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Via Email ICDOCKETMgr@ed.gov

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Dear Ms. Arrington,

On behalf of the American Civil Liberties Union (ACLU), its over half a million members, fifty-three affiliates nationwide, and countless additional supporters and activists, we submit these comments on the Department of Education's ("the Department") proposed changes to the bi-annual Civil Rights Data Collection, as detailed in your Federal Register notice of September 11, 2009 (FR Doc. E9-21935, at 74 Fed. Reg. 46750). You have requested comments from the public on: (1) whether this collection is necessary to the proper functions of the Department; (2) whether this information will be processed and used in a timely manner; (3) whether the estimate of burden is accurate; (4) how the Department might enhance the quality, utility, and clarity of the information to be collected; and (5) how the Department might minimize the burden of this collection on the respondents. Our comments focus on questions (1) and (4).

The ACLU has a long history of vigorously promoting nondiscrimination and respect for the civil rights of children in public education. We are at the forefront of efforts, through both impact litigation and legislative and executive branch work, to ensure that students, in particular children of color, girls, children with disabilities, those with limited English proficiency, and LGBT youth, do not suffer from current discrimination or its legacy. We have consistently fought for an educational system that encourages every student to succeed in school.

Given our commitment to promoting the rights of all individuals, eradicating discrimination in schools, and ensuring government accountability and transparency, the ACLU strongly supports an expanded Civil Rights Data Collection program by the Department. The proposed inquiries will provide information critical to assessing the state of our nation's public education system for at-risk and minority youth and enabling the Department to better guarantee the fair and equal treatment of young people.

1. This data collection is necessary to the proper functioning of the Department.

The ACLU strongly believes that Civil Rights Data Collection efforts are essential for the proper performance of the Department's duties to enforce federal anti-discrimination laws. The Department is responsible for disbursing significant federal funds and for ensuring that those funds are expended in accordance with the laws applicable to recipients of federal funding, including Titles VI and IX of the Civil Rights Act and the Rehabilitation Act. The Department is additionally responsible for enforcing portions of the Americans with Disabilities Act applicable to all public entities. With a vast network of more than 99,000 schools across the country subject to its oversight, the Department needs the kind of data produced by the Civil Rights Data Collection that show how schools are treating students and enable efficient identification of individual schools and school districts where civil rights violations may be taking place. In short, the Civil Rights Data Collection is a key tool in the Department's enforcement arsenal.

2. Comments on enhancing the quality, utility and clarity of collected information.

The ACLU applauds the Department's proposals overall, and believes, if implemented, the changes will provide information that will enhance ability to find and remedy potential civil rights issues in the schools. The following are comments on particular proposals.

a. Expansion of number of reporting LEAs, juvenile justice education programs, and schools

We are very pleased with the Department's decision to expand the sample of local education agencies (LEAs) to include all districts with more than 3,000 students, as well as all educational programs in juvenile justice facilities. We share the Department's conviction that a larger sample size is needed to ensure accuracy of the data and to provide an appropriate cross-section of American school districts and schools. In the future, we would like to see the Department collect civil rights data from all schools and LEAs.

b. Publication of results

The Department has indicated that data from the Civil Rights Data Collection effort will be shared with the public. In the past, the Department made available at least some of its results and projections online. We strongly support these transparency measures and would urge the Department to continue to make data publicly available and easily navigable online, to permit access to the greatest number of individuals, families, advocacy organizations, and all other stakeholders.

c. Data collection on ability-testing

The ACLU supports the Department's initiatives to gather information about ability-testing disaggregated by students' protected characteristics. Civil rights advocates and family members have raised concerns that children of color are too frequently tracked, possibly on a discriminatory basis, into lower-performing classes. The proposed data will shed light on the incidence and prevalence of this phenomenon. We are pleased that the Department will also continue to collect information by race, gender, national origin, and disability on graduation and grade-promotion rates, which will also reveal any discriminatory patterns in assessment of students.

We have, however, some outstanding questions about whether elimination of data collection about high-stakes tests given to determine graduation and grade promotion is warranted. Serious questions about the validity and impact of such tests have been raised, particularly where large numbers of at-risk students and students of color have performed well in school and obtained the requisite credits, but fail the high-stakes tests and suffer long-term consequences as a result. Collection of information about tests used to determine graduation and grade-promotion could help reveal to what extent certain student populations are caught in this trap. In fact, national projections based on the 2006 Civil Rights Data Collection suggested that this may be a problem: students of color were expected to retake, sometimes repeatedly, graduation tests in numbers disproportionate to their share of the school and national population. We understand that this data group was proposed for deletion to reduce the burden on school districts, however, much of this data is already collected for compliance with NCLB. We urge the Department to consider ways to include these results when publishing the Civil Rights Data Collection for ease of access to educators and communities.

d. Data collection on alternative schools

According to its proposals, the Department will be asking some much-needed questions about the number and focus of alternative schools. The ACLU has seen countless districts farm at-risk youth, particularly children of color and youth with disabilities, into such alternative institutions that more closely resemble prisons than schools. For example, a recent report by the ACLU and the ACLU of Mississippi on alternative schools in Mississippi found that black children are twice as likely to be referred to disciplinary alternative schools as white students, and that, in some districts, students with special needs represented only two percent of the district population, but thirty percent of the student body at alternative schools. In many of these environments, children do not obtain adequate educational opportunities; some programs do not even provide teachers or the opportunity to earn a high school diploma.

