



REGION IX
CALIFORNIA

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS**

50 UNITED NATIONS PLAZA
MAIL BOX 1200, ROOM 1545
SAN FRANCISCO, CA 94102

July 20, 2022

VIA ELECTRONIC MAIL

Andrew S. Johnsen
Superintendent
San Marcos Unified School District
255 Pico Avenue Suite 250
San Marcos, CA 92069
XXXXXXXX

Re: OCR Complaint No. 09-21-1275

Dear Superintendent Johnsen:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the above-referenced complaint against San Marcos Unified School District (District). The Complainant alleged that the District failed to provide the Student with a free, appropriate, public education (FAPE) and retaliated against the Complainant and the Student.¹ Specifically, OCR investigated the following issues:

- 1) Whether the District failed to provide the Student with a FAPE by failing to evaluate the Student in a timely manner during the 2020-2021 school year, even though it had reason to believe that the Student needed special education or related services because of a disability; and
- 2) Whether the District retaliated against the Complainant and the Student after the Complainant advocated on the Student's behalf in the special education process, when among other things, the District revoked the Student's intradistrict transfer for the 2021-2022 school year.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of disability under any program or activity receiving Federal financial assistance. OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. §§ 12131-12134, and its implementing regulation, 28 C.F.R. Part 35, which prohibit discrimination on the basis of disability by public entities. The District is a public entity that receives funds from the Department and is therefore subject to Section 504, Title II, and their implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the District. Specifically, OCR interviewed and reviewed documents provided by the Complainant, interviewed District employees, and reviewed the District's August 11,

¹ In previous correspondence with the District, OCR identified the Complainant and the Student, therefore in order to protect the Complainant and Student's privacy, it will not do so here.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

2021 data response. Prior to OCR completing its investigation and making a compliance determination, the District expressed an interest in voluntary resolution pursuant to section 302 of *OCR's Case Processing Manual (CPM)*², and OCR determined it was appropriate to do so. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Issue 1: Whether the District failed to provide the Student with a FAPE by failing to evaluate the Student in a timely manner during the 2020-2021 school year, even though it had reason to believe that the Student needed special education or related services because of a disability.

Legal Standards:

The Section 504 regulations, at 34 C.F.R. § 104.33, require public school districts to provide a FAPE to all students with disabilities in their jurisdictions. An appropriate education is defined as regular or special education and related aids and services that are designed to meet the individual needs of students with disabilities as adequately as the needs of students without disabilities are met, and that are developed in accordance with the procedural requirements of §§ 104.34-104.36 pertaining to educational setting, evaluation and placement, and due process protections. Implementation of an individualized education program (IEP) developed in accordance with the Individuals with Disabilities Education Act (IDEA) is one means of meeting these requirements. 34 C.F.R. § 104.33(b)(2). OCR interprets the Title II regulations, at 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii) and (iii), to require districts to provide a FAPE at least to the same extent required under the Section 504 regulations.

Section 104.35(a) of the regulations requires school districts to conduct an evaluation of any student who needs or is believed to need special education or related aids and services because of disability before taking any action with respect to the student's initial placement and before any subsequent significant change in placement. In this regard, school districts must ensure that all students who may have a disability and need services under IDEA or Section 504, are located, identified, and evaluated for special education and disability-related services. Under § 104.35(b), tests and other evaluation materials must be administered by trained personnel, must be reliable, and must be valid for the purpose for which they are being used.

Facts:

District Section 504 Policies and Procedures

The District's *Section 504 Policies and Procedures for Assessing Students* state that a student may be referred by a parent/guardian, teacher, other school employee, community agency, and/or a student study team (SST) for consideration of eligibility as a student with a disability under Section 504. Once referred, a multi-disciplinary team will "promptly" consider the referral and determine whether an assessment is appropriate based upon a review of relevant and available information regarding the student. In interviews with OCR, District employees stated that it is "not typical" for the District to initiate assessments; the District often waits for a diagnosis from a physician. One District employee further stated that it is the District's practice to hold an SST meeting if the school believes there are concerns about a student, unless there is a documented disability, or a parent formally requests an assessment.

