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Re: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED–2021–SCC–0158, at 86 Fed. Reg. 70831)

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 Mandatory Civil Rights Data Collection (CRDC). NWLC fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially those who face multiple forms of discrimination, including women of color, LGBTQI+ people, and low-income women and families.

I. The Department Should Ensure the CRDC Is an Annual, Universal Data Collection and Should Work to Increase Disaggregation, Cross-Tabulation, and School Compliance.

NWLC urges the Department to make significant improvements to the collection and reporting of education civil rights data. The CRDC is a crucial tool that schools, districts, local and federal policymakers, communities, and other stakeholders use to better understand the experiences of certain groups of students, particularly girls of color, LGBTQI+ students, and students with disabilities, and make recommendations on how schools can provide safety and equal access to a quality education to all students. Moreover, enhanced data collection under the CRDC could further shed light on the prevalence and effects of sex-based harassment, including sexual assault, dating violence, and stalking; the treatment of LGBTQI+ students; the enforcement of discipline policies and practices; and the provision of accommodations for pregnant and parenting students, among other issues.

A. The Department should conduct the CRDC and report its data annually.

NWLC would like to thank the Department for hearing the feedback of advocates across the country in deciding to collect education civil rights data for the 2021-22 school year, making this the first time in the Office for Civil Rights' (OCR) history that the CRDC will take place two years in a row. The Department's decision to conduct the CRDC for school years 2020-21 and 2021-22 will ensure that ED, students, families, educators, and the civil and human rights community have meaningful data that captures the impact of the COVID-19 pandemic on our nation's students.

The ongoing pandemic has clarified the need for OCR to collect and report civil rights data annually going forward. Students across the country are facing burdens, stresses, and levels of trauma they have never experienced before. The social and emotional impact of the pandemic on students, along with ongoing school closures, other COVID-related learning disruptions, and inequitable remote learning opportunities will affect students' educational experiences for years to come. It will be difficult to understand the full scope of students' educational needs in the years ahead without annual data reflecting the experiences of students during these unprecedented school years, as schools attempt to address barriers to learning that students faced both before and during the pandemic. These annually collected data will allow the Department, states, and districts to better structure student support and for Congress to carefully direct funds where needed.

Even when the pandemic recedes, annual civil rights data collection and reporting will remain extremely important to schools, communities, and advocates, as well as to the Department's efforts to rigorously enforce our nation's civil rights laws. Children experience great bursts in academic, social, and emotional development over a relatively short period of time in school from preschool through 12th grade, so it is critically important that data be available for every year to be responsive to their developmental needs. The Department, educators, families, and advocates need access to regular, timely data in order to address issues and intervene quickly, so that no children lose access to educational opportunities—even if only for a year. This includes not only the timely collection of data, but also the timely reporting of data. The most recent data available to the public, the 2017-18 CRDC, was not released until October 2020. In this case particularly, such an extended lag time between data collection and reporting gave stakeholders no opportunity to address already troubling inequities in our education system that were only exacerbated by a global pandemic two years later. For these reasons, we also request that the Department report the data in a more timely fashion by decreasing the time between data collection and reporting to the public so that the most recent CRDC is published sometime within the immediately following school year.

B. The Department should continue conducting a universal collection of data from *all* schools.

The Department should, as it has for several years, survey the experiences of students in all schools, not merely a sample of some schools. Students, families, educators, advocates, and policymakers rely on the ability to find data for their own schools and the schools in their communities. Limiting the scope of the collection to a sample would obscure the considerable variability among schools and districts. A narrower collection also makes it more difficult to represent the experiences of smaller demographic groups, such as Asian American and Pacific Islander or Native American students, or student groups cross-tabulated by race, gender, and disability, for example, who often are left out of data reports at the school or district level. With a universal collection, these smaller student demographic groups can be more easily aggregated. Since the CRDC is often the only source of disaggregated school level data about students' experiences, loss of the data provided by a universal collection would be significant.

C. The Department should expand its disaggregation and cross-tabulation of collected data.

NWLC appreciates the Department's ongoing effort to disaggregate data in certain new, restored, or revised data groups, such as the expansion of the sex membership category to include nonbinary students and the separation of disability data into "IDEA" and "Section 504 only." However, the Department should further expand its disaggregation and cross-tabulation of collected data to allow for easier identification of schools and districts that must reform policies and practices to create safe and inclusive schools for all students. The current list of categories by which data is disaggregated is not representative of the diverse populations of students, with intersecting identities, who attend schools across the country. To fully capture the experiences of diverse student populations, particularly those most living at the intersections of the most marginalized identities, the Department should strengthen the CRDC by collecting, disaggregating, and cross-tabulating data by sex, race/ethnicity, English learner status, native language, socioeconomic status, disability status, pregnancy or parenting status, foster care status, homeless status, and national origin.¹

The Department should also consider adding new and more nuanced racial and ethnic categories to the "Racial ethnic" data group, which would include disaggregating Asian American Pacific Islander (AAPI) data given that the AAPI community represents over 50 ethnic groups.² The Department should also allow an option to check more than one race or ethnicity and remove the word "other" in "Native Hawaiian and Other Pacific Islander."

Currently, both disaggregated and cross-tabulated data is not easily accessible on the Department's CRDC website to general members of the public. This lack of accessibility to disaggregated and cross-tabulated data impedes the ability of families, educators, advocates, policymakers, and other stakeholders to identify specific student populations who may be over- or underrepresented in particular data groups and implement corrective policies that protect those students' civil rights. For these reasons, the Department should report data to the public in a format that is fully disaggregated and cross-tabulated by the categories recommended above.

D. The Department should exercise greater oversight and conduct more technical assistance to ensure full and accurate compliance with the data collection.

NWLC recognizes that the CRDC creates heavy demands on local educational agencies (LEAs), state educational agencies (SEAs), and the Department. However, the extensive time and effort spent on the CRDC are spent in vain if school districts do not consistently report complete and accurate data. For example, analyses of the 2015-16 CRDC revealed "widespread failure by districts to report data on school policing."³ Sixty percent of the largest school districts, such as New York City and Los Angeles, reported zero school-related arrests, an implausible result that strongly suggests the data was either incomplete or

¹ NWLC recommends including "national origin" as a category for disaggregation and cross-tabulation in alignment with the National Indian Education Association (NIEA). The NIEA recommends that Native American students be pulled out of the race and ethnicity categories because Native American students are identified in statute by their political status, not a racial or ethnic status—and not all Native American students identify as students of color. For Native American students, their political status is defined by their citizenship in tribes that have a government-to-government relationship with the federal government under the United States Constitution.

² Christian Edlagan & Kavya Vaghul, *How data disaggregation matters for Asian Americans and Pacific Islanders*, WASHINGTON CENTER FOR EQUITABLE GROWTH (Dec. 14, 2016), <https://equitablegrowth.org/how-data-disaggregation-matters-for-asian-americans-and-pacific-islanders>.

³ Daniel J. Losen & Paul Martinez, The Center for Civil Rights Remedies & Learning Policy Institute, *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn v* (2021), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>.

missing.⁴ For New York City, the largest school district in the country, which enrolls over one million students⁵ and employs over 5,500 school police officers or “school safety agents,”⁶ zero school-related arrests over the course of an entire school year seems statistically impossible. Similar trends were discovered in the 2017-18 CRDC. The Center for Civil Rights Remedies found in a recent report that the percentage of school districts with at least 1,000 secondary students that reported zero school-based arrests increased to 61% in the 2017-18 school year.⁷ The districts reporting zero arrests again included several large school districts, such as New York City and Pittsburgh.⁸ However, “[i]n some cases, police reported data to other agencies, proving that the zeros are not true.”⁹

The incomplete and missing data is not limited to school policing and has been an ongoing flaw in the collection of education civil rights data. For example, during the 2013-14 school year, nearly 80% of school districts reported zero incidents of restraint or seclusion for students in “special education” (wording used by an Education Week analysis).¹⁰ As with the school-related arrests data, a report of zero restraint and seclusion incidents, particularly for the largest school districts, seems statistically implausible, and some local examples even point to intentional underreporting. In 2019, for example, local journalists uncovered that Fairfax County Public Schools in Virginia had reported zero cases of restraint or seclusion for almost ten years.¹¹ However, records acquired by a public records request revealed that the school district internally reported 1,679 incidents that affected 203 students during the 2017-18 school year.¹² District officials said it was “unclear” why the district reported zero cases all those years but that they would offer corrections for years past.¹³ Similarly, in 2017, the American Association of University Women (AAUW) found that 79% of public schools reported zero incidents of sexual harassment or bullying in 2013-14, even though independent research by the AAUW revealed nearly 50% of students in grade 7-12 reported experiencing some form of sexual harassment that school year.¹⁴

Missing and misreported data erroneously skews statistics and impedes meaningful analysis that can lead to necessary policy change. Anecdotally, the NWLC research team has struggled with incomplete and inaccurate data and avoided reliance on certain implausible data reports altogether, such as reports of zero incidents of harassment in large LEAs. In light of this problem, the Department should offer significant technical assistance, issue guidance, and implement other oversight measures to ensure that respondents fully comply with the mandatory collection and reporting of data in the 2021-22 survey.

⁴ *Id.*

⁵ *DOE Data at a Glance*, SCHOOLS.NYC.GOV (last visited Dec. 9, 2021), <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance>.

⁶ See Joe Anuta, *School safety agents will stay under NYPD this year, despite city's claims of \$1B cut*, POLITICO (Jul. 2, 2020), <https://www.politico.com/states/new-york/albany/story/2020/07/02/school-safety-agents-will-stay-under-nypd-this-year-despite-citys-claims-of-1b-cut-1296868>.

⁷ Daniel J. Losen *et al.*, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* 6 (2021), <http://www.schooldisciplinedata.org/ccrr/docs/final-Report-03-22-21-v5-corrected.pdf>.

⁸ *Id.*; see also Mark Keierleber, *Exclusive: Pittsburgh Schools Reported Zero Student Arrests While Court Records Show It's a Discipline 'Hot Spot'*, THE74MILLION (Jan. 19, 2022), <https://www.the74million.org/article/exclusive-pittsburgh-schools-reported-zero-students-arrests-while-court-records-show-its-a-student-discipline-hot-spot> (citing that the Pittsburgh school district reported zero arrests in the CRDC despite its reporting 86 arrests and 395 referrals to law enforcement to the Pennsylvania education department, and the county juvenile court tallying 499 school-related arrests).

⁹ Daniel J. Losen *et al.*, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies* 6 (2021), <http://www.schooldisciplinedata.org/ccrr/docs/final-Report-03-22-21-v5-corrected.pdf>; see Mark Keierleber, *supra* note 8 (citing New York City police department records that reveal about 1200 school-based arrests were logged for the 2017-18 school year).

¹⁰ Christina A. Samuels, *70,000 Students With Disabilities Secluded, Restrained in School*, EDUCATIONWEEK (May 16, 2017), <https://www.edweek.org/leadership/70-000-students-with-disabilities-secluded-restrained-in-school/2017/05?intc=eml-contshr-shr-desk>.

¹¹ Jenny Abamu, *'We Have Fallen Short': Fairfax Schools Officials Release Findings From Isolation Review*, WAMU.ORG (Apr. 3, 2019), <https://wamu.org/story/19/04/03/we-have-fallen-short-fairfax-schools-officials-release-findings-from-isolation-review>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12*, AAUW.ORG (last updated Oct. 24, 2017), <https://ww3.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment>.

II. The Department Should Preserve and Expand Data Collection on Sexual Assault, Dating Violence, and Stalking.

A. The Department should clarify that harassment and bullying based on sex includes sexual assault, dating violence, and stalking.

Sexual assault is widely prevalent in K-12 schools. In a 2017 survey of more than 1,000 girls ages 14-18 nationwide, NWLC found that one in five girls surveyed had been kissed or touched without their consent, including 56 percent of girls who are pregnant or parenting, 38 percent of LGBTQI+ girls, 24 percent of Latina girls, 23 percent of Indigenous girls, and 22 percent of Black girls.¹⁵ In addition, 6 percent of girls ages 14-18 reported being forced to have sex when they did not want to, including 15 percent of LGBTQI+ girls, 11 percent of Indigenous girls, 9 percent of Black girls, and 7 percent of Latina girls.¹⁶ Disabled students are also 2.9 times more likely than their peers to be sexually abused.¹⁷ An estimated 10 percent of K-12 students will experience sexual misconduct by a school employee by the time they graduate from high school.¹⁸ The Department is well aware of the troubling prevalence of sexual assault in K-12 schools. In justifying its 2019 CRDC proposal to collect data on staff-on-student “sex offenses,” the Department observed that there had been a “ten-fold increase in the number of cases that the Department has seen annually involving sexual violence from 2009-18.”¹⁹ And indeed, a 2004 survey of 8th-11th grade students found that 7 percent of them had received physical sexual contact from a school employee, and 10 percent had been subjected to physical sexual contact, pornography, sexual talk, sexual exhibitionism, or masturbation from a school employee.²⁰ At this moment, the Department is currently investigating 103 complaints against school districts for failing to respond adequately to reported sexual violence.²¹

Dating violence is widely prevalent among K-12 students. In the last year, 1 in 11 high school girls experienced physical dating violence, and 1 in 8 experienced sexual dating violence.²² Similarly, in the last year, 1 in 14 high school boys experienced physical dating violence, and 1 in 26 experienced sexual dating violence.²³ Black and Latinx youth are 1.8 times and 1.4 times, respectively, more likely than their white peers to be victims of dating violence.²⁴ Similarly, LGB youth are 1.5 times and 1.9 times more likely than their heterosexual peers to experience physical dating violence and sexual dating violence, respectively.²⁵

¹⁵ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 3 (2017), [hereinafter NWLC Sexual Harassment Report] <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence>; National Women’s Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting>.

¹⁶ NWLC Sexual Harassment Report, *supra* note 15, at 3.

¹⁷ National Women’s Law Center, *Let Her Learn: Stopping School Pushout for: Girls With Disabilities* 7 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-with-disabilities>.

¹⁸ Billie-Jo Grant *et al.*, *A Case Study of K–12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation* (Sep. 15, 2017), <https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf>.

¹⁹ Department of Education, Office for Civil Rights, Mandatory Civil Rights Data Collection, *Supporting Statement, Part A: Justification* (Sept. 2019), at 4.

²⁰ Charol Shakeshaft, *Know the warning signs of educator sexual misconduct*, KAPPAN MAGAZINE 2 (Feb. 2013), <https://filestore.scouting.org/filestore/nyps/2013/pdf/Shakeshaft-Kappan20138.full.pdf>.

²¹ Department of Education, Office for Civil Rights, *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools as of October 29, 2021 7:30am Search* (last modified Nov. 1, 2021; last updated Feb. 3, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html?perPage=1000>.

²² Centers for Disease Control and Prevention, *Preventing Teen Dating Violence* (last updated Mar. 5, 2021), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html>.

²³ *Id.*

²⁴ Donna K. Lormand *et al.*, *Dating Violence Among Urban, Minority, Middle School Youth and Associated Sexual Risk Behaviors and Substance Use*, 83 J. SCH. HEALTH 6 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4372798>.

²⁵ Meredith Dank *et al.*, *Dating Violence Experiences of Lesbian, Gay, Bisexual, and Transgender Youth*, 43 IN PRESS: J. YOUTH & ADOLESCENCE 846, Table 2 (2014).

Transgender youth are especially vulnerable, with 89 percent of them experiencing physical dating violence and 61 percent experiencing sexual dating violence.²⁶ Teen victims of dating violence are more likely than their peers to miss school, receive lower grades, smoke, use drugs, engage in disordered eating, and attempt or consider suicide.²⁷ Among all those who experience dating violence in their lifetime, 26 percent of women and 15 percent of men first experienced dating violence before they turned 18.²⁸ Teens who experience physical dating violence are three times more likely than their peers to experience violence again during college.²⁹

Stalking is also prevalent among K-12 students. Among stalking survivors, 12 percent were under 18 when the stalking began.³⁰ In a 2014 statewide survey of 18,000 students in Kentucky, 16.5 percent reported being stalked over the last year.³¹ In 2016, more than a quarter of a million people aged 16-19 were victims of stalking.³² Most stalking is sex-based; more than 60 percent of women who have been stalked and 44 percent of men who have been stalked were stalked by a former or current intimate partner, and many more are stalked by an acquaintance or stranger who sees them as a prospective romantic or sexual partner.³³ Additionally, there is an overlap in dating violence and stalking: half of adolescents aged 12-18 years old have experienced dating-abuse related stalking and harassment, and Black girls and Latino boys are especially vulnerable.³⁴

Since sexual assault, dating violence, and stalking are serious and prevalent forms of sex-based harassment that have an impact on students' equal access to education, the Department should expand the list of permitted values for Data Categories "Civil Rights Category (Student Counts)" and "Civil Rights Category (Allegations)" to include "sexual assault," "dating violence," and "sex-based stalking." This is similar to how the Department already includes "sexual orientation" and "gender identity" as permitted values in the Data Category "Civil Rights Category (Allegations)."³⁵ Making this change would require schools to disaggregate by sexual assault, dating violence, and stalking when they report the number of harassment allegations, the number of students disciplined for harassment, and the number of student harassment victims (Data Groups 933, 934, and 935). For consistency, the Department should also revise the definition of "harassment or bullying on the basis of sex" (which already includes "sexual assault"³⁶) to include "dating violence" and "stalking" (Data Groups 933, 934, 935, 988, and 1022; and Data Categories "Civil Rights Category (Student Counts)" and "Civil Rights Category (Allegations)").