Although we understand that a wide range of school-level data will be collected from individual institutions that self-identify as alternative schools, it is not immediately clear to us whether the Department will aggregate information about alternative schools in general, other than statistics about the number and focus of alternative schools as a whole. We would be particularly interested in the collection and publication of data showing total enrollments in alternative schools by race, gender, national origin and disability; average length of time students spend in alternative programs; and teacher qualifications for these schools.

e. Data collection on harassment and bullying

The ACLU commends the Department on the addition of questions about harassment and bullying incidents on the basis of race, sex, national origin and disability – this information is much needed. Studies conducted by the private sector, such as one commissioned by the Gay, Lesbian, and Straight Education Network (GLSEN), have indicated that as many as 65% of all high school students are bullied in a typical year. More information about the breadth of the problem is sorely needed, as experts agree that children who feel harassed or threatened cannot learn and grow to their greatest potential.

In addition, our advocacy and experiences suggest that a great number of student victims of harassing behavior are singled out on the basis of their perceived or actual sexual orientation or

gender non-conforming behavior. For example, we have found that LGBT students are five times as likely as their peers to skip school out of fear for their own safety. We would like for schools and districts to document and report cases of LGBT harassment and bullying, in addition to those based on race, gender, national origin and disability. Any such reporting, however, must be done with care to protect individual students' comfort and privacy. No student should be questioned about or forced to reveal sensitive personal information about sexuality or gender identity. Schools and LEAs must be instructed to count incidents only when students themselves volunteer their sexual orientation or gender identity. Moreover, information transmitted to the government must be in such a form that it cannot be used to identify particular students. This data can also provide information to assist schools in focusing on programs that provide positive behavioral approaches to end school bullying.

f. Data collection on disciplinary incidents and methods

1. Reporting of types of discipline applied: We are very pleased with the Department's proposal to expand from four to eight the number of possible categorizations of disciplinary methods used by schools, and are particularly pleased to see that data will be collected about the impact of zero-tolerance policies, corporal punishment, seclusion and restraint, school-related arrests, multiple out-of-school suspensions, and cases referred to law enforcement. In many cases, school-based arrests and referrals to law enforcement are for relatively minor forms of misconduct such as pushing, trespass, and disorderly conduct. Arrest or referral often, if not in almost all cases, leads to a juvenile criminal record, which has life-long consequences -- consequences which are not warranted when the behavior is not particularly serious. A recent study by the ACLU and the ACLU of Connecticut about the Hartford, East Hartford, and West Hartford, Connecticut school districts showed gross racial disparities in punishment: black and Latino/a West Hartford students accounted for just 24% of the school population in 2006-07, but represented 63% of students who experienced school-based arrest. From 2005 through 2007, black and Latino/a students in East Hartford who committed infractions involving alcohol, drugs, and tobacco were a shocking ten times more likely than white students committing similar offenses to be arrested.

In view of these apparent problems, we strongly support the Department's plan to collect further information about law enforcement in schools. We would ask, however, that the Department further clarify for reporting agencies and schools what is meant by "referrals to law enforcement" (which we interpret as occasions on which school officials contact outside law enforcement personnel about incidents involving students) and "school-based arrest" (which we understand to mean arrests carried out by school-based security personnel, or on school grounds or during school-sponsored events).

We would also recommend that in addition to the proposed eight categories, the Department ask respondent schools to report on some other common forms of discipline, such as in-school suspensions and out-of-school suspensions during which some academic services are provided. In

addition, we feel that collection of information on de-enrollments upon arrest or placement in a juvenile justice facility, and re-enrollments upon completion of expulsions, sentences, and juvenile justice placements, is warranted to help the Department and advocates understand what effect those punishments have on students' eventual completion of secondary education.

2. Zero-tolerance policies: We are particularly pleased that the Department is proposing new data collection on discipline under zero-tolerance policies. Disciplinary policies that mandatorily impose severe punishments for particular student infractions are pushing students out of schools and into a pipeline running straight from the classroom to the prison. For these reasons, professional organizations from the American Bar Association to the American Psychological Association to the American Academy of Pediatrics have criticized these draconian methods of discipline. We have found in our research that criminalizing behavior that was previously dealt with more flexibly through the school system alienates students and causes them to disengage with the educational process. As a result, once a student begins his or her involvement with the criminal justice system, he or she is at greater risk of both further involvement in criminal activities and leaving school permanently. The proposed data collection on this issue will help both advocates and the Department better understand the ineffective and discriminatory nature of these zero tolerance policies.
3. Continuing investigation of corporal punishment: The ACLU applauds the Department for continuing its data collection around incidents of corporal punishment. We hope that all statistics collected around corporal punishment will be made publicly available.

