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Submitted via *regulations.gov*

RE: Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Mandatory Civil Rights Data Collection (Docket No. ED-2019-ICCD-0119)

To Whom It May Concern,

We are grateful for the opportunity to provide additional 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 2020-2021 school year.¹ The undersigned are scholars affiliated with the Williams Institute, which 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, 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 gender identity information on population-based surveys.²

On November 18, 2019, we submitted comments to OCR³ in response to its notice proposing changes for the 2019-2020 cycle of the CRDC (the “original proposal”).⁴ There, we shared our opposition to 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”), as well as our support for the addition of sexual orientation and gender identity measures to the enumerated categories of the CRDC’s Civil Rights Category (Student Counts) table. We thank OCR for providing this renewed opportunity for the public to comment on its proposed changes to the CRDC following its

¹ *Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Mandatory Civil Rights Data Collection*, 85 Fed. Reg. 40,628 (proposed July 7, 2020).

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 Referenced under comment ID ED-2019-ICCD-0119-0604 on *regulations.gov*.

⁴ *Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection*, 84 Fed. Reg. 49,277 (proposed Sept. 19, 2019).

postponement of the 2019-2020 collection to the 2020-2021 school year in light of the COVID-19 pandemic, and write to express our continued opposition to OCR’s proposal. In particular, we remain concerned that OCR’s continued position that schools would not be required to report incidents of gender-based harassment as forms of sex-based harassment is contrary to law, and would instead serve to deprive OCR, public policymakers, educational agencies, and the public of an invaluable resource for understanding and addressing the patterns of harassment that make our schools unsafe for significant numbers of students. The need for the CRDC to maintain a definition of sex-based harassment inclusive of gender-based harassment has only been strengthened by the Supreme Court’s recent decision in *Bostock v. Clayton County*, which, when read properly, serves to make it clear that OCR’s enforcement responsibilities under Title IX require it to take action to address discrimination based on sexual orientation and gender identity as forms of sex discrimination. As the CRDC exists as a means of ensuring that OCR is meeting those enforcement obligations, its failure to collect information on harassment based on all bases covered by the law would undermine OCR’s ability to discharge its statutory responsibilities.

I. OCR Should Maintain the CRDC’s Previous Definition of Sex-Based Harassment to Ensure Compliance with Title IX

As OCR itself noted in response to public comments solicited for the 2013-2014 CRDC, “there is no doubt, as research identified by [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.”⁵ In our comments opposing OCR’s original proposal for the upcoming CRDC, we highlighted that existing data have revealed not only that gender minority youth experience significant disparities in harassment while in school, but also that their high prevalence of suicide attempts and ideation, as well as depression, anxiety, substance abuse, and other negative health outcomes, are related to their experiences of stigma, discrimination, harassment, and assault/sexual violence. We incorporate those data discussed in our previous comment herein by reference, but note that they are only some examples of the existing, but limited, data reflecting the experiences of gender minority youth.

For example, regarding whether gender minority youth disproportionately experience harassment while in school, a study observing a representative sample of 5,469 students from the 2013 Youth Risk Behavior Surveys 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.⁶ Additionally, regarding the possible impact of these experiences, we found in a study that while gender minority youth in California may experience statistically similar rates of lifetime suicidal thoughts compared to their gender conforming peers, they were much more likely to report suffering severe psychological distress in the past year (17% vs. 7%).⁷ This all being said, our understanding of the full

⁵ 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>.

⁶ 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).

⁷ BIANCA D.M. WILSON ET AL., WILLIAMS INST. CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2–3 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/CHIS-Transgender-Teens-FINAL.pdf>.

discrimination experiences of these youth (and resulting impacts of same) is ultimately limited due to challenges faced by non-government actors seeking to collect relevant data on schoolchildren, which of course OCR and the Department are better equipped to do, particularly through existing, compulsory, nationwide collections like the CRDC.