²⁶ *Id.* at Table 3.

²⁷ Department of Education, Office of Safe and Health Students, *Teen Dating Violence in the United States* (last updated Aug. 24, 2015), <https://www2.ed.gov/about/offices/list/oese/oshs/teendatingviolence-factsheet.html>.

²⁸ Centers for Disease Control and Prevention, *Preventing Teen Dating Violence* (last updated Mar. 5, 2021), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/teendatingviolence/fastfact.html>.

²⁹ New York State, Department of Health, *Dating Violence Prevention, Teens Ages 13 to 19 Years* (last updated Oct. 2018), https://www.health.ny.gov/prevention/injury_prevention/children/fact_sheets/13-19_years/dating_violence_prevention_13-19_years.htm.

³⁰ Patricia Tjaden & Nancy Thoennes, *Stalking in America: Findings from the National Violence Against Women Survey* 6, U.S. Department of Justice – Office of Justice Programs (Apr. 1998), <https://www.ojp.gov/pdffiles/169592.pdf>.

³¹ Bonnie S. Fisher *et al.*, *Statewide Estimates of Stalking Among High School Students in Kentucky: Demographic Profile and Sex Differences*, 20(10) VIOLENCE AGAINST WOMEN 1258-1279 (2014), <https://doi.org/10.1177%2F1077801214551574>.

³² Jennifer L. Truman & Rachel E. Morgan, *Stalking Victimization, 2016*, U.S. Department of Justice – Office of Justice Programs (Apr. 2021), <https://bjs.ojp.gov/content/pub/pdf/sv16.pdf>.

³³ SafeHorizon, *Stalking Statistics & Facts* (last accessed Feb. 8, 2022), <https://www.safehorizon.org/get-informed/stalking-statistics-facts>.

³⁴ Emily Rothman *et al.*, *Prevalence of and Risk Markers for Dating-Abuse Related Stalking and Harassment Victimization and Perpetration in a Nationally Representative Survey of U.S. Adolescents*, 53 YOUTH & SOC'Y 6, 955-978, <https://journals.sagepub.com/doi/abs/10.1177/0044118X20921631>.

³⁵ Department of Education, Office for Civil Rights, Mandatory Civil Rights Data Collection, *Data Categories for Civil Rights Data Collection for School Year 2021-22* (Dec. 2021), at A3-9, A3-10 [hereinafter CRDC Data Categories 2021-22].

³⁶ Department of Education, Office for Civil Rights, Mandatory Civil Rights Data Collection, *Data Groups for Civil Rights Data Collection for School Year 2021-22* (Dec. 2021) [hereinafter CRDC Data Groups 2021-22], at A2-43, A2-45; CRDC Data Categories 2021-22, *supra* note 35, at A3-8, A3-9.

Note: If the Department makes this change, which includes collecting data on sexual assault as a type of sex-based harassment (*i.e.*, civil rights violation), it may wish to retire Data Group 1024, which currently collects data on sexual assault by students as a type of “offense” and “criminal act.”³⁷

The Department should also define “sexual assault” with more specificity and by using the absence of “consent,” consistent with how the Department already defines “sexual assault” under the Clery Act.³⁸ The current definition relies on terms like “fondling,” “indecent liberties,” and “child molestation,” which are vague and not defined in the CRDC, and which make it more likely for a school to underreport the number of reported sexual assaults. For example, the Department could define “sexual assault” as:

“the intentional touching, over or under clothing, of:

- (i) a private body part (which includes the breast, vagina, vulva, penis, testicle, anus, buttock, or inner thigh) of another person, with any body part or object; or*
- (ii) any part of another person’s body with a private body part;*

without the consent of one of the people, including instances where the victim is incapable of giving consent, including, for example, because of the victim’s temporary or permanent mental or physical incapacity. Classification of these incidents should take into consideration the age of the victim and the age and developmentally appropriate behavior of the respondent.”

A definition like this would give precise definitions of which body parts are considered private body parts and would include a wider range of incidents, including where the victim is made to touch the assailant’s private body parts. It would also explicitly clarify, as was recognized in the preamble to the 2020 Title IX regulations, that the touching of private body parts “over clothing” can constitute sexual assault.³⁹ Furthermore, by focusing on “intentional” touching, this definition would exclude situations such as those where an individual accidentally bumps against another person in a crowded place. At the same time, “intentional” touching would ensure that incidents like hazing or hate incidents against LGBTQI+ students are included as “sexual assault,” even though the incident may not have been done for the purpose of sexual gratification but rather to assert dominance over the victim or to express hatred against the victim.⁴⁰ Finally, this definition properly instructs schools to take into consideration the age of the victim when classifying incidents of sexual assault, consistent with two decades of Department Title IX policy recognizing that “in the case of younger students, sexually harassing conduct is more likely to be intimidating if coming from an older student.”⁴¹ Note that we have *not* recommended considering the “developmentally appropriate behavior” of the victim because a victim’s “behavior” is never relevant in incidents of sexual assault, as the victim is never responsible for being sexually assaulted, and an inquiry into what is “developmentally appropriate” for a victim

³⁷ CRDC Data Groups 2021-22, *supra* note 36, at A2-68.

³⁸ The Clery regulations define “sexual assault” as “[a]n offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.” 34 C.F.R. § 668.46. Appendix A of the Clery regulations, in turn, define “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.” 34 C.F.R. App’x A to Subpart D of Part 668 (emphasis added).

³⁹ Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026, 30176 (May 19, 2020), <https://www.federalregister.gov/d/2020-10512>.

⁴⁰ In contrast, the Clery regulations define “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.” 34 C.F.R. App’x A to Subpart D of Part 668 (emphasis added).

⁴¹ Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, of Third Parties*, at 7 (issued Jan. 19, 2001; rescinded Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> (instructing schools to consider the “age ... of the alleged harasser *and the subject or subjects of the harassment*”) (emphasis added).

may open the door to victim-blaming relying on stereotypes based on the victim's sex (including sexual orientation, gender identity, transgender or nonbinary status, pregnancy or parenting status), race, disability, etc. On the other hand, we agree it is important to consider the "developmentally appropriate behavior" of a respondent when classifying an incident of sexual assault, given that very young respondents and some disabled respondents may engage in sexually harassing behavior without being aware of the nature or implications of their actions.

The Department should consider not counting "rape" separately from other types of "sexual assault." Having separate categories creates more potential for confusion for school officials who are tasked with reporting this data, and there does not seem to be any specific benefit to collecting this data separately. However, if the Department chooses to continue counting rape and other sexual assault separately, we recommend the following two changes:

- The Department should define "rape" by relying on the absence of "consent" and not by reference to the existence of "force," consistent with how the Department already defines "rape" under the Clery Act.⁴² The Department should also ensure that the definition of "rape" encompasses a diverse range of situations, including when an individual with a penis is made to penetrate another person's vagina, anus, or mouth; and when one person performs non-penetrative oral sex on another person with a vagina without the consent of one of the people involved. For example, the Department could define "rape" as:
 - (i) *Any penetration, no matter how slight, of one person's vagina or anus by another person's body part or object; or*
 - (ii) *Any sexual contact, no matter how slight, between one person's mouth and another person's penis or vagina;**without the consent of one of the people, including instances where the victim is incapable of giving consent, including, for example, because of the victim's temporary or permanent mental or physical incapacity. Classification of these incidents should take into consideration the ages of the victim and the respondent.*
- The Department should change the list of permitted values to "Rape" and "Sexual assault (other than rape)." The current permitted values are "Rape or attempted rape" and "Sexual assault (other than rape)." Removing "attempted rape" from the list of permitted values would reduce confusion for schools, since the CRDC does not currently define "attempted rape" or explain how "attempted rape" is different from "sexual assault (other than rape)."⁴³

The Department should adopt the existing definition of "dating violence" from the Clery regulations in the CRDC.⁴⁴ We also urge the Department to clarify that dating violence includes, but is not limited to, physical, sexual, and emotional abuse; interfering with the victim's ability to secure a job or save money; violence or

⁴² The Clery regulations define "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.*" 34 C.F.R. App'x A to Subpart D of Part 668 (emphasis added).

⁴³ CRDC Data Categories 2021-22, *supra* note 35, at A3-27, A3-28.

⁴⁴ 34 C.F.R. § 668.46 (defining "dating violence" as "[v]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. (i) The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. (ii) For the purposes of this definition - (A) Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. (B) Dating violence does not include acts covered under the definition of domestic violence.").

threats of violence toward the complainant's family members, friends, pets, or property; threats by the respondent to kill themselves; and threats by the respondent to report the victim or the victim's family members to police, immigration officials, child protective services, or a mental health institution.

The Department should adopt the existing definition of "stalking" from the Clery regulations in the CRDC.⁴⁵

B. The Department should collect data on all forms of staff-on-student harassment or bullying, including sexual assault and stalking.

Like student-on-student harassment and bullying, staff-on-student harassment and bullying can have a serious impact on students' access to education. Indeed, harassment and bullying from an adult authority figure is likely to have even more severe consequences than from a peer. Accordingly, the Department should create new three data groups regarding staff-on-student harassment or bullying to collect data on the number of allegations, the number of disciplined staff, and the number of victims—analogueous to the existing Data Groups 933, 934, and 935. The permitted values for these data groups should include "sexual assault" and "stalking" (see **Section II.A** above);⁴⁶ "sex characteristics (including intersex traits)" (see **Section III.E** below); and the existing permitted values used in the Data Category "Civil Rights Category (Allegations)"—*i.e.*, sex; race, color, or national origin; disability; religion; sexual orientation; and gender identity. Likewise, the definitions used in these new staff-on-student data groups should indicate that "harassment or bullying based on sex" includes "sexual assault" and "stalking."

Note: If the Department makes this change, which includes collecting data on sexual assault as a type of sex-based harassment (*i.e.*, a civil rights violation), it may wish to retire Data Group 1025, which currently collects data on sexual assault by staff as a type of "offense" and "criminal act."⁴⁷

C. The Department should collect data on the outcomes of reported staff-on-student sexual assault and stalking and on the outcomes of reported student-on-student sexual assault, dating violence, and stalking.

NWLC supports the Department's proposal to continue collecting data on the outcomes of reports of staff-on-student sexual assault (currently Data Groups 1026-1029). We note that while Data Groups 1024 and 1025 collect data on the number of reported incidents of both staff-on-student and student-on-student sexual abuse, this data does not provide any information on how schools are responding to these reported incidents. Data Groups 1026-1029 help explain what happens *after* students report staff-on-student sexual abuse. For example, if a school reports that most reports of staff-on-student sexual assault result in the staff member resigning or retiring prior to final discipline or termination (Data Group 1026), this may indicate that staff members are consistently escaping accountability for sexually abusing students. Similarly, if a school reports that most reports of staff-on-student rape have resulted in investigations that are still pending at the end of the school year (Data Group 1028), this may indicate that the school is in violation of Title IX's requirement to

⁴⁵ 34 C.F.R. § 668.46 (defining "stalking" as "(i) Engaging in a course of conduct directed at a specific person that would cause a reasonable person to - (A) Fear for the person's safety or the safety of others; or (B) Suffer substantial emotional distress. (ii) For the purposes of this definition - (A) Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property. (B) Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim. (C) Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.").

⁴⁶ We do not include "dating violence" here because K-12 staff and students cannot be said to "date" each other.

⁴⁷ CRDC Data Groups 2021-22, *supra* note 36, at A2-69.

resolve complaints promptly.⁴⁸ Having continued access to this data is critical to ensuring that the Department, as well as students and families, can identify schools that are in potential violation of their Title IX obligations. Reporting this data does not impose a significant burden on schools, as schools are already required under the Title IX regulations to provide notice to parties of the outcome of all formal complaints of staff-on-student sexual assault and to retain records of all outcomes for at least seven years.⁴⁹

Consistent with **Section II.B** above, the Department should expand this data collection to include the outcomes of reports of both staff-on-student sexual assault and staff-on-student stalking. We also recommend that the Department collect this data as a type of sex-based harassment (*i.e.*, a civil rights violation) rather than as a type of “offense” or “criminal act,” given that the CRDC is about civil rights, not crimes. To that end, we recommend the Department incorporate the information requested by Data Groups 1026-1029 (regarding “offenses”) into NWLC’s recommended data groups regarding staff-on-student harassment or bullying and retire the existing Data Groups 1026-1029.

Furthermore, the Department should collect separate data on how often staff are found responsible *and* how often they are found not responsible for reported staff-on-student sexual assault or stalking. Currently, under Data Group 1027, the Department collects only a *single data point* on how often a staff member is found *either* responsible *or* not responsible for a staff-on-student sexual assault. This obscures important information regarding school determinations of responsibility from the Department, students, and families. For example, a school may report that all reports of staff-on-student sexual assault result in a determination that the staff member was either responsible or not responsible, but this may obscure the fact that 100% of determinations are “Not Responsible.” Collecting separate data on “Responsible” and “Not Responsible” determinations would allow the Department, as well as students and families, to identify situations where a school is potentially conducting sham investigations to sweep staff-on-student sexual assault and stalking under the rug.

The Department should also clarify what a “duty reassignment” is. Currently, Data Group 1029 requires schools to report the number of reports of staff-on-student sexual assault “that were followed by a duty reassignment, *prior to* final discipline or termination.”⁵⁰ However, it is not clear whether schools should report the number of staff members reassigned to another position *as an alternative* to conducting an investigation that could lead to final discipline or termination or *as an interim measure* pending an investigation, prior to final discipline or termination. If it is the former, and a school reports a high number of staff reassignments as an alternative to discipline or termination, then this could indicate that the school has a practice of relocating serial predators instead of fully investigating them, thereby making students (and possibly staff members) in the reassigned staff member’s new work environment vulnerable to sexual assault or stalking. If it is the latter, and a school reports a high number of staff reassignments as an interim measure prior to final discipline or termination, then this could indicate that the school is taking proper steps to minimize the staff respondent’s contact with students while investigating. But even in the latter scenario, it is unclear whether the interim measure is a meaningful safety measure because Data Group 1029 does not require schools to report whether the reassigned staff member’s new work environment involves interacting with students. The Department should clarify these points, so that schools can report accurate data and so that students and families can understand whether a high number of staff reassignments means their school is taking steps to protect students from sexual assault or stalking by staff or is further exposing students to these dangers.

⁴⁸ 34 C.F.R. § 106.8(c).

⁴⁹ 34 C.F.R. §§ 106.45(b)(7) (notice), 106.45(b)(10) (recordkeeping).

⁵⁰ CRDC Data Groups 2021-22, *supra* note 36, at A2-71 (emphasis added).

We also urge the Department to create data groups similar to Data Groups 1027 and 1028 regarding the outcomes of reports of *student*-on-student sex assault, dating violence, and stalking. Collecting this data is critical for informing the Department's enforcement activities with respect to Title IX, as well as school policies and practices aimed at addressing and preventing student-on-student sex-based harassment. Collecting this data would not create a significant additional burden on schools, as they are already required under the Title IX regulations to provide notice to parties of the outcome of all formal complaints involving not only staff-on-student sexual assault but also student-on-student sexual assault and to retain records of all outcomes for at least seven years.⁵¹ Therefore, in order to ensure a more complete understanding of students' experiences with sexual assault, dating violence, and stalking in order to enable schools to work towards creating safer school climates, the Department should create the following data groups regarding student-on-student sexual assault, dating violence, and stalking:

- The unduplicated number of allegations against a student that were followed by a determination that the student was **responsible** and the unduplicated number of allegations against a student that were followed by a determination that the student was **not responsible**, by type of harassment (sexual assault, dating violence, or stalking) and by outcome ("Responsible" or "Not Responsible").
- The unduplicated number of allegations against a student that had a determination that **remained pending**, by type of harassment (sexual assault, dating violence, or stalking).

D. The Department should require schools to include off-campus incidents in all data regarding staff-on-student and student-on-student harassment or bullying.

For more than two decades, schools have been responsible for addressing any harassment based on sex, race, or disability that creates a hostile educational environment, including when the harassment occurs off campus.⁵² In 1998, the Supreme Court recognized that schools may be liable for money damages under Title IX, even if the harassment at issue "never [occurred] on school property."⁵³ From 2001 to 2020, the Department recognized that schools' Title IX obligations to address sexual harassment depended not on where the *underlying conduct* occurred, but rather whether the harassment created a hostile environment at school.⁵⁴ While the 2020 Title IX regulations narrowed this responsibility, in conflict with Supreme Court precedent, schools are still required to address many off-campus incidents of sexual assault, dating violence, and stalking, including any off-campus incident that occurs during a school-sponsored program or activity or where the school has "substantial control" over the respondent and the incident.⁵⁵ Accordingly, the Department

⁵¹ 34 C.F.R. §§ 106.45(b)(7) (notice), 106.45(b)(10) (recordkeeping).

