



October 29, 2019

Kenneth L. Marcus  
Assistant Secretary for Civil Rights  
Office for Civil Rights  
U.S. Department of Education  
Washington, DC 20202

Re: Request for Comments on Proposed Mandatory Civil Rights Data Collection  
(Docket ID Number ED-2019-ICCD-0119; OMB Control Number 1870-0504)

Dear Assistant Secretary Marcus:

Thank you for the opportunity to provide comments regarding proposed changes for the 2019-20 Civil Rights Data Collection (CRDC) administered by the Department of Education's Office for Civil Rights (OCR).<sup>1</sup>

The National Center for Youth Law (NCYL) is a non-profit organization with offices in Oakland and Los Angeles, CA, Phoenix, AZ, and Washington, DC. NCYL staff have worked for more than four decades to improve the lives of disadvantaged children and youth. NCYL leads campaigns, weaving together research, public awareness, policy development, technical assistance and litigation to ensure governmental systems provide the support these children and youth need to thrive.

We strongly oppose OCR's proposals to eliminate a number of data elements that are needed to help parents, educators, researchers, and advocates to make needed changes to policies, programs and practices to ensure we are building more equitable education programs and systems, and to enforce applicable civil rights laws.

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<sup>1</sup> OCR, *Mandatory Civil Rights Data Collection Data Set for School Year 2019–20: Supporting Statement, Part A: Justification* (Sept. 2019) (hereinafter "OCR, 2019–20 Supporting Statement A"), <https://www.regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0119-0002&attachmentNumber=1&contentType=pdf>.

OCR's proposed removal of important data elements around school finance, teacher experience, and teacher absenteeism is particularly troubling because it suggests OCR may be abandoning its responsibility to ensure resource equity within and between school districts. We also need more, not less, data about what is happening in public pre-schools. We need more, not less, data about student perseverance in Advanced Placement courses. And we need more, not less, data about harassment on the basis of gender identity or transgender status.

More generally, we are concerned that OCR is not following through on its prior commitments and is not being sufficiently transparent. We are disheartened that OCR has, despite its prior promise, elected to ignore the treatment of children with disabilities placed by their own public schools into private schools, where they can experience restraint and seclusion and exclusionary discipline.

And we are significantly troubled by OCR's oblique announcement that it intends to reduce spending on the 2019-20 CRDC by 26% compared to the 2017-2018 CRDC. This is so even as OCR acknowledges the need for more technical assistance to school districts to improve data quality and the urgent need for speedy processing and release of the data. OCR can and must do better.

In this comment, NCYL urges OCR to take the following actions regarding this essential nationwide source of equity-related education data:

- Retain all school finance items
- Retain teacher experience and teacher absenteeism items
- Retain all early childhood education items
- Retain Advanced Placement (AP) test-taking items
- Add Section 504-only disability disaggregation to all AP course items
- Add an item regarding harassment based on perceived gender identity
- Meet prior commitments to measure experiences of children with disabilities placed by school districts in non-public schools
- Provide additional resources for, and transparency over, the operations of the CRDC

## Retain all school finance items

CRDC is the only mandatory data collection that collects and reports (1) salaries at a particular school for teachers, instructional aides, support services staff, and school administration staff; and (2) non-personnel expenditure at a particular school, both disaggregated between state/local and federal funding. While expenditure data will be 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.<sup>2</sup>

The current CRDC school finance data is central to identifying inequities. School spending matters. More money leads to better outcomes, especially if spent well and spent in schools serving students with the highest needs.<sup>3</sup> But education funding disparities continue to exist – a recent report found that predominantly White school districts have access to \$23 billion more in state and local funding compared to majority non-White districts.<sup>4</sup> Further, schools across the country with larger populations of students of color and students from low-socioeconomic status are “under-resourced relative to schools attended by wealthier peers *in the same district.*”<sup>5</sup>

We urge OCR to keep all of the current data elements in the school finance section.

## Retain teacher experience and teacher absenteeism items

OCR has 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.”<sup>6</sup> This is

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<sup>2</sup> 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-guidance-final.pdf>.

<sup>3</sup> 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/product-files/Investing\\_Student\\_Success\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/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>.

<sup>4</sup> EdBuild, *\$23 Billion* (Feb. 2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

<sup>5</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103200).

