August 16, 2013

VIA EMAIL www.regulations.gov
Director of the Information Collection Clearance Division
U.S. Department of Education
400 Maryland Avenue, SW., LBJ, Room 2E105
Washington, DC 20202-4537

Re: ACLU Comments for 2013-2014 and 2015-2016 Mandatory
Civil Rights Data Collections, 78 FR 37529, Docket ID number ED–
2013–ICCD–0079

Dear Director of the Information Collection Clearance Division:

The ACLU, on behalf of its more than half a million members, countless
additional supporters and activists, and 53 affiliates nationwide is pleased to
submit these comments on the Department of Education’s (the Department)
proposal for its 2013-2014 and 2015-2016 Civil Rights Data Collections (CRDC).
These comments are in response to the request for comments published at 78 Fed.
Reg. 37529, in connection with the Department’s submission of the proposed data
collection for OMB review. 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 largely on questions (1), (2), and (4).

The ACLU has a long history of 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, LGBT and gender non-
conforming youth, and children of all religions and beliefs, do not suffer from
current discrimination or its legacy. We consistently fight 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, while maintaining student privacy, we continue to support the Department’s expanded CRDC program. Although a few areas remain where additional data would prove useful, the information the Department proposes to collect in the upcoming 2013-2014 and 2015-2016 collections will provide data critical to assessing the state of our nation’s public education system and will enable the Department to better guarantee the fair and equal treatment of all young people.

I. Comments on Proposed Expansions Regarding School Discipline

The ACLU commends the Department’s proposals to further expand its collection of punitive school discipline categories. If implemented, these changes will provide information that will greatly aid efforts to identify and remedy potential civil rights issues in schools. The following are comments on particular proposals related to those school discipline reporting requirements.

a. Expansion of corporal punishment reporting requirements (Data Group 917, 921, 922)

Corporal punishment remains a legal form of discipline in 19 states across the country.\(^1\) In addition to inflicting physical pain on students, such violent punishment negatively affects students’ academic performance and long-term wellbeing. Moreover, previous CRDC data shows that corporal punishment is disproportionately used in punishing African American students and students with disabilities.\(^2\) Schools have an obligation to create a healthy school environment for all students; unfortunately, this destructive practice does not make schools safer or more productive.\(^3\) The ACLU particularly values and applauds the additional proposed reporting expansions in this area.

First, the proposed expansion to include reporting on the number of *instances* in which students are subjected to corporal punishment will give a more complete picture of the number of times students are hit and brutalized in our schools (Data Group 917). Currently, the CRDC collects data on the number of *students* with and without disabilities who receive corporal punishment in grades K-12. As such, the current collection does not capture the frequency of corporal punishment in a school because it does not quantify those instances of repeated striking of an individual student. We have long advocated for this change and welcome the requirement to


report both the number of students subjected to corporal punishment as well as the number of corporal punishment instances at a school for preschool through grade 12. This proposed addition will help to ensure that the frequency of punishment and the scope of the student body affected are accurately disclosed.

Second, we are pleased that OCR has extended corporal punishment reporting to include both the number and instances at the pre-K level (Data Group 921). This proposal rightly reaches beyond the traditional K-12 framework to capture more areas where violent punishment is used on our most vulnerable students. These expanded reporting requirements will help show the full extent to which our youngest children are harmed in schools at the hand of educators and will provide the footing for redress, so that children can experience a learning environment with safety and dignity.

Third, the disaggregation of data to identify the students with disabilities, covered under specific civil rights statutes⁴ who are subject to corporal punishment (including the number of instances), as well as other forms of punitive school discipline, will provide much needed data that may be used to address the disproportionate use on students with disabilities (Data Groups 922, 917).

b. Additional school discipline categories (Data Groups 975, 952, 922, 923)

We are also pleased to see expanded data collection in areas that will shine a light on the interaction of law enforcement and students with respect to school discipline, including: the number of security personnel present in a school (Data Group 975) and incidents triggering discipline at a school (Data Group 952).

