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Submitted via www.regulations.gov

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Secretary
U.S. Department of Education
400 Maryland Avenue SW
Washington DC, 20202

The Honorable Catherine Lhamon
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**Re: Comment Request; Mandatory Civil Rights Data Collection (87 FR 189)
ICR Reference #202111-1870-001
Agency Docket No. ED-2021-SCC-0158**

As the nation’s leading organization on LGBTQ+ issues in K-12 education, GLSEN knows that collecting civil rights data related to the experiences of LGBTQI+ young people—including those who are lesbian, gay, bisexual, transgender, queer, nonbinary, Two-Spirit¹, and intersex²—is essential both for enforcing civil rights protections and advancing racial, gender, and disability justice outcomes in K-12 education systems across the country.

We thank the U.S. Department of Education’s Office of Civil Rights (OCR) for revising proposed Civil Rights Data Collection (CRDC) measures related to school athletics participation and law enforcement officers in schools to better ensure compliance with civil rights laws. We also appreciate OCR’s assurances with regard to the future, public availability of bullying prevention policy weblinks that are reported by local education agencies (LEAs).

We do, however, write to voice our concern regarding OCR’s decision to revise the definition of “nonbinary” it proposed and to request further revisions detailed in our earlier comment on the CRDC.³ In particular, we want to highlight the following recommendations from our earlier comment:

- OCR should allow LEAs to report teachers as nonbinary when their personnel records reflect their gender identity as such; and

¹ “Two-Spirit” is a contemporary umbrella term used by Native American LGBTQ+ communities that refers to the historical and current First Nations people whose individual spirits were and are a blend of female and male spirits. See: Edmo, Se-ah-dom and Aaron Ridings, editors. (2017). Tribal Equity Toolkit 3.0: Tribal Resolutions and Codes to Support Two Spirit & LGBT Justice in Indian Country. <https://www.thetaskforce.org/tribal-equity-toolkit-3-0/> (Accessed May 3, 2022).

² “Intersex” is an umbrella term describing individuals born with variations in internal or external sex characteristics. For example, an intersex person may have variations in their chromosomes or genitals. See: interact: Advocates for Intersex Youth. (N.D.). Intersex Definitions. <https://interactadvocates.org/intersex-definitions/> (Accessed May 3, 2022).

³ GLSEN et al. Public Comment regarding Mandatory Civil Rights Data Collection (86 FR 70831; ED-2021-SCC-0158). February 11, 2022. Available at <https://www.glsen.org/activity/civil-rights-data-collection-and-lgbtq-youth>.

- OCR should specifically collect data on students subjected to, and disciplined for, incidents of harassment or bullying on the basis of actual or perceived sexual orientation and on the basis of gender identity (rather than collecting this data under the broader category of sex-based harassment or bullying only).

We view these revisions as essential to ensuring compliance with civil rights laws and promoting safe, inclusive, and nondiscriminatory educational environments for LGBTQ+ students, particularly those who experience compounded marginalization as students who are transgender, nonbinary, and students of color.

Recommendations Regarding Collection of Nonbinary Gender Data

OCR proposes revising its definition of “nonbinary” to read as follows: “Nonbinary ~~refers to a student who does not~~ *means* not identify exclusively as male or female. ~~Nonbinary does not refer to a transgender student who identifies exclusively as either male or female.~~”⁴ OCR indicates that this change is made in response to commenters who inaccurately suggest that data related to gender identity and sexual orientation fall outside the purview of federally-funded public schools and OCR,⁵ which is charged with enforcing nondiscrimination protections on the basis of sex, including gender identity and sexual orientation.