<sup>6</sup> OCR, *Dear Colleague Letter: Resource Comparability*, at 12 (Oct. 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

important because more experienced teachers are shown by research to produce higher student achievement.<sup>7</sup>

OCR has found, however, that “[s]chools serving the most black 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.”<sup>8</sup>

According to an upcoming report by the Learning Policy Institute, 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.<sup>9</sup> The same pattern exists when examining teachers at schools enrolling English learner students.<sup>10</sup>

Without collecting data regarding first- and second-year teachers, it will be much more difficult to know whether progress is made on the equitable distribution of new teachers. Indeed, the National Academies of Science, Engineering, and Medicine recently recommended *expanding* the CRDC teacher experience data in order to measure and monitor disparities in access to effective teaching.<sup>11</sup> OCR offers no grounds for removing these important data items.

Likewise, OCR offers no grounds for removing the teacher absenteeism data item. When OCR 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.”<sup>12</sup> OCR has more recently stated that it “may assess relative rates of teacher absenteeism ... as part of investigating discrimination in student access to quality teaching.”<sup>13</sup> This is, OCR explained, because teacher absenteeism of more than 10 days has “a significant impact” on student achievement.<sup>14</sup> Nothing has changed that would warrant stopping collection of this data.

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<sup>7</sup> OCR, *Dear Colleague Letter: Resource Comparability*, at 4, 29 n.18; Tara Kini and 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/product-files/Teaching\\_Experience\\_Report\\_June\\_2016.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Teaching_Experience_Report_June_2016.pdf).

<sup>8</sup> OCR, *Dear Colleague Letter: Resource Comparability*, at 4 (footnote omitted).

<sup>9</sup> 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-teacher-workforce-preschool-questions-from-civil/563446/>.

<sup>10</sup> National Academies of Sciences, Engineering, and Medicine, *Monitoring Educational Equity* 93 (2019), <https://www.nap.edu/catalog/25389/monitoring-educational-equity>.

<sup>11</sup> *Id.* at 225.

<sup>12</sup> OCR, *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>.

<sup>13</sup> OCR, *Dear Colleague Letter: Resource Comparability*, at 13.

<sup>14</sup> *Id.* at 34 n.46.

Removing these data items, along with the school finance items discussed above, sends a strong signal that OCR is no longer interested in addressing resource inequities. We urge OCR to keep all the current data elements regarding first- and second-year teachers and teacher absenteeism.

### **Retain all early childhood education items**

In responding to public comments to the 2017-18 CRDC, OCR explained that it was “committed to collecting CRDC preschool data” for at least two purposes: (1) to “assist[] in creating a picture of the educational landscape and potential discrimination across the country;”<sup>15</sup> and (2) “to ensure equality within public school systems across the country.”<sup>16</sup> OCR identifies no change since the 2017-18 CRDC that would warrant deletion of any of the existing preschool data items.

It is important to continue to require the collection and reporting of preschool enrollment data disaggregated by race, sex, disability-IDEA, and English learner status. Existing data show that children – and especially boys – of color are disproportionately excluded from the early education settings,<sup>17</sup> and research demonstrates that such early learning opportunities are critical to brain development, school readiness, and life success. Absent the disaggregated enrollment data, there will be no effective way of determining whether exclusionary discipline continues to fall more harshly on particular populations of students.

Research also shows that early childhood education tends to be racially segregated.<sup>18</sup> Disaggregated enrollment data will allow parents and other stakeholders to assess the racial and English learner composition of public-school programs for our youngest learners and allow comparisons with those programs run by other government and private agencies. It is essential that we have the data that can help us to measure progress in ensuring that all children remain in and benefit from quality early childhood settings. Continuing to do so will meet the same goals OCR previously identified in retaining these items in the 2017-18 CRDC.

In any event, whatever OCR’s purported rationale for removing disaggregation of this important enrollment item, OCR lacks the legal authority to do so. The Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, requires state and local report

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<sup>15</sup> OCR, *CRDC Data Set for School Year 2017–18: Attachment B: Response to First Round Public Comment*, at B-13 (revised Oct. 2017), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=5&contentType=pdf>.

<sup>16</sup> OCR, *CRDC Data Set for School Year 2017–18: Attachment C: Response to Second Round Public Comment*, at C-12 (Oct. 2017), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=6&contentType=pdf>.

