

February 11, 2022

Director of Strategic Collections and Clearance  
Office of the Chief Data Officer  
Office of Policy, Evaluation and Policy Development  
U.S. Department of Education  
400 Maryland Avenue SW, LBJ, Room 6W201  
Washington, DC 20202-8240  
Submitted via *regulations.gov*

**RE: Agency Information Collection Activities; Comment Request; Mandatory  
Civil Rights Data Collection (Docket No. ED-2021-SCC-0158)**

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Office for Civil Rights (“OCR”) of the U.S. Department of Education (the “Department”) on the above-captioned notice proposing changes to the Civil Rights Data Collection (“CRDC”) for the 2021–2022 school year. *See* 86 Fed. Reg. 70,831 (Dec. 13, 2021).

The undersigned are scholars affiliated with the Williams Institute at the UCLA School of Law. The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity (“SOGI”), including on discrimination and stigma experienced by lesbian, gay, bisexual, and transgender (“LGBT”) people. The Williams Institute collects and analyzes original data, as well as analyzes governmental and private data, and has long worked with federal agencies to improve data collection on the U.S. population. These efforts include producing widely-cited best practices for the collection of SOGI information on population-based surveys.<sup>1</sup>

We write in response to OCR’s request for comments on its proposal expanding the sex category used throughout the CRDC to be inclusive of nonbinary students (Directed Question #3), as well as on its other proposals concerning SOGI. In particular, we write to provide research in support of OCR’s various proposals that would mandate the collection and reporting of SOGI information, including enrollment counts based on nonbinary identity, through the upcoming CRDC as part of its work to monitor and enforce against violations of Title IX of the Education Amendments of 1972 (“Title IX”).

In Part I, we briefly review the scope of the legal protections afforded to students under Title IX and OCR’s role in enforcing same, noting that it would be consistent with the Assistant

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<sup>1</sup> *See, e.g.*, GENDER IDENTITY IN U.S. SURVEILLANCE (GENIUSS) GROUP, WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS TO IDENTIFY TRANSGENDER AND OTHER GENDER MINORITY RESPONDENTS ON POPULATION-BASED SURVEYS (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Survey-Measures-Trans-GenIUSS-Sep-2014.pdf>; SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), WILLIAMS INST., BEST PRACTICES FOR ASKING QUESTIONS ABOUT SEXUAL ORIENTATION ON SURVEYS (2009), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Best-Practices-SO-Surveys-Nov-2009.pdf>.

Secretary for Civil Rights’s broad grant of authority to require the collection and reporting of SOGI information to aid in the enforcement of laws like Title IX—including through the CRDC. In Part II, we provide a review of relevant existing research on LGBTQ<sup>2</sup> youth, documenting the persistence and impact of discrimination and harassment that they face in schools, including disparities when compared to non-LGBTQ youth. Finally, in Part III, we note our support for OCR’s various proposals for the CRDC related to SOGI in light of that research, offering suggestions for additional modifications intended to support OCR in monitoring and enforcing against violations of Title IX and the other civil rights laws it enforces.

## **I. OCR has the Regulatory Authority to Mandate the Collection and Reporting of SOGI Information as Part of the CRDC**

OCR is charged with enforcing various civil rights laws in schools, including Title IX, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and Title II of the Americans with Disabilities Act.<sup>3</sup> Under the Department of Education Organization Act, the Assistant Secretary for Civil Rights has been granted the broad authority to mandate the collection of “data necessary to ensure compliance with civil rights laws within the jurisdiction of [OCR].”<sup>4</sup> The Assistant Secretary has previously used this authority to implement various information collection initiatives; within primary and secondary schools, this has been done primarily through the biennial CRDC.<sup>5</sup>

Title IX prohibits any education program or activity receiving federal financial assistance from discriminating against individuals on the basis of sex, including that individuals not be excluded from participation in or denied the benefits of covered programs or activities because of their sex.<sup>6</sup> Like the other statutes enforced by OCR, Title IX does not expressly include SOGI as protected bases. However, in 2020, the U.S. Supreme Court decided in *Bostock v. Clayton County* that the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>7</sup> encompasses SOGI discrimination.<sup>8</sup> Notably, the Court’s reasoning in *Bostock* is premised on general principles applicable to contexts outside of employment.<sup>9</sup> As such, the Department of Justice has formally adopted the position that there is “nothing persuasive . . . to

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<sup>2</sup> Consistent with the literature on sexual and gender minority people, “LGBTQ”—with the Q representing questioning or queer—is often used to capture individuals, generally youth, who identify their SOGI using such terms, including those whose identities are less developed or more fluid. Certainly, adults question their SOGI and can identify as queer. See, e.g., *6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer*, WILLIAMS INST. (Jan. 22, 2020), <https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release>. However, as only specific studies relevant to this comment include measures to allow for the identification and analysis of LGBT people who specifically identify as queer or questioning, we generally use “LGBT” when discussing sexual and gender minority people, whether youth or adults, unless supported by the underlying study.

