous comment, many LEAs and SEAs have reported in past CRDCs “zero” incidents of common occurrences, such as “zero” school arrests, “zero” restraints or seclusions, and “zero” incidents of sex-based harassment in an entire school year.⁸ Missing and misreported data erroneously skews statistics and impedes meaningful analysis that can lead to necessary policy change. In light of this problem, the Department should offer significant technical assistance, issue guidance, and implement other oversight measures to ensure LEAs’ and their civil rights coordinators’ full and accurate compliance with the 2021-22 and subsequent CRDCs.

II. Recommendations on Harassment Data

A. Harassment data should include data on sexual assault, dating violence, and stalking.

In our previous comment, we urged the Department to require disaggregation of data on harassment allegations, disciplined harassers, and harassment victims (Data Groups 933, 934, and 935) by “sexual assault,” “dating violence,” and “sex-based stalking”—similar to how the CRDC already disaggregates by “sexual orientation” and “gender identity.”⁹ While we appreciate that the Department will “keep [these] recommendations in mind for future collections,”¹⁰ for the reasons we explained in our previous comment, we urge you to implement these changes in the 2021-22 CRDC.

We also previously asked the Department to define “sexual assault,” “rape,” “dating violence,” and “stalking” with more specificity and inclusivity, similar to how the Department already defines these terms under the Clery Act.¹¹ While the Department proposes to rely on definitions from the School Survey on Crime and Safety (SSOCS) for the 2021-22 CRDC,¹² we urge you to adopt our recommended definitions or, at a minimum, update both the CRDC and SSOCS definitions as soon as possible to be consistent with the more specific and inclusive Clery definitions.

B. Harassment data should include harassment by staff and students and off-campus incidents.

We support the Department’s continued plan to preserve Data Groups 1026-1029 regarding the outcomes of staff-on-student sexual assault.¹³

⁵ *Id.* at 17; *see also* NWLC Comment at 3.

⁶ Attachment B, *supra* note 2, at 19.

⁷ *Id.* at 24.

⁸ NWLC Comment Feb. 2022, *supra* note 1, at 3-4.

⁹ *Id.* at 6.

¹⁰ Attachment B, *supra* note 2, at 63.

¹¹ NWLC Comment Feb. 2022, *supra* note 1, at 7-9; *see also* Attachment B, *supra* note 2, at 75.

¹² *Id.* at 75-76.

¹³ *Id.* at 77.

We also reiterate our previous recommendation for the Department to collect data on all staff-on-student harassment (not just sexual assault) regarding the number of allegations, disciplined harassers, and victims, analogous to the existing Data Groups 933, 934, and 935 regarding student-on-student harassment.¹⁴ By doing so, the Department would also be able to retire Data Group 1025, which treats staff-on-student sexual assault as a “criminal act” rather than a type of a civil rights violation (*i.e.*, harassment).¹⁵ While we appreciate that the Department will “keep [this] recommendation in mind for future collections,”¹⁶ we urge you to implement our recommendations as soon as possible to ensure a more comprehensive and streamlined CRDC that accounts for all types of harassment targeting students and to avoid using a criminal legal framework to analyze civil rights violations.

As a part of this harassment data collection, we also asked the Department to collect data on outcomes for staff-on-student stalking as well as outcomes for *student*-on-student sex assault, dating violence, and stalking; collect data on how often staff and students are found “responsible” versus “not responsible” for harassment; and incorporate all of these elements into the “harassment and bullying” data element (rather than the current “offenses” data element).¹⁷ We appreciate that the Department “may consider” our recommendations for “revising and expanding” Data Groups 1026-1029 in a future CRDC, but again, urge the Department to implement them as soon as possible.¹⁸

We previously asked the Department to require LEAs to include off-campus incidents when reporting data regarding staff-on-student or student-on-student harassment, consistent with the Supreme Court’s Title IX case law and the Department’s own Title IX regulations and guidance since 2001.¹⁹ The Department did not indicate in its September 2022 proposal whether it had considered our suggestion, and we urge you to require LEAs to report off-campus harassment in the 2021-22 CRDC.

Finally, we request clarification on one issue that the Department did not address in this proposal. In our February 2022 comment, we asked the Department to clarify what a “duty reassignment” is in Data Group 1029. Specifically, we wanted to know whether LEAs should report the number of staff members reassigned to another position *as an alternative* to discipline or *as an interim measure* pending an investigation that could result in discipline.²⁰

C. ED should publish LEAs’ harassment policy web links.

The Department has stated it plans to release LEAs’ harassment policy weblinks from the 2021-22 CRDC in a restricted-use data file that is available to researchers who obtain a National Center for Education Statistics (NCES) license and to release data from subsequent CRDCs in a public-use data file.²¹ However, we urge the Department to release the 2021-22 CRDC in a public-use data file as well, so that researchers, advocates, and others can access this data with few administrative burdens.

