



State of California
Office of the Attorney General

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ATTORNEY GENERAL

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Via Federal eRulemaking Portal

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

RE: Comments on Proposed Revisions to the 2019-2020 Civil Rights Data Collection, Docket No. ED-2019-ICCD-0119, OMB Control No. 1870-0504

Dear Assistant Secretary Marcus:

As the Attorney General of the State of California, I write today to oppose the U.S. Department of Education Office for Civil Rights' (OCR) proposal to retire, revise, and add incomplete data elements to the 2019-20 Civil Rights Data Collection (CRDC).¹

The CRDC is the largest and, for many data elements, the only source of nationwide publicly available civil rights education data. OCR and other federal agencies, policymakers, researchers, educators, and school officials use the data to analyze student equity and opportunity in education. The CRDC is vital to this type of analysis because it contains data from nearly every school, state and local education agency, allowing "[u]sers [to] search for data on a specific school or district, analyze the data using the available online data analysis tools, and create data reports."² The ability to compare data from state to state or among school districts is critically important to evaluating outcomes, determining best practices, and ensuring progress toward equitable education systems across the nation.

In structuring our state data collection, California has been particularly mindful of improving data quality and minimizing the burden on schools and local education agencies

¹ Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection, 84 Fed. Reg. 49, 277 (Sept. 19, 2019), <https://tinyurl.com/CRDC1920>.

² Nat'l Forum on Educ. Statistics, Forum Guide to Reporting Civil Rights Data 4 (Jan. 2018), <https://tinyurl.com/NFESforumguide>.



(LEAs).³ During comment periods for prior data collections, California has noted that data collected in the CRDC is *not* duplicative of data collected by the California Department of Education (CDE). *Id.* Therefore, in certain instances discussed below, see *infra* at I., II., III., VI., VII., if OCR retires or revises data elements, this data will cease to be collected at either the state or federal level in California.

In this comment, I urge you to take the following actions:

- Retain all early childhood education data;
- Retain all school financing data;
- Retain teacher experience and absenteeism data;
- Retain credit recovery data;
- Retain Advanced Placement (AP) enrollment and test-taking data;
- Do not revise the definition of sexual harassment or bullying, and continue collecting data on gender-based harassment or bullying;
- Continue disaggregating English Learners with IDEA disabilities and add Section 504 data; and
- Add data on the number of sexual assaults (other than rape) committed by school staff.

I. Early Childhood Education Data

OCR proposes to cease collecting a variety of data elements related to early child education, purportedly to reduce the burden on LEAs.⁴ Specifically, OCR proposes to no longer collect data on whether an LEA provides early childhood services and preschool services, the length and cost of such services, categories of students to whom preschool services are offered, and the length and cost of kindergarten services provided.⁵ OCR also proposes to stop disaggregating preschool enrollment by race, sex, disability, or English learner (EL) status. *Id.* Finally, OCR proposes to combine the collection of preschool children who received one out-of-

³ Cal. Dep't of Educ., Comment Letter on Mandatory Civil Rights Data Collection (OMB Control Number 1870-0504) (Aug. 21, 2017), <https://tinyurl.com/2017CDEletter>.

⁴ U.S. Dep't of Educ., Office for Civil Rights, Supporting Statement, Part A: Justification for Mandatory Civil Rights Data Collection 7 (Sept. 2019), <https://tinyurl.com/supportingstatementA919> (Supporting Statement A).

⁵ *Id.*; see also U.S. Dep't of Educ., Office for Civil Rights, Attachment A-2: Data Groups for Civil Rights Data Collection for School Year 2019-20, A2-3-5 (Sept. 2019), <https://tinyurl.com/attachmentA2919> (Attachment A-2).

school suspension with preschool children who received more than one out-of-school suspension.⁶

Preschool and early childhood education lead to improved school readiness in the short term, as well as significant long-term benefits.⁷ Nearly every study examining early childhood education has found that children who attend preschool have improved kindergarten readiness, literacy, and numeracy.⁸ Studies suggest that state-financed public school prekindergarten programs improve children's reading, writing, and numeracy skills.⁹ Preschool programs can also have long-term positive impacts on children's health, educational attainment, and social, emotional, and behavioral development.¹⁰ Research regarding the federal Head Start program found that children participating in Head Start have lowered mortality rates,¹¹ higher rates of high school completion and college attendance,¹² and improved self-control and self-esteem,¹³ and that Head Start contributes to participants' positive parenting of their own children. *Id.*

Access to preschool programs is particularly important for children from low-income families and underrepresented minorities. Studies reflect significant school readiness gaps between children from middle- or high-income families and children from low-income families, as well as between white children and black and Latino children.¹⁴ Research demonstrates that children from these disadvantaged subgroups experience greater gains from participation in preschool than do their more-advantaged counterparts. *Id.* at 34-35. In particular, studies have shown significant positive effects of preschool participation for EL students. *Id.* at 35.