The ACLU works to identify and reduce overly punitive school discipline policies that push kids out of school and into the criminal justice system. OCR’s proposed additions of reporting the number of security guards, school resource officers, and sworn law enforcement officers within a school, and identifying and recognizing the differences in authority and responsibility, will give a more accurate picture of the factors that fuel the pipeline. The presence of officers in schools may create an adversarial environment where otherwise minor misbehaviors are met with police intervention.⁵ Instead of resolving behavior, like speaking out of turn or running in the halls, with the help of a teacher or a counselor, schools that use law enforcement risk punishing students with arrests, tickets, or other police involvement. Understanding how many school resource officers, security guards, and sworn law enforcement officers are present school-by-school across the country can help communities create guidelines and training for those officers so that they understand their role in a school. It can even help communities advocate for more evidence-based alternatives.

⁴ The Department proposal requires schools to identify students covered under the IDEA and Section 504 of the ADA.
In addition, requiring schools to document and report incidents that would trigger discipline in a school, including referrals to law enforcement and arrest, is another welcome addition to the CRDC. Bringing to light the number of violent instances, such as robbery or physical attack with a weapon or firearm, rape, sexual battery, or the other types of incidents listed in the proposed CRDC, will provide valuable data on the safety of our schools.

However, in order to identify instances of over-policing that lead to the school-to-prison pipeline and to identify potential disparities based on race or disability, we encourage the expansion of this data set to include the types of minor offenses which are triggering disciplinary referrals. It is students’ increased involvement with law enforcement for minor disciplinary infractions that unnecessarily exposes children to the criminal justice system and results in African American students being punished more harshly for the same minor offenses. More detailed data is needed to root out this form of discrimination. Recently, Attorney General Eric Holder made the case quite clearly that “[a] minor school disciplinary offense should put a student in the principal’s office and not a police precinct.” Therefore, it is for these reasons that the proposed data collection on offenses be modified. Specific proposed changes are discussed in detail below.

Recommended changes:

Although we believe that the proposed changes will make great strides, there is more that could be done to alert students, parents, communities, and advocates to possible civil rights violations. Additional ways to improve data collection surrounding school discipline include:

- Providing more clarity on the types of law enforcement in schools, such as: data on both full-time and part-time personnel who are engaged in policing roles regardless of who pays their salaries; consistency in OCR’s and the federal statutory definition of SROs; data on which security staff have the power to arrest; and data on whether security staff is armed. (Data Group 975)

- Modifying the collection to include an offense category within each of the disciplinary categories (e.g., suspension, expulsion, arrest, referral to law enforcement, etc.). Doing this would permit OCR to know both the offense and the outcome of the incident, as well as the ability to identify disparities. (Data Group 952)

- Requiring schools to report, as part of the offenses that trigger discipline, the types of minor disciplinary offenses (e.g., insubordination, disorderly conduct, etc.) that result in disciplinary referral to law enforcement. Expansion of this data set will provide a more complete picture of the disciplinary incidents that result in student/law enforcement

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interaction and will help to identify racial or disability disparities that manifest due to over-policing. (Data Group 952)

- Limiting reporting of offenses to students only or creating a separate category for offenses involving non-students. This will ensure the accurate collection of information that is directly impacting students. (Data Group 952)

- Reporting both the number of students referred to law enforcement or arrested as well as each individual instance of referral or arrest. It is important to see not only how frequently students are being referred to law enforcement, but also how many students are being referred. (Data Groups 952, 922, 923)

- Clarifying in the instructions to schools that “referral to law enforcement” can include an instance in which a police officer approaches a student directly, and is not limited to incidents in which a student is formally “referred” by school officials to police. Alternatively, this could be captured by creating a separate category of “formal law enforcement interaction short of arrest.” (Data Group 922, 923).

- Expanding what is included in the “referral to law enforcement” category to include tickets and citations. This category should include all interactions between security staff and a student that puts the student at risk of being detained or referred to court. It is important to capture police-student encounters that result not only in arrests, but also in tickets and citations. Alternatively, this could also be captured by creating a separate category of “formal law enforcement interaction short of arrest.” (Data Groups 922, 923).