<sup>3</sup> *Laws & Guidance*, ED.GOV, <https://www2.ed.gov/policy/landing.jhtml?src=pn> (last accessed Jan. 31, 2022).

<sup>4</sup> 20 U.S.C. § 3413(c)(1).

<sup>5</sup> ABOUT THE CIVIL RIGHTS DATA COLLECTION, DEP’T OF EDUC., <https://ocrdata.ed.gov/assets/downloads/About%20the%20CRDC.9-14-20.pdf> (last accessed Jan. 31, 2022).

<sup>6</sup> 20 U.S.C. § 1681(a).

<sup>7</sup> 42 U.S.C. § 2000e-2(a).

<sup>8</sup> 140 S. Ct. 1731 (2020).

<sup>9</sup> *Id.* at 1738 (noting the Court’s deference to the “ordinary public meaning” of the terms contained within Title VII—in particular, its prohibition on discrimination “because of . . . sex”—in determining whether SOGI discrimination is encompassed within said terms).

justify a departure from [applying] *Bostock*'s textual analysis" to claims under Title IX, noting that its prohibition on sex discrimination is "interchangeable" with the similar prohibition contained in Title VII.<sup>10</sup> Similarly, a number of courts—consistent with a longstanding body of caselaw holding that Title VII matters are instructive for interpreting provisions in Title IX—<sup>11</sup> immediately began applying the Supreme Court's reasoning in *Bostock* to affirm LGBTQ students' SOGI-based claims under Title IX following that decision.<sup>12</sup> Accordingly, the Department has issued a Notice of Interpretation announcing its intent to "fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."<sup>13</sup>

Therefore, given that Title IX is now fully understood to clearly prohibit discrimination and harassment on the basis of SOGI, as it does on the basis of sex, it would be consistent with the regulatory authority granted to the Assistant Secretary to require the consistent collection and reporting of SOGI information as a means of checking compliance with and enforcing against violations of Title IX—including through the CRDC. Such action would be consistent with the mandates of Executive Order 13988, which calls on the Department and other agencies to fully implement the *Bostock* decision across the civil rights statutes they enforce.<sup>14</sup> And, as described more fully below, existing research on LGBTQ youth indicates that those students experience persistent bullying, harassment, and other forms of discrimination—which often go unresolved by and are at times perpetrated by school officials—<sup>15</sup> across the country. This body of research suggests that OCR may indeed need to collect additional information related to SOGI through the CRDC to allow it to fully monitor and enforce against potential Title IX violations, consistent with the mandates of Executive Order 13803 that the Department engage in "additional [Title IX, SOGI-related] enforcement actions . . . to the fullest extent permissible under law."<sup>16</sup>

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<sup>10</sup> Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021).

<sup>11</sup> See, e.g., *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992); *Jennings v. Univ. of N.C.*, 482 F.3d 686 (4th Cir. 2007); *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172 (10th Cir. 2001); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd* 631 F. 2d 178 (2d Cir. 1980).

<sup>12</sup> See, e.g., *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, (11th Cir. 2020).

<sup>13</sup> Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 at 32,639 (June 22, 2021).

<sup>14</sup> Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>15</sup> See, e.g., *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112–13 (E.D. Cal. 2011) (alleging that, after receiving complaints that a student's peers called him derogatory names and assaulted him for coming out, teachers engaged in their own disparaging comments including that the student was "fruity" and "in need of help."); *McMillen v. Itawamba County Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (student denied permission to attend prom with a same-sex partner or while wearing clothing that does not conform with sex stereotypes).

<sup>16</sup> Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, Exec. Order. No. 14,021, 86 Fed. Reg. 13,803 (Mar. 08, 2021).

## II. Existing Research on LGBTQ Students Documents Experiences with Persistent Bullying, Harassment, and Other Forms of Discrimination

In the United States, at least 9.5% of the youth population (ages 13–17) identifies as LGBT.<sup>17</sup> We estimate there are nearly 2 million LGBT youth ages 13–17 in the United States;<sup>18</sup> approximately 150,000 of these youth are transgender.<sup>19</sup> The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; for example, a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.<sup>20</sup>

LGBT people have faced a long history of discrimination in the United States across a range of contexts. In *Obergefell v. Hodges*, the Supreme Court observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”<sup>21</sup> The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”<sup>22</sup> Regarding transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”<sup>23</sup>

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades (in some places more than others), ample research confirms that anti-LGBT violence, stigma, and discrimination remain widespread. These adverse experiences take a toll on LGBT students’ mental health and wellbeing in comparison to their non-LGBT peers, and certain disparities widen when factoring in the compounding effects of discrimination faced along intersectional dimensions of identity such as race and sex.