¹⁴ NWLC Comment Feb. 2022, *supra* note 1, at 9; *see also* Attachment B, *supra* note 2, at 62.

¹⁵ NWLC Comment Feb. 2022, *supra* note 1, at 9.

¹⁶ Attachment B, *supra* note 2, at 63.

¹⁷ NWLC Comment Feb. 2022, *supra* note 1, at 10-11; *see also* Attachment B, *supra* note 2, at 75.

¹⁸ *Id.* at 77.

¹⁹ NWLC Comment Feb. 2022, *supra* note 1, at 10.

²⁰ *Id.* at 10.

²¹ Attachment B, *supra* note 2, at 64.

III. Recommendations on LGBTQI+ Student Data

A. Directed Question #3: ED should collect data on nonbinary students.

We support the Department's proposal to require all LEAs to report whether they collect nonbinary student data, and to require LEAs that do collect this data to report it. We urge the Department to require all LEAs reporting nonbinary student data to do so for in all measures in 2021-22 and onward (not just for student counts). For LEAs already collecting this data there will be little additional burden, and this will ensure more complete data across CRDC and provide critical information for understanding the challenges nonbinary students face and schools' Title IX obligations. We also appreciate the Department's correcting its typographical error in the "Sex (Membership)–Expanded" data category to include "nonbinary" as a response option.²² As more nonbinary students feel able to be open about who they are,²³ we urge the Department to work closely with LEAs to offer technical assistance and to promote collection of data that is inclusive of students of all genders.

The Department is correct to reject suggestions that counting nonbinary students—or collecting any data on LGBTQI+ students—is barred by any federal law such as the Protection of Pupils Rights Amendment (PPRA).²⁴ PPRA requires opportunities for parental review and consent for survey asking about "sex behaviors or attitudes." But being nonbinary is no more a "sex behavior or attitude" than being male or female; the same is true for schools that collect demographic data on sexual orientation or variations in sex characteristics (including intersex traits). We appreciate the Department clarifying that data that can shed light on the experiences of LGBTQI+ students falls within its purview, and that the CRDC would only collect nonbinary student data that is already in schools' administrative records.²⁵ However, we are concerned that, while accurate, the Department's statement that "[t]he CRDC is not a survey for students to complete,"²⁶ may unintentionally encourage misconceptions that the PPRA applies to any collection of data on gender identity and may generate further obstacles to collecting data on LGBTQI+ students and their experiences that is essential to fulfill Title IX's promise.

We request that the Department restore this originally proposed sentence in its definition of "nonbinary," which garnered broad support from 118 commenters: "Nonbinary does not refer to a transgender student who identifies exclusively as either male or female."²⁷ Retaining this sentence would avoid confusion for LEAs that have adopted more LGBTQI+ inclusive administrative data collection practices, including by allowing student records to reflect a student's gender identity as male, female, nonbinary, or *another gender identity*. In addition, it would avoid the possibility that LEAs could misclassifying all transgender students as "nonbinary" due to a misunderstanding of terms.

We appreciate the Department's effort to provide clarity for schools by stating that LEAs "may" and "would be allowed" to report students' sex as male, female, or nonbinary by relying on their own current administrative records.²⁸ We continue to urge the Department to make clear that neither CRDC nor any other federal requirement necessitates reporting a students' sex assigned at birth. Additionally, we note that some LEAs use more than one data element related to students' sex or list a student's sex differently in different types of records, and some LEAs may use varying terminology for sex data fields. In such cases, the Department should clarify that

²² *Id.* at 37; see also NWLC Comment Feb. 2022, *supra* note 1, at 13.

²³ For example, GLSEN's school climate surveys of LGBTQI+ youth ages 13-21 show that 15.1% of survey respondents were nonbinary in 2019 and 31.5% were nonbinary in 2021. GLSEN, *The 2021 National School Climate Survey 7* (2022), <https://www.glsen.org/research/2021-national-school-climate-survey>; GLSEN, *The 2019 National School Climate Survey 11* (2020), <https://www.glsen.org/research/2019-national-school-climate-survey>.

²⁴ Attachment B, *supra* note 2, at 39, 41-42.

²⁵ *Id.* at 41-42.

²⁶ *Id.* at 42.

²⁷ *Id.* at 36.

²⁸ Attachment B, *supra* note 2, at 42.

LEAs have discretion to determine how to best translate information in their records into the sex categories in the CRDC.