The Student's Attendance in the District

² *Case Processing Manual* (July 18, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>

The Student resides within the District and attended a school (School) in the District on an intradistrict transfer from the XXXXX to the XXXXX grade. At the end of the 2020-2021 school year, the District revoked the Student's intradistrict transfer and the Student returned to his home school for the 2021-2022 school year.

The 2020-2021 School Year

During the 2020-2021 school year, the School documented multiple communications with the Complainant regarding the Student's academic, attendance, and social-emotional challenges. In November 2020, the Complainant notified the School Social Worker (Social Worker) and Student's Teacher (Teacher) of the Student's "meltdown", stated that he "gets very anxious", and asked the School to assist him. The Social Worker offered to meet with the Student to build his self-confidence and address his challenges with remote learning, and to collaborate with the Teacher to develop classroom-based accommodations. The Complainant initially agreed to these supportive measures and then declined them when she believed the Student's situation had improved.

In January 2021, the Student's academic, attendance, and social-emotional challenges resumed, and the Complainant and the School discussed their shared concerns about the Student's needs in these areas. On January XX and January XX, 2021, the Complainant notified the Social Worker and Teacher of the Student's "major meltdowns", breakdowns, physical sickness from anxiety, and requested academic support for remote learning. The Social Worker responded by offering to provide social-emotional check-ins and support, and met with the Teacher to develop accommodations for the Student. On January XX, 2021, the Social Worker and Teacher contacted the Complainant about the severity of the Student's social-emotional needs. The Teacher sent an email to the Complainant and the Social Worker stating that she was "very concerned about [the Student's] emotional state and his personal views about himself" and the Social Worker recommended the Student receive therapy from an outside service provider out of concern that the Student was regressing and his social-emotional needs exceeded the services the School could provide. On January XX, 2021, a multi-disciplinary team at the School discussed the Student's low attendance rate and scheduled a follow-up meeting with the Complainant wherein she told the School that the Student was "having a hard time emotionally and will refuse to attend school via Zoom if he is overtired."

After a brief reprieve in February, the Student's attendance and social-emotional challenges escalated in March. On March XX, 2021, the Complainant sent an email to the School stating that the Student was "continuing to struggle" and was "hanging on by a thread". The Complainant inquired about additional supportive measures for the Student and stated that she believed that "if something were not done soon, we will not be able to get him back on track." On March XX, the School responded to a report from the Complainant that the Student was having panic attacks and XXXXXX XXXXXXXX. The Social Worker referred the Complainant to a XXXXX XXX and the Assistant Principal contacted the Complainant to propose academic and social-emotional supportive measures, including a reduced workload and regular meetings with the Social Worker. The Social Worker told OCR that it was at this time that she identified safety concerns and initiated the SST process. The Social Worker stated that she did not recommend the Student for a special education assessment at this time because the Student did not have a medical diagnosis, she did not want to assume a disability when it could be an issue with the learning environment, and because the Complainant had previously stated that the Student's condition was improving.

On March XX, 2021, the School held an SST and discussed the Student's needs in the areas of attendance, attention, inattention, insecurity, reading comprehension, task completion, and writing, amongst others. The SST agreed to interventions such as a reduction in assignments, a task completion

chart, and a social-emotional support group, and to reconvene in May 2021. According to the Social Worker, the School assesses a student for special education and related aids and services if they do not demonstrate any progress after six to eight weeks of SST plan implementation, or if a Student has a medical diagnosis of a disability. In the event that a student with an SST plan is found eligible under Section 504, a parallel Section 504 plan is created with identical interventions to those provided in their SST plan.

On April X, 2021, approximately two weeks after the creation of the Student's SST plan, the Complainant sent an email to the School stating that the Student had two additional panic attacks. On April XX, 2021, the School Principal met with the Complainant to discuss her ongoing concerns and agreed to schedule a Section 504 meeting. At the Student's initial Section 504 meeting on May X, 2021, the Section 504 team determined that an assessment was needed to gather more information to determine eligibility. The Section 504 team reviewed a referral form submitted by the Complainant listing concerns in the areas of anxiety, attendance, work completion, and documentation from the Student's teachers rating the Student well below average in multiple areas including attention, attendance, classwork, following oral directions, organization and reasoning. After reviewing these concerns and low ratings, the Section 504 team concluded that "without a diagnosis or discussion with a therapist, an assessment plan is needed to gather more data and determine [the Student's] eligibility."