### *Research on Discrimination Faced by LGBTQ Students*

A longstanding body of research indicates that LGBTQ youth experience persistent discrimination and harassment while in school, including our own analyses of survey data. For example, the Williams Institute conducted two large LGBTQ-specific population-based national surveys through the NIH-funded Generations and TransPop studies on sexual and gender

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<sup>17</sup> KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

<sup>18</sup> *Id.* at 1.

<sup>19</sup> JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON, & KERITH J. CONRON, WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 4 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf>.

<sup>20</sup> BIANCA D.M. WILSON, SOON KYU CHOI, JODY L. HERMAN, TARA L. BECKER, & KERITH J. CONRON, WILLIAMS INST., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GNC-Youth-CA-Dec-2017.pdf>.

<sup>21</sup> 135 S. Ct. 2584, 2596 (2015).

<sup>22</sup> *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

<sup>23</sup> *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

minority people, respectively.<sup>24</sup> Using these data, we found that—when combining the “often” and “sometimes” responses—67% of LBQ cisgender women, 75% of GBQ cisgender men, and 70% of transgender people reported being bullied before age 18.<sup>25</sup> Similarly, in a forthcoming Williams Institute analysis of data from the Access to Higher Education Survey (“AHES”)—which asked a nationally representative sample of U.S. adults ages 18 to 40 to report on their lifetime experiences in schools—we found that among respondents, 42.5% of transgender respondents and 24.7% of their LGBTQ cisgender peers felt they did not fully belong at school at some point in their lives due to being LGBTQ.<sup>26</sup> Likewise, just over half (51.7%) of LGBTQ adults in the sample reported lifetime experiences of needing to hide their SOGI at school due to being LGBTQ.<sup>27</sup>

Surveys of youth currently in school support the retrospective accounts of adults. For example, our analysis of the 2015 Youth Risk Behavior Survey (“YRBS”)—a nationally representative survey of high school students conducted by the Centers for Disease Control and Prevention (“CDC”)—found that sexual minority youth were nearly two times more likely than heterosexual (straight) youth to report being bullied and threatened with a weapon on school property.<sup>28</sup> Similar research by other investigators replicate these findings, including analyses of more recent data collected through the YRBS.<sup>29</sup> Likewise, according to GLSEN’s 2019 National School Climate Survey (“NSCS”), 81% of LGBTQ students reported being verbally harassed in the past year because of their sexual orientation, gender expression, or gender.<sup>30</sup> Additionally, 34.2% of LGBTQ students responding to the 2019 NSCS reported being physically harassed, and 14.8% of LGBTQ students reported being physically assaulted, in the past year because of their sexual orientation, gender expression, or gender.<sup>31</sup> Notably, 20.8% of LGBTQ students reported being told to change their own behavior after reporting anti-LGBT harassment; similarly, 7.3% were disciplined after reporting their victimization to school staff.<sup>32</sup> NSCS data indicate that LGBTQ students also experience discrimination motivated by various non-SOGI

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<sup>24</sup> ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O’NEILL, WILLIAMS INST., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPop STUDIES 1 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

<sup>25</sup> BRAD SEARS, CHRISTY MALLORY, ANDREW R. FLORES & KERITH J. CONRON, WILLIAMS INST., LGBT PEOPLE’S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 13 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>26</sup> KERITH J. CONRON, KATHRYN O’NEILL & LUIS A. VASQUEZ, WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE: FINDINGS FROM A NATIONAL PROBABILITY SURVEY (2022) (forthcoming).

<sup>27</sup> *Id.*

<sup>28</sup> Ilan H. Meyer, Feijun Luo, Bianca D.M. Wilson & Deborah M. Stone, *Sexual Orientation Enumeration in State Antibullying Statutes in the United States: Associations with Bullying, Suicidal Ideation, and Suicide Attempts Among Youth*, 6 LGBT HEALTH 9 (2019), <https://doi.org/10.1089/lgbt.2018.0194>.

<sup>29</sup> *See, e.g.*, Kathleen C. Basile et al., Ctrs. for Disease Control & Prevention, *Interpersonal Violence Victimization Among High School Students — Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 28, 33 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf>; Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 19, 23 (2020), <https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf>.

<sup>30</sup> JOSEPH G. KOSCIW ET AL., GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION’S SCHOOLS 28, [https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web\\_0.pdf](https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf).

<sup>31</sup> *Id.* at 28–29.