⁵² Department of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, of Third Parties*, at 7 (issued Jan. 19, 2001; rescinded Aug. 26, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; Department of Education, Office for Civil Rights, *Prohibited Disability Harassment* (July 25, 2000), *Racial Incidents and Harassment Against Students*, (Mar. 10, 1994), <https://www2.ed.gov/about/offices/list/ocr/docs/race394.html>.

⁵³ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998).

⁵⁴ Department of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct*, at 1 n.3 (issued Sept. 22, 2017; rescinded Aug. 26, 2020) [hereinafter 2017 Guidance] ("Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities"); Department of Education, Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* (issued Apr. 29, 2014; rescinded Sept. 22, 2017) ("a school must process all complaints of sexual violence, regardless of where the conduct occurred"); Department of Education, Office for Civil Rights, *Dear Colleague Letter on Sexual Violence* (issued Apr. 4, 2011; rescinded Sept. 22, 2017) ("Schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity"); Department of Education, Office for Civil Rights, *Dear Colleague Letter on Harassment and Bullying*, at 2 (issued Oct. 26, 2010; partially rescinded Aug. 26, 2020) (finding Title IX violation where "conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," regardless of location of harassment).

⁵⁵ 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>.

should require schools to include off-campus incidents when reporting data regarding staff-on-student or student-on-student harassment or bullying.

E. The Department should collect data in a future CRDC on the number of students who are disciplined after reporting they were a victim of sexual harassment.

Instead of helping students who report sexual harassment, sexual assault, dating violence, or stalking, schools regularly punish them. Often, victims are suspended or expelled because school officials believe the sexual assault was consensual and that the student made a false accusation or because the victim discloses during the course of an investigation that they engaged in consensual sexual activity leading up to the nonconsensual incident.⁵⁶ Student victims are also disciplined for using drugs or alcohol during their abuse, for physically defending themselves against their harassers, for acting out in age-appropriate ways after the incident due to trauma, for missing school in order to avoid their harasser, or for merely telling other students about the incident.⁵⁷ In addition to formally disciplining survivors, many schools informally punish them by forcing them to enroll in inferior “alternative” education programs that isolate them from their friends, offer little to no instruction, and deprive them of access to extracurriculars.⁵⁸ (See **Section IV.B.6** for more recommendations on data regarding alternative schools.) Unfortunately, schools are more likely to disbelieve and punish girls of color (especially Black girls), LGBTQI+ students, pregnant and parenting students, and disabled students due to stereotypes that label these students as more “promiscuous,” more “aggressive,” less credible, and/or less deserving of protection.⁵⁹ When students see that their schools punish their classmates for being victims of sexual assault, dating violence, or stalking, they are, in turn, less likely to report their own victimization, which exacerbates the existing problem of underreporting. Already, fewer than one in four sexual harassment victims in grades 7-12 report the incident to a school employee,⁶⁰ and only two percent of girls ages 14-18 who are kissed or touched without their consent report it to their schools.⁶¹

⁵⁶ See, e.g., Sarah Nesbitt & Sage Carson, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15-16 (Mar. 2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf>; Tyler Kingkade, *Schools Keep Punishing Girls – Especially Girls of Color – Who Report Sexual Assaults, and the Trump Administration’s Title IX Reforms Won’t Stop It*, THE 74 (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it>; Brian Entin, *Miami Gardens 9th-grader says she was raped by 3 boys in school bathroom*, WSVN-TV (Feb. 8, 2018), <https://wsvn.com/news/local/miami-gardens-9th-grader-says-she-was-raped-by-3-boys-in-school-bathroom>; Mary Ann Georgeantopoulos, *A Teen Says She Was Expelled From School After A “Star Athlete” Sexually Assaulted Her*, BUZZFEED NEWS (Feb 8, 2017), <https://www.buzzfeednews.com/article/maryanngeorgantopoulos/teen-says-she-was-expelled-from-school-after-a-star-athlete>; Nora Caplan-Bricker, *“My School Punished Me”*, SLATE (Sept. 19, 2016), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html>; Aviva Stahl, *“This Is an Epidemic”: How NYC Public Schools Punish Girls for Being Raped*, VICE (June 8, 2016), https://broadly.vice.com/en_us/article/59mz3x/this-is-an-epidemic-how-nyc-public-schools-punish-girls-for-being-raped; Kate Taylor, *Schools Punished Teenagers for Being Victims of Sexual Assault, Complaints Say*, N.Y. TIMES (June 7, 2016), <https://www.nytimes.com/2016/06/08/nyregion/schools-punished-teenagers-for-being-victims-of-sexual-assault-complaints-say.html>.

⁵⁷ Nesbitt & Carson, *supra* note 56, at 15-16; NAACP Legal Defense and Education Fund, Inc. & National Women’s Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Educational Equity* 25 (2014), https://nwlc.org/wp-content/uploads/2015/08/unlocking_opportunity_for_african_american_girls_report.pdf.

⁵⁸ E.g., Tyler Kingkade, *A High Schooler Says Her School Called Her A “Drama Queen” When She Reported Harassment*, BUZZFEED (Oct. 13, 2017), <https://www.buzzfeednews.com/article/tylerkingkade/forced-out-of-high-school-for-reporting-harassment-lawsuits>; Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418>.

⁵⁹ Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, 1-6 (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [hereinafter *Girlhood Interrupted*]; Laura Dorwart, *The Hidden #MeToo Epidemic: Sexual Assault Against Bisexual Women*, MEDIUM (Dec. 3, 2017), <https://medium.com/@lauramdorwart/the-hidden-metoo-epidemic-sexual-assault-against-bisexual-women-95fe76c3330a>; Jennie M. Kuckertz & Kristen M. McCabe, *Factors Affecting Teens’ Attitudes Toward Their Pregnant Peers*, 16 Y PSI CHI, INT’L HONOR SOC’Y. PSYCHOL. 33 (2011), https://www.psichi.org/resource/resmgr/journal_2011/spring11jnkuckertz.pdf; The Arc, *People with Intellectual Disabilities and Sexual Violence* 2 (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>.

⁶⁰ American Association of University Women, *Crossing the Line: Sexual Harassment at School* 28 (2011), <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

⁶¹ NWLC Sexual Harassment Report, *supra* note 15, at 2.

Student survivors of sexual assault are also more likely than their peers to have been subject to exclusionary discipline, including in situations where the discipline is not directly related to the survivor’s report of the underlying sex assault. For example, NWLC found in a 2017 survey that 25% of girls ages 14-18 who have experienced sexual assault have also been subject to exclusionary discipline, compared with only 11% of girls overall.⁶² Similarly, 25% of them have been in a physical fight at school, compared with 12% of girls overall.⁶³

The Department should create a new Data Group in a future CRDC to understand whether schools are disciplining students after they report they are the victim of sexual assault, dating violence, or stalking. This data group should use a slightly revised version of the existing “Discipline Methods” data category—which tracks corporal punishment, suspensions (in- and out-of-school), expulsions (with or without educational services and because of zero tolerance policies), referrals to law enforcement, arrests, and transfers to an alternative school for disciplinary reasons—by adding an additional permitted value for transfers to an alternative school for a *non-disciplinary* reason. This would include instances when schools *informally* punish student survivors by sending them to an alternative school, even though there is not part of a formal disciplinary action. The new Data Group should also allow the Department to disaggregate and cross-tabulate the data by students’ demographic information (*i.e.*, race/ethnicity, sex, disability, English Learner status, native language, socioeconomic status, pregnancy or parenting status, foster care status, homeless status, and national origin), so that the Department can track whether certain groups of students are disproportionately punished after reporting they are the victim of sexual assault, dating violence, or stalking.

III. The Department Should Make Key Revisions to Its Data Collection regarding LGBTQI+ Students.

A. The Department should correct the error in its expanded definition of sex.

NWLC supports the Department’s proposal to recognize nonbinary students in its expanded definition of sex. However, we note that Data Category “Sex (Membership)—Expanded” still defines sex as “[a]n indication that students are either female or male.”⁶⁴ We urge the Department to correct what is likely a typographical error.

B. The Department should expand its definitions of sexual orientation and gender identity.

NWLC supports the Department’s proposal to clarify that sex-based harassment or bullying includes harassment of bullying on the basis of sexual orientation and gender identity. We also recommend the Department make the following changes to its proposed definition of “sexual orientation” to reflect the fact that there are many types of sexual orientations and to include associational discrimination (Data Groups 1034, 1035, and 933; and Data Category “Civil Rights Category (Allegations)”):

Sexual orientation harassment or bullying refers to harmful conduct based on actual or perceived sexual orientation (including but not limited to harassment because a student identifies as, ~~or~~ is perceived to be, or is associated with people who are gay, lesbian, bisexual, asexual, pansexual, or heterosexual).

⁶² *Id.* at 8.

⁶³ *Id.*

⁶⁴ CRDC Data Categories 2021-22, *supra* note 35, at A3-37.

Similarly, the Department should make the following changes to its proposed definition of “gender identity” to reflect the fact that there are many types of gender identities and to include associational discrimination (Data Groups 1034, 1035, and 933; and Data Category “Civil Rights Category (Allegations)”):

Gender identity harassment or bullying refers to harmful conduct based on actual or perceived gender identity (including but not limited to harassment because a student identifies as, or is perceived to be, or is associated with people who are transgender, cisgender, or nonbinary).

C. The Department should define sex to include gender expression and transgender status when collecting data on harassment and bullying.

The Department should include “gender expression” and “transgender status” in its definition of “harassment or bullying on the basis of sex” (Data Groups 988 and 1022; and Data Categories “Civil Rights Category (Student Counts)” and “Civil Rights Category (Allegations)”). This would reflect that fact that many students who are both heterosexual and cisgender are bullied or harassed because of their gender expression (not their sexual orientation or gender identity). It would also reflect the fact that transgender students who identify with a binary gender are often bullied not because of their gender identity but because of their transgender status. For example, a transgender girl and a cisgender girl share the same gender identity (*i.e.*, they are both girls), but the transgender girl may be harassed because she is transgender instead of cisgender.

D. The Department should provide additional guidance to schools on collecting sex data.

The Department should provide LEAs with guidance on collecting sex data more generally, including clarifying that recording sex based on student self-identification is acceptable and is the preferred method for CRDC and other federal reporting—consistent with the approach of the Equal Employment Opportunity Commission.⁶⁵ While beyond the scope of the current data collection, 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 Title IX, the Every Student Succeeds Act (ESSA), and Family Educational Rights and Privacy Act (FERPA).⁶⁶ The Office of Elementary and Secondary Education (OESE) should work with OCR and the Student Privacy Policy Office (SPPO) on guidance that outlines and gives examples of best practices, such as enabling record changes based on student self-identification; communicating to students and families, including ensuring students understand that updated records are available to parents; 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 allowable ESSA uses for implementing these practices.⁶⁷

⁶⁵ EEOC, Frequently Asked Questions (FAQs): EEO-1 Component 1 Data Collection (rev. Aug. 18, 2021), <https://eeocdata.org/pdfs/EEO-1%20Component%201%20FAQ.pdf>.

⁶⁶ Such guidance would build on prior guidance and resources issued by OESE and OCR that addressed these issues—though, notably, did not specifically address nonbinary students. Department of Education, *Examples of Policies and Emerging Practices for Supporting Transgender Students* (May 2016; archived); Department of Education, *Dear Colleague Letter on Transgender Students* (May 13, 2016; rescinded).

⁶⁷ *E.g.*, Elementary and Secondary Education Act (ESEA), §§ 2101 (c)(4)(B)(xx), 2103 (b)(3)(E)(ii), 4104 (b)(3)(C)(i), 4109 (a)(2).

E. The Department should collect separate data on harassment and bullying allegations on the basis of sex characteristics (including intersex traits).

NWLC supports the Department's proposal to clarify that "sex" includes "sex characteristics" and recommends two changes to account for intersex students and to better disaggregate this data. People with variations of sex characteristics may comprise as much as 1.7% of the population,⁶⁸ and face documented but understudied health and social disparities.⁶⁹ A recent National Academies consensus study noted that "[p]opulation-based data on intersex populations are generally not available at all," calling this "a significant gap in terms of identifying and understanding the well-being of intersex populations."⁷⁰ That report recommended that federal agencies should develop, evaluate, and consider implementing measures to identify intersex populations.⁷¹ A forthcoming Academies report will make further recommendations to advance intersex data collection.⁷²

Though variations of sex characteristics themselves are perfectly healthy, many intersex youth have experienced "normalizing" genital or sterilizing surgeries in infancy or early childhood, with lasting impacts on their health.⁷³ Intersex students often face harassment, discrimination, and privacy infringements at school, as well as curricula that erase or stigmatize bodies like theirs.⁷⁴ These experiences contribute to educational, health, and other disparities.⁷⁵ Unfortunately, even as intersex youth are increasingly coming out, they are also increasingly targeted in by laws and policies seeking to exclude them from educational opportunities,⁷⁶ or to provide sweeping legal authorization for early intersex surgeries.⁷⁷ Increasing debate and scrutiny surrounding students' sex characteristics—including scrutiny mandated by new state laws restricting school sports participation—may increase the risk of harassment for intersex students.⁷⁸ The Department of Justice's *Title IX Legal Manual* recognizes that Title IX's prohibition on sex discrimination includes discrimination based

⁶⁸ Melanie Blackless *et al.*, *How Sexually Dimorphic Are We? Review and Synthesis*, 12(2) AM. J. HUM. BIOL. 151-166 (2000), <https://pubmed.ncbi.nlm.nih.gov/11534012>.

⁶⁹ Amy Rosenwohl-Mack *et al.*, *A national study on the physical and mental health of intersex adults in the U.S.*, 5(10) PLOS ONE e0240088 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7546494>; Laetitia Zeeman & Kay Aranda, *A Systematic Review of the Health and Healthcare Inequalities for People with Intersex Variance*, 17(18) INT. J. ENVIRON. RES. PUBLIC HEALTH 6533 (2020), <https://pubmed.ncbi.nlm.nih.gov/32911732>; NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS (2020) [hereinafter LGBTQI+ WELL-BEING].

⁷⁰ *Id.* at 53, 67.

⁷¹ *Id.* at 401-02.

⁷² National Academies, *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health* (accessed Dec. 10, 2021), <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health>.

⁷³ LGBTQI+ WELL-BEING, *supra* note 69, at 380.

⁷⁴ 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>.

⁷⁵ Mandy Henningham & Tiffany Jones, *Intersex students, sex-based relational learning & isolation*, SEX EDUC. (2021), DOI: 10.1080/14681811.2021.1873123; Rosenwohl-Mack, *supra* note 69; Tiffany Jones, *The needs of students with intersex variations*, 16 SEX EDUC. 602 (2016), https://www.researchgate.net/publication/297891165_The_needs_of_students_with_intersex_variations.

⁷⁶ See, e.g., 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). Other proposals—none of them enacted to date—could also sweep intersex youth into mandated reporting of students' "gender nonconformity." See, e.g., N.C. SB 514 (2021); Iowa IA HF2272 (2020); Ohio HB 658 (2018).

⁷⁷ See, e.g., Ark. Acts 626 (2021). Texas officials have also opined that genital or sterilizing surgeries on young intersex children "may be warranted." Texas Department of Family and Protective Services, Letter of Commissioner Jaime Masters to Governor Greg Abbott (Aug. 11, 2011), https://gov.texas.gov/uploads/files/press/Response_to_August_6_2021_OOG_Letter_08.11.2021.pdf.

⁷⁸ 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).

on sex characteristics, including intersex traits.⁷⁹ The Department has also recognized the importance of protecting and supporting intersex students in a recent Title IX fact sheet,⁸⁰ and in its grant priorities.⁸¹

Accordingly, the Department should seek to collect data on harassment and bullying based on sex characteristics, including harassment targeting intersex students. First, we recommend the Department adopt the following definition of “harassment or bullying on the basis of sex characteristics” in Data Groups 1034 and 1035 and in the Data Categories “Civil Rights Category (Allegations)” and “Civil Rights Category (Student Counts)”:

Harassment or bullying on the basis of sex characteristics – Sex characteristics harassment or bullying refers to harmful conduct on the basis of actual or perceived variations in sex characteristics (including, but not limited, to harassment because a student has or is perceived to have variations in sex characteristics, is or is perceived to be intersex, or is associated with such an individual). Sex characteristics include sexual or reproductive anatomy, chromosomal patterns, hormone function, secondary sex characteristics, or any combination thereof. Variations in sex characteristics, sometimes called intersex traits, include any combination of sex characteristics that may be perceived as not fitting typical, binary definitions of male or female in terms of development, appearance, or function. Harassment or bullying may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that is physically threatening, harmful, or humiliating. Harassment or bullying includes conduct carried out by school employees, other students, or third parties.

Second, we recommend that, as with sexual orientation and gender identity, the Department include a separate permitted value for allegations of harassment and bullying on the basis of sex characteristics in the Data Categories “Civil Rights Category (Allegations)” and “Civil Rights Category (Student Counts).” A separate permitted value is justified by evidence of harassment and bullying against intersex students, together with increasing visibility of this population, and the potential for increased scrutiny of student’s sex characteristics, including intersex traits, in light of recently enacted and proposed state legislation.