Two days later, on May X, 2021, the Complainant sent an email to the Principal inquiring about the timing of the Section 504 process and requesting that it be expedited to account for the time it had taken the School to respond to the Complainant's concerns. A week later on May XX, 2021, the Principal responded that the School had expedited the response to intervention process after it learned of the Complainant's concerns on March XX, 2021, and the Complainant responded that she had initially contacted the School on January XX, 2021, two months beforehand. The next day, on May XX, 2021, the Complainant contacted senior-level District officials about the delayed special education process and formally requested a special education assessment.

The 2021-2022 School Year

At the start of the 2021-2022 school year, the District held a Section 504 meeting for the Student and found him eligible for a Section 504 plan on the basis that his impairments of anxiety and ADHD substantially limit his major life activities of learning, communicating, and concentrating. Pursuant to the Section 504 plan, the Student receives accommodations including a "counseling anytime" pass, breaks when he is overwhelmed, checks for understanding, gentle redirections when he is distracted, and preferential seating. The Complainant consented to and signed this Section 504 plan.

Analysis:

OCR identified a concern that the District may have failed to evaluate the Student in a timely manner even though it had reason to believe that the Student needed special education related services because of a disability. The Complainant notified the School in November 2020 that the Student had meltdowns and was very anxious, and asked for help from the School to address his needs. While the Student's social-emotional needs subsided in December 2020, his anxiety resumed in January 2021 and impacted his ability to attend school. The Complainant notified the School of the Student's "breakdowns", meltdowns", and that he was "physically sick from anxiety." The Teacher told the Complainant that they were "very concerned about [the Student's] emotional state and his personal views about himself" and the Social Worker recommended out-of-school therapy because she believed the Student was regressing and his needs were beyond what the School could provide. The Social Worker and Teacher also collaboratively developed accommodations to address the impact on the classroom and the School's multi-disciplinary team discussed the Student's low rate of attendance. Despite their documentation of the

severity of the Student's anxiety and the impact on his ability to attend school, the Social Worker and Teacher, in January 2021, did not refer the Student for a special education assessment or provide information to the Complainant regarding the special education assessment process.

According to the information provided to OCR, the School did not initiate the special education assessment process until the Complainant contacted the School to express continued concern about the Student's continued academic and social emotional needs after the School had convened an SST and implemented interventions. In March 2021, when the School learned of the Student's XXXXXX XXXXXXXX, the Social Worker initiated the SST process and the Assistant Principal contacted the Complainant to discuss accommodations for the Student, yet neither referred the Student for a special education assessment nor informed the Complainant of the special education assessment process. At the March XX, 2021 SST meeting, the team followed the School's process of identifying interventions, agreeing to implement them for six to eight weeks, and reconvening in May 2021 to review the Student's progress determine whether to assess the Student. The documentation does not indicate that the SST made an individualized determination regarding the timing for SST implementation or otherwise took into consideration the Student's recent XXXXXX XXXXXXXX or the ongoing communications between the Complainant and the School regarding the Student's escalating social-emotional needs starting from at least January 2021. It was not until the Complainant contacted the School two weeks after the SST meeting, in April 2021, to notify the School that the Student had several additional panic attacks that the School offered to convene a Section 504 meeting.

The special education process was further delayed after the School agreed to hold a Section 504 meeting. Whereas the Assistant Principal agreed to schedule a Section 504 meeting on April XX, 2021, the School did not convene the meeting until May X, 2021, despite the Complainant's request that it be expedited to account for previous delays. At the Student's initial Section 504 meeting, the Section 504 team concluded that it was unable to determine eligibility, despite reviewing teacher ratings of well below average in attention, attendance, classwork, following oral directions, and organization, and the Complainant's documented concerns in the areas of anxiety, attendance, and work completion. According to the Section 504 documentation, an eligibility determination was not possible because the Student did not have a medical diagnosis and the School had not communicated with a therapist. While the Section 504 team agreed to assess the student and created an assessment plan, the School did not complete the assessment prior to the end of the 2020-2021 school year. As a result, it was not until the start of the 2021-2022 school year that the Student's Section 504 team met to review the assessments, and found him eligible for a Section 504 plan due to impairments of anxiety and ADHD.