<sup>17</sup> Institute for Child Success, *Preschool Suspension and Expulsion: Defining the Issues*, at 3 (Dec. 2018), <https://www.instituteforchildsuccess.org/wp-content/uploads/2018/12/ICS-2018-PreschoolSuspensionBrief-WEB.pdf>.

<sup>18</sup> Urban Institute, *Segregated from the Start: Comparing Segregation in Early Childhood and K-12 Education* (Oct. 1, 2019), <https://www.urban.org/features/segregated-start>.

cards to include the number and percentage of students enrolled in preschool programs as reported to the CRDC.<sup>19</sup> As the Department explained in its most recent guidance document about state and local report cards, “the ESEA *requires* that State and local report cards include the *CRDC data disaggregated by any subgroup that is also required under the ESEA (i.e., major racial and ethnic groups, English learners, gender, and children with disabilities).*”<sup>20</sup> The state and local education agencies can’t meet the legal requirements of ESEA, as described by the Department, if OCR fails to collect the disaggregated data.

Finally, OCR should continue to require the collection and reporting of early childhood education program data. Early education is offered and supported by a variety of government programs, including public schools. It is important to understand the types of early childhood programs used by public schools that are currently serving children, including by collecting data regarding whether early childhood programs are full-day versus part-day, whether there is a cost, and whether services for children birth to age 2 are offered for children not identified for services under the IDEA. Without this data, it will be impossible to create an accurate picture of the early education landscape and potential discrimination across the country. Further, these data items are extremely low burden for respondents because they are categorical questions asked at the LEA level.

We urge the OCR to keep all of the current data elements regarding preschool education.

### **Retain Advanced Placement (AP) test-taking items**

OCR proposes to stop collecting data about 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 that did not take any AP examinations, both disaggregated by race, sex, disability-IDEA, and English learner status. This follows on OCR’s prior decision to remove from the 2017-18 CRDC the data items regarding the number of students who passed an AP examination.

But measuring AP enrollment without measuring AP test taking ignores the fact that it is *taking* the examination that seems to solidify the benefits of an AP course, and that this is true even if the student fails the examination. There is “strong empirical evidence that participation in AP English and AP calculus courses is *not* beneficial to students who merely enroll in the courses, [but] has *some* benefits to students who take the AP exam but do not pass it.”<sup>21</sup> In addition, the

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<sup>19</sup> 20 U.S.C. § 6311(h)(1)(C)(viii)(II)(aa).

<sup>20</sup> 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 30 (F-1) (Sept. 2019) (emphases added), <https://www2.ed.gov/policy/elsec/leg/essa/report-card-guidance-final.pdf>; see also *id.* at 54, 56 (identifying “Number of students enrolled in preschool programs” as an indicator that has a “Disaggregation or Reporting Level Required” of “MREG, CWD, ELL, GEN,” which means “Each major racial and ethnic group,” “children with disabilities,” “English learners,” and “Gender”).

<sup>21</sup> Russell T. Warne, Ross Larsen, Braydon Anderson & Alyce J. Odasso, *The Impact of Participation in the Advanced Placement Program on Students' College Admissions Test Scores*, *J. of Educ. Research*, 108:5, 400 (2015) (emphases added), <https://www.tandfonline.com/doi/full/10.1080/00220671.2014.917253>.

drop off between taking an AP course and taking an AP examination can suggest that there are barriers at that school that impede students from taking an examination that could result in essentially free college credits.

If this proposed deletion were accepted (on top of the decision of 2017-18 CRDC to stop collecting data about passing the AP examinations), OCR would have no way of knowing whether the purported opportunities to learn actually resulted in learning. Further, removing all data items regarding AP examinations is 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*.”<sup>22</sup> Removing these data items would remove all data about examinations from the CRDC.

OCR should work with the College Board on a way to obtain these data with less burden on school districts. But it should not remove them.

We urge OCR to keep all the current data elements regarding AP courses.

#### **Add Section 504-only disability disaggregation to all AP course items**

We support OCR’s proposal to add Section 504-only disability status to the disaggregations for student enrollment in the International Baccalaureate (IB) Diploma Programme and Advanced Placement (AP) courses.