Because these changes would be made to existing questions, we do not anticipate significant burdens on jurisdictions to respond to it. Nevertheless, because it will be new for some jurisdictions, the Department may wish to consider giving SEAs and LEAs notice that it will begin in the 2022-23 school year. In the meantime, the Department should collect information for the 2021-22 school year on whether jurisdictions have policies that enumerate harassment and bullying based on sex characteristics.

F. The Department should use a consistent method for collecting data on allegations of harassment, disciplined harassers, and harassment victims.

The Department should require schools to report how many students are disciplined and how many students are victims of harassment based on sexual orientation, gender identity, or religion—just as it already requires schools to report how many allegations they receive of harassment based on sexual orientation,

⁷⁹ U.S. 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”).

⁸⁰ U.S. Department of Education, Office for Civil Rights, *Supporting Intersex Students* (Oct. 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-intersex-202110.pdf>.

⁸¹ U.S. Department of Education, Secretary’s Supplemental Priorities and Definitions for Discretionary Grants Programs, 86 FR 70612, 70460 (Dec. 10, 2021).

gender identity, or religion. The Department's current data collection method is inconsistent: When reporting data on disciplined *harassers* (Data Group 934) and harassment *victims* (Data Group 935), schools may only report whether the harassment was based on sex, race/color/national origin, or disability (using the "Civil Rights Category (Student Counts)" Data Category). But when reporting data on harassment *allegations* (Data Group 933), schools may report whether the harassment was based on sex, race/color/national origin, disability, *sexual orientation, gender identity, or religion* (using the "Civil Rights Category (Allegations)" Data Category). The Department can correct this inconsistency by retiring the "Civil Rights Category (Student Counts)" Data Category and switching to the "Civil Rights Category (Allegations)" Data Category for Data Groups 934 and 935.

We note that this is unlikely to create any privacy concerns, as schools are already being required to report the number of harassment allegations based on sexual orientation, gender identity, and religion. Furthermore, the CRDC already instructs schools to look to "likely motives, and not the actual status of the alleged victims" when reporting on disciplined harassers and harassment victims.⁸²

G. The Department should make clear that affirming the identities of LGBTQI+ and pregnant or parenting students is not religious harassment.

NWLC supports the Department's continued efforts to collect data on harassment or bullying based on religion. Hate-based incidents have been on the rise—especially against students who are Muslim⁸³ or Jewish⁸⁴ or who are perceived to be Muslim, such as Sikh students.⁸⁵ Nonetheless, NWLC is wary of administrators coding nondiscriminatory conduct that affirms LGBTQI+ students as religious-based harassment or bullying.⁸⁶ Therefore, NWLC recommends that the Department make clear that disciplining students for harassing other students for their actual or perceived sexual orientation, gender identity, or gender expression is not religious harassment. It should also be made clear that requiring staff and students to avoid harassment of gender-nonconforming students or pregnant students is not religious harassment. Similarly, allowing transgender students access to programs and facilities that match their gender identity is not religious harassment, and should not be coded as such.

H. The Department should provide additional guidance to schools on reporting and analyzing data regarding LGBTQI+ students.

Collecting sex data using a nonbinary sex category is necessary, appropriate, and feasible, as demonstrated by the growing number of LEAs collecting this data. NWLC is not aware of any major obstacles LEAs have faced to collecting this data. However, several steps are important to ensure effective data collection, including:

- Ensuring relevant IT systems include a data field for the nonbinary category. Vendors are increasingly

⁸² CRDC Data Groups 2021-22, *supra* note 36, at A2-47, A2-49.

⁸³ *E.g.*, Ali Tadayon, *Report: California still sees widespread Islamophobia in schools*, EDSOURCE (Nov. 2, 2021), <https://edsources.org/updates/report-california-still-sees-widespread-islamophobia-in-schools>.

⁸⁴ *E.g.*, Maria Cartaya, *Georgia school board investigating after swastikas and an anti-Semitic message were painted in a high school bathroom*, CNN (Sept. 14, 2021), <https://www.cnn.com/2021/09/14/us/georgia-high-school-anti-semitic-graffiti-investigation/index.html>.

⁸⁵ Narjas Zatat, *How Sikhs face discrimination and get mistaken for Muslims*, INDY100 (May 3, 2018), <https://www.indy100.com/news/sikhs-face-discrimination-get-mistaken-for-muslims-hardayal-singh-united-sikhs-8332796>.

⁸⁶ Kevin Reagan, *Chandler teacher fired for religious, anti-gay actions*, EAST VALLEY TRIB. (Oct. 13, 2019), https://www.eastvalleytribune.com/news/chandler-teacher-fired-for-religious-anti-gay-actions/article_fcd97f9e-ec79-11e9-a530-339241381d13.html.

making this available to LEAs, either out-of-the-box or optional modifications.

- Providing appropriate communications and training to ensure administrators, teachers, staff, families, and students are aware of the option to record a student's sex as nonbinary, and that this option is voluntary, confidential, need not be based on state-issued identification documents, and does not determine a student's access to any school opportunity.
- Providing appropriate context about the likely limitations of data using this new category when reporting and disseminating it.

NWLC supports the proposed definition for nonbinary but recommends adding additional language to clarify that LEAs may sometimes use different terms or abbreviations for this category in their own record systems. For example, some SEAs and LEAs use descriptors such as "X" or "other" to record sex data for nonbinary students.⁸⁷ The use of "X" is similar to practices of many motor vehicle and vital records agencies, and the recently adopted policy of the US State Department for US passports, all of which abbreviate the sex category inclusive of intersex people as "X." The Department should clarify that LEAs may use "X" or other descriptors for other recordkeeping purposes, but in any event should use this category for all students who do not identify exclusively as male or female.

NWLC encourages the Department to report disaggregated and cross-tabulated data on the nonbinary sex category, while providing appropriate context for the potential limitations of data using this new category. We make the following recommendations for reporting this data:

- First, to the extent that privacy protections may be an obstacle to reporting nonbinary student data at the school or (in the case of some smaller districts) the district level, the Department should make state-level "expanded" sex data readily available.
- Second, to provide context for this data and to better understand trends in local practices, the Department should make data readily available on the number of LEAs reporting that they collect nonbinary data (Directional Indicator 22: Nonbinary student indicator, p. A4-23).
- Third, the Department should make clear in presenting this data that it includes only nonbinary students, and thus excludes transgender and intersex girls and boys and cannot be taken to represent all transgender or intersex students.
- Fourth, the Department should make clear in reporting this data that it likely represents an undercount, because nonbinary students may not be recorded as such for a variety of reasons. These reasons may include that a student is not open about their nonbinary identity; faces administrative or personal barriers to updating school records or is unaware of the option to do so; or chooses not to do so out of concern for possible discrimination or because of lack of parental support. Moreover, many LEAs may report "zero" nonbinary students—particularly in initial years—simply because they have not yet implemented such a category in their IT systems or have not fully informed the school community of this option.

For all these reasons, the nonbinary sex category is particularly likely to produce undercounts in its initial years, even among LEAs willing to report this data. While this data will nevertheless provide a useful lower bound for estimating the nonbinary student population, and for identifying trends in measures disaggregated by sex, the Department should make clear these limitations when reporting this data.

⁸⁷ See, e.g., Pennsylvania Information Management System User Manual, Vol. 1 (2021), <https://www.education.pa.gov/Documents/Teachers-Administrators/PIMS/PIMS%20Manuals/2021-2022%20PIMS%20Manual%20Vol%201.pdf>; Washington Office of Superintendent of Public Education, Comprehensive Education Data and Research System (CEDARS) Data Manual (2020), <https://www.k12.wa.us/sites/default/files/public/cedars/pubdocs/2019-20CEDARSDataManual.pdf>.

IV. The Department Should Expand Data Collection on Discipline.

A. The Department should include the “Racial Ethnic” data category in all school discipline data groups.

NWLC seeks to ensure safe, healthy, and inclusive learning environments for all students, especially girls of color, LGBTQI+ students, and pregnant or parenting students, who are often denied access to educational opportunities due to sexist and racist school discipline policies. Over the years, NWLC has grown increasingly concerned about disciplinary policies, practices, and allocation of resources that school districts have used to marginalize and criminalize girls of color in (and out of) the classroom. Black girls, in particular, bear both the statistical and physical brunt of such discriminatory discipline.⁸⁸ However, disaggregated and cross-tabulated data is not easily accessible on the Department’s CRDC website. Therefore, stakeholders are less able to see that Black girls are overrepresented in all aspects of school discipline and less able to take corrective action that improves learning environments for Black girls and all marginalized students.

The CRDC has revealed time and again that educators discipline girls of color, especially Black girls, more harshly than white girls. For example, the disproportionality in out-of-school suspensions between Black girls and white girls (4:1)⁸⁹ is much higher than the disproportionality in out-of-school suspensions between Black boys and white boys (3:1).⁹⁰ Compared to white girls, Black girls are over four times more likely to receive out-of-school suspensions; four times more likely to be expelled; and over five times more likely to be transferred to another school for disciplinary reasons.⁹¹ Unfortunately, these disparities begin early, when it is developmentally inappropriate and particularly cruel to exclude students from school. For example, Black girls make up 20% of girls enrolled in pre-school nationally but 53% of out-of-school suspensions for pre-school girls.⁹² As with exclusionary discipline, Black girls are disproportionately impacted by police presence in schools. In the 2017-18 school year, Black girls were three times more likely to be referred to law enforcement and four times more likely to be arrested at school than white girls.⁹³

Nor are Black girls the only girls facing barriers to education because of discriminatory discipline. Indigenous girls are also disproportionately impacted by discriminatory practices in school discipline. For example, Indigenous girls were two times more likely to be suspended and two times more likely to be expelled than white girls in the 2017-18 school year.⁹⁴

⁸⁸ Studies show that combined sex and race stereotypes lead school educators and administrators to “adultify” Black girls, perceiving them as loud, defiant, sexually provocative, and less innocent and less in need of care than their white counterparts. This gendered racial bias combined with vague school policies that allow for broad administrator discretion in imposing discipline lead school staff to punish Black girls more often and more harshly for normal, childlike behaviors, even though they are not more likely than other students to misbehave. Adultification bias applied in the education context has meant that Black girls are overrepresented in every aspect of the school discipline continuum, leading to lost instruction time, school pushout, and long-term economic consequences. See Nat’l Women’s Law Ctr. & The Educ. Trust, “...and they cared”: *How to Create Better, Safer Learning Environments for Girls of Color* 1-2 (2020), https://nwlc.org/wp-content/uploads/2020/08/FINAL_NWLC_EDTrust_Guide.pdf [hereinafter “...and they cared”]; see also *Girlhood Interrupted*, *supra* note 5959, at 1.

⁸⁹ Georgetown Ctr. for Poverty & Inequality, *Data Snapshot: 2017-2018 National Data on School Discipline by Race and Gender* (2020) [hereinafter *Georgetown Data Snapshot*], <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/12/National-Data-on-School-Discipline-by-Race-and-Gender.pdf>.

⁹⁰ This data was analyzed from the Center for Civil Rights Remedies supplemental Excel workbook on suspensions, released with the 2021 report, *Disabling Inequity: The Urgent Need for Race-Conscious Resource Remedies*. See Ctr. for Civil Rights Remedies, *New Reports Released!*, SCHOOLDISCIPLINEDATA.ORG, <http://www.schooldisciplinedata.org/ccrr/index.php> (last visited July 23, 2021).

⁹¹ “...and they cared”, *supra* note 88, at 2; see also *Georgetown Data Snapshot*, *supra* note 89.

⁹² “...and they cared”, *supra* note 88, at 2.

⁹³ *Georgetown Data Snapshot*, *supra* note 89.

⁹⁴ *Id.*

Girls of color and other historically marginalized students are also more likely to be blamed or punished when they report their own sexual assault or harassment to their schools. (See **Section II.E** for more recommendations on data regarding discipline of student survivors.) For example, NWLC has advocated on behalf of LGBTQI+ students who experience discriminatory discipline when biases cause educators to retaliate against LGBTQI+ students who report instances of sexual assault or harassment, based on stereotypes that they are “hypersexual” or “deviant.” Disabled students, too, are less likely to be believed and more likely to be punished because of stereotypes about disabled people being less credible⁹⁵ and because they may have greater difficulty describing or communicating about the harassment they experienced, particularly if they have a cognitive or developmental disability.⁹⁶

In short, girls of color, LGBTQI+ students, girls with disabilities, and other students living at the intersections of multiple, marginalized identities are experiencing an educational crisis because of discriminatory school discipline, as well as school environments that prioritize punitive responses to normal youth behavior over restorative practices and supports that address students’ social, emotional, academic, and health needs. However, it is incredibly difficult for members of the public to identify and assess these disparities for marginalized girls based on how discipline data is currently reported and published. To ensure all students feel safe, supported, and included in their schools, the Department must make it as easy as possible for the public to read the civil rights data to understand the experiences of these students and to determine what supports particular groups of students need based on their intersecting identities. Therefore, the Department should include the “Racial Ethnic” data category in all school discipline data groups to provide the public with easier access to a comprehensive scope of disaggregated and cross-tabulated discipline data. Disaggregating and cross-tabulating all categories of discipline data by race will also help OCR identify possible intersectional civil rights violations for particular populations of students, such as Black girls.

NWLC urges the Department to add the “Racial Ethnic” data category to all below category sets of the following data groups:

- **Corporal punishment instances table (Data Group 917)**
 - Category Set A = Disability Status (Corporal Punishment)
- **Discipline of preschool children table (Data Group 921)**
 - Category Set B = discipline method, disability status (IDEA), & sex
 - Category Set C = discipline method, EL status (only), & sex
 - Category Set D = discipline method, disability status (Section 504 only), & sex
- **Discipline of students with disabilities (Data Group 922)**
 - Category Set B = discipline method, disability status (Section 504 only), & sex/sex expanded
 - Category Set C = discipline method, EL status, & sex/sex expanded
- **Discipline of students without disabilities (Data Group 923)**
 - Category Set B = discipline method, EL status, & sex/sex expanded
- **Restraint or seclusion for IDEA students table (Data Group 959)**
 - Category Set B = action (restraint or seclusion), EL status, & sex/sex expanded
- **Restraint or seclusion for non-IDEA students table (Data Group 960)**
 - Category Set B = action (restraint or seclusion), disability status (Section 504 only), & sex/sex expanded

⁹⁵ The Arc, *People with Intellectual Disabilities and Sexual Violence 2* (Mar. 2011), <https://www.thearc.org/document.doc?id=3657>.

⁹⁶ E.g., Nat’l Inst. of Justice, *Examining Criminal Justice Responses to and Help-Seeking Patterns of Sexual Violence Survivors with Disabilities* 11, 14-15 (2016), <https://www.nij.gov/topics/crime/rape-sexual-violence/Pages/challenges-facing-sexual-assault-survivors-with-disabilities.aspx>.

- Category Set C = action (restraint or seclusion), EL status, & sex/sex expanded
- **School days missed due to out-of-school suspensions table (Data Group 966)**
 - Category Set B = disability status (IDEA), & sex/sex expanded
 - Category Set C = disability status (Section 504 only), & sex/sex expanded
 - Category Set D = EL status (only), & sex/sex expanded
- **Suspension instances (Data Group 1007)**
 - Category Set A = Disability Status (specific)
- **Suspension instances – preschool (Data Group 1008)**
 - Category Set A = Preschool (Corporal Punishment and Suspension)
 - Category Set B = Preschool (Suspension)
- **Corporal punishment instances – preschool (Data Group 1010)**
 - Category Set A = Preschool (Corporal Punishment and Suspension)
 - Category Set B = Preschool (Corporal Punishment)

Alternatively, the Department might consider combining all category sets within each data group to create a “master” category set for each data group. For example, the “discipline of preschool children table” (Data Group 921) currently consists of four category sets: (A) discipline method (preschool), racial ethnic, and sex; (B) discipline method, disability status (IDEA), and sex; (C) discipline method, EL status (only), and sex; and (D) discipline method, disability status (Section 504 only), and sex. Instead of collecting and reporting this data into four category sets, the Department could collect and report this data as one “master” category set, which would include all relevant data categories: discipline method (preschool), discipline method, racial ethnic, sex, disability status (IDEA), disability status (504 only), and EL status. Creating a “master” category set would not increase the burden on schools because they are already collecting and reporting the relevant category group data in the current category set structure. This option would only change the format by which the CRDC reports the data.

If the Department, instead, chooses to keep the current category set structure but adds the “Racial Ethnic” data category to each category set (as proposed above), this option should also only pose minimal burden, as the Department already follows this practice by requiring most discipline categories to be disaggregated by sex. Regardless of which formatting option the Department selects, the Department should also expand the data categories to include native language, socioeconomic status, pregnancy or parenting status, foster care status, homeless status, and national origin (as is recommended in **Section I.C**).

The value of this disaggregation and cross-tabulation of school discipline data far outweighs the negligible burden of changing the format of how it is reported. Although all members of the public are afforded access to the public use files, all members of the public are not experts in research and data analysis. For a general member of the public to currently understand how specific groups of students, such as Black girls served under the IDEA, are being impacted by school discipline, that person would have to use a complicated process, manually combining public use data files on enrollment, race, sex, and disability. Instead, if the CRDC discipline data is reported in a “master” category set format, with data categories fully disaggregated and cross-tabulated, members of the public would have easier and more meaningful access to the data.

