



www.nsba.org  
Phone: 703.838.NSBA Fax: 703.683.7590  
1680 Duke Street Alexandria, Virginia 22314 -3493

August 20, 2013

Via Electronic Submission

[www.regulations.gov](http://www.regulations.gov), and [ICDocketMgr@ed.gov](mailto:ICDocketMgr@ed.gov)

Stephanie Valentine, Acting Director  
Information Collection Clearance Division  
Office of Management  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
LBJ Room 2E105  
Washington, D.C. 20202-4537

Re: ED Notice of Information Collection  
Docket ID: ED-2013-ICCD-0079  
Title of Collection: Mandatory Civil Rights Data Collection  
OMB Control Number: 1870-NEW

To the ICCD Director:

The National School Boards Association (NSBA), representing through our state associations approximately 13,800 school districts nationwide, offers the following comments to the Notice, *Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection*, ED-2013-ICCD-0079,<sup>1</sup> issued by the U.S. Department of Education (Department) on June 21, 2013. NSBA understands that through this Notice, the Department is seeking approval from the Office of Management and Budget (OMB) to permit the Department's Office for Civil Rights (OCR) to make its mandatory civil rights data collection (CRDC) for the 2013-14 and 2015-16 school years a separate data collection from *EDFacts*.

In reviewing the Notice and supporting documents,<sup>2</sup> NSBA has identified several areas of concern with regards to certain proposed new data groups and data categories, as well as proposed revisions to existing data groups and data categories, contained in Attachments A-2 and A-3. NSBA appreciates the opportunity to share with OMB, the Department, and OCR the specific information regarding the types of data being proposed to be collected, the burden and expense to already financially-strapped public school districts of such proposed collections, the confusion certain requests will generate because of the differences between OCR's characterization of certain ideas and actions and the actual definitions and obligations, responsibilities, and rights of public school districts as

<sup>1</sup> Notice, 78 Fed. Reg. 37,529 (June 21, 2013).

<sup>2</sup> References to Attachments and Supporting documents refer to those included with the electronic file attached to the Notice, ED-2013-ICCD-0079, and are not included with NSBA's comment submission.

defined by state law, and the areas of proposed data collection for which NSBA believes there is questionable legal jurisdiction to support, or be the basis for, OCR's inquiries.

In the Notice, OCR states that it is especially interested in public comment addressing the following issues: "(1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology." NSBA will address these issues, as applicable, in the context of the areas of concern identified below.

## **I. Comments and Discussion**

OCR states that the proposed additions and changes to the CRDC "reflect the need for a deeper understanding of and accurate data about the educational opportunities and school context for our nation's students."<sup>3</sup> However, there are several proposed new and revised data groups and categories for which NSBA questions not only their relevance to OCR's CRDC, but whether the data requested raises federal civil rights enforcement questions such that OCR would have any jurisdiction, and which may result in an unnecessary burden and labor- and cost-expense to each district. As drafted, the Notice appears to be a hypothesis in search of support – a hypothesis about students' educational opportunities and school contexts – with the proposed expanded CRDC data elements searching for data to support the hypothesis.

### **A. School & District Characteristics**

Civil Rights Coordinator.<sup>4</sup> OCR states that the item related to civil rights coordinators "will measure compliance with civil rights regulations and permit OCR to communicate with coordinators."<sup>5</sup> However, the collection of this particular data item is not "necessary to the proper functions of the Department,"<sup>6</sup> and a portion of the scope of this item goes beyond the statutory requirements of federal law. Also, the collection of this data item will not achieve the two goals OCR stated as its reason for doing so.

Public school districts are already required to make publicly available the contact information of its civil rights compliance coordinators. Districts usually make this available in a variety of places, such as on their websites, in student codes of conduct or behavior, or in the school board's policies and regulations. OCR can access this information now via the internet. OCR should clarify how adding it to the CRDC adds value to the agency's work.

---

<sup>3</sup> *Supporting Statement, Part A: Justification* at p. 3.

<sup>4</sup> Data Group 916: Civil Rights Coordinators, Attachment A-2, p. A2-28.

<sup>5</sup> *Supporting Statement, Part A: Justification* at p. 3.

<sup>6</sup> Issue No. 1 in the Notice, 78 Fed. Reg. at 37,529.

