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July 23, 2021

The Honorable Miguel Cardona
Secretary
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights
Department of Education
400 Maryland Avenue SW
Washington, DC 20202

Dear Secretary Cardona and Acting Assistant Secretary Goldberg:

The Victim Rights Law Center (VRLC) is a non-profit law center in Massachusetts and Oregon that represents victims of sexual assault. The VRLC has represented thousands of PK-12 students in legal matters to restore their safety and access to education following a sexual assault. We are writing in response to the Request for Information Regarding the Nondiscriminatory Administration of School Discipline issued on June 8, 2021. We write to highlight issues surrounding the intersection of gender and racial discrimination in the response to reports of sexual assault in elementary and secondary schools and to make recommendations to address these issues. Specifically:

- OCR must require that administrators responsible for student discipline receive annual training related to racial and gender bias to ensure that all students involved, including reporting parties, are treated equitably.
- OCR must require new data elements for all Civil Rights Data Collection (CRDC) surveys moving forward to truly understand the intersection of sexual harassment and school discipline with gender and race.
- Training and Technical Assistance must be provided to elementary and secondary schools regarding effective interventions and remedial measures that can be offered in conjunction with or in lieu of exclusionary sanctioning practices in sexual assault and sexual harassment cases.

PK-12 Teachers and Administrators Responsible for Discipline Need Training Related to the Intersection of Sexual Harassment and Assault and Racial Bias.

Many of our clients are elementary and secondary students who were sexually assaulted by peers or teachers. Some students choose to report these experiences to school administrators. Throughout our representation, we have noticed an alarming trend when students of color, specifically Black girls, report sexual harassment and sexual assault to their school – they are blamed and often punished. In one case, a 9th grade student was asked by a group of male students to leave school with them to pick up lunch. She agreed and, on the way, they told her she needed to perform oral sex on them. She declined and they pulled over and told her to walk back to the school. When she reported this experience to a vice principal, she was suspended for leaving campus and told she should think more about how her own actions and poor judgment contributed to this situation. In another case, a 7th grade student was asked to share sexually explicit photos with a teacher. The teacher threatened that if she did not, he would report her undocumented family members. She initially sent several photos but declined his request for additional, more explicit, photos. She then shared the photos with a close friend when seeking advice about whether to report. When she did report, she received an in-school suspension for disseminating explicit photos to her friend in violation of the school’s sexual harassment policy.

Our experience is consistent with what research shows about the experiences of Black girls. Teachers and administrators often view them as more “adult” than their white peers and less likely to need support.¹ By perceiving Black girls as older than they are, teachers and administrators assume their behavior is intentionally malicious rather than due to their age or immaturity.² It is imperative that this bias is identified, acknowledged, and discussed among PK-12 teachers and administrators in order to take steps toward protecting and supporting students who are reporting sexual assault and sexual harassment. Title IX requires individuals acting as decision-makers or those who facilitate informal resolutions to receive training on bias, and this training should be extended to any teacher or administrator who responds in any form to reports of sexual harassment or assault.³ OCR should clarify this requirement and provide additional resources regarding the topics to be covered and the goals of any bias training. This training is especially critical in light of what we know about the prevalence of sexual assault among girls and women of color. In one study, 11% of Black girls in a national high school sample reported having been raped.⁴ Sexual assault reporting rates are already low due to the stigma that the victim was somehow to blame for the assault. In these cases, girls of color are not only blamed for the assault or harassment, but then disciplined.

¹ See generally Rebecca Epstein, Jamilia Blake & Thalia Gonzalez, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*. Center on Poverty and Inequality Georgetown Law. (2017) <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> Study reveals that adults surveyed view Black girls as less innocent and more adult-like than white girls of the same age, especially between 5–14 years old.

² *Id.* at 4-5.

³ 34 C.F.R. §106.45(b)(1)(iii)

⁴ Nancy Thompson, Robin McGee & Darren Mays. *Race, Ethnicity, Substance Use, and Unwanted Sexual Intercourse among Adolescent Females in the United States*. 13 WEST J EMERG MED, 283-8 (2012).

Elementary and Secondary Schools Must Report More Information Regarding Sexual Harassment and Sexual Assault.

While research shows and the VRLC has personally observed problematic trends surrounding the treatment and punishment of girls of color when reporting sexual harassment, no one has the full picture. To be clear, we do not have the necessary data to truly understand the intersection of sexual harassment and school discipline with gender and race in public elementary and secondary schools.