- Including data on the use of force by security staff against students. (Data Groups 922, 923, 959, 960, 961)

**c. Removal to alternative schools (Data Groups 922, 923)**

The proposal to add data reporting on the number of students (K-12) who were removed for disciplinary reasons to alternative schools is an important piece that should be adopted into the CRDC. Alternative schools may function differently with respect to educational goals and methodologies. The ACLU has sued privately-run alternative schools that use overly punitive approaches and fail to provide a quality education.\(^8\) Alternative schools serve our most vulnerable students. Unfortunately, sending children to alternative schools often results in their continued educational decline and their entrance into the criminal justice system.\(^9\) It is important to know how many students are placed in such schools due to disciplinary reasons at school, as

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the proposed CRDC intends to show. We also applaud the Department’s requirement to identify separately students with disabilities who are removed from their schools for disciplinary reasons.

**Recommended changes:**

- Collect data on students “voluntarily” transferred. We understand that some students receive the option of being expelled or “voluntarily” transferring to an alternative school. Data on those students should be captured as well, and clarifying this in the instructions to schools would be useful. (Data Groups 922, 923)

**d. Student chronic absenteeism (Data Group 978)**

The addition of data collection for chronic absence is an important inclusion. Chronic absence is correlated with low academic performance and is an indicator of a student’s likelihood to drop out. Collecting such data would facilitate intervention by school leaders. Moreover, tracking chronic absence will better detect attendance problems among students who are highly mobile or who and may miss a small number of days at many schools over a short period of time.

**Recommended changes:**

- Amend the definition of chronic absence to the unduplicated number of students absent 10% or more during the school year. Using a 10% measure is better for comparing data across states and districts with different lengths of school year. Numerous studies now show missing 10% of school is correlated with significantly lower academic performance. For younger children, pre-K through elementary school, it affects reading and math proficiency especially if a student is chronically absent for two or more years. Through middle and high school, missing 10% or more of school is a proven early warning sign of drop-out. (Data Group 978)

- While the data collects information for both excused and unexcused absences, we recommend requiring disaggregation between excused and unexcused absences. The disaggregation will allow for the identification of unexcused chronic absenteeism that places students at risk of not meeting attendance requirements for graduation. (Data Group 978)

**e. School days missed due to out-of-school suspension (Data Group 966)**

The decision to include the number of school days missed due to out-of-school suspension is important for assessing the impact of suspension on academic achievement and future success. Out-of-school suspensions have an effect on students similar to chronic absenteeism and removal to alternative schools, all of which contribute to academic decline and lead to the school-to-prison pipeline.

As suspension disproportionately impacts students with disabilities and minority students, it is important to have a universal standard for calculating the length of suspension. Currently, for students without disabilities and those with disabilities served solely under Section 504, out-of-
school suspension is defined as removal “for at least a day,” where suspension for students with disabilities served under IDEA is defined as removal for “at least a half day.” A uniform standard, as proposed below, should be applied.

We further encourage the expansion of this collection to include the number of instances of out-of-school suspension, and encourage the Department to provide a definitive total number of students suspended by combining the number of students suspended once with those who have been suspended more than once, while also continuing the separate reporting of those categories.

Recommended changes:

- Clarify the proposal for the number of school days missed due to out-of-school suspensions, by defining an out-of-school suspension to be a period of “at least a half day” for all students. This clarification will create uniformity for students with and without disabilities. (Data Group 966)

- Report combined data on the number of students suspended once with the number of students suspended more than once so that a total number of students suspended can be provided. The Department should also continue to separately report this data. (Data Group 966)

II. Harassment on the Basis of Sexual Orientation and Religion (Data Group 933)

In addition to reporting the number of allegations of harassment of bullying on the basis of sex, race, color, national origin, and disability, the Department proposes the number of allegations based on sexual orientation and religion.10 The ACLU supports this expansion. Including religion and sexual orientation is in line with recommendations made by the U.S. Commission on Civil Rights in 2011.11