Finally, while beyond the scope of the current data collection, we reiterate our prior recommendation that the inclusion of nonbinary sex data in CRDC will increase the need for broader guidance on best practices for recordkeeping related to a student's gender, consistent with applicable civil rights and privacy laws. The Department should provide guidance that outlines and gives examples of best practices, such as enabling record changes based on student self-identification; ensuring students and families understand that updated records are available to parents and guardians; maintaining separate, confidential records regarding sensitive data such as birth name and enrolled gender when needed for legal or reporting purposes; updating documents such as diplomas on request; and explaining allowable Every Student Succeeds Act (ESSA) uses for implementing these practices.²⁹

B. Harassment data should be more comprehensive regarding sexual orientation, gender identity, gender expression, transgender status, and sex characteristics.

In our previous comment, we asked the Department to define harassment based on both "sexual orientation" and "gender identity" to include associational harassment and to define "sexual orientation" to include "asexual" and "pansexual" identities.³⁰ We also recommended that the Department define sex-based harassment to include harassment on the basis of "gender expression" and "transgender status."³¹ In addition, we asked the Department to clarify that affirming LGBTQI+ (and pregnant or parenting) students is not religious harassment.³² Furthermore, we previously asked the Department to require LEAs to have a written and online policy against harassment based on "sex characteristics" in Data Groups 1034 and 1035 (consistent with what is already required for sexual orientation and gender identity)³³ and to add "sex characteristics" as a permitted value for the "Civil Rights Data" data categories.³⁴ While we disagree that these additions are not necessary to inform ED's civil rights enforcement work at this time, we appreciate that the Department will "keep [these] recommendations in mind for future collections,"³⁵ and we urge you to do so by the time the 2022-23 CRDC survey is released.

C. Harassment data regarding sexual orientation and gender identity should be consistent with data regarding other protected classes.

In our previous comment, we urged the Department to require LEAs to report how many students are disciplined for harassment and are victims of harassment based on sexual orientation, gender identity, or religion, so that the CRDC applies a consistent method for collecting data across all allegations of harassment (DG 933), students disciplined for harassment (DG 934), and harassment victims (DG 935).³⁶ The Department acknowledged this recommendation regarding religion and stated it "will keep [these] recommendations in mind for future collections,"³⁷ but did not indicate whether it had considered this recommendation regarding sexual orientation and gender identity, or why it made different determinations with regard to these categories. We urge you to fully consider and incorporate this recommendation into the 2021-22 CRDC to ensure consistent collection of harassment data across all protected classes.

²⁹ NWLC Comment Feb. 2022, *supra* note 1, at 14.

³⁰ *Id.* at 13-14; *see also* Attachment B, *supra* note 2, at 62.

³¹ NWLC Comment Feb. 2022, *supra* note 1, at 14; *see also* Attachment B, *supra* note 2, at 62.

³² NWLC Comment Feb. 2022, *supra* note 1, at 17; *see also* Attachment B, *supra* note 2, at 61.

³³ NWLC Comment Feb. 2022, *supra* note 1, at 15-16.

³⁴ *Id.* at 16.

³⁵ Attachment B, *supra* note 2, at 63.

³⁶ NWLC Comment Feb. 2022, *supra* note 1, at 16-17.

³⁷ Attachment B, *supra* note 2, at 61.

IV. Recommendations on Discipline Data

A. Discipline data should be fully disaggregated and cross-tabulated.

For future CRDCs, we reiterate our previous suggestion for the Department to create a single large category set for each data group that is fully disaggregated by all of the relevant data categories (e.g., racial ethnic, sex, EL status, disability-IDEA, and disability-504), rather than having multiple smaller category sets that each contain different subsets of data categories.³⁸ This would not increase the burden on LEAs because they are already collecting and reporting all of the relevant data categories, but reporting the data as fully disaggregated would make it easier for members of the public to access and analyze the fully cross-tabulated dataset.³⁹

In particular, we previously urged the Department to disaggregate and cross-tabulate all discipline data groups by the “racial ethnic” data category, given that students of color (including Black girls) are disproportionately disciplined and referred to police, including when they report sex-based harassment.⁴⁰ Although the Department rejected this recommendation for some specific data groups (e.g., preschool suspensions and corporal punishment),⁴¹ we encourage you to reconsider, and we appreciate that the Department “may consider” our recommendation for other discipline data groups and that it plans to further disaggregate data in the 2023-24 CRDC after it addresses student privacy concerns.⁴²