<sup>32</sup> *Id.* at 34.

factors—among respondents to the 2019 survey, 36.5% reported bullying or harassment based on actual or perceived disability, 23.1% based on actual or perceived religion, and 21.4% based on actual or perceived race or ethnicity.<sup>33</sup>

While limited within the context of primary and secondary education, available research also suggests that LGBTQ students are at particular risk of experiencing sexual harassment and assault in schools. For example, among respondents to the 2019 NSCS, over half (58.3%) of all LGBTQ students reported experiencing sexual harassment at school in the past year, with 13.4% reporting that such experiences had occurred often or frequently.<sup>34</sup> And, per the CDC’s analysis of 2019 YRBS data, LGB students were more likely than heterosexual students to report experiencing sexual dating violence in the past year (16.4% vs. 6.7%).<sup>35</sup>

Finally, while studies reflect that both sexual and gender minority youth regularly experience discrimination in schools, research suggests that gender minorities bear a disproportionate share. CDC surveillance data (collected through the YRBS) from ten states and nine large urban school districts found that 34.6% of transgender students reported being bullied at school, 29.6% reported electronic bullying, 26.9% felt unsafe at or traveling to school, and 23.8% reported being threatened or injured with a weapon at school, in the previous twelve months.<sup>36</sup> An earlier study of 5,469 students who completed the 2013 YRBS conducted in four urban school districts found a “significant linear relationship between gender expression and bullying victimization[,]” with each unit increase in a student’s perceived gender nonconformity resulting in a 15% greater likelihood of their experiencing bullying.<sup>37</sup> Data from the 2019 NSCS indicate that there may be differences still among nonbinary students based on their specific gender identity and expression—with transgender nonbinary respondents being more likely to report feeling unsafe at school in the past year because of their gender expression (77.7%) than students who reported being nonbinary male or female (52.4%).<sup>38</sup>

The 2015 U.S. Transgender Survey (“USTS”)—the largest survey of transgender and gender nonconforming people to date—found that 54% of respondents reported being verbally harassed, 24% reported being physically attacked, and 13% reported being sexually assaulted, while in grades K-12 because they openly identified or were perceived as transgender.<sup>39</sup> An earlier study found that 82% of transgender youth reported hearing negative comments based on their gender identity or expression from other students “sometimes or often[,]” with 31% reporting hearing such comments from school personnel.<sup>40</sup> USTS data show that while

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<sup>33</sup> *Id.* at 29.

<sup>34</sup> KOSCIW ET AL., *supra* note 30, at 30.

<sup>35</sup> Basile et al., *supra* note 29, at 31.

<sup>36</sup> Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Abuse, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

<sup>37</sup> Allegra R. Gordon et al., *Gender Expression, Violence, and Bullying Victimization: Findings from Probability Samples of High School Students in 4 US School Districts*, 8 J. SCH. HEALTH 306 (2018).

<sup>38</sup> KOSCIW ET AL., *supra* note 30, at 95.

<sup>39</sup> SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUALITY, *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 132* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>40</sup> Jennifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 J. YOUTH ADOLESCENCE 1175, 1179–90 (2010).

transgender and gender nonconforming people indeed experience high levels of discrimination overall, race, disability, and other dimensions of identity can contribute to the likelihood of such experiences. For example, among respondents to the 2015 survey who were out or were perceived as transgender and experienced some form of mistreatment while attending K-12 schools, those that were American Indian (92%), Middle Eastern (84%), and multiracial (81%), alongside those with disabilities (82%), were the most likely to report one or more such negative experiences.<sup>41</sup>

### *Research on the Impact of Discrimination Faced by LGBTQ Students*

Research has long indicated that experiences with discrimination adversely impact LGBTQ youth's health, well-being, and dignity.<sup>42</sup> Anti-LGBT stigma and discrimination drive well-documented health disparities between the LGBT and non-LGBT populations, as articulated in the "minority stress" research literature.<sup>43</sup> The minority stress model, which the Institute of Medicine has recognized as a core perspective for understanding LGBT health,<sup>44</sup> describes how LGBT people experience chronic stress stemming from their stigmatization. While stressors—such as loss of a job or access to education—are ubiquitous in society, experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other factors being equal). This excess stress exposure confers an elevated risk for certain mental and physical health conditions in LGBT youth and adult populations. For example, one study found that gender minority youth reported significantly higher prevalence of experiencing bullying and harassment in the past year as compared to cisgender youth, and that this was associated with increased odds of having consumed alcohol, cigarettes, marijuana, or non-marijuana illicit drugs over the past twelve months.<sup>45</sup>

For many LGBTQ youth, the challenges that they face at school are compounded—and often eclipsed—by having unaccepting families and facing other difficulties tied to their SOGI. For example, in one study about the challenges that youth face, LGBT youth ranked non-accepting families as the most important problem in their lives (26%), followed by school and bullying problems (21%) and fear of being open about being LGBT (18%).<sup>46</sup> In contrast, non-

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<sup>41</sup> JAMES ET AL., *supra* note 39.