First, although there has been little research done on bullying and harassment based on religion, there are reports, for instance, that anti-Sikh and anti-Muslim bullying have risen in the past decade.12 Often students are targeted because of visible religious symbols.13 Anecdotally, we know that bullying and harassment based on religion is also not limited to Muslim or Sikh students.14

10 “Religion” must include all religions and beliefs, as well as non-belief.
12 Id.
14 Heather L. Weaver, Paying the Price for Defending Religious Freedom in South Carolina, ACLU Blog (Apr. 17, 2013), http://www.aclu.org/blog/religion-belief/paying-price-defending-religious-freedom-south-carolina (non-believer student harassed by classmates and family harassed and received death threats); see also U.S. COMM’N supra note 11 at p. 22-23.
Second, a 2011 nationwide survey of more than 8,500 students between the ages of 13-20 found that eight out of ten LGBT students reported experiencing harassment at their school within the past year based on their sexual orientation.\(^\text{15}\) Transgender students experienced even more hostile school climates than their non-transgender peers, with 80% of transgender students reporting feeling unsafe at school because of their gender expression.\(^\text{16}\) These numbers clearly show the valuable research that has already been conducted to document the impact of harassment on LGBT students; however, serious data gaps remain unaddressed.

The additional data that the Department proposes to collect will help support the development and implementation of effective policies and practices for addressing harassment.

**Recommended changes:**

- Collect and disaggregate specific data on gender identity-based harassment. We appreciate the Department’s collection of statistics on allegations of harassment based on sex, including that which is based on non-conformity with gender stereotypes. However, as demonstrated above, transgender students are among the most vulnerable to harassment in our public schools. Collecting specific data on harassment based on gender identity will ensure that allegations are fully counted, and provide critically important information to the public on school climate for transgender and gender non-conforming students. (Data Group 933)

**III. Single-Sex Interscholastic Athletics (Data Groups 937, 938, 939)**

The ACLU welcomes expanded reporting around single-sex interscholastic athletics in schools. Although Title IX holds the promise of equality for students in athletics, that promise has yet to be fulfilled, and glaring inequalities persist for women and girls in interscholastic athletics. Girls have 1.3 million fewer chances to play sports in high school than boys, and when they do play, they often receive fewer resources and less institutional support than boys. These disparities are even greater for girls of color: fewer than two-thirds of African American and Hispanic girls play sports, while more than three-quarters of Caucasian girls do.\(^\text{17}\) We, therefore, applaud the continued requirement of reporting the numbers of interscholastic high school teams and sports and number of participants.

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\(^\text{16}\) *Id.*

\(^\text{17}\) *See Nat’l Coalition for Women and Girls in Educ., Title IX: Working to Ensure Gender Equity (2012), available at* [http://www.ncwge.org/PDF/TitleIXat40.pdf](http://www.ncwge.org/PDF/TitleIXat40.pdf).
Recommended changes:

- Add a question regarding expenditures for the boys’ and girls’ athletic programs (e.g., travel, equipment; uniforms, practice and competitive facilities and locker rooms, training and medical facilities; and publicity). (Data Group 938)

- Include data on Interscholastic Athletics Team Participants not only by sex, but also by race/ethnicity, in a format that can be fully cross-tabulated. (Data Group 939)

IV. Single-Sex Classes (Data Group 976)

In recent years, numerous public school districts have introduced single-sex education programs, in an attempt to find solutions to the array of problems facing our schools. This trend sharply accelerated in October 2006, when, over the objections of a wide range of stakeholders and advocacy organizations including the ACLU, the U.S. Department of Education announced new regulations under Title IX of the Education Amendments of 1972 that were supposed to clarify the standards pursuant to which public schools could implement single-sex schools and classrooms.18 The separation of students on the basis of sex within public schools implicates critical equality concerns and civil rights protections, including Title IX and the U.S. Constitution.