Similarly, we reiterate our request for the Department to disaggregate discipline data by pregnancy and parenting status, to better understand whether pregnant and parenting students are disproportionately disciplined and subject to restraints that threaten their health or the health of their pregnancy.⁴³ We acknowledge that students are at risk of being targeted and criminalized for seeking or obtaining abortions. As such, collecting data on students' pregnancy status raises particularly urgent privacy concerns. It is also the case, however, that the growing hostility towards students exercising reproductive decision-making is likely to result in disproportionate school discipline against this population. The CRDC is a crucial mechanism to track this trend so advocates can better advocate for civil rights enforcement. Additionally, this data will only contain information schools already have. In other words, LEAs will only count the students they already know to be pregnant or parenting and will not be required to newly collect or maintain information regarding students' pregnancy or parenting status. To balance the goals of protecting pregnant and parenting students' privacy and ensuring they are not disproportionately disciplined, we urge you to take steps to address privacy concerns, consistent with your plans regarding disaggregation of AANHPI and other racial/ethnic data, and, similarly, to work toward disaggregation of pregnant and parenting status in a future CRDC.⁴⁴ We also ask the Department to clarify the LEAs may not use data collected for the CRDC to subsequently report pregnant students to law enforcement because of abortions or miscarriages.

Finally, we reiterate our request for the Department to collect data in a future CRDC on the number of students who are disciplined after reporting that they are a victim of sex-based harassment, given how common such discipline is among student survivors.⁴⁵ The Department did not indicate in its September 2022 proposal whether it had considered our suggestion, and we urge you to incorporate it into future CRDCs.

³⁸ NWLC Comment Feb. 2022, *supra* note 1, at 21.

³⁹ *Id.*

⁴⁰ *Id.* at 19-21.

⁴¹ See, e.g., Attachment B, *supra* note 2, at 66 (preschool suspensions), 66-68 (corporal punishment).

⁴² *Id.* at 18-19.

⁴³ NWLC Comment Feb. 2022, *supra* note 1, at 31.

⁴⁴ See Attachment B, *supra* note 2, at 19.

⁴⁵ NWLC Comment Feb. 2022, *supra* note 1, at 12-13.

B. Data collection on arrests and referrals should be more comprehensive.

We support the Department's proposed new Data Group 1047, which would collect data on the number of "referrals to law enforcement" and "school-related arrests" of students in K-12 and comparable ungraded levels, disaggregated by disability status (no disability, Section 504, and IDEA), optional for 2021-22 and required after that.⁴⁶ To strengthen this data element, the Department should further disaggregate this data by race/ethnicity, sex, and EL status, given that students of color (particularly Black and Indigenous students), marginalized girls (e.g., girls of color, disabled girls), LGBTQI+ students, and English learners are—like disabled students—more likely to be targeted for arrests and police referrals.⁴⁷ We also suggest defining "referrals" to include all threat assessments in which a law enforcement officer is a member of the threat assessment team and/or is present during the assessment.⁴⁸

In addition, as we previously recommended, the Department should require LEAs to report *both* the duplicated count of referrals and arrests *and* the unduplicated count of students subjected to referrals and arrests, as this provides a fuller picture of which groups of students are most vulnerable to encounters with police and whether some students are repeatedly targeted.⁴⁹ The Department has stated that it plans to collect only the duplicated count of referrals and arrests,⁵⁰ but this does not provide information regarding whether certain individual students are targeted more than others, and it is inconsistent with the way the CRDC already currently collects information on harassment by *both* the (duplicated) number of allegations and the (unduplicated) numbers of disciplined harassers and harassment victims.

Finally, we reiterate our previous request for referrals and arrests to be added to the "Discipline Method (Preschool)" data category,⁵¹ as preschool children are increasingly subjected to police interactions, which are especially traumatic and harmful at such young ages.

C. Data collection on school security staff should be more comprehensive.

We support the Department's proposal to define "law enforcement officer" to include both "sworn" and "non-sworn" officers when counting referrals and full-time equivalents (FTEs).⁵² We also support the Department's proposal to provide additional guidance to LEAs clarifying that a "student referred to law enforcement" includes a student who is formally or informally referred, sent, or reported to a law enforcement agency or official or who has direct interaction with law enforcement because of a school-related incident.⁵³

We also reiterate our previous request to expand the permitted values for the "Security Staff Type" data category to include private security and correctional officers (not just law enforcement officers and security guards).⁵⁴ And we reiterate our prior request⁵⁵ to require LEAs to report the number of FTE law enforcement officers and other security assigned to, contracted by, or employed by the district as part of both the school and

⁴⁶ Department of Education, Office for Civil Rights, Mandatory Civil Rights Collection, *Attachment A-1: Mandatory Civil Rights Data Collection Data Set for School Years 2021–22 and 2023–24: Overview and Information to Assist Reviewers*, at 76 (Sept. 16, 2022); Attachment B, *supra* note 2, at 73-74.

⁴⁷ NWLC Comment Feb. 2022, *supra* note 1, at 19-20.

⁴⁸ *Id.* at 23-24.

⁴⁹ *Id.* at 24.

⁵⁰ Attachment B, *supra* note 2, at 12-13.