More importantly, the definition of “civil rights coordinator” in this data group, and the “Permitted Value” in this item’s data category exceed OCR’s statutory jurisdiction. The definition statement identifies the coordinator as having responsibilities to coordinate a school district’s efforts to prohibit discrimination on the basis of sex, disability, and race/color/national origin.<sup>7</sup> Similarly, the “Permitted Value” includes “race, color, or national origin.”<sup>8</sup> This is statutorily unsupported.

There is no legal requirement mandating school districts have civil rights coordinators for race, color, or national origin under OCR’s Title VI implementing regulations, as reiterated in OCR’s own October 2010 Dear Colleague Letter on bullying and harassment.<sup>9</sup> In that Dear Colleague Letter, OCR correctly states that only Title IX (sex),<sup>10</sup> Section 504 (disability),<sup>11</sup> and Title II of the ADA (disability)<sup>12</sup> require school districts to have civil rights compliance coordinators. It is not NSBA’s position that a school district should not have a designated employee to coordinate its efforts at combating race, color, and national origin discrimination. Rather, NSBA contends only that existing law does not require said position. If this data element is included ultimately in the CRDC, NSBA recommends it be revised to remove race, color, and national origin from the data group’s definition and data category’s “Permitted Values” sections, so as to remain consistent with existing federal law.

Moreover OCR’s goal that this data item requires school districts provide the name and email address of the civil rights coordinator<sup>13</sup> to “permit OCR to communicate with coordinators,” raises important process concerns for school districts. It would be inappropriate for OCR personnel, particularly as part of enforcement actions and investigations, to make direct contact with school district employees without first contacting school district counsel. Also, depending on OCR’s areas of inquiry when “reaching out” to the civil rights coordinators, the coordinator may not be the appropriate person to respond. If this data element is included ultimately in the CRDC, NSBA recommends that the contact information question be removed, leaving just the basic “Yes/No” inquiry of whether a district has a civil rights compliance coordinator for sex and disability. For those districts that identify in the CRDC that they do not have such coordinators, OCR can then contact those divisions individually.

## **B. Discipline**

### **1. Expulsion**

This category raises concerns regarding the reporting of the number of students removed from their primary educational setting for disciplinary reasons. NSBA’s concern is the Department’s (mis)characterization of “removal” of a student in grades K-12 through an involuntary transfer process

---

<sup>7</sup> Attachment A-2, p. A2-28 (“Civil Rights Coordinator” definition) (emphasis added).

<sup>8</sup> Data Category: Civil Rights Law (Coordinators), Attachment A-3, p. A3-12.

<sup>9</sup> See Dear Colleague Letter, OFFICE FOR CIVIL RIGHTS, at p. 3 n.11 (Oct. 2010), *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

<sup>10</sup> 34 C.F.R. § 106.8(a).

<sup>11</sup> 34 C.F.R. § 104.7(a).

<sup>12</sup> 28 C.F.R. § 35.107(a).

<sup>13</sup> Attachment A-2, p. A2-28 (“Comment” section).

from the student's then-present educational setting to some other setting as an "expulsion",<sup>14</sup> even when the student continues to receive educational services in the new setting.<sup>15</sup> The lack of a unique federal definition of "expulsion," and its typical definition by state law, raises the spectre at the misapprehension of a term in ways that taint reported "findings". Additionally, the reasons for a transfer of a student through the disciplinary process from the student's then-present educational setting to another education setting could be for reasons in addition to discipline, including a setting that is more academically appropriate for the student, as well as the student's physical safety. Thus, though OCR may identify such school board actions as "expulsions" for CRDC-purposes, OCR's (mis)characterization of what constitutes an "expulsion" could cause confusion in reporting, and could result in an over-reporting of the actual number of true "expulsions" that took place in a given school year.

Another possible source of confusion in a school district's reporting of expulsion counts exists under the data category "Discipline Method (Preschool), where OCR specifically excludes as an "expulsion" the transition of a preschooler from one educational setting to another, without providing justification for such a difference in the treatment of K-12 students and preschoolers.

The additional staff time and expense each school district will incur by performing manual checks of student discipline records to separate out from the total count of expulsions, those expulsions that occurred under "zero-tolerance policies" is onerous. It is unlikely that existing student information systems collect information about the reasons supporting expulsions, thus collection of this data item will not only increase the staff time and expense of each reporting district, but will likely result in an over-reporting of expulsions for this subcategory.