Research shows that 1 in 9 girls and 1 in 53 boys under the age of 18 experience sexual assault at the hands of an adult.⁵ Furthermore, females between the ages of 16 and 19 are 4 times more likely than the general population to be sexual assaulted.⁶ Despite this, there is no requirement that elementary and secondary schools collect and report data on sexual assault. By contrast, the Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act (Clery Act) requires colleges and universities to track and publicize an annual security report including data about sexual assaults on campus. In order to develop meaningful interventions and responsive guidance, OCR needs comprehensive data.

While OCR made recent changes to the Civil Rights Data Collection (hereinafter “CRDC”) for the 2020-21 school year, the new data elements regarding sexual assault are optional and do not fully capture the realities of sexual harassment and school discipline’s intersections with gender and race in public elementary and secondary schools. In order to rectify this, OCR must first make reporting data from elementary and secondary schools required and not optional. Otherwise, the information cannot be fully relied upon because it will not be comprehensive. Secondly, the new data elements are missing critical pieces of information. For instance, they do not solicit information about sexual harassment at all. Given the prevalence of sexual harassment and the changing nature of its perpetration with technology, data on this is vital. The new data elements do not ask for the number of allegations of sexual assaults by a student. Without this information, OCR cannot evaluate the effectiveness of PK-12 schools in responding to sexual assault. Finally, the new data elements do not contain any information about the Complainant or Respondent’s⁷ identity, including gender and race and do not require any information about school disciplinary actions following a report of sexual harassment or sexual assault. This information is

⁵ David Finkelhor, Anne Shattuck, Heather A. Turner, & Sherry L. Hamby, *The Lifetime Prevalence of Child Sexual Abuse and Sexual Assault Assessed in Late Adolescence*, 55 *Journal of Adolescent Health* 329, 329-333 (2014).

⁶ Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Sex Offenses and Offenders* (1997).

⁷ Here, we use the term Complainant to refer to the individual filing a complaint of sexual harassment as is commonly done so in Title IX of the Education Amendments (Title IX). Additionally, we use the term Respondent to refer to the individual responding to a complaint of sexual harassment as is commonly done so in Title IX.

necessary to understand the intersection between sexual harassment and school discipline with gender and race.

To that end, OCR must require these new data elements for all CRDC surveys moving forward. They must also include additional new, data elements regarding sexual harassment for all CRDC surveys. Specifically, the OCR should add the below data elements, bolded below⁸:

- Number of documented incidents of offenses committed by a student that occurred at the school (**disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent**). Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment**.
- **Number of allegations made against a student of offenses that occurred at the school, which were followed by a transfer or graduation prior to final determination (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent). Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**
- **Number of allegations made against a student of offenses that occurred at the school, which were followed by a determination that the student was responsible for at least one of the offenses (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent). Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**
- **Number of allegations made against a student of offenses that occurred at the school, which were followed by a determination that the student was not responsible for the offense (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent). Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**
- **Number of allegations made against a student of offenses that occurred at the school, which had a determination that remained pending (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent). Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**
- Number of documented incidents of offenses committed by a school staff member that occurred at the school (**disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent**). Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment**.
- Number of allegations made against a school staff member of offenses that occurred at the school, which were followed by a resignation or retirement prior to final discipline or termination (**disaggregated by race, sex, disability-IDEA, EL of the Complainant and**

⁸ The below data elements are based on the new, optional data elements added to CRDC for the 2020-21 school year. Additional language to future CRDC surveys is **bolded** below. Language which should be removed from future CRDC surveys is ~~struck through~~.

Respondent). Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment.**

- Number of allegations made against a school staff member of offenses that occurred at the school, which were followed by a determination that the school staff member was responsible for **at least one of the offenses (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment.**
- Number of allegations made against a school staff member of offenses that occurred at the school, which were followed by a determination that the school staff member was not responsible for the offense **(disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment.**
- Number of allegations made against a school staff member of offenses that occurred at the school, which had a determination that remained pending **(disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment.**
- Number of allegations made against a school staff member of offenses that occurred at the school, which were followed by a duty reassignment prior to final discipline or termination **(disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, ~~and~~ sexual assault (other than rape), **and sexual harassment.**
- **Number of students that faced any disciplinary action after filing a report of an offense against a student or school staff member (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.
- **Number of students that faced any juvenile delinquency action through the school resource officer after filing a report of an offense against a student or school staff member (disaggregated by race, sex, disability-IDEA, EL of the Complainant and Respondent).** Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.
- **Number of allegations made against the same student of offenses that occurred at the school. Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**
- **Number of allegations made against the same school staff member of offenses that occurred at the school. Offenses categories include: rape or attempted rape, sexual assault (other than rape), and sexual harassment.**

Only with complete data can we truly understand the intersection of sexual assault, sexual harassment and school discipline with race, gender, and disability in public elementary and secondary schools. Only then can OCR provide truly evidence-based guidance.