⁵¹ NWLC Comment Feb. 2022, *supra* note 1, at 27-28; *see also* Attachment B, *supra* note 2, at 71.

⁵² *Id.* at 73, 88; *see also* NWLC Comment Feb. 2022, *supra* note 1, at 24.

⁵³ Attachment B, *supra* note 2, at 73.

⁵⁴ NWLC Comment Feb. 2022, *supra* note 1, at 24.

⁵⁵ *Id.* at 25; *see also* Attachment B, *supra* note 2, at 87.

LEA surveys, which would ensure that the hours of security staff with less consistent school-based assignments⁵⁶ are captured as accurately as possible across a district.

D. Data collection on alternative schools and justice facilities should be more comprehensive.

In our previous comment, we asked the Department to expand Data Group 914 (alternative schools) to disaggregate students by demographic (not just by whether they are students with academic difficulties, discipline problems, or both),⁵⁷ given that Black, Indigenous, Latinx, Pacific Islander, pregnant, and disabled students are disproportionately referred to alternative schools. Although the Department rejected this request, stating that it plans to rely instead on the “continued collection” of counts of students who are transferred to an alternative school for disciplinary reasons,⁵⁸ those current collections (Data Groups 922 and 923) do not count transfers made for non-disciplinary reasons, and our recommendation would fill that gap to present a fuller picture of those students removed from their regular instruction, even if for non-disciplinary reasons.

Similarly, we previously urged the Department to expand Data Group 941 (justice facility students) to collect demographic information (not just the duration of the students’ stay), given disproportionalities within the criminal legal system.⁵⁹ We appreciate that the Department “will consider” this recommendation for future CRDCs.⁶⁰

E. Data collection on preschool discipline should be more comprehensive.

We support the Department’s continued proposal to count the number of preschool children who receive “one” and “more than one” out-of-school suspensions (OSS) in Data Group 921 (discipline of preschool children).⁶¹ And we reiterate our previous request to count preschool children who receive in-school suspensions (ISS) as well, which the Department has already acknowledged “may yield valuable information.”⁶² This would be consistent with how the CRDC already counts both OSS and ISS for K-12 students.⁶³

We also support the Department’s decision to introduce a new “Preschool (Suspension)” data category in Data Group 1008 (number of preschool suspensions).⁶⁴ Again, we reiterate our previous request to separate this data category by ISS and OSS.⁶⁵

F. Data collection on restraint and seclusion should be more comprehensive.

We support the Department’s proposed changes to the definition of “mechanical restraint,” which would clarify that the term includes restraints on “legs” and restraints by “unsworn” (and “sworn”) officers.⁶⁶ We urge the Department to include “tasers” and “batons” as examples of restraints, given, as we noted in our previous comment, they are commonly used against students.⁶⁷ And we encourage the Department to confer directly with

⁵⁶ For example, this may look like a law enforcement officer assigned to spend part of a week patrolling one school and the rest of the week patrolling the district in a car or working from a central office. This sort of “mixed” assignment may lead a school to report a lower FTE than the number of hours the officer has actually worked for the district as a whole (and what would ultimately be reported at the LEA level).

⁵⁷ NWLC Comment Feb. 2022, *supra* note 1, at 26; *see also* Attachment B, *supra* note 2, at 21.

⁵⁸ *Id.* at 22.

⁵⁹ NWLC Comment Feb. 2022, *supra* note 1, at 26; *see also* Attachment B, *supra* note 2, at 23.

⁶⁰ *Id.* at 23.

⁶¹ *Id.* at 66.

⁶² *Id.* at 66.

⁶³ NWLC Comment Feb. 2022, *supra* note 1, at 27; *see also* Attachment B, *supra* note 2, at 66.

⁶⁴ Department of Education, Office for Civil Rights, Mandatory Civil Rights Collection, *Attachment A-2: Data Groups for Civil Rights Data Collection for School Years 2021–22 and 2023–24*, at 97 (Sept. 16, 2022) [hereinafter Attachment A-2].

⁶⁵ NWLC Comment Feb. 2022, *supra* note 1, at 27.

⁶⁶ Attachment B, *supra* note 2, at 83-84.

⁶⁷ NWLC Comment Feb. 2022, *supra* note 1, at 22, 30.

civil rights organizations as it makes a decision regarding whether tasers and batons should be considered mechanical or physical restraints.