⁶ Supporting Statement A at 7, *supra* n. 4.

⁷ Equity and Excellence Comm'n, For Each and Every Child: A Strategy for Education Equity and Excellence 28 (2013), <https://tinyurl.com/eachandeverrychild>.

⁸ Phillips, et al., *Puzzling It Out: the Current State of Scientific Knowledge on Pre-Kindergarten Effects*, in *The Current State of Scientific Knowledge on Pre-Kindergarten Effects* 9, 26 (2017), <https://tinyurl.com/puzzlingitout>.

⁹ Husted, et al., *The Effects of the New Mexico PreK Initiative on Young Children's School Readiness* 13 (2007), <https://tinyurl.com/NMprekonreadiness>; Gormley Jr., et al., *The Effects of Universal Pre-K on Cognitive Development*, 41 *Developmental Psychology* 872, 882 (2005), <https://tinyurl.com/effectsofuniversalprek>.

¹⁰ Schazenbach & Bauer, *The Long-Term Impact of the Head Start Program*, The Brookings Institution (Aug. 19, 2016), <https://tinyurl.com/HSlongtermimpact>.

¹¹ Ludwig & Miller, *Does Head Start Improve Children's Life Chances? Evidence From a Regression Discontinuity Design*, 122 *The Quarterly J. of Econ.* 159, 178-79 (2007), <https://tinyurl.com/headstartimproveslife>.

¹² *Id.* at 197; Deming, *Early Childhood Intervention and Life-Cycle Skill Development: Evidence from Head Start*, 1 *Am. Econ. J.: Applied Econ.* 111, 126 (2009), <https://tinyurl.com/headstartevidence>; Schazenbach, *supra* n. 10.

¹³ Schazenbach, *supra* n. 10.

¹⁴ Ladd, *Do Some Groups of Children Benefit More Than Others from Pre-Kindergarten Programs?*, in *The Current State of Scientific Knowledge on Pre-Kindergarten Effects* 31, 32 (2017), <https://tinyurl.com/somegroupsbenefitmore>.

The CRDC is a vital source of information on access to early childhood education. Ensuring that children receive equitable access to preschool programming is critical to ameliorating educational disparities. If OCR no longer collects data about the availability, cost, and length of preschool and kindergarten programming, states will lose an important tool for analyzing gaps in early childhood education availability and for evaluating national trends, impeding state policymakers' ability to increase access to this resource. If OCR no longer collects data on preschool participation disaggregated by race, sex, disability, and English learner status, efforts to analyze access to preschool for these subgroups will be stymied, and policymakers will lose an important tool for developing solutions to ongoing educational disparities. Moreover, removing preschool disaggregate data elements will undermine the Every Student Succeeds Act (ESSA) requirement for state and local education agencies to "use CRDC data to report the number of students enrolled in preschool programs ... for all students and each student subgroup" including race, sex, limited EL proficiency, and students served under the Individuals with Disabilities Education Act (IDEA).¹⁵ The relatively low burden on schools caused by collecting this data is outweighed by federal law requirements that LEAs use this information and the importance of the data to policymakers and researchers.

Eliminating the disaggregation of preschool enrollment by demographic subgroup would also mean that policymakers and researchers are no longer able to analyze racial disparities in preschool discipline.¹⁶ The CRDC data on preschool discipline inequities has spurred significant policy change across the country, including in California.¹⁷ In 2017, California legislators passed a bill to limit preschool expulsion. Analysis of this bill relied on data regarding preschool suspensions and expulsions collected through the CRDC that demonstrated serious racial disparities in preschool discipline.¹⁸ The following year, the legislature built on this policy change by enacting a bill to provide additional mental health supports to preschool children.¹⁹ Limiting disciplinary data collected will impede policymakers' ability to address disciplinary disparities in early childhood education.