## 2. Differences in Terms of Out-of-School Suspensions

In the attachments accompanying the Notice regarding the expansion in data collection, OCR has stated a difference in the minimum length of time an IDEA-disabled student must be removed from school for an out-of-school suspension, as compared to a non-disabled student or a Section 504-disabled student. Specifically, the data categories "Discipline Method" and "Discipline Method (Preschool)" both state that an out-of-school suspension of an IDEA-disabled student is "an instance in which a child is temporarily removed ... for at least half a day", whereas for all other students, the child must be "temporarily removed ... for at least a day ...."<sup>16</sup> However, OCR has not provided any justification, legal or otherwise, for such difference in treatment. Not only will this likely cause confusion among school district personnel responsible for reporting this information, it will likely require a manual check of attendance and discipline records by school personnel to determine which of all the students serving an out-of-school suspension were IDEA-disabled students and which were not. The increased staff time and expense of identifying the necessary data for this reporting data item is unreasonable and overly burdensome.<sup>17</sup>

---

<sup>14</sup> *Supporting Statement, Part A: Justification*, at p. 4.

<sup>15</sup> Attachment A-3, p. A3-17.

<sup>16</sup> Attachment A-3, pp. A3-16, A3-19.

<sup>17</sup> NSBA is also concerned about another possible area of data collection that will require additional staff time and expense in reporting, and possibly result in over-inflation of discipline data. Specifically, Data Group 966, "School days missed due

### 3. Incidents Triggering Discipline

This category raises concerns for the quality and integrity of data to be collected. First, OCR is requiring that “[i]ncidents should be counted *regardless of whether any disciplinary action was taken*, and regardless of whether students *or non-students* were involved.”<sup>18</sup> This is problematic for two reasons: (1) some “incidents” are resolved without any subsequent disciplinary action after school staff and administrators have an opportunity to investigate matters and interview the students involved; and (2) schools should not be required to report “incidents” that involve strictly *non-students*, since the school does not have control of the behavior of non-students who may visit campus. Having to report incidents that ultimately do not result in disciplinary action and incidents involving strictly non-students will result in total reported numbers that are overinflated and not truly representative of what is occurring in schools.

Second, OCR defines the “incident” that should be reported as “a specific criminal act involving one or more victims or offenders.”<sup>19</sup> Here, OCR has arbitrarily established not only a definition of “incident”, but also the types of criminal offenses to be reported in this category, including “weapon”, “rape”, “sexual battery”, “robbery”, “physical attack or fight”, “threat”, “threat of physical attack with a weapon”, and “threat of physical attack without a weapon.”<sup>20</sup> As with “school removal”, NSBA is not aware of any definition of these terms in the laws administered by the Department or OCR. Again, the lack of a unique definition in federal education statutes, and the potential with inconsistency with each state’s legal definitions under their respective criminal codes, poses grave concern for the integrity of the data, creates the opportunity for misreporting, and clouds the understanding of data collectors at the school district level. This data category and related “definitions” create numerous problems for school districts costing ever-decreasing public taxpayer dollars in both staff time and expense in the following ways in trying to respond to related data items:

- School districts will have to conduct new training of any and all possible staff members who may be involved in the disciplinary process, from the staff member who initially receives the student report and drafts the disciplinary report, to the staff member who conducts the investigation, or a staff member who may simply witness possible conduct warranting disciplinary action, on what are the definitions of “incident” and the related “criminal offenses” for which data is to be collected and reported. This will likely include every administrator, teacher, teacher’s aide, front office staff member, school security officer, school nurse, guidance counselor, school psychologist, cafeteria worker, bus driver, custodian, athletic coach, school secretary, bookkeeper, attendance officer, or any other staff member who comes into contact with students.

---

to suspensions table,” would require schools to count as **full days of suspension** those days “when students were dismissed early from school, but school staff were not, ....” Attachment A-2, p. A2-70 (emphasis added). If the rest of the student body has been dismissed early from school, then the suspended student has not missed any additional educational time than other non-disciplined students. This presents yet more examples of the kind of manual examination of student records to complete this data item count, and of the opportunities for over-reporting of disciplinary data.