We appreciate OCR clarifying that it disagrees with these commenters. As OCR notes, the purpose of adding the nonbinary measure is to shed light on the experience of nonbinary students by collecting data on nonbinary students in schools where that data is already available, that is, where nonbinary students are registered as nonbinary or another gender identity that is not exclusively male or female in their student records. However, by stating that “[t]he CRDC is not a survey for students to complete,”⁶ OCR’s response may be read as confirmation that there is a federal prohibition on the use of a measure of gender identity or sexual orientation on surveys of students without prior parental consent, which is inaccurate and may generate further confusion and obstacles to LGBTQI+ data inclusion.⁷

OCR notes that one of the three commenters who “strongly opposed the addition of nonbinary” gender identity to CRDC’s sex (membership) measure cites the Protection of Pupils Rights Amendment (PPRA), which requires that parents have an opportunity to review and consent before a student takes a survey that asks about “sex behaviors or attitudes.”⁸ Measures of gender identity, sexual orientation, and intersex status, are demographic measures that communicate important information about who an individual is and are necessary to identify and address disparities impacting LGBTQ+ people. Such measures communicate nothing about how any one individual views sex, and specifically sexual activity, with which the PPRA is concerned. For example, knowing an individual identifies as a woman and a lesbian does not communicate

⁴ U. S. Department of Education Office of Civil Rights. (2022) Attachment B. CRDC Data Set for School Years 2021–22 and 2023–24: Response to First Round Public Comment, p. 41. Available at https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=202111-1870-001.

⁵ Ibid. at pp. 41-42.

⁶ Ibid at p. 41.

⁷ Washick, B., Ridings, A., & Juste, T. (2022). LGBTQ+ Data Inclusion: Advancing Intersectional Equity in K-12 Education Systems. Washington, DC: GLSEN. Available at: <https://www.glsen.org/LGBTQ-data-inclusion>.

⁸ U. S. Department of Education Office of Civil Rights. (2022) Attachment B, p. 38.

anything about whether she is sexually active or whether she views sexual activity in a positive or negative light.

Furthermore, by revising the definition of nonbinary, OCR removes an important clarification that will support uniform reporting from LEAs who have adopted more LGBTQ+ inclusive administrative data collection practices, including by allowing student records to be corrected to reflect a student's gender identity as male, female, nonbinary, or another gender identity. We ask the previous definition of "nonbinary" be retained, which OCR indicates garnered broad support from 118 commenters.

OCR also declined to enable LEAs to report teachers as nonbinary when they are identified as such in their personnel records. OCR indicates that it declined to make changes to demographic data collected on teachers because "OCR must balance the benefit of adding useful data and their reporting burden on LEAs."⁹ LEAs that employ teachers who identify as nonbinary in their personnel records are burdened by OCR's binary reporting requirement and, where LEAs do not already have teachers identified as nonbinary in their personnel records, LEAs would, at most, be required to indicate whether such an option is available, which is not burdensome and is consistent with OCR allowing LEAs to report students as nonbinary when they are identified as such in their student records.

Twenty-two states and the District of Columbia now allow individuals to select X, rather than M or F, for their gender marker.¹⁰ As was the case with student records, state and local education agencies have implemented or are in the process of implementing nonbinary inclusive personnel records. For example, the Oregon Department of Education cites nonbinary-inclusive employment data in its *2022 Oregon Educator Equity Report*.¹¹ We again ask that OCR allow school districts to report teachers as nonbinary where their personnel records reflect their gender identity as such.

We continue to urge OCR to make clear in the technical assistance it provides in connection to the CRDC that an individual's self-identified gender, as recorded in their student or personnel records, is appropriate and recommended for the purpose of this and other federal collections. Dispelling confusion regarding federal sex-related reporting requirements and communicating evidence-based best practices for reporting gender data aligns with President Biden's executive order on advancing equality for lesbian, gay, bisexual, transgender, queer, and intersex individuals, which "requires that the Federal Government use evidence and data to measure and address the disparities that LGBTQI+ individuals, families, and households face, while safeguarding privacy, security, and civil rights."¹²

⁹ U. S. Department of Education Office of Civil Rights. (2022) Attachment B, p. 86.