Based upon the information obtained to date, OCR is concerned that the District's prolonged process for identifying and evaluating the Student for special education and related aids and services caused a delay in finding the Student eligible as an individual with a disability under Section 504. Because the Student was found eligible for a Section 504 Plan on August XX, 2021, the evidence demonstrates that he may have been denied services to receive a FAPE for several months during the 2020-2021 school as a result of the District's delayed special education assessment process.

OCR also identified a concern that the District has a practice of relying on a medical diagnosis to determine whether a student should be assessed and found eligible for special education and related aids and services. Although the District may request a medical diagnosis from parent(s)/guardian(s) if one exists, a District may not unnecessarily delay conducting an assessment, as required by the Section 504 regulation, at 34 C.F.R. § 104.35(a), if the parent(s)/guardian(s) are either unable or unwilling to provide medical information. District employees told OCR that it is District practice to wait for a note from a physician to evaluate a student for special education and to refer a student for an SST if the District identifies a concern, unless there is a diagnosis or parent request for evaluation. Moreover, the Social Worker stated that she did not recommend the Student for a special education assessment after she learned of his XXXXXX XXXXXXXX in part because the Student did not have a diagnosis, and the SST

similarly declined to find the Student eligible at his initial Section 504 meeting in part because he did not have a diagnosis.

In order to make a determination with respect to whether the District delayed the identification and evaluation the Student and its reliance on medical diagnosis, OCR would need to gather additional information from the Principal and other School witnesses on the School's decision to not evaluate the Student prior to May 2021. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving this legal issue through a section 302 Resolution Agreement as described below.

Issue 2: Whether the District retaliated against the Complainant and the Student after the Complainant advocated on the Student's behalf in the special education process, when among other things, the District revoked the Student's intradistrict transfer for the 2021-2022 school year.

Legal Standards:

The regulation implementing Section 504, at 34 C.F.R. § 104.61, incorporates by reference 34 C.F.R. § 100.7(e) of the regulation implementing Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., which provides that no recipient or other person shall intimidate, threaten, coerce or discriminate against any individual for the purpose of interfering with any right or privilege secured by regulations enforced by OCR or because one has made a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. The Title II regulations, at 28 C.F.R. § 35.134, similarly prohibit intimidation, coercion, or retaliation against individuals engaging in activities protected by Title II. The following three elements must be satisfied to establish a prima facie case of retaliation: (1) an individual engaged in a protected activity; (2) an individual experienced an adverse action caused by the recipient; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. When a prima facie case of retaliation has been established, OCR then determines whether there is a facially legitimate, non-retaliatory reason for the adverse action; and if so, whether the facially legitimate, non-retaliatory reason is a pretext for retaliation.

Facts:

District Intradistrict Transfer Policies and Procedures

The District's Board Policy and Administrative Regulation 5116.1 outline the District's process for intradistrict transfers. According to these policies, the parent(s)/guardian(s) of any student who resides within the district boundaries may apply to enroll their student in any district school irrespective of the location of their residence within the District. The District will grant an intradistrict transfer application if the program, class, grade, level or school requested is not at capacity, the student has satisfactory attendance, citizenship or scholarship, and the principal of the requested school approves the application. Once approved, an intradistrict transfer is automatically renewed unless the student exhibits unsatisfactory grades, attendance problems, or misbehaves. If the District revokes a student's intradistrict transfer for failure to meet these standards, the decision is final and there is no opportunity to appeal. The District policies and procedures do not define "satisfactory attendance" or "attendance problems." According to the Director of Student Services, the District uses the chronic truancy definition for unsatisfactory attendance (missing 30 minutes of instruction three times during the school year, or three or more unexcused absences), however, this definition is not provided to parent(s)/guardian(s) in any of the District's documentation regarding intradistrict transfers.