Recent work by the ACLU¹ has found that both students of color and students with disabilities are disproportionately the targets of paddling or other corporal punishment, in many instances exacerbating their difficult medical and mental conditions. As with school-based arrests, physical punishment is not an effective behavioral modifier, and pushes children away from education and socialization. Moreover, corporal punishment erodes trust between students and the adults who supervise them in schools. More data is needed to fully illuminate the impact of corporal punishment and its inappropriate use in schools.

4. New data collection on seclusion and restraint: We are also pleased that the Department proposes to initiate collection of information about the

¹ For details of the ACLU's and Human Rights Watch's findings on discriminatory and damaging use of corporal punishment in schools, please see our two recent reports: *A Violent Education: Corporal Punishment of Children in U.S. Public Schools*, at http://www.aclu.org/files/pdfs/humanrights/aviolenteducation_report.pdf; and *Impairing Education: Corporal Punishment of Students with Disabilities in US Public Schools*, at <http://www.aclu.org/files/pdfs/humanrights/impairingeducation.pdf>.

number and targets of incidents of restraint and seclusion in schools. As Professor Reece Peterson testified at the House Education and Labor Committee's May 19, 2009 hearing on use of restraint and seclusion in schools, there is little data currently available to show how often these methods are being used and, importantly, no evidence to show that seclusion and restraint are an effective means of changing student behavior over the long run. Nonetheless, there is significant reason to believe these methods are being used, against the consensus recommendations of education experts. Evidence presented to the House in May ranged from a study which found that schools were employing seclusion and restraint merely to discipline students who did not follow directions, even when they posed no danger to others, to the testimony of parents whose children were killed by in-school use of restraints. In addition, the GAO has investigated the issue and uncovered hundreds of allegations of abuse and death due to restraint and seclusion, yet located not a single agency or government website collecting information about the use of the methods. Thus, the Department's data collection will be filling a critical void that will contribute significantly to our knowledge of the use and prevalence of restraint and seclusion. We would recommend that the Department specify that "restraint" incidents include those in which a student's range of movement is restricted in any way, and not only those in which the student is entirely prevented from any movement.

g. Data collection on total numbers of students of limited English proficiency

The Department has proposed a change from counting total numbers of students of limited English proficiency at the end of the school year to counting totals based on fall enrollment data. In addition, this information was previously reported both by individual schools and LEAs, but will henceforth be collected from schools only.

Overall, the Department's proposals to collect information about students with limited English proficiency are excellent. However, we have some concern that these changes could result in an undercount of students of limited English proficiency. Students of limited English proficiency are likely members of immigrant families, which can be more mobile than the norm. Thus, a single count of their numbers based only on fall enrollment will miss perhaps a significant number of children who move into or between school districts during the school year. We would ask the Department to consider requesting counts of students of limited English proficiency both on October 1 and on the Child Count date in February to more accurately monitor trends in enrollment of such students.

3. The proposed changes are a positive development.

In conclusion, the ACLU applauds the Department's initiative to collect more strategic and comprehensive information about civil rights issues in American schools. This data will greatly enhance the Department's effectiveness, as well as the capacity of advocates for civil rights protections in education. We also applaud the Department's decision to protect individual student privacy. We note, however, that much of the information collected at the school level is personally identifiable, extremely sensitive, and deserves the highest possible protection. In

order to protect that information, the Department must ensure that the highest possible privacy standards are maintained. Personal information that is linked to individual students must only be collected and used for limited, predetermined purposes and students must have notice about the information collection. Clear controls must be established over who can view personally identifiable information and audit logs kept which track this access. Any outsourcing of information must be strictly governed by contract with penalties for misuse or failure to comply with privacy standards. Finally, this information must be discarded after the applicable set time period.

The protections are vital to ensuring that personal information on students is not handled inappropriately or leaked to the public. However, none of these controls prevent the long-term storage and publication of aggregate, non-identifiable data on schools and students that is so critical to civil rights monitoring and enforcement. The data collection's importance to enabling the Department to efficiently carry out its mandate to guarantee civil rights protections in schools is paramount, given the broad scope of that task. Moreover, this imperative easily outweighs the burden on reporting schools and districts, which the Department estimates at just 9.25 hours for each survey. Based on our experience in education policy and litigation, we believe the proposed changes are timely and necessary.

If you have any questions regarding these comments, please contact Deborah J. Vagins, ACLU Legislative Counsel, at dvagins@dcaclu.org or (202) 715-0816.

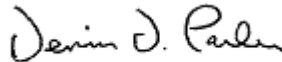
Sincerely,



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