For the same reasons that such disaggregation is important and appropriate for those advanced-coursework items, it should also be added to the item regarding student enrollment in at least one AP course in specific subject areas (which OCR has not proposed removing). It should be added as well for the items regarding taking or failing to take any AP exams (which OCR has proposed removing but which we believe should be retained for the reasons stated above).

We urge OCR to add Section 504-only disability status to all AP course items as well as the IB program.

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<sup>22</sup> 20 U.S.C. § 6311(h)(1)(C)(viii)(II)(bb) (emphasis added).

## Add an item regarding harassment based on perceived gender identity

Harassment of students on the basis of their gender identity or transgender status is widespread and deeply injurious.<sup>23</sup> OCR has correctly acknowledged in the past that “[t]here is no doubt, as research identified by the commenters confirms, that students are often subjected to harassment or bullying based on their gender identity or transgender status.”<sup>24</sup>

For the last three CRDC cycles, OCR defined “harassment on the basis of sex” to expressly include harassment on the basis of actual or perceived “gender identity, gender expression, and nonconformity with gender stereotypes.” Indeed, OCR promised that it would “prominently clarify (beyond the definitions section) that harassment on the basis of gender identity or transgender status is included in the sexual harassment category,” so that school districts would know how to track and report such harassment.<sup>25</sup> It was primarily because of that complete inclusion of gender identity and transgender status as part of “sex” that OCR rejected requests to separately track harassment on the basis of gender identity.<sup>26</sup>

OCR now surreptitiously proposes, however, to remove references to gender identity from the definition of “harassment on the basis of sex.”<sup>27</sup> If it does that, then there is no justification for not tracking such harassment separately in its own category.

Even if OCR now believes (wrongly, in our view) that not *all* harassment on the basis of gender identity and transgender status could violate Title IX, it cannot and does not dispute that at least *some* of that harassment violates Title IX.<sup>28</sup> Collecting gender identity harassment data would then be similar to the CRDC’s continuing collection of data around harassment on the basis of religion and sexual orientation. As OCR has acknowledged, those categories are not perfectly aligned with the types of harassment OCR currently interprets the civil rights statutes

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<sup>23</sup> StopBullying.gov, *LGBTQ Youth* (revised Sept. 2017), <https://www.stopbullying.gov/at-risk/groups/lgbt/index.html>; The Williams Institute, *LGBT Youth Experiences Discrimination, Harassment, and Bullying in School* (Mar. 2018), <https://williamsinstitute.law.ucla.edu/press/lgbt-youth-bullying-press-release/>.

<sup>24</sup> OCR, *CRDC Data Set for School Years 2013–14 and 2015–16: Attachment B: Response to First Round Public Comment*, at B-26 (Nov. 2013), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=43619801>.

<sup>25</sup> OCR, *CRDC Data Set for School Years 2013–14 and 2015–16: Attachment C: Response to Second Round Public Comment*, at C-14 (Feb. 2014), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=46250101>.

<sup>26</sup> *Id.*; OCR, *CRDC Data Set for School Year 2017–18: Attachment B: Response to First Round Public Comment*, at B-17 (Oct. 2017), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=5&contentType=pdf>; OCR, *CRDC Data Set for School Years 2013–14 and 2015–16: Attachment B: Response to First Round Public Comment*, at B-26 to 27 (Nov. 2013), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=43619801>.

<sup>27</sup> OCR, *2019–20 Supporting Statement A*, at 5 (“OCR proposes to amend the ‘harassment or bullying on the basis of sex’ definition to refer to sexual harassment and harassment or bullying based on sex stereotypes to achieve more consistency with OCR complaint adjudication processes.”).

<sup>28</sup> OCR, *Instructions to the Field re Complaints Involving Transgender Students*, at 1-2 (June 6, 2017), <https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html>.



to prohibit, but they are sufficiently aligned that OCR has an interest in tracking the matter.<sup>29</sup> As explained in OCR’s current justification for further disaggregation of the question of religious harassment: “[c]ollecting these data could potentially allow OCR to provide technical assistance where there are patterns of conduct.”<sup>30</sup>

Further, there do not appear to be any practical problems in collecting this data. As OCR previously explained, “Congress currently requires institutions of higher education to collect and report data to ED on reported incidents in which the victim was selected because of actual or perceived gender identity, which suggests that it is something that educational institutions can report.”<sup>31</sup> The same FBI Manual that OCR relies on in its current justification to further disaggregate religious harassment<sup>32</sup> also instructs how to determine whether an action was based on perceived gender identity and how to distinguish it from an action based on perceived sexual orientation or gender nonconformity.<sup>33</sup> Certainly, there is no ground for opposing the collection on privacy grounds in light of the CRDC’s current claim that there are no privacy concerns surrounding collection of religious harassment data.<sup>34</sup>