<sup>18</sup> Attachment A-2, Data Group 952: Offenses Table, p. A2-58 (emphasis added).

<sup>19</sup> Attachment A-2, Data Group 952: Offenses Table, p. A2-58.

<sup>20</sup> Attachment A-3, Category Name: Offense Type, pp. A3-27 to -28.

- Current student information systems may not contain data fields that ask reporting staff members to input the type of “criminal offense” as that is defined in this data category. Thus, in collecting the requisite information for this data item, school staff will have to either manually review every disciplinary record for the school year at issue and determine what “offense” occurred, if any, or engage the services of IT staff to manually adapt existing computer systems or develop an additional recordkeeping system to capture this new data. At a minimum, to be truly integrated throughout a school district, this requirement could require the implementation with new software and database reconfiguration processes that could prove to be both time consuming and expensive – particularly for under-resourced small and rural districts.

Additionally, the data collected for this data item encourages a school official to engage in a subjective determination of which “offense” may have occurred based on a student’s own possibly incomplete/inaccurate description of events. For example, a student reporting an incident is not going to know the difference between sexual harassment, sexual assault, rape, attempted rape, or sexual battery. This calls into question the validity and accuracy of the data, particularly in cases of the “eggshell” plaintiff in which a person may unreasonably perceive actions or words of others as threats or attacks, when they actually are not. Consequently, school districts should be reluctant to define a particular incident as falling into a certain category based on a student’s description of the “incident” for fear of mischaracterizing it. In doing so, a school district risks having the reported numbers being perceived by OCR as those of a district having less of a safe school environment than actually exists.

Perhaps most significantly, this requirement could chill the professional discretion of seasoned educators by compelling classification of low-level incidents using a criminal framework. Such behavior could force childish behavior such as pushing or shoving into criminal definitions of battery, limiting the ability of educators to exercise classroom management, maintain order, and teach appropriate conduct through educational behavior techniques.

Lastly, using the definitions of “offenses” proposed by OCR, the numbers reported by school districts may be over-inflated, since some offenses can fall into multiple categories. For example, in the “number of incidents of possession of a firearm or explosive device,”<sup>21</sup> data group incidents involving just possession of a firearm or explosive device might well be counted again in the “robbery with a firearm or explosive device”, “physical attack or fight with a firearm or explosive device”, and “threats of physical attack with a firearm or explosive device” data groups, since each of these data groups also necessarily requires the possession of a gun in the first place. Similarly, under OCR’s definition, “rape” could also fall into the “sexual battery” and “physical attack or fight” categories, again, causing an over-inflation of reported “incidents”. All of these possible areas of redundancy in reporting ultimately call into question the validity of the data set, and contribute to a final product based on inaccurate reports.

---

<sup>21</sup> Appendix, *Supporting Statement, Part A: Justification* at p. 21.

### C. Harassment and Bullying

In proposing to expand the data categories and data groups to be collected, OCR states in the Notice that it is proposing to include “sexual orientation” and “religion” in the data request for the “number of reported allegations of harassment or bullying of K-12 students on the basis of: sex; race, color, or national origin; disability.” In gathering this data, OCR states that the school district employee is not to determine the actual status of the victim, *i.e.*, the victim’s sexual orientation or religion, but is to “**look to the likely motive** of the harasser/bully” in determining if a particular allegation made by a student-victim involved harassment or bullying on the basis of the student-victim’s sexual orientation or religion.<sup>22</sup> This “look” at the “likely motive of the harasser/bully” opens a wide door to speculation and subjective interpretation by, the district employee investigating and/or completing the disciplinary report for a given incident.

Moreover, NSBA continues to be concerned with OCR’s conflating of the two issues of harassment and bullying on the basis of sexual orientation and religion under the umbrellas of Title IX (sex) and Title VI (race/ethnic origin). To be clear, NSBA is opposed to and condemns harassment and/or bullying of any kind, and in particular when it is premised on a student’s actual or perceived sexual orientation or religion. All students should be protected from such hurtful conduct. However, under existing law as currently written, OCR is limited to enforcing only clearly articulated federal civil rights laws. Conflation clouds the parameter of OCR’s authority and confuses the legal standards under which schools act to protect students.