The Student's Enrollment and Attendance History

The Student enrolled at the School as a XXXXX-grade student on an intradistrict permit during the 2018-2019 school year. The Student's intradistrict transfer states that once accepted, "a student shall not have to reapply for a transfer the following year unless the student's residence changes" and the School "may revoke an intradistrict transfer at the end of the school year due to unsatisfactory attendance, behavior, and/or academic achievement."

The Student began exhibiting attendance challenges at another District elementary school in XXXXXXXXXXXX and XXXX grade when he was absent from school for twenty-three and nineteen days respectively. The Student's low attendance rate continued in the XXXXX grade after he enrolled at the School on an intradistrict transfer. During his XXXXX-grade year, the Student was absent for thirteen days.

The 2020-2021 School Year

The Student's attendance challenges continued during his XXXX-grade year, and as described in detail in Issue 1, the Complainant contacted the School on multiple occasions beginning in November 2020, to request assistance to address the Student's anxiety, panic attacks, and XXXXXX XXXXXXXX that she believed were impacting his attendance. During the 2020-2021 school year, the Student was absent from school (for non-COVID-19 symptoms) for fifteen days.

On May X, 2021, the School held an initial Section 504 meeting during which it determined that the existing data was not sufficient to determine whether the Student is a student with a disability and agreed to conduct an assessment to determine eligibility. Shortly thereafter, on May X, 2021, the Complainant sent an email to the School asking when the Section 504 assessment would commence. The Complainant stated that she did not mean to be "pushy", but she was following-up after the Section 504 meeting because after five months of contacting the School about the Student's challenges, "we are at a standstill." The Complainant further stated that when she initially contacted the School about the Student's needs, she was told that there was nothing that could be done, and she was concerned that as a result the Student had "lost so much opportunity to learn" and "is really behind." The Complainant asked that the process moving forward be expedited so that the Student does not "lose another school year."

On May XX, 2021, the Principal responded that the special education assessments were in progress and the School had expedited the response to intervention process after the Complainant notified the School of the Student's academic and social-emotional challenges on March XX, 2021, and the Complainant responded that she had initially contacted the School two months prior on January XX, 2021. The following day, on May XX, 2021, the Complainant called the District office to speak with the Assistant Superintendent of Instructional Services and the Superintendent. According to District documentation of the Complainant's conversation with District administrators, she told the District that the Student has anxiety, "he can't do school", and "no accommodations have been made for him this past school year." On the same date, the Complainant formally requested a special education assessment.

Revocation of the Student's Intradistrict Transfer

On an unspecified date in May 2021, the District revoked the Student's intradistrict transfer. The District sent the Complainant an undated intradistrict transfer revocation letter (Revocation Letter) signed by the Director of Student Services stating, "we regret to inform you that your intradistrict transfer is being revoked. Your child's last day of attendance at [the School] in [the District] will be June X, 2021." The Revocation Letter listed the reason for the revocation as "Attendance" without any further explanation or detail about the Student's attendance record.

The District told OCR that it was unable to provide the exact date the Revocation Letter was issued to the Complainant. The Director of Student Services stated that she believed it “would have had to be after May XX” and “towards the end of May.” Several communications between the Complainant, the Complainant’s Advocate (Advocate), and the District align with this estimated time frame and narrow it to between May XX, 2021, and May XX, 2021. On May XX, 2021, the Complainant sent an email to the School stating that she had been informed that the Student’s intradistrict transfer may be revoked, but had not been notified of a final decision; on May XX, 2021, a District employee sent an email the Principal stating that she would send the Revocation Letter to the Complainant’s updated address after learning that the Complainant had moved; and on May XX, 2021, the Advocate sent an email to the District requesting that it reconsider the intradistrict transfer revocation. According to this timeline, the Revocation Letter would have been sent after the Complainant’s May XX, 2021 email and the District’s May XX, 2021 internal email, and before the Advocate’s May XX, 2021 request for reconsideration of the revocation.