Relatedly, the CRDC need not define the term “sex” outside the harassment context. The National Center for Education Statistics (NCES) has found no need to do so for its collection of data from institutions of higher education.<sup>35</sup> OCR has no good reason why it cannot follow that approach. If, nonetheless, OCR insists on defining the term, that definition should be revised to align with the new definition adopted by ED*Facts* for the 2019-20 school year.<sup>36</sup>

We urge OCR to add a data item about harassment on the basis of perceived gender identity.

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<sup>29</sup> OCR, *Mandatory Civil Rights Data Collection Data Set for School Years 2013–14 and 2015–16: Supporting Statement, Part A: Justification*, at 12-13 (revised Nov. 2013), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=43619501>.

<sup>30</sup> OCR, *2019–20 Supporting Statement A*, at 5.

<sup>31</sup> OCR, *CRDC Data Set for School Years 2013–14 and 2015–16: Attachment B: Response to First Round Public Comment*, at B-26 (Nov. 2013), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=43619801>.

<sup>32</sup> OCR, *2019–20 Supporting Statement A*, at 5.

<sup>33</sup> Federal Bureau of Investigation, *Hate Crime Data Collection Guidelines and Training Manual* 56-57 (2015), <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>.

<sup>34</sup> OCR, *2019–20 Supporting Statement A*, at 17-18.

<sup>35</sup> RTI International, *Report and Suggestions from IPEDS Technical Review Panel #51: Gender*, at 2 (2016) (“IPEDS guidance does not define sex or gender or the categories in which this information is collected (men and women).”), [edsurveys.rti.org/IPEDS\\_TRP\\_DOCS/prod/documents/TRP51\\_Summary.pdf](https://edsurveys.rti.org/IPEDS_TRP_DOCS/prod/documents/TRP51_Summary.pdf).

<sup>36</sup> NCES, *Annual Mandatory Collection of Elementary and Secondary Education Data through ED*Facts*: Attachment A: ED*Facts* Data Groups and Categories for School Years 2019-20, 2020-21, and 2021-22*, at 178 (revised July 2019) (“An indication that students are either male or female.”), <https://www.reginfo.gov/public/do/DownloadDocument?objectID=87311802>.

## **Meet prior commitments to measure experiences of children with disabilities placed by school districts in non-public schools**

NCYL is disappointed that OCR has not kept the promises it made in October 2017 when seeking clearance of the 2017-18 CRDC. It is time to make good on those promises so that the experiences of certain children with disabilities are not overlooked.

Tens of thousands of students with disabilities who are placed by their school districts into non-public schools can be subjected to exclusionary discipline, restraint and seclusion, and other adverse actions, yet those students' experiences are not tracked by the CRDC. Two years ago, commenting on the 2017-18 CRDC proposals, "[s]ixteen commenters expressed support for the collection of data on the treatment of students with disabilities placed in private or non-public schools by the reporting LEAs. Ten commenters urged ED to involve stakeholders, such as through a series of meetings or phone calls, to help explore and evaluate what data to collect in these educational settings."<sup>37</sup>

OCR agreed with commenters that "the collection of data regarding the treatment of students with disabilities in these settings is important for gauging possible discrimination and educational inequities."<sup>38</sup> OCR committed that it would "consider options to gather input from key stakeholders to help determine the full range of data that can be collected, and how to best collect quality data from these districts" about the treatment of such students.<sup>39</sup>

Despite its prior promises, we are not aware of *any* efforts by OCR to gather input from stakeholders about how to collect data from public school districts about students they place in private schools. In March 2019, NCYL requested records under FOIA (No. 19-01312-F) about the steps OCR had taken to gather such input, but no documents have yet been released.

After two years of silence, the proposed 2019-20 CRDC does not offer *any* proposal to address this issue. This is despite OCR's claim that it is engaged in a new "Initiative to Address the Inappropriate Use of Restraint and Seclusion," where it will use a "proactive approach" to "protect students with disabilities" from "the possible inappropriate use of restraint and seclusion."<sup>40</sup> OCR cannot protect students if it does not count them. That must change.