¹⁵ U.S. Dep't of Educ., Opportunities and Responsibilities For State and Local Report Cards Under the Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act 30-31, 33 (2019), <https://tinyurl.com/ESSAreportcardguidance>, (Opportunities and Responsibilities); *see also* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482 (2018)).

¹⁶ Malik, *New Data Reveal 250 Preschoolers Are Suspended or Expelled Every Day*, Center for American Progress (Nov. 6, 2017, 9:01 AM), <https://tinyurl.com/preschooldisciplineproblem>.

¹⁷ *See, e.g.*, Rafe, Education Comm'n of the States, *The Status of School Discipline in State Policy* 2, 5-6 (2019), <https://tinyurl.com/schooldisciplinestatus>.

¹⁸ Assemb. B. 752, 2017-2018 Leg. Sess. (Cal. 2017) (enacted), <https://tinyurl.com/AB752statepreschool>; Assemb. Comm. On Human Servs., *Analysis of Assembly Bill No. 752, 2017-2018 Leg. Sess.*, at 4-5 (Cal. 2017), <https://tinyurl.com/AB752statepreschoolanalysis>.

¹⁹ Assemb. B. 2698, 2017-2018 Leg. Sess. (Cal. 2018) (enacted), <https://tinyurl.com/AB2698preschoolmentalhealth>.

As recently as October 2017, OCR reaffirmed its commitment “to collecting CRDC preschool data to ensure equality within public school systems across the country.”²⁰ OCR has provided no reasoned explanation of its decision to back away from that commitment and to eliminate the bulk of its preschool data collection—nor could it, given the critical importance of this information. California strongly urges OCR to continue collecting this data.

II. Education Financing

OCR proposes eliminating all collections of school financing data, citing “expressed concern” from LEAs “with the level of difficulty in reporting school-level personnel and non-personnel expenditures data for the CRDC, and OCR’s concern with the quality of data that OCR has received.” Supporting Statement A at 8. The data elements OCR proposes to eliminate include school-level data on the number of teachers, full-time personnel, and non-personnel, their salaries, and the sources of funding used to support them. Attachment A-2 at A2-5, 78-95. Although ESSA requires the states and LEAs to report this data on the LEA and school report cards, the data will not be disaggregated by personnel, non-personnel, or any other type of employee. 20 U.S.C. § 6311(h)(1)(C)(x).²¹ School-level data is important to understanding and reducing funding and staffing disparities within districts. OCR added these data elements to the CRDC during the 2009-10 collection and provides no reason why these data elements are no longer needed.²²

Indeed, OCR itself has recognized the importance of equitable allocation of school resources, noting in a 2014 Dear Colleague letter that many districts allocate resources inequitably and that “disparities in the level of access to . . . resources often reflect the racial demographics of schools.”²³ As a result, OCR used information regarding funding levels as a part of its determination as to whether students have access to education resources. *Id.* at 10-11. Failure to collect this data on a national level may result in increased difficulty in identifying whether states have succeeded in reducing funding disparities both within and across districts and assessing whether students have equitable access to educational resources in comparison to other states.

In California, LEAs are required to submit annual financial reports, including revenues and expenditures, to the CDE. Cal. Educ. Code § 42100. These financial reports are publicly available on the CDE website, but this state-level collection is not identical to the federal data collection in the CRDC. For example, for the purposes of reporting to the CDE, school-level

²⁰ U.S. Dep’t of Educ., Office for Civil Rights, CRDC Data Set for School Year 2017-18: Response to Second Round Public Comment Attachment C C-12 (Oct. 2017), <https://tinyurl.com/AttachmentC1017>.

²¹ Opportunities and Responsibilities, *supra* n. 15, at 43, 63.

²² U.S. Dep’t of Educ., Office for Civil Rights, Civil Rights Data Collection: Data Notes 2, <https://tinyurl.com/CRDCdatanotes> (last visited Nov. 14, 2019).

²³ U.S. Dep’t of Educ., Office for Civil Rights, Dear Colleague Letter: Resource Comparability (Oct. 1, 2014), <https://tinyurl.com/resourcecomparability>, at 5.

data is not collected. In addition, when reporting to the CDE, LEAs are required to report whether certain expenditures are supported with state and local only funds, or with federal funds. California urges OCR to retain these data elements.

