

United States Senate

WASHINGTON, DC 20510

October 5, 2022

The Honorable Catherine Lhamon
Assistant Secretary, Office for Civil Rights
Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, DC 20202

Dear Assistant Secretary Lhamon:

We write today regarding the Department of Education (Department) Office of Civil Rights' (OCR) intent to strengthen regulations for Section 504 of the *Rehabilitation Act of 1973* (Section 504). We applaud the Department's recent guidance on supporting students with disabilities and avoiding the discriminatory use of student discipline under Section 504. The new guidance makes clear how Section 504's requirements to provide a free appropriate public education (FAPE) apply to disciplinary practices, such as informal removal. We urge the Department also to include a definition of informal removals in its final rulemaking for Section 504 to ensure that students receive the FAPE to which they are legally entitled.¹

Informal removals occur when children with disabilities are removed from school for a period of time without the rights extended under Section 504 and other federal and state laws and regulations.² Informal removals may include repeated or long-term use of shortened school days; frequently sending a child home in the middle of the school day; placing a child on homebound instruction that often results in fewer than 10 hours of in-person instruction per week; placing a child in full-time, virtual learning; or an agreement to drop a suspension in exchange for disenrolling the child or waiving the child's rights.

Formal removals, which are documented suspensions and expulsions, result in a loss of 11 million instructional hours per year.³ Informal removals, however, are not counted in this figure, making it impossible to know the exact number of informal removals and the amount of class time that children with disabilities lose when they are informally removed. The National Disability Rights Network recently released a report that estimates that hundreds and perhaps thousands of informal removals occur each year, negatively affecting the educational outcomes of students with disabilities. In some cases, informal removals may result in students with disabilities missing months and even years of classroom instruction. Missing school also

¹ 20 U.S.C. § 1401 (9)

² Smith Howard and Huncharek. (2022). *Out of the Shadows: Informal Removals of Children with Disabilities from Public Schools*. National Disability Rights Network. <https://www.ndrn.org/wp-content/uploads/2022/01/Out-from-The-Shadows-1.pdf>.

³ Losen, D. J, & Martinez, P. (2020). *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn*. The Center for Civil Rights Remedies. <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>.

deprives children of other important services, such as access to free lunch, referrals to outside services, medical care, evaluation services, access to a library and playground, extracurricular activities, and a sense of community and belonging.

Informal removals not only restrict children's personal growth and decrease their likelihood of graduating, but they also are discriminatory.⁴ Federal and state laws and regulations, including Section 504, were intended to eliminate the segregation of students with disabilities. A student with a disability has a right to FAPE under Section 504, which requires that a student with a disability receive education and related services and supports that are designed to meet the student's needs as adequately as the needs of nondisabled students.⁵ Section 504 also requires due process protections, inclusive learning environments, and nondiscrimination in programs and activities that receive federal funding, including schools.⁶ The denial of such protections through the practice of informal removals is concerning to us and must be addressed by the Department.

At a minimum, the regulations implementing Section 504 must:

1. Define informal removal in regulation.
2. Include informal removals as a form of prohibited discriminatory action in 34 C.F.R. Section 104.

Thank you for your consideration of our comments.

Sincerely,



Richard J. Durbin
United States Senator



Tammy Duckworth
United States Senator

cc: The Honorable Miguel Cardona

⁴ Christina LiCalsi, David Osher, Paul Bailey. (2021). *An Empirical Examination of the Effects of Suspension and Suspension Severity on Behavioral and Academic Outcomes*. American Institutes for Research. <https://www.air.org/sites/default/files/2021-08/NYC-Suspension-Effects-Behavioral-Academic-Outcomes-August-2021.pdf>.

⁵ 34 C.F.R. § 104.33(b)(1)

⁶ 34 C.F.R. § 104