

November 18, 2019

Office for Civil Rights
U.S. Department of Education
Attention: Director of the Information Collection Clearance Division
550 12th Street SW, PCP, Room 9089
Washington, DC 20202–0023
Submitted via *regulations.gov*

RE: Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED-2019-ICCD-0119)

To Whom It May Concern,

The Williams Institute writes 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 2019-2020 school year.¹ The Williams Institute is dedicated to conducting rigorous and independent research on sexual orientation and gender identity, including on sexual and gender minority youth. A research center at UCLA School of Law, we collect and analyze original data, as well as analyze governmental and private data, and have 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 gender identity information on population-based surveys.²

We write to oppose OCR’s proposed removal of “[g]ender-based harassment . . . including harassment based on gender identity, gender expression, and nonconformity with gender stereotypes” (“gender-based harassment”) from the CRDC’s definition of “harassment or bullying on the basis of sex” (“sex-based harassment”).³ Changing that definition in this respect would risk losing “vital data related to the civil rights laws’ requirements that [educational agencies] provide equal educational opportunity”⁴ that the CRDC exists to collect, and would adversely impact the quality, utility, and clarity of the CRDC overall. At a minimum, OCR should defer this proposed action under after the U.S. Supreme Court decides *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, which will inform the Department’s interpretation of Title IX as to gender identity discrimination. In addition, we urge OCR to add elements on sexual

¹ *Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection*, 84 Fed. Reg. 49,277 (proposed Sept. 19, 2019).

² 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/geniuss-report-sep-2014.pdf>.

³ Compare OCR, *Attachment A-3: Data Categories for Civil Rights Data Collection for School Year 2019–20* at A3-8, <https://regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0119-0003&attachmentNumber=3&contentType=pdf> with OCR, *Master List of 2015–2016 CRDC Definitions* at 2, <https://ocrdata.ed.gov/Downloads/Master-List-of-CRDC-Definitions.pdf>.

⁴ 84 Fed. Reg. 49,277 at 49,278.

orientation and gender identity to the enumerated categories of the Civil Rights Category (Student Counts) table to ensure that the CRDC collects all possible data relevant to the discrimination experiences of lesbian, gay, bisexual, and transgender (“LGBT”) youth.

In the United States, there are approximately 150,000 transgender youth (ages 13-17).⁵ However, the number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.⁶

Research demonstrates the high prevalence of harassment experienced by gender minority youth. For example, a recent study by the Centers for Disease Control and Prevention (“CDC”) reviewing Youth Risk Behavior Survey data 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.⁷ Similarly, 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.⁸ Moreover, 17% of USTS respondents who were out as transgender in grades K-12 reported leaving their school altogether because of gender-based harassment.⁹ OCR has previously recognized that “there is no doubt, as research identified by the commenters [advocating for the collection of gender-based harassment data] confirms, that students are often subjected to harassment or bullying based on their gender identity or transgender status.”¹⁰

Research shows that the high prevalence of suicide attempts and ideation, as well as depression and anxiety, among transgender youth are related to their experiences of stigma,

⁵ JODY L. HERMAN ET AL., WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 4 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

⁶ BIANCA D.M. WILSON ET AL., WILLIAMS INST. CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CHIS-Transgender-Teens-FINAL.pdf> [hereinafter “Williams Institute California Report”].

⁷ 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*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019) [hereinafter “CDC Study”].

⁸ 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> [hereinafter “USTS Report”].

⁹ *Id.* at 132.

¹⁰ OCR, *CRDC Data Set for School Years 2013–14 and 2015–16: Response to Public Comment* at B-26, <https://reginfo.gov/public/do/DownloadDocument?objectID=43619801> [hereinafter “OCR Response to 2013–14 Comments”].

discrimination, harassment, and assault/sexual violence.¹¹ For example, the CDC study noted above found that 43.9% of transgender students considered attempting suicide, with 34.6% actually attempting suicide, within the past twelve months.¹² Gender-based harassment can also lead gender minority youth to engage in substance abuse: one study found that these youth are at increased odds of having consumed alcohol, cigarettes, marijuana, or non-marijuana illicit drugs over the past twelve months as compared to cisgender boys.¹³

Given the evidence of pervasive discrimination against gender minority youth in school, and the negative impact of such discrimination on them, it is imperative the CRDC collect data relevant to this population. As OCR notes in its justification for the proposal, “[s]afe environments are critical to learning.”¹⁴ OCR has collected data on gender-based harassment in the last three cycles of the CRDC. The existing definition of sex-based harassment that is inclusive of gender-based harassment reflects the current state of the Title IX law and provides clear guidance to respondents to the CRDC about the entire scope of sex-based harassment. As OCR previously explained, “under Title IX, schools already must respond to harassment on the basis of a student’s failure to conform to stereotyped notions of masculinity and femininity as a form of sex discrimination. [The Department] will, therefore, continue to collect data on incidents of harassment based on a student’s gender identity or gender nonconformity under its current collection of harassment based on sex.”¹⁵

OCR’s proposed definition ignores relevant case law¹⁶ and will weaken the CRDC’s ability to collect the “data necessary to ensure compliance with civil rights laws within the jurisdiction of [OCR].”¹⁷ Moreover, OCR ignores guidance from the Federal Bureau of Investigation’s Hate Crime Data Collection Guidelines and Training Manual (the “Manual”), which notes that perpetrators often use derogatory language associated with one of those forms

¹¹ See, e.g., 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).

¹² CDC Study at 69–70.

¹³ 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, 249 (2015).

¹⁴ OCR Justification Statement at 10.

¹⁵ OCR, *CRDC Data Set for School Year 2017–18: Response to First Round Public Comment* at B-17, <https://regulations.gov/contentStreamer?documentId=ED-2016-ICCD-0147-1480&attachmentNumber=5&contentType=pdf>.

¹⁶ See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017) (holding that transgender students may bring sex-based discrimination claims under Title IX under a theory of sex stereotyping); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (concluding that “allegations of gender stereotyping are cognizable as sex-discrimination claims under Title VII, and consequently, Title IX. . . . claims of discrimination on the basis of transgender status are per se actionable under a gender stereotyping theory.”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 283 n.23 (W.D. Pa. 2017) (denying the defendant’s motion to dismiss and noting that the transgender plaintiffs “made a more than sufficient ‘showing’ in their Complaint of a right to relief under . . . Title IX.”).

¹⁷ Department of Education Organization Act, 20 U.S.C. § 3413(c)(1) (2018).

of harassment when engaging in the other and thus calls for and provides clear guidelines to aid data collectors in distinguishing between the two.¹⁸

OCR should, at a minimum, defer implementing its proposed definition of sex-based harassment until after the Supreme Court decides *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, which will inform the Department's interpretation of Title IX as to gender identity discrimination. Should the Court hold that sex-based discrimination under Title VII encompasses gender identity discrimination, such a holding would be in tension with OCR's proposed definition. And even if the Court does not find that Title VII prohibits gender-based discrimination, future litigation could still result in a finding that Title IX does.

Respectfully Submitted,

The Williams Institute

¹⁸ FBI, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 56–58 (2015), <https://ucr.fbi.gov/hate-crime-data-collection-guidelines-and-training-manual.pdf>.