III. Teacher Experience and Absenteeism

Data on the number of teachers in a school with one or two years of experience is critical in assessing whether schools are creating or exacerbating disparities among certain populations by failing to provide quality teaching, yet OCR proposes retiring the collection of this data category. Attachment A-2 at A2-6, 116. Teacher experience is one source OCR uses to determine if schools are “providing access to strong teaching and instructions to its students.”²⁴ Data shows that “inexperienced teachers perform less well on average than their more experienced colleagues.”²⁵ Teacher experience data collected in 2012-13 “found that Black, Latino, American Indian and Native-Alaskan students are three to four times more likely to attend schools with higher concentrations of first-year teachers than white students. English learners also attend these schools at higher rates than native English speakers.”²⁶ The federal government now requires states to develop plans to address these disparities and publicly report their progress. *Id.* at 30. However, states are permitted to create individual definitions of what qualifies as an inexperienced teacher. 20 USC § 6311(e)(2). For example, California defines teacher inexperience as two or fewer years of experience.²⁷ Other states define teacher inexperience differently.²⁸ With varying standards of teacher inexperience, states will no longer be able to compare the number of novice teachers across state lines if the CRDC ceases to collect first- and second-year teaching data. The slight burden this may add to schools is far outweighed by the benefit this data collection has to helping eliminate educational inequity.

Similarly, teacher absenteeism data is a vital piece of information in determining whether schools are negatively impacting certain populations by failing to provide quality teaching, yet OCR proposes to stop collecting this data without justification. Attachment A-2 at A2-6, 107. This data category first appeared in the CRDC in 2009-10.²⁹ In the years following the first collection of this data, OCR found that while most teachers are rarely absent, nearly 30% of

²⁴ *Id.* at 12.

²⁵ *Id.* at 14.

²⁶ Kini & Podolsky, Learning Policy Institute, Does Teaching Experience Increase Teacher Effectiveness? A Review of the Research 4-5 (2016), <https://tinyurl.com/increaseteachereffectiveness>.

²⁷ Cal. Dep’t of Educ., Equity Data Definitions: California Definitions for Purposes of Collecting Equity Data Under ESSA (2019), <https://tinyurl.com/defineinexperience>.

²⁸ At least 25 other states, including Massachusetts, New York, and Oregon, define “inexperience” as 1 year or less of teaching. Williams II, et al., Equitable Access to Excellent Educators: An Analysis of States’ Educator Equity Plans 12-13, J-1-3 (2016), <https://tinyurl.com/equityanalysis>.

²⁹ U.S. Dep’t of Educ., Office for Civil Rights, *supra* n. 22, at 3.

teachers were absent for ten days or more.³⁰ Students with disabilities served by IDEA were more likely to attend schools with over 50% of teachers absent more than ten days compared to students without disabilities. *Id.* In California, teacher absenteeism data, which is gathered only through the CRDC, enables policymakers and educators to “compare absenteeism within and across districts, explore contributing factors, and assess any impact on student learning.” *Id.* If the CRDC retires this data category, critical information will be lost.

IV. Credit Recovery

OCR’s proposal to eliminate the collection of data on the number of students who participate in a credit recovery program will remove a key information source for policymakers and researchers interested in examining issues such as disparities in education, education quality, and services provided to youth in juvenile justice facilities. Although reporting on this data element was only required for the first time in the 2015-16 reporting cycle, the data has already spurred significant analysis and policy discussion.³¹ Researchers have used this data to determine that credit recovery programs are more heavily used in schools with high proportions of students in poverty and minority students and to make recommendations for districts to ensure that credit recovery programs are accessible and of high quality.³² The CRDC’s inclusion of this element is especially significant, as there is little other data available on the use of credit recovery programs around the country.³³

The only justification given for the proposed elimination of this data element is to reduce the burden on LEAs. Supporting Statement A at 8. However, the importance of this information for policymakers and researchers greatly outweighs the relatively low burden to schools of reporting a simple count of students enrolled in credit recovery. In fact, researchers have called for OCR to *expand* the data collected on the use of credit recovery programs, proposing that OCR track participation disaggregated by student characteristics, which courses are available and what programs are used to deliver the coursework, and the format of the program (*e.g.*, whether

³⁰ U.S. Dep’t of Educ., Office for Civil Rights, Civil Rights Data Collection: Data Snapshot (Teacher Equity) 4 (2014), <https://tinyurl.com/CRDCdatasnapshot>.