B. The Department should make robust changes to all data collection relating to law enforcement in schools, criminal offenses, and alternative and justice facility placements.

This section outlines NWLC’s recommendations for what changes, updates, and other measures the Department should take with respect to the involvement of law enforcement in schools and other elements of

school policing. Additional recommendations relating to law enforcement can be found in **Section IV.C.2** (collecting school-related arrests and law enforcement data in preschools) and **Section IV.D.2** (collecting data on chemical and irritant restraints used by both sworn and non-sworn law enforcement officers).

1. The Department should expand data collection on assaults by school-based law enforcement.

The presence of school-based law enforcement is harmful to the academic, social, and emotional wellbeing of students—especially girls of color, students with disabilities, and LGBTQI+ students. 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. In addition to pepper spray and chemical restraints, school-based law enforcement officers may also carry firearms and other weapons, such as conducted electrical weapons (i.e., tasers), batons, rubber bullets, and “bean-bag rounds.” Armed with these weapons, it has become all too common for school-based law enforcement officers to carry out physical assaults on students, especially Black girls and other girls of color, in direct violation of their civil rights. From our work with Black girls and from accounts the nation has repeatedly witnessed in the media, we know that Black girls have frequently been targets of physical and sexual harassment and abuse at the hands of school resource officers (SROs) and other school-based law enforcement.⁹⁷ For example, 2021 began with an SRO body-slammng Taylor Bracey, a 16-year-old Black girl, onto a concrete floor and knocking her unconscious.⁹⁸ Mere days later, an SRO tased a fifteen-year-old Black girl at a different high school in the same state.⁹⁹ Unfortunately, these violent incidents are not isolated, nor are they limited to Black girls. In September 2021, a non-sworn school safety officer shot at a fleeing teen, Manuela “Mona” Rodriguez, who had complied with the officer’s directives to end a fight and was leaving the scene unarmed.¹⁰⁰ The shot left Mona without any brain function, and her family chose to take the 18-year-old off life support a few days later, leaving her five-month-old without a mother.¹⁰¹ These are only the incidents captured on viral video.

In recent months, we have also heard from partners that have held listening sessions with Black girls who report being sexually harassed or abused by SROs and who feel like they have no means of reporting the abuse because of their schools’ allegiances to school police. When schools fail to provide and publicize reporting mechanisms for such abuse, they prevent the collection and publication of data on SRO misconduct, provide no accountability for such misconduct, and leave students without meaningful avenues for relief and healing.

⁹⁷ See, e.g., Lauren de Valle, *Michigan School Resource Office Sentenced to 1 Year in Jail for Sexually Assaulting 3 High School Students*, CNN (Oct. 3 2019), <https://www.cnn.com/2019/10/03/us/michigan-officer-sentenced-sexual-assault/index.html>; Tom Jones, *Video Shows School Officer Slam Girl into Wall While Breaking Up Fight*, WSB-TV (Aug. 20, 2019), <https://www.wsbtv.com/news/local/newton-county/video-shows-school-officer-slam-girl-into-wall-while-breaking-up-fight/977763035>; Tim Stelloh & Tracy Connor, *Video Shows Cop Body-Slamming High School Girl in S.C. Classroom*, NBC NEWS (Oct. 26, 2015), <https://www.nbcnews.com/news/us-news/video-appears-show-cop-body-slamming-student-s-c-classroom-n451896>.

⁹⁸ Meredith Deliso, *Florida Teen Body-slammed by School Resource Officer 'Traumatized,' Family Says*, ABC NEWS (Jan. 31, 2021), <https://abc7ny.com/florida-teen-body-slammed-school-resource-officer-slams-girl-police-slam-taylor-bracey/10183813>.

⁹⁹ Adam Poulisse & Q McCray, *School Resource Officer Who Used Taser on Eustis High School Student Not Facing Discipline, Student Arrested*, WFTV9 ABC (Jan. 28, 2021), <https://www.wftv.com/news/local/lake-county/school-resource-officer-who-used-taser-eustis-high-school-student-not-facing-discipline-student-arrested/3D2JJI64Q5FRHOE5S4DACWUZ2M>; see also Strategies for Youth, Catch & Stun, *The Use and Abuse of Conducted Electrical Weapons (CEWS) on Children and Youth 17* (2022), https://strategiesforyouth.org/sitefiles/wp-content/uploads/2022/01/SFY_Catch-and-Stun_fnl-rev_web.pdf (citing instances for which children have been tased by school police since 2011, including for “talking back,” getting into fights, “mouthing off,” “defiance,” and running away from the principal’s office).

¹⁰⁰ Jonathan Edwards, *A school safety officer shot a fleeing teen. He has been fired and police have opened a homicide investigation.*, WASH. POST (Oct. 8, 2021), <https://www.washingtonpost.com/nation/2021/10/08/long-beach-schools-officer-shooting>.

¹⁰¹ Jax Miller, *Teen Taken Off Life Support After School Safety Officer Shot Her, Police Open Homicide Investigation*, OXYGEN (Oct. 11, 2021), <https://www.oxygen.com/crime-news/manuela-mona-rodriguez-dies-after-allegedly-being-shot-by-eddie-f-gonzalez>.

In an era when police presence on school campuses is the unfortunate norm, it is imperative that OCR collects data on police and security guard assaults on students, including assaults with and without weapons of various types.¹⁰² At a minimum, the CRDC should include a full table of elements related to actions against students taken by sworn law enforcement officers, non-sworn law enforcement officers, and other school security that includes incidents of the use of chemical or irritant restraints, incidents of the use of firearms, incidents of use of other “less-lethal” weapons, incidents of physical assault without a weapon, and incidents of sexual assault (see **Section II.B** for further recommendations on staff-on-student harassment/bullying).

Collecting accurate and complete data on discipline data elements will provide students, families, educators, advocates, and policymakers the information they need to address disparities, ensure equal educational opportunity, and comply with nondiscrimination laws.

2. The Department should update its definitions and other aspects related to the data elements for “School-related arrest” and “Referral to law enforcement.”

The CRDC data collection on school-related arrests and referrals to law enforcement is vital to the protection of students’ civil rights. Data on school-related arrests and referrals to law enforcement in past school years reveals that the policing of public school students is common and widespread. However, a substantial (and growing) body of quantitative research, qualitative research, and student and educator advocacy shows that school policing is extremely harmful, especially for the most marginalized students. NWLC has a number of recommendations for the school-related arrests and law enforcement referrals definitions and data elements.

First, as outlined in **Section I.D**, a critical flaw with the CRDC is the widespread failure by districts to report (or report accurately) data on school policing, despite the fact that civil rights enforcement related to arrests and referrals depends on the accuracy and transparency of this data. Although no self-reported survey can be completely accurate, the Department can mitigate a substantial amount of mis- or non-reporting by providing stronger guidance, training, technical assistance, and follow-up relating to data reporting on the school-related arrest and law enforcement referral elements. With this revamped oversight, the Department should pay particular attention to data on citations and ticketing. Although citations and ticketing were added to the definition of “referrals to law enforcement” in the 2013-14 data collection, advocates remain concerned that LEAs are not accurately gathering or reporting data on citations and ticketing of students. Schools have a responsibility to accurately collect and report *all* arrest and referral data related to students. At minimum, the Department should ensure schools are collecting all instances of ticketing, citations, other referrals, and arrests of which they are aware, which at minimum should include those that occur on school grounds, occur in the presence of a school employee, and/or are carried out by police officers who are employed by the school district. NWLC acknowledges the complexities and potential harms of data sharing between school districts and police, particularly when the police are not employed by the school district and when certain incidents, such as arrests and citations, occur at off-campus school activities and/or out of the direct control of school officials. NWLC strongly recommends the Department host additional listening sessions with a wide range of stakeholders, especially communities directly impacted by these issues, to develop guidance on collecting such off-campus policing data from unaffiliated police departments.

Second, the Department should add threat assessment meetings involving a law enforcement officer

¹⁰² In 2017-18, “36 percent of elementary schools, 67.6 percent of middle schools, and 72 percent of high schools reported having sworn officers on campus routinely carrying a firearm.” (Kristin Henning, *Cops at the Schoolyard Gate*, Vox (July 28, 2021)).

to the definition of “referrals to law enforcement” and add a separate data element that indicates whether the “referral” occurred as part of a threat assessment process. Threat assessments involving a law enforcement officer are an increasingly common practice, and Black students and students with disabilities are especially targeted for referral for threat assessment. See **Section IV.B.3** for additional recommendations relating to threat assessments.

Third, the Department should clarify that referrals to non-sworn law enforcement officers are referrals to law enforcement in the referral element. Non-sworn law enforcement officers may carry firearms or other weapons and may issue tickets and citations, meaning they have the power to harm students and otherwise impact their civil rights. Therefore, the CRDC should include all referrals to non-sworn law enforcement officers in its definition, including citations and tickets issued by non-sworn law enforcement officers.

Finally, the CRDC should require LEAs to report *both* the instances of referrals and arrests *and* the unduplicated count of students subjected to referrals and arrests. Reporting instances of referral and arrest in addition to the unduplicated count of students subjected to referrals and arrests would provide greater clarity to the Department and stakeholders regarding the frequency of these forms of discipline. Further, reporting instances of referral and arrest would add little additional data reporting burden for LEAs because referrals and arrests are usually reported as incidents in state data systems.

3. The Department should update and provide additional guidance on school security staff.

The CRDC currently does not collect an accurate count of law enforcement officers assigned to patrol public schools. This is evident in the 2017-18 CRDC, where the data file indicated only 143 law enforcement officers assigned to schools in Los Angeles Unified School District, but the district’s own website showed a total of 410 sworn law enforcement officers and 101 non-sworn school safety officers employed by the Los Angeles School Police Department.¹⁰³ To ensure accurate counting of “Security Staff Type,” the Department should revise the CRDC to include a count of the various types of security and law enforcement being assigned, stationed, or placed in schools. This revision should include but not be limited to private security personnel, correctional officers, law enforcement officers and personnel, and security guards.

The Department should also provide updated and more comprehensive definitions and instructions for the staffing elements related to security and law enforcement. At minimum, these changes should include:

- Adding “Non-sworn¹⁰⁴ Law Enforcement Officer” to the Security Staff Type data category to capture law enforcement officers who have not sworn to uphold the constitution and may not make lawful arrests, but who otherwise hold limited law enforcement powers and responsibilities as part of their regular duties. These law enforcement powers and responsibilities may include carrying firearms or less-lethal weapons and the power to detain, issue a citation, and perform custodial investigation. Unsworn law enforcement officers are a growing presence on school campuses, but they are not currently being accounted for in the CRDC.
- Updating the special instructions to clarify that the security staffing elements include “Any individual who is employed by, contracted to work in, or assigned to work with a local educational agency,

¹⁰³ Amir Whitaker et al., *No Police in Schools: A Vision for Safe and Supportive Schools in California* 37 (2021), https://www.aclusocal.org/sites/default/files/field_documents/no_police_in_schools_-_report_-_aclu_-_082421.pdf.

¹⁰⁴ Other partners of NWLC and in the civil rights community may use “unsworn” instead of “non-sworn.” NWLC views these terms as interchangeable and is open to whichever the Department selects, as long as the description provided for this role remains the same.

system of vocational education, or other school system; in a program that serves children who receive federal funding; or in an elementary school or secondary school that is not a public school that enrolls a student who receives special education and related services under IDEA.”

- Updating the special instructions under the Security staff (FTE) table (Data Group 975) to clarify that all security staff employed by, contracted to work in, or assigned to work in an LEA must have the full amount of their working hours in the LEA allocated across schools and reported to the CRDC in FTEs. Currently, the Security Staff instructions ask school staff to report the “Number of FTE sworn law enforcement officers” who were “present at the school at least once a week to perform his/her duties.”¹⁰⁵ However, law enforcement officers are not typically school staff, and their hours are unlikely to be fully allocated to schools under the current instructions.

NWLC does not support the presence of law enforcement officers in schools and school events. Schools must end the use of staffing and practices that criminalize students and instead provide students with social, emotional, and academic supports. It is incumbent upon the Department to monitor the presence and activities of these staffing types and to hold them accountable for violating students’ civil rights.

4. *The Department should expand data collection on threat assessments.*

Threat assessments apply a law enforcement and terrorism frame to addressing student behavior in schools and ultimately tend to criminalize students, further harming marginalized communities, through discriminatory referrals to the threat assessment process, assessments that rely on and promote harmful stereotypes, and violations of students’ privacy rights. The Department should require schools to collect and report disaggregated and cross-tabulated data on students who are subject to threat assessments as well as on the disciplinary outcomes of these evaluations, in order to provide the necessary insight for the Department and stakeholders, including families and advocates, to identify and address racial and other disparities. Students subjected to threat assessments should also be counted among students referred to law enforcement (see recommendation in **Section IV.B.2**), since law enforcement, at minimum, are involved in the decision-making process about a student’s misconduct in school. This data is particularly critical where police in schools have the authority to arrest, “Baker Act”¹⁰⁶ the student, or trigger deportation and/or probation decisions.

5. *The Department should retire the “Offenses” table from the CRDC.*

The Offenses table (Data Group 952) solicits data that is not relevant to the enforcement of civil rights, promotes the criminalization of children and youth, and is susceptible to misuse. Incidents recorded under the Offenses table need not be connected to any specific disciplinary outcomes nor involve students. The CRDC is not the appropriate place to collect such criminal offense data that relates neither to any protected class nor to the enforcement and protection of civil rights. Even if the Offenses table related to civil rights enforcement, it remains problematic. The Offenses table can lead to the criminalization of students, particularly when data suggests increased incidents of crime (even if not related to the school), and school policies are changed to

¹⁰⁵ U.S. Dep’t of Educ., Office for Civil Rights, 2020-21 Civil Rights Data Collection – School Form 52-53, <https://www2.ed.gov/about/offices/list/ocr/docs/2020-21-crdc-school-form.pdf>.

¹⁰⁶ The Baker Act is a Florida statute that allows for detainment and the voluntary and involuntary admission of individuals for psychiatric care. The Baker Act requires that a person be afforded due process rights, particularly before involuntary admission; however, schools and police have inappropriately used this statute in recent years to detain and commit children, as a form of student control and discipline. In a recent report, the Southern Poverty Law Center revealed that children have had the Baker Act used against them more than 37,000 times each year. See Southern Poverty Law Ctr., *Costly and Cruel: How Misuse of the Baker Act Harms 37,000 Florida Children Each Year* (2021), https://www.splcenter.org/sites/default/files/com_special_report_baker_act_costly_and_cruel.pdf.

increase police presence or other school hardening measures that ultimately treat students as criminals rather than keep them safe.

6. The Department should expand data collection on alternative schools and justice facility educational programs.

Regarding alternative schools, the Department currently only collects information on the specific group of students whose needs the alternative school is designed to meet, such as whether the alternative school is for students with academic difficulties, students with discipline problems, or students with both academic difficulties and discipline problems (Data Group 914). However, students of color, students with disabilities, and pregnant students are disproportionately removed from their regular classroom setting and referred to alternative schools. To ensure that stakeholders and the Department can identify and address these disparities, the Department should add a new data group to the CRDC that would require schools to collect demographic data on student enrollment at alternative schools, according to our disaggregation and cross-tabulation recommendations in **Section I.C.**

Similarly, the Department should expand the “Justice facility educational participants table” (Data Group 941) to also include disaggregated and cross-tabulated enrollment data, according to our recommendations in **Section I.C.** Currently, the Department only collects data on the duration of a student’s time at the justice facility, but this information alone does not capture whether there are disproportionalities in certain student groups that end up in the justice facilities. This lack of information hinders the Department from ensuring that school police are not contributing to this form of student exclusion from school and prevents advocates from working with schools and policymakers to develop diversion programs that ensure students involved with the juvenile legal system can quickly return to school.

C. The Department should further strengthen data collection on preschool discipline.

1. The Department should collect data on in-school suspensions of preschool children.

NWLC commends the Department for restoring the “discipline of preschool children table” data group and replacing the “one or more out-of-school suspension” data element with both a “one out-of-school suspension” and “more than one out-of-school suspension” data element. The data collected by the CRDC are indispensable in understanding the types of programs currently serving children and the demographics of children enrolled in preschool, as well as exposing harmful, overly punitive discipline practices for our youngest learners through the data collected on preschool suspension and expulsion.

CRDC data has demonstrated that discriminatory policies and practices in school discipline start before children enter kindergarten. For example, the 2015-16 CRDC showed that although Black girls make up 20% of girls enrolled in prekindergarten (pre-K), they are 50% of girls suspended demonstrating the need for pre-K interventions to stop school pushout.¹⁰⁷ Even more troubling, these suspensions are often given for behavior that is common among children age five and younger, such as refusing to wear shoes¹⁰⁸ or having

¹⁰⁷ Kayla Patrick & Karen Schulman, *Too Many Black Girls in Preschool Disciplined and Pushed Out*, NWLC.ORG (June 22, 2016), <https://nwlc.org/blog/too-many-black-girls-in-preschool-disciplined-and-pushed-out>; Devin Anderson, *Disrupt the Preschool-to-Prison-Pipeline with Equitable Practices*, NWLC.ORG (Nov. 17, 2017), <https://nwlc.org/blog/disrupt-the-preschool-to-prison-pipeline-with-equitable-practices>.