The Advocate’s May XX, 2021 email requested reconsideration of the revocation on three bases: 1) the Student’s attendance had improved; 2) the Student had an ongoing special education assessment; and 3) the Student necessitates consistency due to his anxiety. The Advocate’s email also alleged that the revocation was punitive and discriminatory. On June X, 2021, the District responded in an email that there is “no appeal process for intradistrict transfers and all decisions are final”, however, the District had nonetheless reviewed the Student’s attendance records and determined the “attendance conditions of the intradistrict agreement have not been met.” Comparably, the District stated in its data response to OCR that it had revoked the Student’s intradistrict transfer “due to chronic attendance concerns since the 2018-2019 school year.”

In an interview with OCR, the Director of Student Services stated that at the time she decided to revoke the Student’s intradistrict transfer, she was aware of the ongoing SST and special education evaluation processes for the Student. According to the Director of Student Services, the Principal informed her that the Complainant had requested an assessment for panic attacks and anxiety, but the Principal did not believe the School would assess the Student because his panic attacks and anxiety did not occur at School. The Director of Student Services stated that contrary to the Principal’s anticipated outcome, the School created an assessment plan on May X, 2021 and the School began the assessment thereafter. The Director of Student Services further told OCR that the special education evaluation processes had “no bearing” on the intradistrict transfer process because the assessments were not directly related to attendance. Since the Student “had just brought [up] concerns about anxiety this year”, and the Student had a longstanding history of absenteeism, the Section 504 process would have no bearing on the intradistrict transfer revocation. The Director of Student Services told OCR that the Principal had not recommended the revocation of the Student’s intradistrict transfer previously because she wanted to provide consistency for the Student amidst XXX XXXXXXXX XXXXXXX, whereas she recommended revocation during the 2020-2021 school year because she believed that she had exhausted all options to assist the Student’s family and the Student’s attendance was continuing to impact his education.

Analysis:

The evidence obtained to date indicates that the Complainant engaged in protected activities when she emailed the Principal on May X, 2021 and called the District office to speak with the Assistant Superintendent and Superintendent on May XX, 2021. During these conversations, the Complainant communicated her reasonable belief that the District had not adequately responded to her requests for assistance to address the Student’s academic, attendance, and social-emotional needs and was not timely evaluating him for special education and related services.

After the Complainant contacted the School Principal and senior level District leadership, the District revoked the Student’s intradistrict transfer. The revocation of an intradistrict transfer is an adverse action

as it could well dissuade a reasonable person from making or supporting a charge of discrimination. Therefore, the evidence obtained to date indicates that the District subjected the Complainant to an adverse action.

The proximity in time between when the Complainant contacted the School and District regarding her concerns about the delayed special education assessment process and the revocation of the Student's intradistrict transfer suggest an inference of a causal connection between the Complainant's protected activities and the District's adverse action. The Complainant emailed the School Principal on May X, 2021, and contacted senior District administrators on May XX, 2021, and the District revoked the Student's intradistrict transfer shortly thereafter on an unspecified date between May XX and May XX, 2021.

OCR identified a concern that the District's proffered reason for revoking the Student's intradistrict transfer may be pretext for discrimination for two reasons: the evidence obtained to date indicates that the District treated the Complainant differently from how she was treated prior to the protected activity; and the District's proffered reason for revoking the Student's intradistrict transfer is insufficient to explain the action.

First, the District revoked the Student's intradistrict transfer based on an undefined and unexplained attendance standard shortly after the Complainant engaged in the aforementioned protected activities, whereas the District had granted the Student's intradistrict transfer when he had a lower attendance rate and had renewed the Student's intradistrict transfer when he had a similarly low attendance rate. The Revocation Letter states that the basis for revocation is attendance, however the District does not have an established attendance standard and did not provide a written explanation for the revocation on this basis. The District intradistrict transfer policies and procedures use the terms "satisfactory attendance" and "attendance problems" but do not define or provide criteria for these terms, nor is an explanation of these terms provided to intradistrict transfer applicants, permit holders, or in the standard form revocation letter. The Revocation Letter notifies the Complainant that the Student's intradistrict transfer is revoked for "attendance", yet it does not provide any detail regarding the Student's attendance record or explain revocation on this basis. Nor does the Revocation Letter list the number of days the Student was absent during the 2020-2021 school year or otherwise explain how his attendance record fell below the District's undefined attendance standard. The evidence obtained to date further shows that District applied this ambiguous standard differently prior to and after the Complainant's protected activities. The District granted the Student's intradistrict transfer to the School for the 2018-2019 school year when he had been absent for twenty-three and nineteen days during the two previous school years at another District school. The District further renewed the Student's intradistrict transfer for the 2019-2020 school year, even after he was absent from school for thirteen days. Whereas the District revoked the Student's intradistrict transfer during the 2020-2021 school year, when the Student was absent for fifteen days. As the District recognized in its data response to OCR, the Student had chronic attendance concerns since the 2018-2019 school year, yet the District had declined to revoke the Student's intradistrict transfer prior to the 2020-2021 school year.