³¹ *See, e.g.*, Malkus, Am. Enterprise Institute, *Second Chance or Second Track? Credit Recovery Participation in US High Schools 6-7* (2018), <https://tinyurl.com/secondchanceorsecondtrack>; Groeger et al., *Miseducation: Is There Racial Inequality at Your School?*, ProPublica (Oct. 16, 2018), <https://projects.propublica.org/miseducation/>; Tyner & Munyan-Penney, *Gotta Give ‘Em Credit: State and District Variation in Credit Recovery Participation Rates 12* (2018), <https://tinyurl.com/gottagiveemcredit>; Korman, et al., *Bellweather Educ. Partners, Patterns and Trends in Educational Opportunity for Students in Juvenile Justice Schools Updated and New Insights* (2019), <https://tinyurl.com/juvenilejusticeschools>.

³² Malkus, *supra* n. 31, at 10-11, 19; Tyner & Munyan-Penney, *supra* n. 31, at 20-21, 35-36.

³³ Tyner & Munyan-Penney, *supra* n. 31, at 5.

the program is in-person or online).³⁴ Retaining or expanding this data element would not create an undue burden on schools. California schools routinely collect this information, and most California schools collect additional information, such as the cost of these programs and the delivery method used. California urges OCR to retain—and consider expanding—this data element.

V. Advanced Placement (AP) Coursework

OCR proposes to cease collecting the number of students enrolled in AP courses other than math, science, or computer science courses, and the number of students enrolled in AP courses who took AP exams. Attachment A-2 at A2-3, 10-11, 14. Tracking such data is necessary to assessing educational disparities and schools' preparation of their students for college.³⁵ Indeed, OCR regularly examines AP course enrollment to determine whether students are receiving equal access to college and career readiness programs that prepare them to enter and succeed in post-secondary opportunities.³⁶ Furthermore, ESSA requires state and local report cards to include the CRDC data on the number and percentage of students reenrolled in “accelerated coursework to earn postsecondary credit while still in high school, such as Advanced Placement [] courses and examinations.” 20 U.S.C. § 6311(h)(1)(C)(viii)(II)(bb).

College readiness requires access to key courses, such as AP courses, that prepare students with the knowledge and skills to do well on the college and career paths. Access to these courses “is worse for schools with high populations of minority students and schools with high populations of low-income students.”³⁷ Last year, the U.S. Government Accountability Office, relying on the CRDC data, released a report demonstrating that not only were high-poverty schools less likely to offer AP courses, but also that high-poverty schools were far less

³⁴ Malkus, *supra* n. 31, at 19; Tyner & Munyan-Penney, *supra* n. 31, at 36; Korman, et al., *supra* n. 31.

³⁵ Smith-Evans & George, NAACP Legal Defense & Educational Fund, Inc. & Nat'l Women's Law Center, *Unlocking Opportunity for African American Girls: A Call to Action for Education Equity* 31 (2014), <https://tinyurl.com/unlockingopportunity> (using the CRDC data to show that African American students are 9% of students enrolled in AP courses but only 4% of students with an AP exam score); Cisneros, et al., *The Advanced Placement Opportunity Gap in Arizona: Access, Participation, and Success*, 11 AASA J. of Scholarship and Prac. 20, 25-26 (2014), <https://tinyurl.com/APaccessopportunitiesuccess> (using the CRDC data to document racial disparities in number of AP courses offered to students and number of students passing AP exams).

³⁶ See, e.g., U.S. Dep't of Educ., Office for Civil Rights, Letter to Dr. Marcelo Cavazos, Superintendent, Arlington Indep. School Dist. (June 23, 2015), at 11, 13, <https://tinyurl.com/OCRlettertoArlington>; U.S. Dep't of Educ., Office for Civil Rights, Letter to Sharron Pitts, Assistant Superintendent of Human Resources and General Counsel, Grand Rapids Public Schools (Feb. 10, 2014), <https://tinyurl.com/OCRlettertoGrandRapids>.

³⁷ ExcelinEd, *College and Career Pathways: Equity and Access* 1 (2018), <https://tinyurl.com/equityandaccesstocollege>.

likely than low-poverty schools to offer a wide variety of AP courses.³⁸ Moreover, taking and passing an AP examination is normally required in order to obtain college credit or pass out of an entry-level college class. Therefore, it is crucial to know that students are not only taking AP classes, but also AP exams—and it is important to be able to analyze whether disparities exist within districts or between, for example, high-income and low-income schools.