<sup>42</sup> See, e.g., Joanna Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. YOUTH & ADOLESCENCE 1001 (2009).

<sup>43</sup> Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129 PSYCH. BULL. 674 (2003); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38 (1995); see also Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PROF. PSYCH.: RES. & PRAC. 460, 465 (2012).

<sup>44</sup> INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 20 (2011), <https://www.ncbi.nlm.nih.gov/books/NBK64806/>.

<sup>45</sup> Sari L. Reisner et al., *Gender Minority Social Stress in Adolescence: Disparities in Adolescent Bullying and Substance Use by Gender Identity*, 52 J. SEX RES. 243 (2015).

<sup>46</sup> HUMAN RIGHTS CAMPAIGN, GROWING UP LGBT IN AMERICA: HRC YOUTH SURVEY REPORT KEY FINDINGS 2 (2012), [https://assets2.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America\\_Report.pdf](https://assets2.hrc.org/files/assets/resources/Growing-Up-LGBT-in-America_Report.pdf).

LGBT youth ranked classes/exams/grades (25%), college/career (14%), and financial pressures related to college or job (11%) as the most important problems in their lives.<sup>47</sup>

Existing data have revealed not only that LGBTQ youth report significant disparities in experiences with bullying and harassment while in school when compared to their non-LGBTQ peers, but also that various negative health outcomes, such as a high prevalence of suicide attempts and ideation,<sup>48</sup> are related to those adverse experiences. While Title IX prohibits acts of discrimination based on SOGI without regard to such impacts, studies have documented that LGBTQ students' experiences with discrimination and harassment can limit their educational attainment—which the Department has previously measured as part of its monitoring of schools' compliance with Title IX's guarantees.<sup>49</sup>

Williams Institute research has previously documented this connection; for example, among respondents to the AHES, we found that over a quarter of transgender people (26.0%) and almost one in ten (9.4%) LBQ cisgender people reported lifetime barriers to their academic success due to being LGBTQ, including experiencing unfair treatment, harassment, or bullying.<sup>50</sup> In a separate forthcoming analysis of AHES data, we also found that LGBTQ people of color were more likely than White LGBTQ people to report that unfair treatment due to being LGBTQ impeded their academic success (10.4% vs. 4.4%, respectively).<sup>51</sup> Similarly, Williams Institute scholars found that, when combined, LBQ women of color reported significantly lower levels of education than White LBQ women, including higher rates of not finishing high school (15.9% vs. 9.7%, respectively), through an analysis data collected through the CDC's Behavioral Risk Factor Surveillance System survey ("BRFSS") between 2017 and 2019.<sup>52</sup>

Turning to other analyses, per data collected through the CDC's 2019 YRBS, 66.3% of LGB students reported feeling so sad or hopeless that they stopped doing their normal activities for two or more weeks in a row over the past year, compared to 32.2% of heterosexual students.<sup>53</sup> LGB respondents to the 2019 YRBS were also more likely than non-LGB respondents to report that they did not go to school at least once in the prior month because they felt unsafe (13.5% vs. 7.5%).<sup>54</sup> Among LGBTQ respondents to the 2019 NSCS, those reporting higher levels of victimization based on gender expression reported lower average GPAs (2.98) when compared to those who reported experiencing lower levels of the same type of

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<sup>47</sup> *Id.*

<sup>48</sup> Johns et al., *supra* note 36, at 69–70; Laura Kann et al., Ctrs. for Disease Control & Prevention, *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12*, 65 MORBIDITY & MORTALITY WKLY. REP. 1, 18–20 (2016).

<sup>49</sup> *Fast Facts – Title IX*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=93> (last accessed Jan. 31, 2022).

<sup>50</sup> CONRON, O'NEILL & VASQUEZ, *supra* note 26.

<sup>51</sup> KERITH J. CONRON, KATHRYN O'NEILL, MARIELLA ARREDONDO & RUBEEN GUARDADO, WILLIAMS INST., EDUCATIONAL EXPERIENCES OF LGBTQ PEOPLE OF COLOR: FINDINGS FROM A NATIONAL PROBABILITY SURVEY (2022) (forthcoming).

<sup>52</sup> BIANCA D.M. WILSON, ALLEGRA R. GORDON, CHRISTY MALLORY, SOON KYU CHOI & M.V. LEE BADGETT, WILLIAMS INST., HEALTH AND SOCIOECONOMIC WELL-BEING OF LBQ WOMEN IN THE US 31 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LBQ-Women-Mar-2021.pdf>.