Additionally, for this specific data item, judgment calls may be difficult to make as to the motive behind the harasser’s/bully’s negative behavior, when sometimes it might not be so clear or obvious from the circumstances, and how to report it in the student information system. The disciplinary incident reporting system used by any given district may not currently contain, or be able to accommodate the addition of, a section for the “motive” or “basis” for the harassing/bullying behavior. Consequently, such information may then be required to be entered manually on district forms, databases, etc., thus making later CRDC data-gathering at the district-wide level extremely labor-intensive, time-consuming, and expensive. And, again without clear definitional language, different districts may report incidents based on different understandings of what constitutes a “motive” or a “basis” for the alleged misbehavior.

### D. Pathways to College and Career

OCR notes its proposed change measuring which schools have high and low chronic absenteeism rates,<sup>23</sup> adding a new item inquiring of the number of students who are absent 15 or more school days.<sup>24</sup> While this may be valuable information, this data item fails to raise a civil rights issue under any of the statutes OCR enforces.

---

<sup>22</sup> *Supporting Statement, Part A: Justification* at pp. 4, 11-13 (emphasis added); Attachment A-2, p. A2-41; Attachment A-3, p. A3-10 to -11.

<sup>23</sup> *Supporting Statement, Part A: Justification* at p. 4.

<sup>24</sup> *Appendix, Supporting Statement, Part A: Justification* at p. 23.

Though OCR states “[c]hronic absenteeism can be a sign of serious school climate issues that are driving children out of school,”<sup>25</sup> there are myriad other reasons why a student may miss 15 or more school days in a particular year that have no relation to “school climate.” Chronic absenteeism can pose a challenge to a student’s success in school, and district monitoring of the number of students with chronic absenteeism is important, but its connection to the laws OCR enforces appears tenuous at best. NSBA recommends that this data item be deleted as it is not “necessary for the proper functions of the Department,” and there is no established connection to any civil rights issue.

## E. Homicides

A new item OCR proposes is “[a]n indication of whether any of the school’s students, faculty, or staff died as a result of a homicide committed at the school.”<sup>26</sup> It is unclear as to what civil rights issue this data group raises. Specifically, how will this data item provide OCR with any information as to whether a school district is complying with its *civil rights* obligations under the five statutes OCR is charged with enforcing. NSBA suggests deleting this item altogether.

## II. How might the Department minimize the burden of this collection on the respondents, including through the use of information technology?

To minimize the burden of OCR’s CRDC on NSBA’s 13,800+ member school boards and school district staff, NSBA recommends the following:

- Because OCR is requesting OMB’s approval to separate OCR’s CRDC from the Department’s ED*Facts* information collection (OMB 1875-0240), OCR should significantly reduce the amount of information being requested by eliminating the data elements in the CRDC that *do not raise a civil rights issue* and are not specifically authorized by law under any of the statutes and implementing regulations (as enacted, not as OCR expansively interprets them) OCR is charged with enforcing. NSBA has provided examples of such data elements in its comments above.
- Definition – Eliminate or clarify.

School districts are becoming more financially strapped each year, as state and federal contributions to the districts’ annual budgets continue to shrink. School districts already have to do more with less. Expanding the scope of inquiry of the CRDC into even more areas of a school district’s operations, for which the connections between the requested data elements and potential civil rights concerns involving equal educational opportunity become less and less legally supportable, only further hampers each school district’s ability to succeed in its mission of educating and protecting this nation’s students.

---

<sup>25</sup> *Supporting Statement, Part A: Justification* at p. 4.

<sup>26</sup> Attachment A-2, Data Group 919: Deaths Due to Homicide, p. A2-29.

NSBA thanks the Department for its review and consideration of the issues raised here regarding OCR's upcoming Civil Rights Data Collection. We look forward to the Department's response to, and resolution of, these comments, and urge the Department to do so in a way that minimizes the potential adverse impact on school districts regarding both staff time and expense, and the educational services they provide to our nation's students.

Sincerely,



Francisco M. Negrón, Jr.  
General Counsel  
National School Boards Association

cc: Catherine Lhamon, Esq., Assistant Secretary for Civil Rights, U.S. Department of Education  
(via electronic mail at [Catherine.Lhamon@ed.gov](mailto:Catherine.Lhamon@ed.gov))