First, OCR eliminated the collection of data on AP exam performance (*i.e.*, exam scores) for the 2017-18 reporting period.³⁹ Now, OCR proposes to also eliminate the collection of information on whether students are taking the exam. Attachment A-2 at A2-3, 14. Researchers have found that simply enrolling in an AP course is not all a student must do to reap college preparedness benefits. Instead, even if a student does not pass the exam, taking the exam, rather than just taking the class, is what improves outcomes. Students who take AP exams are more likely to enroll in a four-year college, earn higher grade point averages, earn a bachelor's degree, earn higher incomes than non-AP students, and have an increased likelihood of earning advanced degrees.⁴⁰ These benefits accrue irrespective of a student's race or gender, which only further demonstrates that OCR should continue tracking AP class and exam enrollment disaggregated by race to ensure that low-income and minority students have opportunities to take AP courses and exams.⁴¹

VI. Sexual Harassment or Bullying

Gender-based sexual harassment and bullying is pervasive and harmful to youth. Gender expression is one of the two most common reasons LGBTQ youth are harassed or assaulted at school.⁴² A recent study found that 83.7% of transgender students and 69.9% of gender nonconforming students were bullied or harassed at school because of their gender. As these high numbers suggest, LGBTQ youth report feeling less safe at school than their non-LGBTQ peers.⁴³ But it's not just school safety that suffers when LGBTQ youth are harassed or bullied.

³⁸ U.S. Gov't Accountability Office, GAO-19-8, K-12 Education: Public High Schools with More Students in Poverty and Smaller Schools Provide Fewer Academic Offerings to Prepare for College 16-17 (2018), <https://tinyurl.com/fewerofferings>.

³⁹ U.S. Dep't of Educ., Office for Civil Rights, *supra* n. 20, at C-19.

⁴⁰ Warne, et al., *The Impact of Participation in the Advanced Placement Program on Students' College Admissions Test Scores* 108 J. of Educ. Res. 400, 413 (2015), <https://tinyurl.com/ImpactofAP>.

⁴¹ The CDE does collect data related to AP course enrollment and examinations, which is reported on the California's DataQuest portal. However, this is not required by state statute or regulation.

⁴² Kosciw, et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2018), <https://tinyurl.com/2017schoolclimate>.

⁴³ Choi, et al., UCLA School of Law, The Williams Institute, *LGBTQ Youth in California's Public Schools: Differences Across the State* 17 (2017), <https://tinyurl.com/CALGBTQstudents>.

Youth who have been victims of gender based harassment and bullying report being less likely to plan to go on to college or to vocational or trade school and have lower grade point averages.⁴⁴ Moreover, “transgender and gender nonconforming students have less access to education than their peers—not only because they feel more unsafe and experience more victimization, but also because they often have restricted access within the school environment itself, specifically a lack of access to gender segregated spaces.”⁴⁵

The CRDC began collecting sexual harassment or bullying data in 2009-10, and the collection of such data elements was the first of its kind at the school and district level.⁴⁶ OCR now seeks to revise the definition of “harassment or bullying on the basis of sex” to “sexual harassment and bullying based on sex stereotypes” in a purported effort “to achieve more consistency with OCR complaint adjudication processes.” Supporting Statement A at 5. By revising the definition, the CRDC will no longer collect the number of reported allegations, the number of students who reported being bullied or harassed based on gender identity, and the number of students disciplined for bullying or harassing other students based on gender identity.⁴⁷ The proposed change reinforces OCR’s failure to protect LGBTQ students represented by the withdrawal of its May 13, 2016 Dear Colleague Letter on Transgender Students.⁴⁸ However, OCR itself stated “withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment.” *Id.* at 2. Rather than revise the definition and retiring the collection of these data categories, the CRDC should maintain them and further disaggregate allegations and incidents reported by transgender males, transgender females, or non-binary individuals, as studies have found the transgender male students generally face a more hostile school environment.⁴⁹

Although California operates a Healthy Kids Survey, participation is only mandatory every two years for recipients of certain grant funds. These districts only survey students in three grades. For all other school districts in California, participation in the Healthy Kids Survey is voluntary. And, while there are questions that ask about bullying and harassment, students are

⁴⁴ Kosciw, et al., *supra* n. 42, at 46.

⁴⁵ *Id.* at 102.

⁴⁶ U.S. Dep’t of Educ., Office for Civil Rights, *supra* n. 22, at 3.

⁴⁷ U.S. Dep’t of Educ., Office for Civil Rights, Attachment A-3: Data Categories for Civil Rights Data Collection for School Year 2019-20, A3-8-11 (Sept. 2019), <https://tinyurl.com/AttachmentA3>.