We urge you to convene immediately an expert group of stakeholders to see what can be done in 2019-20 CRDC and future collections around this issue.

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<sup>37</sup> OCR, *CRDC Data Set for School Year 2017–18: Attachment C: Response to Second Round Public Comment*, at C-16 (Oct. 2017), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=6&contentType=pdf>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Department of Education, *U.S. Department of Education Announces Initiative to Address the Inappropriate Use of Restraint and Seclusion to Protect Children with Disabilities, Ensure Compliance with Federal Laws* (Jan. 17, 2019), <https://www.ed.gov/news/press-releases/us-department-education-announces-initiative-address-inappropriate-use-restraint-and-seclusion-protect-children-disabilities-ensure-compliance-federal-laws>.

## **Provide additional resources for, and transparency over, the operations of the CRDC**

Timely access to accurate data collected by the CRDC is of critical importance. NCYL is frustrated that OCR has not been more transparent about its plans for maintaining and improving the CRDC. OCR has issued two press releases related to CRDC in the past year, yet it has not provided any details of its plans or briefed stakeholders on OCR's progress.

In January 2019, OCR announced a new initiative around restraint and seclusion, two parts of which related to the CRDC: "OCR will conduct data quality reviews and work directly with school districts to review and improve restraint and seclusion data submitted as a part of the Civil Rights Data Collection;" and "OCR will provide technical assistance to schools on data quality, to ensure that they are collecting and reporting accurate data relating to the use of restraint and seclusion."<sup>41</sup> In the abstract, this would seem to be a good development. There has been a healthy skepticism about the quality of the restraint and seclusion data collected and reported by OCR, most recently by the Government Accountability Office.<sup>42</sup> Yet that skepticism certainly isn't limited to restraint and seclusion,<sup>43</sup> and OCR offered no reasons for limiting the initiative in this manner.

Further, OCR has offered no other details about how the restraint-and-seclusion data quality initiative will work in practice. NCYL requested records about the initiative under FOIA in January 2019 (No. 19-00771-F). In June 2019, OCR released an interim response to the portion of the request seeking "records regarding who (including contractors, regional staff, or staff from other operating components or agencies) has been, is, or will be working" on the initiative. OCR's response listed only five people – all of whom are employed in OCR Headquarters and the Program Legal Group and all of whom already worked on CRDC matters prior to the initiative. This suggests that OCR is not devoting any new personnel to the issue and not involving the regional offices. But to be effective, such an initiative necessarily requires additional people to perform the data quality reviews and to work directly with school districts to review and improve restraint and seclusion data submitted as part of the CRDC, as the press release announcing the initiative promised. Unfortunately, this initiative seems to be merely lip

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<sup>41</sup> *Id.*

<sup>42</sup> GAO, *Education Should Take Immediate Action to Address Inaccuracies in Federal Restraint and Seclusion Data*, GAO-19-551R (June 18, 2019), <https://www.gao.gov/assets/700/699795.pdf>.

<sup>43</sup> See, e.g., Evie Blad, *How Bad Data from One District Skewed National Rankings on Chronic Absenteeism*, Education Week (Jan. 9, 2019), <http://blogs.edweek.org/edweek/rulesforengagement/2019/01/chronic-absenteeism.html>; Anya Kamenetz, *The School Shootings that Weren't*, National Public Radio (Aug. 27, 2018), <https://www.npr.org/sections/ed/2018/08/27/640323347/the-school-shootings-that-werent>; Andrew Ujifusa & Alex Harwin, *There Are Wild Swings in School Desegregation Data. The Feds Can't Explain Why*, Education Week (May 2, 2018), <https://www.edweek.org/ew/articles/2018/05/02/there-are-wild-swings-in-school-desegregation.html>; American Association of University Women, *Three-Fourths of Schools Report Zero Incidents of Sexual Harassment in Grades 7-12* (Oct. 24, 2017), <https://www.aauw.org/article/schools-report-zero-incidents-of-sexual-harassment/>.

service rather than a real effort to address the real data quality problems identified by the Government Accountability Office and others.