<sup>53</sup> Johns et al., *supra* note 29, at 23.

<sup>54</sup> *Id.*

victimization (3.36).<sup>55</sup> Additionally, 32.7% of LGBTQ students responding to the 2019 NSCS similarly reported missing at least one full day of school in the past month due to feeling unsafe or uncomfortable; 8.6% missed four or more days in the past month.<sup>56</sup> NSCS respondents were also asked whether they have ever changed schools due to feeling unsafe or uncomfortable: 17.1% of LGBTQ students in 2019 reported having done so.<sup>57</sup> Consistent with this finding, 17% of 2015 USTS respondents who were out as transgender in grades K-12 reported leaving their school altogether because of the harassment they experienced.<sup>58</sup>

Finally, research suggests that these experiences may have impacts on LGBTQ students' educational attainment long-term. For example, a recent study using data from the High School Longitudinal Study conducted between 2009 and 2016 found that sexual minority people were almost 3% less likely to attend college than heterosexual people, even after accounting for certain individual, family, school, and state characteristics.<sup>59</sup> Studies have documented disparities along intersectional dimensions, such as race and gender, here as well. As part of our analysis of 2017–2019 BRFSS data, Williams Institute scholars found that observed differences were “particularly stark” when comparing who had obtained college degrees between White LBQ women (33%) and Black (23%), Latinx (17%), and American Indian/Alaska Native (17%) LBQ women.<sup>60</sup>

### III. OCR's Collection of SOGI-Related Information through the CRDC

In light of the research discussed throughout these comments, the undersigned commend OCR for its various proposals to collect certain information from respondent schools and districts related to SOGI through the 2021–2022 CRDC.

First, we note our support for OCR's proposed measurement of whether respondent agencies maintain written anti-bullying policies enumerating SOGI (Data Group 1034), including by collecting the web links to those policies (Data Group 1035). Half of the states do not have laws or policies that explicitly prohibit SOGI discrimination in schools, and over half lack legal requirements that schools or districts enumerate SOGI within their anti-bullying policies.<sup>61</sup> OCR is therefore likely to increase our understanding on how many and where students lack certain key protections against SOGI discrimination by requiring this reporting, which may in turn inform its own enforcement activities and priorities with respect to Title IX.

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<sup>55</sup> KOSCIW ET AL., *supra* note 30, at 48–49. Similarly, LGBTQ students who reported higher levels of victimization based on sexual orientation reported lower average GPAs than LGBTQ students who reported lower levels of such victimization (3.03 vs. 3.34). *Id.*

<sup>56</sup> *Id.* at 18.

<sup>57</sup> *Id.* at xviii.

<sup>58</sup> JAMES ET AL., *supra* note 39, at 132.

<sup>59</sup> Dario Sansone, *LGBT students: New Evidence on Demographics and Educational Outcomes*, 73 *ECONOMICS OF EDUC. REV.* 101933 (2019), <https://www.sciencedirect.com/science/article/pii/S0272775719302791>. Transgender people in the sample reported similar differences when compared to cisgender people, but these differences were not statistically significant. *Id.*

<sup>60</sup> WILSON ET AL., *supra* note 20.

<sup>61</sup> *Safe Schools Laws*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/safe\\_school\\_laws](https://www.lgbtmap.org/equality-maps/safe_school_laws) (last accessed Jan. 31, 2022).

Second, we similarly support OCR’s proposals related to the “Civil Rights Category (Allegations)” table (Data Group 933): specifically, its proposed maintaining of reporting on the number of allegations of harassment or bullying on the basis of sexual orientation, and restoration of reporting on the number of allegations of harassment or bullying on the basis of gender identity. By allowing for distinct reporting based on specific motivating factors, rather than grouping all forms of harassment or bullying on the basis of sex in violation of Title IX together for reporting, OCR is likely to obtain higher quality data through the CRDC, including that which may provide information about patterns and practices of certain forms of impermissible discrimination in schools. However, we note that as schools are generally directed to use available information on the “likely motives of the alleged harasser, and not the actual status of the alleged victim” when providing their responses to this and other, similar portions of the CRDC, any resulting data is unlikely to reflect the full scope of discriminatory experiences faced by LGBTQ students in schools. Therefore, the undersigned recommend that OCR consider requiring additional reporting on potential instances of SOGI discrimination in violation of Title IX wherever possible throughout the CRDC.