Failure to fully account for the experiences of gender minority youth will weaken the CRDC's ability to collect the "data necessary to ensure compliance with civil rights laws within the jurisdiction of [OCR,]"⁸ as well as the effectiveness of OCR's efforts to combat all forms of harassment within our nation's schools. While we thank OCR for noting that these concerns were raised by the undersigned and other commenters before, we wish to reiterate those concerns here in light of OCR's failure to meaningfully address them in its response to comments submitted related to the original proposal.⁹ In its response, OCR stated only that the proposed change is "appropriate in light of the CRDC's long-standing definition of 'sex,' which has been in place since at least the 2009–10 collection. The definition subject to the proposed change is anomalous within the CRDC collection and will be brought back in line with the definition elsewhere in the existing CRDC, as well as the historical definition since at least 2009."

First, we note that OCR's response to the aforementioned concerns does not state how its proposal to exclude the collection of gender-based harassment data would nonetheless ensure that the CRDC can collect all data necessary to enforce Title IX, which prohibits discrimination on the basis of sex and therefore prohibits discrimination on the basis of gender identity as a form of sex discrimination in light of recent Supreme Court precedent. In our previous comments, we urged that OCR wait until the Supreme Court decided *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, a Title VII case we characterized as likely to inform the OCR's interpretation of Title IX as to gender identity discrimination, before attempting to change the definition of sex-based harassment within the CRDC. In particular, we warned that should the Court hold that sex-based discrimination under Title VII encompasses gender identity discrimination, future courts would decide the same is true in the Title IX context due to the lack of meaningful distinction between Title VII and Title IX's prohibitions on sex discrimination. This would leave no defensible basis upon which to assert that Title IX does not similarly prohibit sexual orientation and gender identity discrimination, and would therefore place OCR's proposal in tension with the law as the CRDC (if implemented as proposed) would no longer collect data on all forms of conduct prohibited by Title IX, despite the purpose of the CRDC being to help effectuate OCR's enforcement obligations, which of course include Title IX.

In the time following the submission of our previous comments, the Court has issued a decision in the aforementioned case (consolidated with other matters under *Bostock v. Clayton County*),¹⁰ and found that Title VII does in fact prohibit discrimination on the bases of sexual orientation and gender identity as forms of sex discrimination. Existing caselaw supports our assertion that judicial interpretations of Title VII's prohibition on sex-based discrimination are meant to "properly inform[]" courts' interpretation of the same prohibition on sex-based

⁸ Department of Education Organization Act, 20 U.S.C. § 3413(c)(1) (2018).

⁹ OCR, *CRDC Data Set for School Year 2020–21: Response to First Round Public Comment* at B-33 to -34, <https://www.regulations.gov/contentStreamer?documentId=ED-2019-ICCD-0119-0607&attachmentNumber=6&contentType=pdf>.

¹⁰ 590 U.S. __ (2020).

discrimination in the Title IX context.¹¹ And, as was highlighted in our previous comments, numerous courts interpreted Title IX’s prohibition on sex-based discrimination as encompassing gender-based discrimination even prior to *Bostock*,¹² meaning we expect future litigation to only continue to find that this is the case now that the Supreme Court has spoken on the issue.¹³ In light of these existing and anticipated decisions, it would be improper for OCR to continue to assert that Title IX does not prohibit acts of gender-based harassment, and in turn it would be inappropriate for the CRDC to fail to collect information on such incidents while nonetheless insisting on the collection of information on all other acts that would violate Title IX. We commend OCR for its continued commitment to obtaining information on sexual orientation harassment through the CRDC, and would urge that the current proposal be retracted to allow for the continued collection of information related to harassment based on gender identity as well. In light of the Supreme Court’s finding in *Bostock* that Title VII’s sex discrimination prohibition also prohibits both sexual orientation and gender identity discrimination, it therefore follows that both forms of discrimination must also be violations of Title IX’s similar prohibition on sex discrimination and that both must be reported through the CRDC.