¹⁰ Movement Advancement Project. (2022). "Equality Maps: Identity Document Laws and Policies." https://www.lgbtmap.org/equality-maps/identity_document_laws/.

¹¹ Oregon Department of Education. (2022). 2022 Oregon Educator Equity Report.

https://www.oregon.gov/tspc/about/Publications_and_Reports/2022_Oregon_Educator_Equity_Report.pdf.

¹² Executive Order 14075 on Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals. (June 15, 2022.) Available at <https://www.federalregister.gov/documents/2022/06/21/2022-13391/advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals>.

At a minimum, OCR should make clear that:

- There are no federal requirements that necessitate reporting program participants’ or personnel’s sex assigned at birth; and
- The leading research scientists of the National Academies of Sciences, Engineering, and Medicine (NASEM) *discourage* data collection of sex assigned at birth and, more broadly, “sex as a biological variable,” except in limited medical or health provision contexts, where such data is “relevant” and, in these limited contexts, NASEM recommends that gender identity data also be collected.¹³

Finally, we ask that OCR actively encourage and support LEAs that are using nonbinary-inclusive information systems to opt-in to reporting 2021-2022 data disaggregated by M-F-nonbinary beyond required student enrollment data. Doing so will best prepare OCR to identify and assist LEAs with common barriers to reporting disaggregated, nonbinary inclusive gender data for all CRDC measures that are disaggregated by gender in subsequent administrations of the CRDC. One obstacle we know education agencies face in fully implementing nonbinary-inclusive administrative records is that other federal administrative collections continue to require binary (M-F) gender reporting. For example, *EdFacts*, which contributes data to the CRDC, does not allow LEAs to report nonbinary students as such.

We thank OCR for its leadership within the U. S. Department of Education in supporting more inclusive administrative data collection and ask that OCR support the adoption of Department-wide nonbinary inclusive administrative data collection standards by communicating the importance of collecting such data and responses received from LEAs and others regarding the barriers imposed by binary (M-F) federal reporting requirements.

Recommendations Regarding Data Collection on Students Subjected to, or Disciplined for, Harassment or Bullying on the Basis of Sexual Orientation and Gender Identity

OCR declines to specifically collect data on students subjected to, and disciplined for, harassment or bullying on the basis of actual or perceived sexual orientation or gender identity, noting that it must consider LEA reporting burden and what data is necessary to ensure compliance with civil rights laws.¹⁴ We appreciate and strongly support the Department’s decision to separately collect data on allegations of harassment or bullying on the basis of sexual orientation and on the basis of gender identity—and agree that it is necessary to ensure compliance with civil rights laws.

However, it is not clear to us how LEAs’ reporting burden is significantly altered by declining to specifically collect data on actual incidents of students being subjected to, and disciplined for, harassment or bullying on the basis of sexual orientation and on the basis of gender identity. Data on students being subjected to, and disciplined for, harassment or bullying on the basis of sexual orientation and gender identity is already collected and reported in Data Groups 934 and 935, which ask for the number of students subjected to, and disciplined for, actual incidents of

¹³ National Academies of Sciences, Engineering, and Medicine. (2022). *Measuring Sex, Gender Identity, and Sexual Orientation*. Washington, DC: The National Academies Press. <https://doi.org/10.17226/26424> (Accessed May 3, 2022). See also: GLSEN et al. “An Open Letter to Health, Education, Corporate, Government & Other Policy Leaders,” March 9, 2022. <https://cancer-network.org/wp-content/uploads/2022/03/NASEM-Data-Letter.pdf> (Accessed May 3, 2022).

¹⁴ U. S. Department of Education Office of Civil Rights. (2022) Attachment B, p. 63.

harassment or bullying on the basis of sex (including sexual orientation and gender identity). In effect, the Department proposes that LEAs should identify specific forms of sex-based harassment when an allegation is made but then remove or disregard that label when reporting incidents of students being subjected to, and disciplined for, bullying or harassment.