Despite the growing popularity of this trend there was no official monitoring of the number of schools offering single-sex classes, or of their number or scope, until a question was added to the CRDC in recent years. Continued data collection in this area is critical so that the public, advocates, and OCR can better understand the scope of such programming and how it is being implemented in our public schools.19 We therefore propose a number of recommendations to improve the data collected on single-sex education.

Recommended changes:

- Significantly refine and clarify the questions included. Analysis by advocates suggested that many schools were reporting programming that is exempt under Title IX’s operative regulations and that do not involve intentional sex-based classifications (such as groups selected by sex-neutral factors such as vocal range, skill or ability that are incidentally single-sex). Therefore, the definitions of “single-sex classes” should specify that if the class is selected by sex-neutral factors, such as skill or ability resulting in it being incidentally limited to members of one sex, then it is not considered a single-sex class. (Data Group 976)

- Require the LEAs to report not only the absolute number of single-sex academic classes in the subjects listed by males/females only, but also the number of coeducational class

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18 34 C.F.R. 106.34.

sections within each of those subjects, as well as the grade level, where applicable. The questions posed on the “number of single-sex academic classes” do not provide sufficient information about the scope of the single-sex programming, as it does not provide any context or permit comparison between male/female only classes and the number of coeducational classes available. Additionally, these questions should be disaggregated by disability and race, in a manner that may be fully cross-tabulated, to enable analysis of whether students of color and students with disabilities are disproportionately channeled into either single-sex or coeducational classrooms. (Data Group 976)

V. Pregnant and Parenting Students (New Data Group Proposal)

The Department recently recognized in its new Pamphlet Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972, that pregnant and parenting students are among the most vulnerable populations, and confront unique challenges to achieving their educational goals. Studies suggest that pregnancy and parenting play a significant role in students’ decisions to drop out of school, yet many schools do little to help keep pregnant and parenting students on track to graduation, and some fail even to meet the basic requirements of Title IX. There is a critical need to obtain further data on the number of students who face these challenges, what services are available to them, and how they are faring so that educators and policy makers can better understand the scope of the problems and craft effective solutions.

Recommended changes:

- Add questions regarding whether schools have policies in place regarding pregnant and parenting students, whether they offer programs or services to such students and, if so, of what nature.

- Request collection and reporting of non-personally identifiable data of the number of pregnant students and the number of parenting students at each school in each grade, or in the alternative, at the LEA level. The Department should emphasize that this data should be collected in a manner that is as protective as possible of student privacy, such as consultation with staff or teachers or through student-initiated self-reporting or enrollment in targeted services.

VI. Expansion of Justice Facilities (Data Groups 940, 941, 942, 943)

The Department has requested comments regarding the proposal to expand the collection of data in justice facilities, which currently include long-term secure facilities and boot camps, to include detention centers, correctional facilities, jails, and prisons, that provide educational

21 NAT’L COALITION, supra note 17.
services. We agree with the Department that expanding the definition of justice facilities ensures coverage of all youth in pre- or post-adjudication facilities that receive educational services, and gives even further clarification on whether our children are receiving appropriate services.

OCR’s proposed expansion will provide valuable data on the variety of facilities where students are educated outside of traditional school settings. We share the Department’s conviction that a larger sample size that includes alternative educational programs, like justice facilities, will provide a more accurate account of the educational opportunities available to students, and raise awareness of any issues students in this learning environment may face. Shamefully, our juvenile justice centers are rife with inequities and tend to further marginalize already vulnerable students.²²

Both short and long-term juvenile facilities, serve high percentages of youth with special education needs and students who may be multiple years below grade level. Youth may experience further educational disruption by placement in isolation or segregated settings, inappropriate removal from diploma-track curriculum or limited availability of career and technical coursework. Significant issues often arise upon release, including problems with transferring credits earned during incarceration or delays in re-enrolling in their home schools.