For example, we recommend OCR consider modifying its proposal for the “Civil Rights Data Category (Counts)” table of the CRDC to require disaggregated reporting of differing forms of harassment or bullying on the basis of sex, specifically by creating separate permitted values for sex, sexual orientation, and gender identity, as it proposed for Data Group 933. Such a revision would require that schools disclose the number of students who have reported experiencing SOGI-motivated harassment or bullying (Data Group 935) and the number of students that have been disciplined for harassment or bullying motivated by SOGI (Data Group 934). Together with its current proposals for Data Group 933, these changes would likely aid OCR in more fully being able to monitor instances of potential discrimination faced by LGBTQ students, including the extent of school officials’ responses.

Third, we support OCR’s proposed addition of a new “Sex (Membership)—Expanded” category, which would allow schools already collecting information on whether students are nonbinary to use such records to note those students’ enrollment across various CRDC data groups where students’ sex is used to disaggregate reporting. As noted above, research indicates that gender minority youth, including those who are nonbinary, are particularly vulnerable to discrimination and harassment in schools. Therefore, any reporting on that population specifically is likely to be of particular value to OCR as it works to monitor and enforce the various guarantees of Title IX, in particular those metrics related to educational attainment where the Department is uniquely situated to facilitate data collection.

However, we note that OCR’s proposal as written would not require that all schools begin collecting and reporting information on nonbinary students as part of this or any future iterations of the CRDC, despite the national reach of Title IX’s protections and research suggesting that the discrimination faced by nonbinary and other LGBTQ students persists across the country. As OCR’s proposal specifically creates the relevant reporting responsibilities only for those schools already collecting information for their enrollment records on whether individual students are nonbinary, OCR and the Department may wish to consider whether and how to facilitate having all other schools report nonbinary students’ experiences across the range of contexts in the CRDC where sex is taken into account.

We also note that OCR’s proposed definition of “nonbinary” would explicitly exclude any students who are transgender and identify “exclusively as male or female.” This is consistent with our understanding of the diverse range of identities held by gender minority people—including that not all individuals who are transgender are also nonbinary and that some individuals who are nonbinary are cisgender.<sup>62</sup> However, as discussed above, research indicates that transgender people are among the gender minorities that report disproportionate experiences with discrimination and its resulting negative outcomes in schools, and that they do so across a range of gender expressions. Additionally, as states continue to enact legislation hostile toward transgender youth, it may be necessary for OCR to specifically monitor such students’ engagement in certain activities and programs through the CRDC to effectuate the guarantees of Title IX. One such example is athletics, in light of recent legislation enacted in several states restricting transgender students’ participation in interscholastic sports on the basis of their gender identity.<sup>63</sup> Notably, the CRDC as currently proposed would have schools report student participation in certain such sports by sex, with no way for OCR to determine what percentage of students in the data are transgender or whether any such students’ identities are being inaccurately reported; likewise, disparities among transgender students when compared to their cisgender counterparts will be obscured. Therefore, the undersigned write to suggest that OCR may wish to consider whether schools should collect and report information on transgender students as it proposes they do for nonbinary students here (whether for this or future iterations of the CRDC), and if so, how it might propose they do so to be inclusive of the range of gender expressions and identities held by transgender people.

Requiring collection of information about students’ nonbinary identity or other information related to SOGI should not create any obstacles for schools or compromise the quality of data collected through the CRDC. Research on federal implementation of SOGI measures suggests that respondents are unlikely to consider SOGI information to be particularly sensitive, and would therefore provide such information if asked.<sup>64</sup> Similarly, studies suggest that sexual minority people are not a population that is difficult to survey.<sup>65</sup> The federal government has long engaged in its own review of best practices for the measurement of SOGI, including through its Federal Interagency Working Group on Improving Measurement of Sexual Orientation and Gender Identity in Federal Surveys organized through the Federal Committee on Statistical Methodology.<sup>66</sup> The federal government has also supported research on this topic, including by funding the research of an ad hoc panel formed by the National Academies of

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<sup>62</sup> See, e.g., MEYER ET AL., *supra* note 24, at 2 (noting that in one study conducted by the Williams Institute (Generations), 6–8% of cisgender LGB people identified their gender identity as non-binary or genderqueer; in another study (TransPop), 31% of transgender people identified their gender identity as non-binary or genderqueer).

<sup>63</sup> *Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans) (last accessed Jan. 31, 2022).

<sup>64</sup> See, e.g., Sean Cahill et al., *Do Ask, Do Tell: High Levels of Acceptability by Patients of Routine Collection of Sexual Orientation and Gender Identity Data in Four Diverse American Community Health Centers*, 9 PLOS ONE 1 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4157837/pdf/pone.0107104.pdf>.