¹⁰⁸ Donna St. George, *Suspended from school in early grades*, WASH. POST (Feb. 12, 2012), https://www.washingtonpost.com/local/education/suspended-from-school-in-early-grades/2012/02/02/gIQA3H0X9Q_story.html.

“too many” potty accidents.¹⁰⁹ Educational programs, which often serve as in loco parentis for students that they enroll, have a duty to foster students’ social-emotional development as well as nurture a lifelong love of learning.

While the number of students receiving one out-of-school suspension (OSS) highlights the breadth of overly harsh discipline policies, the number of students receiving multiple OSSs highlights the number of students who have been given a punishment that has already been proven ineffective. It also highlights the number of students who are likely to miss more days of school because of exclusionary discipline. While there are racial disparities in these data categories, the percentage of students receiving more than one OSS is lower than the number of students receiving just one OSS in preschool. It is critical that the CRDC keeps these two categories separate so that the Department and stakeholders can monitor whether this trend reverses or reveals that the number of students receiving multiple suspensions equals or surpasses the number of students receiving one OSS. For these reasons, NWLC strongly approves the “one” and “more than one” structure proposed for this data. Further, the Department should make this collection mandatory and expand it to include the reason for the suspension.

In addition to this change, the Department should broaden the “discipline method (preschool)” data category to include in-school suspension (ISS) as a permitted value schools may report. Like the data elements for OSSs, the data elements for ISSs should be separated into two categories: “one in-school suspension” and “more than one in-school suspension.” The Department defines an ISS as “[a]n instance in which a child is temporarily removed from his or her regular classroom(s) (physical school setting or virtual setting (e.g., online classroom) where virtual learning takes place) for at least half a day for disciplinary purposes but remains under the direct supervision of school personnel.”¹¹⁰

It is unclear why the Department would collect ISS data in the K-12 context and not in early childhood programs, where students are also being temporarily removed from the classroom, such as when sent to the principal’s office.¹¹¹ As the Department is well aware, exclusionary discipline in the early childhood context is particularly ineffective and can lead to long-term negative consequences for young learners who are in the process of acquiring crucial social, cognitive, and academic skills.¹¹² Therefore, data on when preschool students are subjected to an ISS is critical to inform stakeholders and the Department of when preschool students are losing critical instruction time to all forms of exclusionary discipline and to help schools develop alternatives that effectively address preschool students’ emotional and behavioral needs.

The Department also proposes to add “Preschool (Suspension) as a data category to the “Suspension instances – preschool” data group (Data Group 1008). NWLC commends this addition and recommends that the category be separated into “out-of-school suspensions” and “in-school suspensions.” Further, the permitted values for the category should be disaggregated and cross-tabulated as directed in **Section IV.A**.

2. The Department should collect data on referrals to law enforcement and school-related arrests of preschool children.

The Department should add referral to law enforcement and school-related arrest to the Discipline

¹⁰⁹ Brigid Schulte, *Three-year-old suspended from Arlington preschool for too many potty accidents*, WASH. POST (Jan. 30, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/29/AR2011012903854.html>.

¹¹⁰ CRDC Data Categories 2021-22, *supra* note 35, A3-15.

¹¹¹ See Christina Novoa & Rasheed Malik, *Suspensions Are Not Support: The Disciplining of Preschoolers with Disabilities*, CTR. FOR AMERICAN PROGRESS (Jan. 17, 2018), <https://www.americanprogress.org/article/suspensions-not-support>.

¹¹² *See id.*

Method (Preschool) data category. With increases in school police presence across the country, we unfortunately have also seen an increase in law enforcement targeting our youngest learners. Exposing children as young as 4 and 5 years old to police interaction is not only ineffective, but also extremely traumatizing to a young mind undergoing critical stages of social development. For these reasons, the Department should update the Discipline Method (Preschool) data category to include “Referred to law enforcement agency or official” and “Arrested for a school-related activity” as permitted values schools may select.

D. The Department must have robust data collection on mechanical, physical, and chemical restraint and seclusion.

1. The Department should adopt the restraint and seclusion definitions that were introduced in the Keeping All Students Safe Act.

NWLC appreciates that the Department is taking efforts to ensure more accurate data is collected on the use of restraint and seclusion on students nationwide, including updated definitions for mechanical restraint, physical restraint, and seclusion. However, NWLC recommends that the Department adopt the definitions used in the Keeping All Students Safe Act (“KASSA”) ([S.1858](#) / [H.R.3474](#)), which also includes a definition for chemical restraint. If enacted, KASSA would prohibit the use of seclusion and limit the use of physical restraint on students in federally funded schools and Head Start programs. KASSA’s proposed restraint and seclusion definitions are the following:

- **Mechanical Restraint:** The term “mechanical restraint” means the use of devices as a means of restricting a student’s freedom of movement.¹¹³
- **Physical Restraint:** The term “physical restraint” means a personal restriction that immobilizes or reduces the ability of an individual to move the individual’s arms, legs, torso, or head freely, except that such term does not include a physical escort, mechanical restraint, or chemical restraint.¹¹⁴
- **Chemical Restraint:** 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.¹¹⁵
- **Seclusion:** The term “seclusion” means the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving, except that such term does not include a time out.¹¹⁶

In the 2017-18 school year, students with disabilities served under the IDEA made up only 13% of total student enrollment but comprised 80% of students subjected to physical restraint, 41% of students subjected to mechanical restraint, and 77% of students subjected to seclusion.¹¹⁷ Restraint and seclusion

¹¹³ Keeping All Students Safe Act, S. 1858, 117th Cong. § 2(4) (2021); H.R. 3473, 117th Cong. § 2(4).

¹¹⁴ Keeping All Students Safe Act, S. 1858, 117th Cong. § 2(6) (2021); H.R. 3473, 117th Cong. § 2(6).

¹¹⁵ Keeping All Students Safe Act, S. 1858, 117th Cong. § 2(1) (2021); H.R. 3473, 117th Cong. § 2(1).

¹¹⁶ Keeping All Students Safe Act, S. 1858, 117th Cong. § 2(12) (2021); H.R. 3473, 117th Cong. § 2(12).

¹¹⁷ U.S. Dep’t of Educ., Office for Civil Rights, *2017-2018 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools 6-7* (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

practices are traumatizing and harmful to students and can even cause death.¹¹⁸ Indeed, such practices are harmful to teachers, who report that using restraint and seclusion is one of the worst parts of their job, taking both a physical and psychological toll on them, as well.¹¹⁹ Some teachers also report questionable documentation and reporting policies in their schools, such as one English as a second language teacher who told NPR that her school only required reporting a seclusion “if the student was left alone in a room with the door held shut by an adult,”¹²⁰ meaning that teachers in her school were not required to report when students were put into a room alone, but the door was not held shut.¹²¹ These narrow definitions of seclusion allow schools to underreport the numbers of seclusions that are actually occurring in their buildings.

The definitions in KASSA are a result of years’ worth of convenings with and input from impacted communities, advocates, and organizations, particularly those with expertise on creating a safe school climate for students with disabilities, and represent a consensus in both the disability and civil rights communities. For this reason, the KASSA definitions are considered “gold standards” among advocates. The KASSA definitions are broader than those proposed by the Department in order to capture all instances that may cause physical or emotional harm to students, including restraint and seclusion by sworn and non-sworn law enforcement officers. The Department’s proposed definitions create a scenario in which schools may in fact be utilizing some form of restraint or seclusion, but if they do not conform to the specifics in the Department’s definitions, the school may be able to continue these practices without reporting them. This would leave communities, advocates, and the Department without necessary information needed to identify the overuse of restraint and use of seclusion in schools and to take enforcement action needed to protect students’ safety and civil rights.

The updated definitions should also clarify that mechanical restraint includes restraint by sworn or non-sworn law enforcement using handcuffs or other devices and that seclusion includes detention by sworn and non-sworn law enforcement, where the student is not allowed to leave, including detention in a patrol car. Further, chemical or irritant restraint should be added to all data groups and categories that otherwise collect information on restraint and seclusion, including for the Restraint or seclusion for IDEA students table (Data Group 959), the Restraint or seclusion for non-IDEA students table (Data Group 960), and the Restraint or seclusion instances table (Data Group 961) and the Action (Restraint or Seclusion) data category. Alternatively, the Department could create new elements targeting chemical restraint specifically. Such new elements should include: Students (K-12) subjected to chemical restraint; Number of non-IDEA students subjected to chemical restraint (disaggregated, at minimum, by race, sex including nonbinary, disability-Section 504 only, English learner, but preferably according to our recommendations in **Section I.A**); Number of students with disabilities (IDEA) subjected to chemical restraint (disaggregated, at minimum, by race, sex including nonbinary, disability-Section 504 only, English learner, but preferably according to our recommendations in **Section I.A**).

2. The Department should collect data on chemical and irritant restraints used by both sworn and non-sworn law enforcement officers and by other school security staff.

In response to Directed Question #4 on chemical or irritant restraints, NWLC strongly recommends

¹¹⁸ The story of Corey Foster serves as just one harrowing example of the dangers of restraint and seclusion. Corey Foster, a sixteen-year-old boy, went into cardiac arrest and died while being restrained after Corey grew agitated and refused to leave his residential school’s basketball court. See, e.g., *Laura A. Schifter, The Need for Federal Legislation on Seclusion and Restraint*, THE CENTURY FOUNDATION (Feb. 28, 2019), <https://tcf.org/content/commentary/need-federal-legislation-seclusion-restraint>.

¹¹⁹ See Clare Lonbardo & Jenny Abamu, *A Dreaded Part of Teachers’ Jobs: Restraining and Secluding Students*, NPR (Dec. 5, 2019), <https://www.npr.org/2019/12/05/777358918/a-dreaded-part-of-teachers-jobs-restraining-and-secluding-students>.

¹²⁰ *Id.*

¹²¹ *Id.*

that OCR collect data on chemical and irritant restraints used not only by law enforcement officers, sworn and non-sworn, but also by other school security staff. Reliance on law enforcement officers in schools not only criminalizes developmentally appropriate child and adolescent behavior, but also exacerbates racial disparities in school discipline. The involvement of law enforcement officers in restraint and seclusion practices is no exception.

In November 2021, for example, school resource officers (SROs) at Little Elm High School in Dallas, Texas, pepper sprayed students during their protest of the school's allegedly inadequate response to sexual harassment allegations.¹²² A video of the incident shows that among those pepper sprayed was a Black teen boy who was also tasered and dragged by the shirt once he was unresponsive.¹²³ Incidents of police using chemical restraints and irritants are not a new problem. In 2012, police at Jack Robey Junior High School in Arkansas injured nearly 20 students after using pepper spray to clear a school hallway.¹²⁴ According to parents and students at the time, it was not even immediately clear why the officer used the pepper spray on the children.¹²⁵

Currently, there is no readily available data source with accurate information for students, their families, and policymakers about the dangerous practice of using chemical or irritant restraints on students. Data reporting on chemical and irritant restraints is inconsistent, as demonstrated by the Los Angeles Unified School District (LAUSD), where LAUSD officials reported a much smaller number of pepper spray incidents (13) in the 2018-21 period than the number of incidents (34) the Los Angeles School Police reported for the same period.¹²⁶ Student advocates in LAUSD assert that over-policing and pepper spray incidents occurred at schools with high concentrations of low-income students of color, but here too, official data is hard to find.¹²⁷

After filing a Freedom of Information Act request, student organizers in Clark County, Nevada discovered that their district had recorded about 180 pepper spray incidents from 2012 to 2022 that occurred with students all of ages, including those in elementary school.¹²⁸ They also found that the two Clark County schools with the most pepper spray incidents had student populations of over 90% students of color.¹²⁹

NWLC has heard from partners that one obstacle LEAs face in collecting chemical or irritant restraint data is an inability to collect all data if the incident occurred off-campus or out of school district control. Please refer to **Section IV.B.2** for recommendations on resolving data-sharing concerns between school districts and police departments.

As with other forms of restraint on students, the use of chemical restraints or irritants to control student

¹²² Mark Keierleber, *Texas School Resource Officers Pepper Spray, Tase Students During HS Protest, Prompting Police Brutality Outcry*, THE74MILLION (Nov. 21, 2021), <https://www.the74million.org/article/texas-school-resource-officers-pepper-spray-tase-students-during-hs-protest-prompting-police-brutality-outcry>.

¹²³ *Id.*; This use of excessive police force took place even during a global pandemic—a time when students return to school in fear for their health and the health of family members, with unresolved trauma and grief from a year of online learning and missed milestones, sickness and death of loved ones, and carrying burdens they never had before.

¹²⁴ *Arkansas Pepper Spray Incident: Police Officers Injure Junior High Students While Clearing Hall*, THE HUFFINGTON POST (Apr. 11, 2012), https://www.huffpost.com/entry/arkansas-police-officers-_n_1416175?ref=black-voices&ir=Black+Voices.

¹²⁵ *Id.*

¹²⁶ Sonali Kholi, *School Police Should Stop Pepper Spraying Students, L.A. Unified Superintendent Says*, L.A. TIMES, (Jun. 15, 2020); Ariella Plachta, *L.A. Unified Chief Calls to End School Police Use of Pepper Spray and Policy Allowing Chokeholds*, L.A. DAILY NEWS (Jun. 15, 2020).

¹²⁷ Sarah Djato, Sierra Leone Anderson, Quiano Assoon, & Kahlila Williams. *High School Students: Police Don't Belong in Schools. Here's How We Forced Them Out*. U.S.A. TODAY (Apr. 16, 2021).

¹²⁸ Kate Hamaji & Kate Terenzi, *Arrested Learning: A Survey of Youth Experiences of Police and Security at School*, Ctr. Popular Democracy (Apr. 2021) at 17.

¹²⁹ *Id.*

behavior or restrict freedom is physically and psychologically harmful to students, leading to dangers such as respiratory distress and post-traumatic stress.¹³⁰ For these reasons, the Department should collect data on the use of chemical restraints and irritants to understand the full scope of this practice and its implications for the civil rights of low-income students, students with disabilities, students of color, students living at the intersections of these identities and to help schools develop and implement “evidence-based proactive strategies and techniques to address student behaviors.”¹³¹

E. The Department should collect data on informal discipline of students.

Although the CRDC includes data elements that address students who receive formal in-school suspensions and out-of-school suspensions, this data does not cover the informal removals that students experience in schools. These removals are sometimes also referred to as “informal suspensions.” Sending students home or having parents pick up students without formally suspending students interrupts their education, violates students’ rights, and allows schools to artificially reduce their suspension rates. Black girls are particularly impacted by this practice with respect to “dress coding,” or administering discipline for the violation of an appearance and/or grooming policy. In a 2018 NWLC report, we found that Black girls were sent home for dress code violations, such as wearing the wrong shoes, coming to school with dirty uniform pants, or wearing ripped jeans.¹³² Students also reported other informal suspension practices like having students sit in the principal’s office until the end of the day or until parents could drop off different clothes.¹³³ Schools that are not required to report this information are able to obscure the true number of students who are excluded from the classroom, despite the fact that the impact on students is the same as when formally labeled as a suspension or expulsion—lost critical instruction time. The Department should require schools to collect and report this information to get a complete picture of students who are removed from classrooms and schools beyond formal exclusionary discipline and to provide families, educators, advocates, and policymakers the information they need to address disparities, ensure equal educational opportunity, and comply with nondiscrimination laws. Within this new data element, the Department should also require schools to capture the number of hours of instruction time lost to informal classroom removals.

F. The Department should collect discipline data on pregnant and parenting students.

Pregnant and parenting students are routinely pushed out of educational programs and denied access to supports, such as transportation and childcare, that are necessary to allow them to complete their education. Without frequent and widespread data collection that is disaggregated based on pregnancy and parenting status, it is incredibly difficult to identify this population’s unique experiences and demographics and which interventions best promote enrollment and school completion for pregnant and parenting students. Pregnant students are also pushed out of educational programs and activities by school officials seeking to punish them for their pregnancy. The CRDC does not collect data on the number of pregnant students subject to discipline nor the type of discipline they receive. This gap prevents the Department and advocates from identifying whether pregnant students are disproportionately disciplined and subject to restraints that threaten their health or the health of their fetus. We urge the Department to collect non-identifiable data on the number of pregnant students subject to discipline, disaggregated and cross-tabulated as recommended in **Section IV.A** but subject to any limitations necessary to ensure data remains non-identifiable.

¹³⁰ PHYSICIANS FOR HUMAN RIGHTS, FACT SHEETS: CHEMICAL IRRITANTS (Jan. 1, 2017) at 2.

¹³¹ Susan Ostrander & Amy Halpert, *The Crisis of Trauma and Abuse in Our Nation’s Schools* 6, The Council of Parent Attorneys and Advocates (2020), https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020_docs/restraint_and_seclusion_pape.pdf.

¹³² See Nat’l Women’s Law Ctr., *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* (2018), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf.

¹³³ *Id.* at 25.