Recommended Changes:

- Add reporting requirements to include the number of days youth spent awaiting enrollment after release; the number of days youth have been removed from the regular classroom due to security or other issues; and information about the availability of special education services. (Data Groups 940, 941, 942, 943)

VII. School and District Characteristics: Civil Rights Coordinators (Data Group 916)

The decision for LEAs to report the existence of a civil rights coordinator who is responsible for coordinating efforts to comply with and carry out their responsibilities under federal law, including prohibiting discrimination against students and others on the basis of sex, race, color, national origin, and disability, is a positive development that will help in opening communication between OCR and the LEA. Among other things, requiring reporting of this information will remind LEAs of their statutory obligations under Title IX of the Education Amendments of 1972 and the Rehabilitation Act to designate an individual to coordinate Title IX compliance efforts.

We have found in the context of Title IX enforcement that recipients frequently do not fulfill this obligation to designate such an individual, and that even if they do, it can be difficult for students to locate that individual. What is more, that person is too often poorly trained and under-resourced—particularly at the school level.

Recommended changes:

• Require schools, in addition to LEAs, to report this information, and to report whether those civil rights coordinators receive training on civil rights laws, including, for example, Title VI, Title IX, and section 504 of the Rehabilitation Act, and, if so, with what frequency. Requesting reporting of the contact information for civil rights coordinators at both the LEA and school levels should result in greater accountability on Title IX and civil rights enforcement more broadly, and provide an open line of communication between recipients and OCR, as well as the public, to identify problems and solutions when issues arise. (Data Group 916)

VIII. The Necessity and Processing of this Collection

The Department has requested comments on whether this collection is necessary to the proper functions of the Department and whether this information will be processed and used in a timely manner. We support the CRDC efforts and believe that such a collection is a critical tool for the Department to assess how schools are treating children, and to facilitate identification of those schools where civil rights violation may be taking place. With a vast array of educational settings across the country subject to its oversight, a thorough data collection will alert the Department to proper enforcement of federal anti-discrimination laws, including, for example, Titles VI, Title IX, the Rehabilitation Act, and the Americans with Disabilities Act.  

In addition, these changes are timely, necessary, and not unduly burdensome. Any burden of reporting on schools, districts, and justice facilities is outweighed by the importance of the data gathered. Moreover, because some reporting categories from prior collections have been eliminated in the proposed 2013 and 2015 collections, the burden for the proposed new data collection categories is mitigated.

Recommended changes:

• Require annual and universal data collection to ensure accuracy in data and reporting. Accuracy diminishes when data is not reported on an annual basis and inhibits academic researchers and the civil rights community from adequately utilizing the data. Local activists have also reported on the difficulty of showing achievements or identifying areas of concern at schools when data is not able to be compared year to year.

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IX. Reporting Accountability

In the ACLU’s August 10, 2012 letter to OCR in response to the 2009 CRDC, we identified reporting gaps and failures among school districts to report certain data items correctly. We understand the Department has engaged in a process to provide technical assistance to some schools, but since we have not yet seen complete reporting in the past collections and there are new categories in the proposed collections, we renew those requests here. Districts must be held accountable for complying with mandatory reporting requirements.

Recommended Changes:

- Continue to assist states and districts in developing effective mechanisms for tracking law enforcement referrals, arrests, and other new school discipline categories, such as incidents of corporal punishment.

- Assist districts that have not been tracking this data in reconstructing the information through incident reports, police department statistics, juvenile court records, and any other relevant means.

- Devise a mechanism for flagging districts that report “zeros” for certain categories of data, in order to distinguish between districts that are failing to report any data and those that truly are reporting no occurrences as zeros in the data categories. After developing such a system, follow up with those districts to make clear that failure to comply could lead to a withholding of federal education funds.

Conclusion

The proposed CRDC is worthy of praise and we appreciate the Department’s commitment to identifying factors that impact our nation’s students, through your expansion of the 2013 and 2015 CRDC's categories. The survey is a necessary tool for performing the Department’s civil rights oversight duties.

If you have any questions regarding these comments, please contact Deborah J. Vagins, Senior Legislative Counsel, at dvagins@dcaclu.org or (202) 675-2335.

Sincerely,

Laura W. Murphy     Deborah Vagins
Director, Washington Legislative Office    Senior Legislative Counsel

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