<sup>65</sup> See, e.g., Nancy Bates et al., *Are Sexual Minorities Hard-to-Survey? Insights from the 2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Survey*, 35 J. OFFICIAL STATS. 709 (2019), <https://sciendo.com/article/10.2478/jos-2019-0030>.

<sup>66</sup> See generally *Measuring Sexual Orientation and Gender Identity Research Group*, FED. COMM. STAT. METHODOLOGY (2018), <https://nces.ed.gov/FCSM/SOGI.asp>.

Sciences, Engineering, and Medicine focused on methodological issues.<sup>67</sup> Questions measuring sexual orientation have been included on federal surveys for over two decades,<sup>68</sup> including in large-scale, population-based surveys administered by the U.S. Census Bureau and other agencies, and including surveys of youth.<sup>69</sup> Questions used to identify transgender respondents have been included on state and investigator-led surveys for some time, with more common use of both sexual orientation and gender identity questions over the last decade.<sup>70</sup> Further, youth surveys were the first to successfully integrate population-based SOGI measures, indicating that it is feasible to collect these data within schools.<sup>71</sup>

Of course, however, we note our concern with potential harm to LGBTQ students through SOGI-related data collection activities due to breach of confidentiality. We urge OCR and the Department to ensure that any SOGI-related data are collected and reported, including at the state- or district-level, using all appropriate privacy standards to prevent the unintended release or misuse of individual students' information. Where confidentiality is breached, OCR and the Department should take appropriate action to ensure that LGBTQ students are protected from discrimination and harassment and other violations of their civil rights.

Finally, any data collected through the CRDC will be limited in its utility unless it can allow for the identification of patterns and practices of discrimination along multiple lines of marginalization, such as those faced by LGBTQ students of color. This is particularly important given that existing research indicates that LGBTQ students of color, as well as those with disabilities and along certain other lines of marginalization, are more likely to experience discrimination and harassment, as well as certain negative educational outcomes, at school than white LGBTQ students.<sup>72</sup> To this end, OCR and the Department should consider amendments to the CRDC and any related practices or guidance to better allow it to disaggregate and analyze collected data in order to identify and enforce against violations of civil rights laws driven by

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<sup>67</sup> *Measuring Sex, Gender Identity, and Sexual Orientation for the National Institutes of Health*, NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., <https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health> (last accessed Jan. 31, 2022).

<sup>68</sup> See FEDERAL INTERAGENCY WORKING GROUP ON IMPROVING MEASUREMENT OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS, CURRENT MEASURES OF SEXUAL ORIENTATION AND GENDER IDENTITY IN FEDERAL SURVEYS 3 (2016), [https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1\\_CurrentMeasures\\_08-16-1xnai8d.pdf](https://cpb-us-e1.wpmucdn.com/sites.northwestern.edu/dist/3/817/files/2017/01/WorkingGroupPaper1_CurrentMeasures_08-16-1xnai8d.pdf).

<sup>69</sup> For example, the CDC through both the BRFSS and YRBS as detailed *supra* asks that respondents report their sexual orientation; the BRFSS also includes a question asking whether respondents identify as transgender. See *2019 BRFSS Survey Data and Documentation*, CDC.GOV (Aug. 31, 2020), [https://www.cdc.gov/brfss/annual\\_data/annual\\_2019.html](https://www.cdc.gov/brfss/annual_data/annual_2019.html); *Questionnaires | YRBS*, CDC.GOV (Nov. 17, 2020), <https://www.cdc.gov/healthyyouth/data/yrbs/questionnaires.htm>.

<sup>70</sup> Williams Institute Scholars, Comment Letter on Proposed Basic Demographic Items for the Current Population Survey (March 22, 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf>.

<sup>71</sup> See SEXUAL MINORITY ASSESSMENT RESEARCH TEAM (SMART), *supra* note 1; Elizabeth M. Saewyc et al., *Measuring Sexual Orientation In Adolescent Health Surveys: Evaluation Of Eight School-Based Surveys*, 35 J. ADOLESCENT HEALTH e1 (2004), <https://doi.org/10.1016/j.jadohealth.2004.06.002>.

<sup>72</sup> Researchers have previously used data collected through the CRDC to conduct analyses indicating similar differences between students' experiences in areas like discipline along intersectional lines, including race and disability, but have been unable to consider the role or impact of SOGI given the lack of related measures. See, e.g., Denise K. Whitford et al., *The Exclusionary Discipline of American Indian and Alaska Native (AI/AN) Students with and Without Disabilities: A Civil Rights Data Collection (CRDC) National Analysis*, 28 J. CHILD & FAM. STUDIES 3327 (2019), <https://doi.org/10.1007/s10826-019-01511-8>.

multiple impermissible motivating factors and/or experienced by students with multiply-held identities.

#### **IV. Conclusion**

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