Second, we turn to OCR’s response that historical practices should dictate the definitions used by the CRDC, and would assert that the historical administrative record of the CRDC instead supports that “sex-based harassment” as originally envisioned by OCR for reporting through the CRDC was always meant to be considered inclusive of gender-based harassment and that any continued guidance by OCR should therefore reflect this understanding. When OCR first sought public comment on its proposal for the 2013-2014 CRDC, its proposed definition of sex-based harassment did not include gender-based harassment.¹⁴ OCR reviewed and incorporated received comments into a final proposal, for which it also sought comment; in that finalized proposal, its proposed definition for sex-based harassment now included gender-based

¹¹ *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011); *see also Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (citing a Title VII case and holding that its rule on supervisor-subordinate sexual harassment applies to teacher-student sexual harassment under Title IX); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002) (applying the Court’s principles in a Title VII case to hold that same-sex discrimination is actionable under Title IX, as it was found to be under Title VII).

¹² Rather than restate the caselaw provided in our original comments, we incorporate the same by reference herein and would instead draw OCR’s attention to additional cases discussing this principle. *See, e.g., Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018), *cert. denied sub nom., Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019) (noting the court’s agreement with the assertion that “barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation.”); *Parents for Privacy v. Dallas Sch. Dist. No. 2*, 326 F. Supp. 3d 1075, 1105–06 (D. Or. 2018) (dismissing a suit alleging that allowing transgender students to use restrooms consistent with their gender identities violates Title IX, and instead noting that the plaintiffs’ requested relief—requiring that transgender students use single-user restrooms or those that match their sex assigned at birth—would be a violation of Title IX).

¹³ This is particularly so because Title IX is seen as a much broader statute than Title VII, meaning that if Title VII’s bar on sex discrimination should be read inclusive of gender identity discrimination, it would not follow for the same to not be true under Title IX. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (citation omitted) (“Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute.”).

¹⁴ *See* OCR, *Data Groups for Civil Rights Data Collection for School Years 2013–14 and 2015–16*, <https://regulations.gov/contentStreamer?documentId=ED-2013-ICCD-0079-0003&attachmentNumber=2&contentType=pdf>.

harassment.¹⁵ In justifying this change, OCR characterized the issue of gender-based harassment as a “serious problem” for which there was “strong appeal” for its inclusion in the CRDC.¹⁶ OCR declined to fully accommodate commenters’ requests insofar as gender-based harassment was not given an independent question on the CRDC, and instead chose to amend the definition of sex-based harassment “to clarify” that it includes gender-based harassment as “[the Department] has intended for this type of harassment or bullying to be included within the existing definition” of sex-based harassment.¹⁷ In response to public comments over its proposals for the 2015-2016 CRDC, OCR reiterated this view, stating its intention to “more prominently clarify (beyond the definitions section) that harassment or bullying on the basis of gender identity is included in the sexual harassment category.”¹⁸

In other words, it has been OCR’s position throughout a number of recent CRDC cycles that the definition of sex-based harassment should be read as requiring reporting on gender-based harassment, and that the modification of that definition to its current state was necessary as such incidents needed to have been reported through the CRDC all along. Additionally, OCR noted when first considering the current definition that the estimated size of the transgender student population was “about three times smaller” than reports on the size of the LGB student population; therefore, OCR felt that disaggregated reporting on gender minority harassment would “not yield numbers that would assist [the Department] in identifying *patterns* of potential violations of Title IX.”¹⁹ Together, these references strongly suggest that OCR’s original modification of the sex-based harassment definition to reflect inclusion of gender-based harassment took into account concerns similar to those raised by the undersigned and other commenters, and more specifically, that OCR viewed Title IX as prohibiting gender-based harassment as a form of sex discrimination and that the CRDC therefore should always have been collecting information on such incidents of harassment. However, now OCR has taken the opposite position despite the fact that caselaw has emerged in the time since its original decision that only further supports OCR’s past view that Title IX prohibits gender identity discrimination as a form of sex discrimination, and in the absence of any case or other substantive sources of law providing support for its current notion that agencies’ historical practices should be afforded

¹⁵ *Id.* at B-26.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ OCR, *CRDC Data Set for School Year 2015–16: Response to First Round Public Comment* at B-14, <https://reginfo.gov/public/do/DownloadDocument?objectID=58492300>.