We also support the Department's proposed changes to the definition of "physical restraint," which would help clarify how a "physical restraint" is different from a "physical escort," and we support the Department's idea of creating a technical assistance document that helps LEAs distinguish between the terms.⁶⁸

We also support the Department's proposed changes to the definition of "seclusion," which would clarify that seclusion does not include requiring permission to use the restroom or separating a student from others in a classroom while continuing to provide them instruction.⁶⁹

Directed Question #4: We strongly recommend that the Department collect data on "chemical restraints," given how common it is for schools to use pepper spray and other chemicals on students, particularly low-income students, Black and brown students, and disabled students.⁷⁰ And we reiterate our recommendation to adopt the definition used in the Keeping All Students Safe Act (KASSA),⁷¹ which is the result of years' worth of convenings with input from impacted communities, advocates, and organizations and considered the "gold standard" among advocates.⁷²

G. Discipline data should include data on police assaults and threat assessments against students and should exclude data on criminal "offenses" by students.

In our previous comment, we asked the Department to collect data on assaults by police against students, including physical, sexual, chemical or irritant assaults, and assaults using firearms and so-called "less lethal" weapons.⁷³ The Department has stated it believes this would be too burdensome,⁷⁴ but we hope you will reconsider in a future data collection, given the increasing prevalence of police assaults in schools and the fact that the availability of this data can help prevent these harms against K-12 students.

We also previously urged the Department to collect and report disaggregated and cross-tabulated data on students subjected to threat assessments and the outcomes of these evaluations, as this data is particularly critical where school police have the authority to arrest or involuntarily commit a student or trigger deportation or probation consequences.⁷⁵ The Department has stated that it will not collect threat assessment data for now due to burden concerns and will instead rely on SSOCS data regarding whether a school has a threat assessment team in place.⁷⁶ However, the SSOCS data does not provide any information on whether and how often a school's threat assessment team is deployed; whether certain students or student populations are being disproportionately referred to the threat assessment process; and what serious—and potentially lethal outcomes—occur as a result. We strongly urge the Department to collect threat assessment data in the 2022-23 CRDC.

⁶⁸ Attachment B, *supra* note 2, at 83-84.

⁶⁹ *Id.* at 83-84.

⁷⁰ NWLC Comment Feb. 2022, *supra* note 1, at 29-31.

⁷¹ S. [1858](#), 117th Cong. § 2(1) (2021); H.R. [3473](#), 117th Cong. § 2(1) ("The term 'chemical restraint' means a drug or medication used on a student to control behavior or restrict freedom of movement that is not—(A) prescribed by a licensed physician, or other qualified health professional acting under the scope of the professional's authority under State law, for the standard treatment of a student's medical or psychiatric condition; and (B) administered as prescribed by the licensed physician or other qualified health professional acting under the scope of the professional's authority under State law.").

⁷² NWLC Comment Feb. 2022, *supra* note 1, at 29.

⁷³ *Id.* at 22-23.

⁷⁴ Attachment B, *supra* note 2, at 88-89.

⁷⁵ NWLC Comment Feb. 2022, *supra* note 1, at 25.

⁷⁶ Attachment B, *supra* note 2, at 74.

Finally, we reiterate our request to retire the Data Group 952 (“offenses”), as it promotes the criminalization of children and is susceptible to misuse.⁷⁷ We strongly disagree with the Department’s position that this table is “important to OCR’s civil rights enforcement.”⁷⁸

H. Discipline data should include data on informal removals.

Directed Question #8: We strongly support the Department’s idea to collect data on students who receive informal removals and urge the Department to collect this data no later than in the 2022-23 CRDC. The collection of this data should be a priority to the Department, particularly as the recent report by the Government Accountability Office (GAO) on dress codes supported this recommendation, noting that “[w]ithout information on the full range of ways children are disciplined—including informal removals and non-exclusionary discipline—Education’s efforts to provide resources on the equitable enforcement of discipline will have critical gaps.”⁷⁹

- **Definition of “informal removal”:** The Department should define an “informal removal” as any action by a school official or that official’s designee to remove a student (regardless of age, grade level, or disability status) from an education program or activity for any period of time without documentation.
- **Common types of informal removals:** As we discussed in our previous comment,⁸⁰ schools often send students home or require parents to pick up their child to artificially suppress their suspension rates. Black girls are particularly impacted by informal removals as a form of “dress coding,” or discipline for violating a dress or grooming code (e.g., wearing the wrong shoes, dirty uniforms, or ripped jeans), and may be forced to sit in the principal’s office for the rest of the day or until their parents can drop off different clothes.⁸¹ The recent GAO dress code report found that “an estimated 44 percent of dress codes outlined ‘informal’ removal policies, such as removing a student from class without documenting it as a suspension.”⁸² As other commenters have noted, schools also assign informal detentions, “tardy sweeps,” or “hallway time”; lock students out of remote instruction; and impose longer-term “off the books” removals for longer than 10 days (or even months).⁸³ In addition, some schools recommend that a student stay home for one or more “cool down” days after a behavioral incident has occurred, or that a child with significant behavioral manifestations stay home for one or more days after revising a Behavior Intervention Plan or IEP, while the school obtains the necessary staffing and services to implement a new plan, in the name of safety.
- **Whether informal removal questions should focus solely on students with disabilities:** The Department should collect informal removal data on students of all demographics to determine whether and to what extent disparities exist. As we discussed above and in our previous comment, many nondisabled students disproportionately receive informal removals, including girls, LGBTQI+ students, and Black and other children of color (particularly Black girls), who are punished for not conforming to traditional gender and/or racial stereotypes, including those regarding “respectability.”
- **Specific data involving students** The Department should require LEAs to report demographic information of students who receive informal removals, including disability, race/ethnic, sex, and EL