Of additional concern is that OCR predicts that the estimated annual costs to the federal government for 2019-20 CRDC, which includes “costs to enhance the survey tool, provide technical support for all LEAs in the nation, collect the data, and produce and analyze the resulting database of survey responses,” will be \$2.9 million.<sup>44</sup> That is a 26% *reduction in support* from the \$3.9 million OCR estimated the federal government would spend on the 2017-18 CRDC for the same items.<sup>45</sup> This further suggests that OCR is not devoting any new resources to its purported technical assistance initiative, as well as indicating a general lack of support for the CRDC.

And then in August 2019, OCR announced a new partnership with the National Center for Education Statistics (NCES) “to support school districts by providing technical assistance resources, training and prompt feedback on identified issues” and “to review and revise data quality procedures when needed to reflect lessons learned during collection and review of CRDC data.”<sup>46</sup> But OCR has not released any other details about the partnership – what budget commitments have been made; what agreements exist about control over the selection of items to collect; or the timing of the data release. There is no way for the public to judge the partnership without some understanding of these arrangements. NCYL requested records about the partnership under FOIA in August 2019 (No. 19-02118-F), but no documents have yet been released.

We would be particularly concerned if the partnership with NCES was a cause of the significant delay in issuing this proposed information collection request. Without time to update their records systems and train their staff, proposing to add data items to the 2019-20 collection just as the 2019-20 school year begins is a recipe for disastrously poor data. As the Department’s own National Forum on Education Statistics explained, “changes to the CRDC collection will impact data quality. LEAs may find it difficult to ensure good data quality for new data elements added to the CRDC. It may take up to two years before LEAs are able to report accurate data for a new data element. OCR typically presents new data elements as optional during the first reporting cycle to allow LEAs time to develop sound data collection methods.”<sup>47</sup> With no

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<sup>44</sup> OCR, *2019–20 Supporting Statement A*, at 23.

<sup>45</sup> OCR, *Mandatory Civil Rights Data Collection Data Set for School Year 2017–18: Supporting Statement, Part A: Justification*, at 18 (July 2017), <https://www.regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=1&contentType=pdf>.

<sup>46</sup> Department of Education, *U.S. Department of Education Continues to Work to Improve Civil Rights Data Quality* (Aug. 23, 2019), <https://www.ed.gov/news/press-releases/us-department-education-continues-work-improve-civil-rights-data-quality>.

<sup>47</sup> National Forum on Education Statistics, *Forum Guide to Reporting Civil Rights Data*, at 8 (2018), <https://nces.ed.gov/pubs2017/NFES2017168.pdf>.

suggestion that school districts are currently collecting the proposed new data items,<sup>48</sup> it is difficult to see how school districts are going to be able to provide accurate data about this school year.

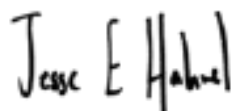
If there are tradeoffs being made between speed, cost, and quality, the public is entitled to know who is making those decisions and if they are properly considering the overarching purpose of the CRDC as a tool for policy development and civil rights enforcement. Current data is needed to identify and address disparities as soon as possible in order to limit the negative impact on students. If the involvement of NCES, a statistical agency, in the CRDC may have the effect of slowing down an already unwarrantedly slow process of collection and reporting,<sup>49</sup> OCR should explain to the public how it intends to address that issue going forward.

We urge you to release the records NCYL has requested under FOIA immediately. We also urge you to hold regularly scheduled quarterly briefings to update stakeholders on the CRDC and answer questions about the operation of the collection.

### CONCLUSION

It is clear that, as a Nation, we have far to go in building a more equitable education system. It is crucial that the U.S. Department of Education collect the information identified in this comment in the 2019-20 CRDC, meet its past and present promises, and maintain regular communication with stakeholders.

Sincerely,



Jesse Hahnel  
Executive Director  
National Center for Youth Law

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<sup>48</sup> See, for example, the comment of the Kentucky SEA, <https://www.regulations.gov/document?D=ED-2019-ICCD-0119-0034>.

<sup>49</sup> NCES, *Statistical Standards: Standard 6-1: Review of Reports and Data Products* (2012) (“NCES employs a multistage review process for all NCES products. In the case of descriptive, analytic, and technical reports, the review process includes internal peer review comments that are addressed through an internal review process coordinated by the Statistical Standards Program.”), <https://nces.ed.gov/statprog/2012/> (follow “Establishment of Review Procedures” hyperlink).