Further, separately collecting data on students subjected to, and disciplined for, harassment or bullying on the basis of sexual orientation and on the basis of gender identity best supports OCR's efforts to ensure compliance with civil rights laws because this data is disaggregated by student race and sex (membership), including nonbinary where available, and thus can better shed light on potential racial or gender disparities in LEA responses to specific forms of sex-based harassment or bullying.

The CRDC is a critical source of data on disparities that may indicate discriminatory school practices. CDC data confirms that LGBTQ+ students experience harassment and bullying at disproportionate rates.¹⁵ GLSEN's National School Climate Survey (NSCS) research indicates that many schools fail to respond effectively to allegations of LGBTQ+-related bullying and harassment. For example, the 2021 NSCS found that, among LGBTQ+ students who indicated that they reported being harassed or bullied to school staff, 60.3% said that staff did nothing or told the student to ignore it, 16.0% were told to change their behavior by, for example, changing the way they dressed, and 12.1% were blamed for their harassment or bullying because they are LGBTQ+.¹⁶

By separately collecting data on students subjected to, and disciplined for, harassment or bullying on the basis of actual or perceived sexual orientation and on the basis of gender identity the CRDC would help to illuminate disparities in responses to such allegations, including how the race or gender of students involved may impact school responses.

Regarding OCR's Response to Recommendations to Standardize the Collection of Disaggregated Student Data to Support Intersectional Analyses

OCR declined to standardize the collection of disaggregated student data to support intersectional analyses, noting that "OCR must balance the usefulness of the data with the reporting burden."¹⁷ It is not clear that standardizing the collection of demographic data to include gender (including nonbinary, where available), race/ethnicity, and disability status would impose a substantial burden since LEAs already collect this data on students and report some combination of this data across different CRDC measures. Meanwhile, standardizing the collection of demographic data to allow for intersectional analyses of disparities impacting students who hold multiple marginalized identities would best support OCR in ensuring

¹⁵ Johns, M. M., Lowry, R., Haderxhanaj, L. T., Rasberry, C. N., Robin, L., Scales, L., Stone, D., & Suarez, N. A. (2020). Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students - Youth Risk Behavior Survey, United States, 2015-2019. *MMWR supplements*, 69(1), 19-27.

https://www.cdc.gov/mmwr/volumes/69/su/su6901a3.htm?s_cid=su6901a3_w.

Johns MM, Lowry R, Andrzejewski J, et al. Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017. *MMWR Morb Mortal Wkly Rep* 2019;68:67-71. DOI: <http://dx.doi.org/10.15585/mmwr.mm6803a3>.

¹⁶ Kosciw, J. G., Clark, C. M., & Menard, L. (2022). The 2021 National School Climate Survey: The experiences of LGBTQ+ youth in our nation's schools, p. 29. New York: GLSEN. <https://www.glsen.org/research/2021-national-school-climate-survey>.

¹⁷ U. S. Department of Education Office of Civil Rights. (2022) Attachment B, p. 17.

compliance with federal nondiscrimination protections. Moving forward, we urge OCR to seek input on the following:

- Would standardizing reported demographic data to include gender (including nonbinary where available), race/ethnicity, and disability status impose a substantial burden on LEAs that are currently reporting varying combinations of this demographic data across different CRDC measures?
- What data is needed to enforce civil rights protections for students who hold multiple marginalized identities, including LGBTQ+ students who are students of color and students with disabilities?

Conclusion

We thank OCR for considering these recommendations that will support strong compliance with civil rights laws and safe, inclusive, and nondiscriminatory educational environments for LGBTQ+ students. If you would like to discuss these recommendations, please contact Aaron Ridings of GLSEN at aaron.ridings@glsen.org. Thank you for your consideration.

Sincerely,

Aaron Ridings
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