⁷⁷ NWLC Comment Feb. 2022, *supra* note 1, at 25-26.

⁷⁸ Attachment B, *supra* note 2, at 76.

⁷⁹ U.S. Gov’t Accountability Off., GAO-23-105348, *K-12 Education: Department of Education Should Provide Information on Equity and Safety in School Dress Codes* (2022), <https://www.gao.gov/assets/gao-23-105348.pdf> (see PDF p.2).

⁸⁰ NWLC Comment Feb. 2022, *supra* note 1, at 31.

⁸¹ See National Women’s Law Center, *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* at 24-25 (2018), <https://nwlc.org/dresscoded>.

⁸² U.S. Gov’t Accountability Off., GAO-23-105348, *K-12 Education: Department of Education Should Provide Information on Equity and Safety in School Dress Codes* (2022), <https://www.gao.gov/assets/gao-23-105348.pdf> (see PDF p.2).

⁸³ Attachment B, *supra* note 2, at 69-70.

status, as students who live at the intersections of these identities are more likely to be targeted for informal removals. In addition, the Department should require LEAs to report the number of informal removals, the number of students who receive an informal removal, and the number of hours of lost instruction time due to informal removals.

V. Recommendations on Pregnant and Parenting Students' Data

We support the Department's continued proposal to include "pregnancy" in the definition of "sex" when collecting harassment data.⁸⁴

We previously asked the Department to clarify that affirming pregnant or parenting students is not religious harassment.⁸⁵ While we appreciate that the Department will "keep [this] in mind for future collections,"⁸⁶ we urge the Department to implement this simple clarification in the 2021-22 CRDC, particularly given the new risks that pregnant and parenting students face after *Dobbs v. Jackson Women's Health Organization*.

In our previous comment, we also urged the Department to collect data on whether LEAs have alternative education programs for pregnant and parenting students; the type of education received by pregnant and parenting students (e.g., AP/IB enrollment, SAT/ACT preparation, GED preparation); and the number of pregnant and parenting students who are chronically absent, who are not promoted to the next grade, and who graduate.⁸⁷ While the Department has stated that collecting this data could raise student privacy concerns,⁸⁸ this data will only contain information schools already have. In other words, LEAs will only count the students they already know to be pregnant or parenting and will not be required to newly collect or maintain information regarding students' pregnancy or parenting status. However, we urge you to take steps to address these privacy concerns, consistent with your plans regarding disaggregation of AANHPI and other racial/ethnic data, to avoid the identification of individual students based on small sample sizes.⁸⁹ We also ask the Department to clarify the LEAs may not use data collected for the CRDC to subsequently report pregnant students to law enforcement because of abortions or miscarriages.

VI. Recommendations on Other Civil Rights Data

A. Athletics data should be more accurate, inclusive, and comprehensive.

We support the Department's continued proposal to disaggregate the number of interscholastic high school athletes by gender (including nonbinary students) and the new proposed clarification that a student should be counted multiple times for each team they play on.⁹⁰ We also support the Department's decision not to retire Data Groups 937 and 938.⁹¹

However, we urge the Department to amend Data Groups 937 and 938 so that they count how many sports have (DG 937) or how many teams are (DG 938) a "girls' team," "boys' team," or "all-gender team."⁹² This would enable the Department to count sports and teams that, for example, allow a girl to play on the boys'

⁸⁴ Attachment A-2, *supra* note 64, at 43, 45; Department of Education, Office for Civil Rights, Mandatory Civil Rights Collection, *Attachment A-3: Data Categories for Civil Rights Data Collection for School Years 2021-22 and 2023-24*, at 8, 9 (Sept. 16, 2022) [hereinafter Attachment A-3].

⁸⁵ NWLC Comment Feb. 2022, *supra* note 1, at 17; *see also* Attachment B, *supra* note 2, at 61.

⁸⁶ *Id.* at 63.

⁸⁷ NWLC Comment Feb. 2022, *supra* note 1, at 32-33.

⁸⁸ Attachment B, *supra* note 2, at 35.

⁸⁹ *See id.* at 19.

⁹⁰ Attachment A-2, *supra* note 64, at 53.