¹⁹ *Id.* at B-27 (emphasis added). OCR’s discussion of “patterns” suggests a view that these acts do violate Title IX, but may not occur in a manner where disaggregated reporting on such incidents as being conceptually distinct from other forms of sex discrimination would be useful to OCR in its work to then address the causes behind violations of the laws it is charged with enforcing. The undersigned would urge OCR to reconsider for future administrations of the CRDC whether, in light of the Supreme Court’s decision in *Bostock* confirming that prohibitions on sex discrimination are inclusive of sexual orientation and gender identity discrimination as forms of same, it would be feasible and methodologically sound to disaggregate this reporting such that incidents of gender-based harassment are reported via their own question, similar to OCR’s current proposal for reporting incidents of sexual orientation-based harassment. In particular, we note our concern that OCR may be hindered in its ability to draw conclusions through which it can then work to meaningfully address specific forms of discrimination in violation of Title IX because the current lack of disaggregated reporting could be obscuring patterns related to gender identity discrimination that are not shared by other forms of sex discrimination and might therefore appear insignificant within a dataset that is not specific to such acts.

a level of deference such that they should supersede the impact that relevant and controlling decisions would have on those agencies and their related activities at any point in the future.

For all of these reasons, the undersigned therefore urge that OCR withdraw its current proposal, and instead maintain the current definition of “sex-based harassment” for the CRDC that is inclusive of gender-based harassment and reflects a current, judicially informed understanding of the acts prohibited by the laws OCR is charged with enforcing.

II. OCR Should Add Elements Related to Sexual and Gender Minority Youth to the Civil Rights Category (Student Counts) Table

Finally, commenters wish to again urge that OCR add elements on sexual orientation and gender identity, expression, and nonconformity to the Civil Rights Category (Student Counts) table of the CRDC. As noted throughout these and past comments, gender minority youth experience significant disparities in harassment while at school, which in turn leads to significant disparities in drop out rates, suicide risks, and substance abuse rates. The same is true for sexual minority (referred to also as “LGB”) youth. For example, a 2015 nationally representative survey of high school students conducted by the CDC found that 10% of LGB students, compared with 5.1% of heterosexual students, reported being threatened or injured with a weapon on school property, and 34.2% of LGB students, compared with 18.8% of heterosexual students, reported being bullied on school property.²⁰ This study also found that LGB students were more likely to report being sad or hopeless (60.4% of LGB versus 26.4% of heterosexual students), having seriously considered attempting suicide (42.8% of LGB versus 14.8% of heterosexual students), and having actually attempted suicide (29.4% of LGB versus 6.4% of heterosexual students).²¹ And as noted previously, the Supreme Court in *Bostock* found that *both* sexual orientation and gender identity discrimination violate Title VII’s prohibition on sex discrimination; as there is no meaningful distinction between that statute and Title IX’s bar on sex discrimination, the same must be true under Title IX. Therefore, to ensure that schools are properly equipped to meaningfully address the needs and vulnerabilities of both sexual and gender minority students, all of whom enjoy protection under Title IX in light of recent Supreme Court precedent, OCR should modify the CRDC by adding elements relevant to both of these populations to the Student Counts table.

III. Conclusion

For all of these reasons, OCR should withdraw its proposal and reinstate the CRDC’s previous definition of sex-based harassment, which was inclusive of gender-based harassment, as well as include measures of sexual orientation and gender identity within the Student Counts table, for the 2020-2021 school year. However, if OCR adopts its proposed definition of sex-based harassment, it should, at a minimum, conduct—or fund others to conduct—research about gender-based harassment to replace the information that will go missing from the CRDC and

²⁰ 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, 11, 15 (2016). These results, and those discussed *infra* note 21 and its accompanying text, were noted by the CDC as being statistically significant. *Id.* at 5.

²¹ *Id.* at 18–20.

ensure that OCR is nonetheless able to fully meet its obligations to enforce the law. Thank you for your consideration. Please direct any correspondence to vasquezl@law.ucla.edu.

Respectfully Submitted,

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