V. The Department Should Expand Data Collection on Pregnant and Parenting Students.

A. NWLC supports the Department’s proposal to define sex-based harassment and bullying to include pregnancy-based harassment.

We commend the Department on explicitly adding “pregnancy” to the definition of “sex” in Data Groups 988 and 1022 regarding harassment and bullying. Becoming pregnant or a parent should not derail a student’s education. Unfortunately, pregnant and parenting students’ chances of success are all too often harmed by active discouragement or even outright discrimination and stigmatization by school personnel, inferior alternative education programs, inflexible attendance policies, and a lack of support from their schools. According to a Gates Foundation study, nearly one-third of female students who did not complete high school reported that becoming a pregnant was a primary factor in their decision to leave school.¹³⁴ Only half of teenage mothers earn a high school diploma by the age of 22 compared with 89 percent of girls who do not have a child during their teenage years.¹³⁵ One third of young mothers never obtain a diploma or GED,¹³⁶ and less than 2 percent of teenage mothers graduate from college by age 30.¹³⁷

B. The Department should collect data on the discipline of pregnant and parenting students.

See **Section IV.F** above.

C. The Department should collect data on whether schools have alternative education programs for pregnant and parenting students.

The Department should collect data on whether districts and schools have policies, programs, and/or alternative schools for pregnant and parenting students, in the same way that data is currently collected on alternative schools generally and on bullying and harassment policies. (See **Section IV.B.6** for more recommendations on data regarding alternative schools.) To address the troubling history of school districts forcing pregnant and parenting student to inferior alternative programs,¹³⁸ Title IX explicitly requires such programs to be voluntary and equal in quality. Some schools still steer or even force pregnant and parenting students to participate in inferior programs that do not keep them on track to graduate or prepare them for post-secondary opportunities. There is currently no repository of information on which districts or schools have programs for, or offer services to pregnant and parenting students. Simply asking the question about whether the school or district maintains an alternate school for pregnant or parenting students will enable greater accountability to stakeholders as to the quality and voluntariness of such programs and enhance the Department’s ability to undertake Title IX enforcement in this area. NWLC recognizes that this would add a new category to the CRDC, but it would not be burdensome for districts to simply identify whether they have schools and programs available to pregnant and parenting students in their districts, and if so, where those programs are. The utility of collecting data on the educational opportunities afforded pregnant and parenting students far outweighs any perceived burden.

¹³⁴ Kate Perper, Kristen Peterson & Jennifer Manlove, *Diploma Attainment Among Teen Mothers*, CHILD TRENDS 1(2010), http://www.childtrends.org/Files/Child_Trends-2010_01_22FS_DiplomaAttainment.pdf.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Cynthia B. Costello, *Pathways to postsecondary education for pregnant and parenting teens*, INSTITUTE FOR WOMEN’S POLICY RESEARCH V (2017), <https://files.eric.ed.gov/fulltext/ED556724.pdf>.

¹³⁸ See, e.g., Julie Bosman, *New York’s Schools for Pregnant Girls Will Close*, NEW YORK TIMES (May 24, 2007), <https://www.nytimes.com/2007/05/24/education/24educ.html>.

D. The Department should collect non-personally identifiable data on the type of education received by pregnant and parenting students.

There is currently little to no data on how many students in our schools are pregnant and parenting, how they are doing, whether they attend mainstream or alternative schools, and whether or not they are graduating. Therefore, we urge the Department to collect *non-personally identifiable* data on the type of education received by pregnant and parenting students – i.e., their enrollment levels in AP and IB courses, SAT or ACT test preparation, and high school equivalency exam preparation (Data Groups 900, 901, 929, 931, 936, and 964). The Department should also collect data on the number of pregnant and parenting students not promoted to the subsequent grade (Data Group 963). Further, inflexible attendance policies too often force pregnant and parenting students to choose between completing their degree and having a safe pregnancy or a healthy child. Balancing their health, parenting responsibilities, and school may result in more absences than their peers who are not pregnant or parenting. As such, the ESS should collect data on the number of pregnant and parenting students who are chronically absent and the number of pregnant and parenting students who graduate (Data Groups 814 and 306). If the “n” size is too small at the school level, this data could still be reported at the district level. Collecting non-personally identifiable data on pregnant and parenting students will help to identify both the discriminatory barriers that still exist today in far too many places and best practices for keeping them in school. It will also help the Department enforce the law, consistent with the strong guidance it issued in 2013 regarding Title IX and pregnant and parenting students.¹³⁹

VI. The Department Should Preserve and Expand Data Collection on Athletics.

Title IX’s impact on women’s athletic participation is one of the country’s greatest civil rights success stories, changing the playing field dramatically for girls and women in sports. Through the CRDC, researchers have been able to track trends in sport and physical activity for underrepresented groups and how access to sports opportunities varies regionally.¹⁴⁰

A. The Department should add and expand the proposed data collection on interscholastic athletics participants.

NWLC supports the Department’s proposal in Data Group 1036 to collect and disaggregate the data on the number of students who participated on interscholastic athletics sports teams by female, male, and nonbinary students. Nonbinary students and their unique experiences are made invisible by limiting data collection systems, and this disaggregation will allow the department to identify the type of guidance and technical assistance schools may need to support nonbinary students’ participation in athletics. However, we also recommend that the Department ask schools to report how many girls, boys, and nonbinary students play on girls’ and boys’ teams. For example, a school may report 50 boys, 40 girls, and 10 nonbinary students playing sports, but under the current proposal, the Department would not know that the boys’ teams have 50 boys, 3 girls, and 2 nonbinary students, whereas the girls’ teams have 37 girls and 8 nonbinary students.

We also recommend that Data Group 1036 include all students (not just those in grades 9-12) who participate on an interscholastic high school sports team. The currently proposed Data Group 1036 would not

¹³⁹ See Department of Education, Office for Civil Rights, *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972* (June 2013), <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>.

¹⁴⁰ Nat’l Women’s Law Ctr. & Poverty & Race Research Action Council, *Finishing Last: Girls of Color and School Sports Opportunities* (2015) [hereinafter *Girls of Color in School Sports*], <https://nwlc.org/resources/finishing-last-girls-color-and-school-sports-opportunities>.

require schools to report the number of 7th and 8th grade students who participate on a high school sports team because it specifically counts only the “[n]umber of students *in grades 9-12*”—unlike the existing Data Groups 937, 938, and 939, which currently require schools to report the “[n]umber of student participants on single sex interscholastic athletics high school sports teams.”¹⁴¹

B. The Department should not retire the three athletics data groups on single-sex sports, single-sex teams, and single-sex team participants.

The new proposed Data Group 1036 cannot be used as a substitute for Data Groups 937, 938, and 939. Knowing the number of students who participate in athletics is, in and of itself, inadequate information for purposes of Title IX enforcement. For example, if a school reports an equal number of girl and boy student athletes, it may be the case that all of the girls play on a few sports teams whereas the boys participate in a dozen different sports. Without data on the number of sports and teams (disaggregated by female male and nonbinary identity) the CRDC cannot be used to identify schools that are denying students equal opportunity for athletic participation because of their sex/gender identity. For example, even if Data Group 1036 shows that a school fails prong 1 of the three-part test (*e.g.*, it does not provide substantially equal athletics participation opportunities for girls and boys), Data Groups 937-939 are still necessary to determine whether the school fails prong 2 and prong 3 as well (*e.g.*, it has not continually expanded girls’ athletics opportunities or it has not fully and effectively accommodated girls’ athletic interests and abilities) and is therefore in violation of Title IX.¹⁴² Additionally, removing items or changing wording in this way will create challenges for researchers as it would remove the opportunity for comparisons to past data sets. This longitudinal reporting is crucial to track trends in Title IX compliance and enforcement. Therefore, we urge the department to not retire the three data tables on interscholastic athletics participation. The department should retain this data and disaggregate those tables by male, female, and nonbinary identity.

In addition, the Department should amend Data Groups 937 and 938 to capture the number of “boys’ sports” and “girls’ sports” and “boys’ teams” and “girls’ teams,” respectively, that schools offer. In this case, boys’ sports and boys’ teams and girls’ sports and girls’ teams should be defined as inclusive of students who participate in sports or teams that primarily serve boys and girls, respectively, and replace prior CRDC references to “male-only” and “female-only” sports and teams.¹⁴³ Data Group 939 should also be revised to capture student participation counts in “boys’,” “girls’,” and “all other” athletic programs by sex (membership), including nonbinary where available, and race/ethnicity.

C. The Department should collect data on athletics expenditures for girls’ and boys’ teams.

Currently, the CRDC does not provide any information on how girls’ teams are treated in terms of the benefits and services they receive. And yet, there is much evidence that, almost 50 years after Title IX was passed, girls not only still receive unequal opportunity to play, but are also treated as second-class when they

¹⁴¹ CRDC Data Groups 2021-22, *supra* note 36, at A2-53 (emphasis added).

¹⁴² Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

¹⁴³ Students may participate in an athletic program that primarily serves students of another gender for a variety of reasons, including discriminatory state laws or regulations that prevent them from participating in a program that aligns with their gender identity and the unavailability of program that aligns with their gender identity. See, *e.g.*, GLSEN & TransAthlete. *Gender Affirming and Inclusive Athletics Participation* (2021), <https://www.glsen.org/activity/gender-affirming-inclusive-athletics-participation>; Women’s Sports Foundation, *Issues Related to Girls and Boys Competing with and Against Each Other in Sports and Physical Activity Settings* (2019), <https://www.womenssportsfoundation.org/wp-content/uploads/2019/08/issues-related-to-girls-and-boys-competing-with-and-against-each-other-in-sports-and-physical-activity-settings-the-foundation-position.pdf>.

do play.¹⁴⁴ Therefore, NWLC strongly recommends that the Department collect information on athletic expenditures on girls' and boys' teams. This is data that schools already collect but do not make publicly available, and so the addition of this data should not be unduly burdensome for schools to provide. The data should include expenditures, from school and non-school sources, for travel; equipment; uniforms; practice and competitive facilities; locker rooms; training and medical facilities; and publicity, including press materials and personnel.

D. The Department should collect data on the race/ethnicity of student athletes.

Collecting data on interscholastic athletics team participants not only by sex, but also by race/ethnicity, in a format that may be fully cross-tabulated is critical to gender equity in athletics for a number of reasons. First, girls of color receive fewer opportunities to play on school sports teams than their white and male peers. Second, girls who participate in sports have higher graduation rates, which is especially important for girls of color, who are more likely not to graduate from high school than their white peers. Third, as compared to their white peers, girls of color are more likely to participate in sports through their schools than through private organizations, so it is particularly important to ensure they have equal access to school-based sports.¹⁴⁵ Collecting information on participants by sex and race will allow schools to better assess the current distribution of opportunities and to take steps to expand those opportunities as needed.

VII. The Department Should Collect Civil Rights Coordinators' Names, Phone Numbers, and Email Addresses.

NWLC supports the Department's proposal to begin collecting civil rights coordinators' email addresses in Data Group 916. In an increasingly digital world, email addresses are an essential way for students and families to communicate with schools, and the Department should ensure that all school districts' civil rights coordinator(s) can be contacted by their email address. Moreover, as we continue to navigate the pandemic and as new types of COVID variants arise, sharing civil rights coordinators' email addresses will help ensure that they are accessible to students and families. For example, if a civil rights coordinator needs to work from home, they must be able to share documents and other information with students and families about the status of their complaints and investigations. Similarly, if a student or family member is ill or immunocompromised, they must be able to contact their civil rights coordinators and send and receive information without having to visit school offices in person.

However, NWLC opposes the Department's proposal to stop collecting the names and phone numbers of civil rights coordinators. The Title IX regulations require school districts to designate at least one employee to serve as the Title IX coordinator; to notify all students, families, and employees of the coordinator's name and contact information (including their phone number and email address); and to publish this information on the school district's website.¹⁴⁶ Yet many school districts have no Title IX coordinator at all.¹⁴⁷ The contact information for school districts' Title IX coordinators is also notoriously difficult to find, even

¹⁴⁴ Nat'l Women's Law Ctr., *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools*, (Jan. 30, 2012) [hereinafter *Gender Equity in K12 Schools*], www.nwlc.org/sites/default/files/pdfs/titleixbattleforgenderequitysecondaryschoolsfactsheet_7.20.12.pdf.

¹⁴⁵ *Gender Equity in K12 Schools*, *supra* note 144.

¹⁴⁶ 34 C.F.R. §§ 106.8(a) (designation and notice), 106.8(b)(2)(i) (publication).

¹⁴⁷ National Coalition for Women and Girls in Education, *Title IX At 45: Advancing Opportunity through Equity in Education* 86 (2017), available at <https://www.ncwge.org>.

for organizations that routinely collect and update this information.¹⁴⁸ A 2021 study of 118 school districts in California and Colorado found that many school districts do not include any information about their Title IX coordinator on their websites.¹⁴⁹ Nor could central office personnel readily provide this information when they were called.¹⁵⁰ Of the Title IX coordinators who were successfully identified, the majority reported that Title IX-related tasks accounted for very little of their time—less than 1 percent in most cases.¹⁵¹ Several coordinators noted that they did not even know Title IX work was a part of their job until they had been in the position for several months, and in one case, after about one year.¹⁵²

Designating civil rights coordinators is a critical first step in ensuring that a school district is complying with its obligations to protect students' civil rights. The Department's proposal to end collection of civil rights coordinators' names and phone numbers would enable school districts that have no coordinators to submit a generic email address (e.g., titleix@____), without attaching a specific person's name or an alternative method of contact, such as a direct phone line. Not only would this make it easier for school districts to violate the designation, notice, and publication requirements in the Title IX regulations,¹⁵³ but it would also make the Department's online database of civil rights coordinators (<https://ocracas.ed.gov/civ-rts-coordinators>)—which is populated by CRDC data—significantly less useful to students and families. For example, if a student emails their Title IX coordinator and does not hear back, they will no longer be able to use the Department's database to find the Title IX coordinator's name or phone number and try to follow up.

We note the Department has given no reason for removing these data elements. The burden on school districts to report this information is negligible, given that the people most likely tasked with completing the CRDC for each school district are their civil rights coordinators, and so they should be able to readily provide their own names and phone numbers. We urge the Department to retain these questions in the CRDC, which can help ensure that school districts have civil rights coordinators in place and share their contact information with students, families, and employees.

VIII. The Department Should Publish Harassment Policy Web Links.

The Department should make school districts' harassment policy web links available via the Department's online CRDC dataset (<https://ocrdata.ed.gov>). Although the Department has been collecting these web links since the 2013-14 CRDC (Data Groups 1022 and 1035), it has not published these web links and has only disclosed whether a school district indicated that it has such a policy or policies. Omitting this information makes the CRDC dataset less useful to students and families and prevents researchers from analyzing the effects of having enumerated anti-harassment/bullying policies. It would also not impose additional burdens on school districts to share this information since they are already providing the links to OCR. These web links are not sensitive information and should be published.

¹⁴⁸ E.g., Feminist Majority Foundation, *State & Large School District Title IX Gender Equity Coordinators, Methods of Administration Coordinators & Other State & District Level Gender Equity Experts 2* (last updated June 2020), <https://feminist.org/education/pdfs/State-TitleIX-Coordinators.pdf>.

¹⁴⁹ Elizabeth J. Meyer et al., *Title IX coordinators as street-level bureaucrats in U.S. schools: Challenges addressing sex discrimination in the #MeToo era*, 26 EDUC. POL'Y. ANALYSIS ARCHIVES 68, at 13 (2018), <https://epaa.asu.edu/ojs/index.php/epaa/article/view/3690>.

¹⁵⁰ Elizabeth J. Meyer & Andrea Somoza-Norton, *Addressing sex discrimination with Title IX coordinators in the #MeToo era*, 100(2) PHI DELTA KAPPAN 8 (2018), <https://doi.org/10.1177/0031721718803562>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See *supra* note 146 and accompanying text.

IX. NWLC Supports the Department’s Proposal to Collect Data on Virtual Learning.

NWLC supports the Department’s proposal to begin collecting 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). A Pew Research Center survey from before the pandemic found Black teens and those from lower-income households were more likely to indicate they sometimes or often were unable to complete homework because of a lack of a reliable device or internet.¹⁵⁴ These disparities acted as barriers to students’ ability to seamlessly transition to virtual learning during the early days of the COVID-19 pandemic. These trends also persisted during the pandemic: U.S. Census Bureau Household Pulse Survey data from October 2020 showed Black and Hispanic households being three to four percentage points less likely than white households to have reliable access to devices and three to six percentage points less likely to have reliable internet access.¹⁵⁵ In its report on the disparate impacts of COVID-19 on students, the Department notes the pandemic “appears to have deepened the impact of disparities in access and opportunity facing many students of color in public schools, including technological and other barriers that make it harder to stay engaged in virtual classrooms.”¹⁵⁶ The Department’s proposal to collect data on the number of students who needed and received Wi-Fi enabled devices and Wi-Fi hotspots from schools will shed light on any progress made toward addressing these inequities, especially given the influx of federal dollars for education through the various relief packages and the Federal Communications Commission’s Emergency Connectivity Fund and Emergency Broadband Benefit.