Second, the District's proffered reason for revoking the transfer is insufficient to explain the action. The Director of Student Services told OCR that the Principal had not recommended the revocation of the Student's intradistrict transfer previously because she wanted to provide consistency for the Student amidst XXX XXXXXXXX XXXXXXXX, whereas she recommended revocation during the 2020-2021 school year because she believed that she had exhausted all options to assist the Student's family and the Student's attendance was continuing to impact his education. Given the ongoing special education evaluation process to assess the Student's anxiety, panic attacks, and XXXXXXXX XXXXXXXX that the School had documented were impacting his attendance, the Principal's reason is insufficient. The basis for and ongoing nature of these processes indicate that the Principal had not exhausted all options to support the Student or address his low attendance rate. Moreover, the information provided to OCR indicates that the Director of Student Services reviewed documentation regarding the Student's social-

emotional needs and the impact on his attendance, and was aware of the ongoing SST and special education processes at the time she revoked the Student's intradistrict transfer.

The District's decision to revoke the Student's intradistrict transfer without explanation and based on an undefined standard, coupled with evidence indicating that the District treated the Complainant differently before and after she engaged in protected activities, and provided an insufficient reason for this different treatment, raises a concern that District's proffered reason for revoking the Student's transfer may be pretext for discrimination. Therefore, OCR identified a concern that the District's revocation of the Student's transfer may be retaliation for the Complainant engaging in protected activities.

In order to make a determination with respect to whether the District retaliated against the Complainant and the Student when it revoked the Student's intradistrict transfer, OCR would need to gather additional information regarding the Principal's decision to recommend revocation, including interviewing the Principal. Prior to the conclusion of OCR's investigation, the District expressed interest in resolving this legal issue through a section 302 Resolution Agreement as described below.

Overall Conclusion:

Prior to OCR completing its investigation and making a compliance determination, the District expressed an interest in voluntary resolution pursuant to section 302 of OCR's *CPM* and OCR determined it was appropriate to do so. The provisions of this resolution agreement are tied to the allegations, and the evidence obtained during the investigation and are consistent with applicable regulations.

This concludes the investigation of this complaint.

To address the complaint allegations and OCR's concerns identified in the investigation, the District, without admitting to any violation of law, entered into the enclosed resolution agreement. The terms of the resolution agreement aim to rectify the compliance issues that OCR identified and to bring the District into compliance with Section 504 and Title II. Under the resolution agreement, the District will clarify the District's attendance standard in its intradistrict transfer policies and procedures, issue a guidance memorandum regarding the responsibility to timely conduct assessments of student suspected of a disability, not retaliate against parents, students, and others exercising their Section 504 rights, and train District staff on the District's responsibilities to conduct assessments of students suspected of a disability and to not retaliate against parents, guardians, students and others. The resolution agreement also required the District to convene a Section 504 meeting to determine whether the Student needs compensatory education as a result of the delayed special education assessment process.

Based on the commitments made in the enclosed resolution agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the resolution agreement is intended to address the complaint allegations. OCR will monitor the implementation of the resolution agreement until the District is in compliance with the terms of the resolution agreement. Upon completion of the obligations under the resolution agreement, OCR will close the case.

OCR's determination in this matter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, discriminate, or otherwise retaliate against any individual because he or she has filed a complaint or participate in the complaint resolution process. If this happens, the individual subjected to such retaliatory treatment may file another complaint alleging retaliation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Anne Busacca-Ryan at Anne.Busacca-Ryan2@ed.gov.

Sincerely,

/s/

Kana Yang
Team Leader

Enclosure