⁹¹ Attachment B, *supra* note 2, at 27.

⁹² NWLC Comment Feb. 2022, *supra* note 1, at 34; *see also* Attachment B, *supra* note 2, at 25-26.

baseball team, a boy to play on the girls' volleyball team, or a nonbinary student to play on both the girls' softball and boys' football team. In contrast, the currently proposed Data Groups 937 and 938 would only count sports and teams that are "male only," "female only," or for "all students".⁹³ This would require a team that primarily serves one gender but allows students from other genders to be counted as an "all students" team, thereby inaccurately labeling, for example, a boys' football team that is inclusive of girls and nonbinary students as a co-educational "all students" team when it is in fact still a boys' team.

We also reiterate our request for the Department to amend Data Group 1036 to count how many girls, boys, and nonbinary students play on "girls' teams" and "boys' teams," as children sometimes choose to or are forced by lack of options or by discriminatory state laws to play on a team that does not match their gender.⁹⁴ We also repeat our prior request to disaggregate athletics participation data by race/ethnicity, as girls of color receive fewer opportunities to play school sports than their white and male peers.⁹⁵ And we reiterate our previous request for the Department to collect information on school and non-school expenditures on girls' and boys' teams, including for travel, equipment, uniforms, facilities, publicity, and staff.⁹⁶ While the Department does not plan to adopt these changes now, we appreciate that you "will consider these suggestions when developing future CRDC surveys" and urge you to implement these changes in the 2022-23 CRDC.⁹⁷

B. ED should continue collecting data on devices, virtual learning, early childhood services, and teachers.

We support the Department's continued proposals to: (i) collect data on the number of students who needed and received Wi-Fi enabled devices and Wi-Fi hotspots from schools (Data Groups 1043, 1044, 1045, and 1046);⁹⁸ (ii) collect data on the amount of virtual instruction provided by teachers, and the percentage of students receiving virtual instruction (Data Groups 1041-1042);⁹⁹ (iii) reinstate data collection on the type of and eligibility criteria for early childhood services (Data Groups 926, 953, 954, and 955) and to collect data for the first time on the number of preschool students who are English learners or disabled (Data Groups 1032, 1033, 1037, and 1038);¹⁰⁰ (iv) reinstate data collection on teacher absenteeism, experience, counts, and certification (Data Groups 983, 985, 1003, 1039, and 1040)¹⁰¹

We reiterate our previous request for the Department to disaggregate teacher and other personnel data by "Sex Membership (Expanded)" to be inclusive of nonbinary staff, as the Department has acknowledged this "might provide useful information about teacher ... diversity."¹⁰²

C. ED should collect data on single-sex classes and school expenditures.

In our previous comment, we asked the Department to disaggregate single-sex classes data by race/ethnicity, collect data on coeducational class sections within single-sex academic subjects, and to count "girls' classes" and "boys' classes" that primarily serve one gender but allow other genders to participate. The Department has rejected these recommendations and stated that "collecting single-sex class data disaggregated by male and female is sufficient to support OCR's mission of civil rights enforcement."¹⁰³

⁹³ Attachment A-3, *supra* note 84, at 21.

⁹⁴ NWLC Comment Feb. 2022, *supra* note 1, at 33; *see also* Attachment B, *supra* note 2, at 26.

⁹⁵ NWLC Comment Feb. 2022, *supra* note 1, at 35; *see also* Attachment B, *supra* note 2, at 26.

⁹⁶ NWLC Comment Feb. 2022, *supra* note 1, at 34-35.

⁹⁷ Attachment B, *supra* note 2, at 28.

⁹⁸ *Id.* at 55-57; *see also* NWLC Comment Feb. 2022, *supra* note 1, at 37.

⁹⁹ Attachment B, *supra* note 2, at 8-10; *see also* NWLC Comment Feb. 2022, *supra* note 1, at 37.

¹⁰⁰ Attachment B, *supra* note 2, at 44-47; *see also* NWLC Comment Feb. 2022, *supra* note 1, at 38.

¹⁰¹ Attachment B, *supra* note 2, at 85-86; *see also* NWLC Comment Feb. 2022, *supra* note 1, at 38-40.

¹⁰² NWLC Comment Feb. 2022, *supra* note 1, at 39; *see also* Attachment B, *supra* note 2, at 85-86.

¹⁰³ *Id.* at 28.

However, the Department has found it important to be inclusive of nonbinary students in athletics data, and we urge you to do the same for single-sex classes data.

* * * * *

Thank you for considering NWLC's recommendations. For questions or additional information, please contact etang@nwlc.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Elizabeth Tang', with a stylized flourish at the end.

Elizabeth Tang
Senior Counsel for Education and Workplace Justice
National Women's Law Center