NWLC also supports the Department’s proposal to collect information on the amount of virtual instruction provided by teachers and the percentage of students receiving virtual instruction, given that research shows different groups of students and types of schools were more likely to offer virtual instruction at different points during the pandemic (Data Groups 1041-1042).¹⁵⁷ However, NWLC recommends the Department ask this question only of schools that indicate they offered a hybrid of in-person and virtual instruction. Presumably, those schools that indicate they offered virtual-only instruction will elicit responses that 100% of students received virtual instruction. If these schools were also to be asked this question, it would be unclear which schools that respond “Over 75%” reported offering virtual instruction only and which reported offering a hybrid of in-person and virtual instruction. Yet outcomes may vary between these modes of instruction. The Institute of Education Sciences’ monthly school survey dashboard at the Department separates these modes into two distinct categories likely for this reason.¹⁵⁸ This recommendation will trim the number of schools that need to respond to this question, allow for more reliable analysis of outcomes by percentage of students receiving virtual instruction, and ensure consistency across the Department’s data collection efforts.

¹⁵⁴ Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital ‘Homework Gap’*, PEW RESEARCH CENTER (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap>.

¹⁵⁵ Emma Dorn *et al.*, *COVID-19 and Learning Loss—Disparities Grow and Students Need Help*, MCKINSEY & COMPANY (Dec. 8, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-learning-loss-disparities-grow-and-students-need-help>.

¹⁵⁶ U.S. Department of Education, Office for Civil Rights, *Education in the Pandemic: The Disparate Impacts of COVID-19 on America’s Students*, (June 2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf>.

¹⁵⁷ Emily Oster *et al.*, *Disparities in Learning Mode Access Among K-12 Students During the COVID-19 Pandemic, by Race/Ethnicity, Geography, and Grade Level—United States, September 2020-April 2021*, Centers for Disease Control and Prevention (July 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7026e2.htm>.

¹⁵⁸ See generally U.S. Department of Education, Institute of Education Sciences, *Monthly School Survey Dashboard* (Dec. 2021),’s <https://ies.ed.gov/schoolsurvey>.

X. NWLC Supports the Department’s Proposals to Reinstate and Expand Data Collection on Early Childhood Services.

NWLC supports the Department’s proposal to reinstate Data Groups 926, 953, 954, and 955 regarding the type of and eligibility criteria for early childhood services. Families, providers, advocates, researchers, and policymakers need access to publicly reported and disaggregated data to ensure children and their families have equal opportunity for comprehensive and high-quality early care and education settings. Such settings must meet the individual needs of children and remove barriers to participation including translation services and other accommodations. To that end, NWLC also supports the Department’s proposal to collect data for the first time on the number of preschool students who were English learners or disabled in Data Groups 1032, 1033, 1037, and 1038. NWLC also supports the proposal to disaggregate such data by race, sex, and disability type as such data is necessary to identify and address the needs of historically marginalized young children.

XI. The Department Should Expand Data Collection on Single-Sex Classes.

NWLC urges the Department to collect data on the race/ethnicity of students in single-sex academic classes, so that the data can be sorted and cross-tabulated by sex, race, English Learner status, and disability. Because the Department already requires school districts to report data on enrollment in single-sex classes by sex and subject, it will not be overly burdensome for schools to also report data on the race/ethnicity/disability of students in those classes—information they should have readily available. Such information can be useful to the Department’s efforts to ensure that Title IX, Title VI, and Section 504 are enforced in single-sex classes and would be consistent with the way data is reported in most other CRDC categories.

We further urge the Department to require that school districts report not only the absolute number of single-sex academic classes by subjects listed by boys- or girls-only, but also the number of coeducational class sections within each of those subjects, as well as the grade level, where applicable. The questions posed on the “number of single-sex academic classes” do not provide sufficient information about the scope of the single-sex programming because they do not provide any context or permit comparison between boys’ and girls’ classes and the number of coeducational classes available. Additionally, the data collected from these questions should be disaggregated by disability and race, in a manner that may be fully cross-tabulated, to enable analysis of whether students of color and students with disabilities are disproportionately channeled into either single-sex or coeducational classrooms.

Finally, to better understand how schools may be accommodating the needs of students, including transgender and nonbinary students, the Department should also consider disaggregating single-sex class data by sex. To do this, for example, the Department could revise Data Group 976 to count “boys’ classes” and “girls’ classes,” defined as classes that are designated for and primarily serve boys and girls, respectively, even if the class does not exclude students of one sex from enrolling.

XII. NWLC Supports the Department’s Proposal to Reintroduce and Expand Data Collection Regarding Teachers.

NWLC supports the Department’s proposal to reintroduce data collection on teacher absenteeism,

teacher experience, and teacher counts (Data Groups 983, 985, 1003, and 1040). When the Department first decided to collect teacher absenteeism data, it explained: “Teachers play a critical role in providing access to equal educational opportunity. Teacher attendance is an important indicator of the quality of this access.”¹⁵⁹ The Department has also stated that it “may assess relative rates of teacher absenteeism ... as part of investigating discrimination in student access to quality teaching” because teacher absenteeism of more than 10 days has “a significant impact” on student achievement.¹⁶⁰ Reintroducing these data groups sends a strong signal that the Department is interested in addressing resource inequities.

The Department has also previously explained that among the “broad range of information sources” it looks to “when assessing whether a district discriminates based on race in providing access to strong teaching and instruction” is information about “whether teachers are inexperienced.”¹⁶¹ This is important because more experienced teachers are shown by research to produce higher student achievement.¹⁶² The Department has found, however, that “[s]chools serving the most [B]lack and Latino students are 1.5 times more likely to employ teachers who are newest to the profession (who are on average less effective than their more experienced colleagues) as compared to schools serving the fewest of those students.”¹⁶³ Indeed, in schools with high enrollments of students of color, nearly one in every six teachers is just beginning his or her career compared to one in every ten teachers in schools with low enrollment of students of color.¹⁶⁴ The same pattern exists when examining teachers at schools enrolling English learner students.¹⁶⁵ Without collecting data regarding first- and second-year teachers, it would be much more difficult to know whether progress is made on the equitable distribution of new and experienced teachers. Indeed, the National Academies of Science, Engineering, and Medicine recommended expanding the CRDC teacher experience data in order to measure and monitor disparities in access to effective teaching.¹⁶⁶ For these reasons, the Department should continue collecting these important data items.

The Department should also collect sex data that includes the nonbinary category by using “Sex Membership (Expanded)” in the Teachers and other Personnel section. Supporting a diverse workforce is an essential component of Title IX as well as Title II of ESSA.¹⁶⁷ Many studies have found that LGBTQI+ educators are significant part of the current and potential educator workforce and can play critical roles in creating an environment that supports all students, while also facing significant barriers in the workplace themselves.¹⁶⁸ Nonbinary teachers in particular can face challenges in finding and keeping employment, regardless of performance or qualifications.¹⁶⁹

¹⁵⁹ U.S. Department of Education, Office for Civil Rights, *CRDC Data Set for School Year 2009-10: Response to First Round Public Comment*, at 10 (Dec. 2009), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=14800500>.

¹⁶⁰ U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter: Resource Comparability*, at 13, 34 n.46 (Oct. 2014) [hereinafter *Resource Comparability Guidance*], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

¹⁶¹ *Id.* at 12.

¹⁶² *Id.*, at 4, 29 n.18; Tara Kini & Anne Podolsky, Learning Policy Institute, *Does Teaching Experience Increase Teacher Effectiveness?: A Review of the Research* 15-23 (June 2016), https://learningpolicyinstitute.org/sites/default/files/productfiles/Teaching_Experience_Report_June_2016.pdf.

¹⁶³ *Resource Comparability Guidance*, *supra* note 160, at 4 (footnote omitted).

¹⁶⁴ Linda Jacobson, *Ed Dept plans to ax some teacher workforce, preschool questions from Civil Rights Data Collection* (Sept. 23, 2019), <https://www.educationdive.com/news/ed-dept-plans-to-ax-some-teacherworkforce-preschool-questions-from-civil/563446>.

¹⁶⁵ National Academies of Sciences, Engineering, and Medicine, *Monitoring Educational Equity* 93 (2019), <https://www.nap.edu/catalog/25389/monitoring-educational-equity>.

¹⁶⁶ *Id.* at 225.

¹⁶⁷ See Department of Education, *Non-Regulatory Guidance for Title II, Part A: Building Systems of Support for Excellent Teaching and Leading* (Sept. 17, 2016), <https://www2.ed.gov/policy/elsec/leg/essa/essatitleiipartaguidance.pdf>.

¹⁶⁸ See, e.g., GLSEN, *Supporting LGBTQ Students by Protecting LGBTQ Teachers* (Aug. 2020), <https://www.glsen.org/research/lgbtq-supportive-teaching>.

¹⁶⁹ See, e.g., Laura C. Hart & Walter H. Hart, *‘Their Own Personal Unicorn’: The Workplace Experiences of Transgender Teachers*, 40 J. EDUC. HUM. RES. 5 (2022); Lee Iskander, *I Assumed It Was a Much Safer Place Than It Really Is’: Nonbinary Educators’ Strategies for Finding School Jobs*, 40 J. EDUC. HUM. RES. 114 (2022); Anya Kamenetz, *More Than Half Of Transgender Teachers*

NWLC also commends the Department for introducing a new data group on teacher certification areas (FTE) (Data Group 1039). Studies show that student achievement is significantly higher when students have teachers who are fully certified and prepared upon entry.¹⁷⁰ However, substantial research shows that teacher quality is a major source of inequity across race, class, and English Learner status that has serious consequences for children’s life trajectories.¹⁷¹ Analysis of the 2015-16 CRDC data revealed that schools with high student of color enrollment had a greater percentage of inexperienced teachers on staff, compared to schools with low student of color enrollment.¹⁷² The data also shows that the number of uncertified and inexperienced teachers increased from the 2013-14 to 2015-16 school years in schools with high student of color enrollment.¹⁷³ Data on teacher certification and other elements regarding teachers is necessary to monitor whether students have equitable access to resources across schools and districts. This data group can also spark the Department’s and other stakeholder action to create incentives for new teachers to attain the credentials needed to ensure student achievement for all student populations.

XIII. The Department Should Restore the Collection of School Expenditure Data Until the School-Level Finance Survey Is Implemented as Universal and Mandatory.

NWLC commends the Department for pursuing annual, mandatory, and universal data collection under the School-Level Finance Survey (SLFS), in collaboration with the National Center for Education Statistics (NCES). This data is critical to the identification of inequities in schools and the enforcement of students’ civil rights. Therefore, the Department should restore the school expenditures elements of the CRDC until such time as the mandatory data collection under the SLFS is implemented.

Prior to the 2020-21 school year, the CRDC was the only mandatory data collection that collected and reported (1) salaries at a particular school for teachers, instructional aides, support services staff, and school administration staff; and (2) non-personnel expenditures at a particular school, with both amounts disaggregated between state/local and federal funding.

School spending matters. More money generally leads to better outcomes, especially if spent well and spent in schools serving students with the highest needs.¹⁷⁴ But enormous education funding disparities continue to exist: a 2019 report found that predominantly white school districts have access to \$23 billion more in state and local funding compared to majority non-white districts.¹⁷⁵ Further, schools across the country with larger populations of students of color and students from low-socioeconomic status are “under-resourced

Surveyed Tell NPR They Are Harassed At Work, NPR (Mar. 8, 2018), <https://www.npr.org/sections/ed/2018/03/08/575723226/more-than-half-of-transgender-teachers-face-workplace-harassment>.

¹⁷⁰ See Learning Policy Institute, *Inequitable Opportunity to Learn: Student Access to Certified and Experienced Teachers 3* (2020), https://learningpolicyinstitute.org/sites/default/files/product-files/CRDC_Teacher_Access_REPORT.pdf [hereinafter *Inequitable Opportunity to Learn*].

¹⁷¹ See Dan Goldhaber, Vanessa Quince, & Roddy Theobald, *Teacher Quality Gaps in U.S. Public Schools: Trends, Sources, and Implications*, PHI DELTA KAPPAN (Apr. 29, 2019); Joon-Ho Lee, Bruce Fuller, & Sophia Rabe-Hesketh, *How Finance Reform May Alter Teacher and School Quality: California’s \$23 Billion Initiative*, 58 AM. EDUC. RES. J. 1225, 1243.

¹⁷² *Inequitable Opportunity to Learn*, *supra* note 169, at 5.

¹⁷³ *Id.*

¹⁷⁴ Linda Darling-Hammond, Learning Policy Institute, *Investing in Student Success: Lessons from State School Finance Reforms 6-7* (Apr. 2019), https://learningpolicyinstitute.org/sites/default/files/productfiles/Investing_Student_Success_REPORT.pdf; C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question*, NBER Working Paper No. 25368 (Dec. 2018) (“The recent quasi-experimental literature that relates school spending to student outcomes overwhelmingly support a causal relationship between increased school spending and student outcomes.”), <https://www.nber.org/papers/w25368>.

¹⁷⁵ EdBuild, *\$23 Billion* (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

relative to schools attended by wealthier peers in the same district.”¹⁷⁶ However, many of these inequities remain hidden due to inconsistencies in data reporting across schools, districts, and states and due to the lack of a centralized database for school-level expenditures. Until the annual, mandatory, and universal SLFS data collection is implemented, we urge the Department to restore all of the data elements in the school finance section that were removed in 2019.

In addition, we urge the Department to carry over certain elements of the CRDC expenditure data collection requirements to the mandatory SLFS data collection. Although expenditure data is reported at a school level on report cards required by the federal Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, that data is not required to be reported as separate personnel and non-personnel expenditures, much less as salaries for particular types of employees.¹⁷⁷ Information on staff salaries, for example, can provide critical insight on issues relating to the retention of qualified teachers—an aspect of resource equity mentioned in the prior section that can impact students’ equal opportunity to receive an education. Therefore, we urge the Department to incorporate these data elements into the mandatory SLFS data collection.

XIV. The Department Should Reintroduce Data Collection on AP Exams.

In 2020, the Department decided to stop collecting data on the number of students enrolled in Advanced Placement (AP) courses who took at least one AP examination and the number of students enrolled in AP courses who did not take any AP examinations, disaggregated by race, sex/sex-expanded, disability-IDEA, and English learner status (Data Group 904). And in the 2017-18 CRDC, the Department decided to stop collecting data on the number of students who passed AP examinations (Data Group 905). NWLC recommends that the Department reintroduce these two data groups. Research shows participating in AP courses has few benefits for students’ academic achievement while taking and passing the exam has significant benefits.¹⁷⁸ In addition, a large differential between the number of students taking an AP course and the number taking an AP examination at a school can suggest barriers, like cost,¹⁷⁹ that may impede students from taking an examination and obtaining the benefit of college credit that the school should address. Similar disparities persist in the percentage of groups of students not passing the examination (*i.e.*, getting a 1 or 2 where they are unlikely to get college credit): In 2016, 70 percent of Black students and 57 percent of Latinx students who took AP exams did not pass, compared to an overall rate of 42 percent of students not passing.¹⁸⁰

Removing all data items regarding AP examinations is also in significant tension with the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, which requires state and local report cards to report CRDC data regarding the number and percentage of students enrolled in “accelerated coursework to earn postsecondary credit while still in high school, such as Advanced Placement and Internal Baccalaureate courses and examinations.” Removing these data items would remove all data

¹⁷⁶ Lauren Webb, *Educational Opportunity for All: Reducing Intradistrict Funding Disparities*, 92 NYU L. REV. 2169,2173 (2017) (emphasis added), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103200.

¹⁷⁷ U.S. Dep’t of Educ., Office of Elementary and Secondary Education, *Opportunities and Responsibilities for State and Local Report Cards Under the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act*, at 43 (H-8), 63 (App. C) (Sept. 2019), <https://www2.ed.gov/policy/elsec/leg/essa/report-card-guidancefinal.Pdf>.

¹⁷⁸ Russell T. Warne *et al.*, *The Impact of Participation in the Advanced Placement Program on Students’ College Admissions Test Scores*, 108:5 J. OF EDUC. RESEARCH 400 (2015), <https://www.tandfonline.com/doi/full/10.1080/00220671.2014.917253>.

¹⁷⁹ Roby Chatterji *et al.*, *Closing Advanced Coursework Equity Gaps for All Students*, CENTER FOR AM. PROGRESS (June 2021), <https://www.americanprogress.org/article/closing-advanced-coursework-equity-gaps-students>.

¹⁸⁰ Alina Tugend, *Who Benefits From the Expansion of A.P. Classes?*, NEW YORK TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/magazine/who-benefits-from-the-expansion-of-ap-classes.html>.

about examinations from the CRDC.¹⁸¹ The Department should instead work with the College Board to identify methods to obtain this data with less burden on school districts. We urge the Department to keep the current data elements regarding AP courses.

* * * *

Thank you for considering NWLC's recommendations for the 2021-22 CRDC. We would be happy to discuss our comments further or answer any questions you may have. For additional information, please contact Elizabeth Tang (etang@nwlc.org) and Brooke LePage (blepage@nwlc.org).

Sincerely,



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¹⁸¹ 5 20 U.S.C. § 6311(h)(1)(C)(viii)(II)(bb).