Elementary and Secondary Schools Must Consider Disciplinary Sanctions Beyond Suspension to Prevent Future Sexual Harassment and Sexual Assault.

The Department of Education has an important role in ensuring our schools are nondiscriminatory, positive learning environments. To that end, it is important that the sanctions and remedial measures put in place following an incident are grounded in evidence and are intended to increase overall school safety. In our practice, we most often see PK-12 schools refuse to address reports of sexual harassment and sexual assault at all. They most often refer reporting students and families to law enforcement and take the position that it is outside of their purview. In the small number of cases when schools do respond to the report, it is with a brief in- or out-of-school suspension and no other educational opportunities, remedial measures, or interventions. This separates the students very temporarily with little concern for the safety of the reporting party or incentive to change behavior on the part of the responding party.

Exclusionary sanctions alone do not address underlying causes of sexual assault and harassment, are themselves rife with racial bias, and have adverse long-term effects on students reentering school. These sanctions are explicitly punitive rather than offering opportunities for students to learn, to address harms, and to gain skills to change future behavior. Exclusionary sanctions isolate and remove students from pro-social environments rather than providing necessary treatment or educational opportunities.⁹ Research also shows that assignments of exclusionary sanctions, specifically out-of-school suspensions, are subject to racial bias and discrimination, impacting African American students at a significantly higher rate than their White, Hispanic, and Asian counterparts.¹⁰ Furthermore, exclusionary sanctioning has adverse effects on a student's success upon returning to the classroom.¹¹

PK-12 schools can facilitate behavioral change through responsive interventions and remedial measures that allow students to return to the classroom in a manner that is safe for harmed parties and the greater school community.¹² Such interventions include educational trainings or programs, restorative justice conferencing, and treatment by outside experts or

⁹ Pro-social behaviors are a documented "protective factor" against perpetrating sexual violence in Worling, J.R. (2017, November). *Profesor: Protective + Risk Observations for Eliminating Sexual Offense Recidivism*. https://www.profesor.ca/uploads/8/7/7/6/8776493/the_profesor_november_2017.pdf, referenced by Wilgus, J., Tabachnick, J. King, R., & Creeden, K. (2020). *Widening Our Lens: Expanding Perspectives to Sanction and Prevent Sexual Misconduct*. <https://klancystreet.com/wp-content/uploads/2020/01/ASCA-MASOC-Widening-Our-Lens-1-9-20-Final.pdf>

¹⁰ Loveless, T. (2017). Race and School Suspensions. *The 2017 Brown Center Report on American Education: How Well Are American Students Learning*, 3(6), 22–33. [2017-brown-center-report-on-american-education.pdf](https://www.brookings.edu/wp-content/uploads/2017/07/2017-brown-center-report-on-american-education.pdf) (brookings.edu).

¹¹ *Id.* at 31-32.

¹² There is lack of research on sanctioning in cases of sexual misconduct in K-12 cases. These interventions are recommended for institutions of higher education; however, we believe they can and should be implemented in K-12 school systems. Wilgus, J., Tabachnick, J. King, R., & Creeden, K. (2020). *Widening Our Lens: Expanding Perspectives to Sanction and Prevent Sexual Misconduct*. <https://klancystreet.com/wp-content/uploads/2020/01/ASCA-MASOC-Widening-Our-Lens-1-9-20-Final.pdf>

school counselors.¹³ These interventions have the potential to enable behavioral changes and to improve overall community outcomes moving forward. In many ways, PK-12 schools are the best spaces for these interventions while students continue to cognitively develop. OCR has an opportunity to provide Technical Assistance and additional resources to support PK-12 schools in navigating best practices in sanctioning and treatment for students engaged in sexual assault or harassment.

School discipline does not occur in a vacuum. OCR must consider the ways it intersects with racial discrimination in the context of responding to reports of sexual assault and sexual harassment. By requiring schools to report data, we will have a full picture of the prevalence rates and can work toward meaningful interventions and remedial measures that are implemented equitably.

A handwritten signature in black ink, appearing to read "Stacy Malone", is centered on the page. The signature is written in a cursive, flowing style.

Stacy Malone
Executive Director
Victim Rights Law Center

¹³ *Id.*