⁴⁸ The U.S. Department of Education withdrew its May 13, 2016 Dear Colleague Letter on Transgender Students less than a year after its joint issuance with the U.S. Department of Justice’s Civil Rights Division. U.S. Dep’t of Educ., Office for Civil Rights & U.S. DOJ, Civil Rights Division, Dear Colleague Letter (Feb. 22, 2017), at 1, <https://tinyurl.com/OCRrecision>; see also Ahmed Mirza & Bewkes, *Secretary DeVos Is Failing to Protect the Civil Rights of LGBTQ Students*, Center for American Progress (July 29, 2019, 10:00 AM), <https://tinyurl.com/DeVosfailingtoprotectLGBTQ>.

⁴⁹ Kosciw, et al., *supra* n. 42, at 96.

asked to self-report and can decline to participate. Moreover, without a national database of these incidents it is difficult to compare between schools, districts, and across state lines.

VII. English Learner (EL) Students

OCR proposes to cease collecting the number of EL students who qualify for services through the IDEA and are enrolled in English language instruction classes. Attachment A-2 at A2-3, 37; Supporting Statement at 8. Tracking this data is crucial because EL students are classified as students with disabilities at a higher rate than their non-EL peers.⁵⁰ Research shows there is national variability in how LEAs identify ELs as eligible for special education services.⁵¹ In response, the U.S. Department of Education provides LEAs a toolkit in which it suggests LEAs use the data collected from the CRDC. *Id.* at 4, 13-15. Moreover, OCR has noted problems with LEAs classifying EL students as disabled based on their language capabilities and failing to provide both language and disability services.⁵² Without disaggregating this information, OCR risks schools and LEAs failing to meet the needs of EL students.

The removal of this data does not align with OCR's desire to collect more data disaggregated by Section 504 of the Rehabilitation Act of 1973 status. Supporting Statement A at 5.⁵³ Instead of removing disaggregation by IDEA, OCR should add disaggregation by Section 504.

VIII. Sexual Assault

OCR seeks to add six data elements aimed at gathering more detailed data on sexual assault in schools. Attachment A-2, A2-4, 62-64; Supporting Statement at 4. California supports the addition of these elements. However, California also urges OCR to add the collection of data on the number of sexual assaults (other than rape) committed by school staff, and not to limit data collection only to those sexual assaults committed by students. Tracking this data is critical, as approximately one in ten students "will experience sexual misconduct by a school employee

⁵⁰ U.S. Dep't of Educ., *Our Nation's English Learners: What are their characteristics?*, <https://tinyurl.com/EDenglishlearners> (last visited Nov. 14, 2019).

⁵¹ U.S. Dep't of Educ., Office of English Language Acquisition, *English Learner Toolkit for State and Local Education Agencies* (SEAs and LEAs) Ch. 6, p. 2 (2017), <https://tinyurl.com/OLEAELtoolkit>; see also Cal. Dep't of Educ., California Practitioners' Guide for Educating English Learners with Disabilities (2019), <https://tinyurl.com/CDEELtoolkit> (California toolkit for educators based on similar concerns).

⁵² U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter: Ensuring English Learner Students Can Participate Meaningfully and Equally in Educational Programs (Jan. 7, 2015), at 2, <https://tinyurl.com/OCRELstudents>.

⁵³ Section 504 is another statute setting out what accommodations and services must be provided to those with qualifying disabilities. Some EL students with disabilities receive services pursuant to a 504 plan rather than through IDEA. See 29 U.S.C. § 794.

by the time they graduate from high school.”⁵⁴ Tracking only the most egregious sexual violence committed by school staff will significantly undercut OCR’s desire to have “sufficient data to address rape or attempted rape, and sexual assault cases” and skew data in favor of school staff. Supporting Statement A at 4.

CONCLUSION

It is essential that the CRDC continue to collect information identified in this comment letter for the 2019-20 collection. This data collection is extremely beneficial to both OCR and stakeholders’ efforts to continue developing, monitoring, and enforcing civil rights education laws in California and across the nation. For the reasons set forth above, California urges OCR to reconsider its proposed changes and consider additions to identified gaps.

Sincerely,



XAVIER BECERRA
California Attorney General

⁵⁴Grant, et al., A Case Study of K-12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation 1 (2017), <https://tinyurl.com/TitleIXlessonslearned>.