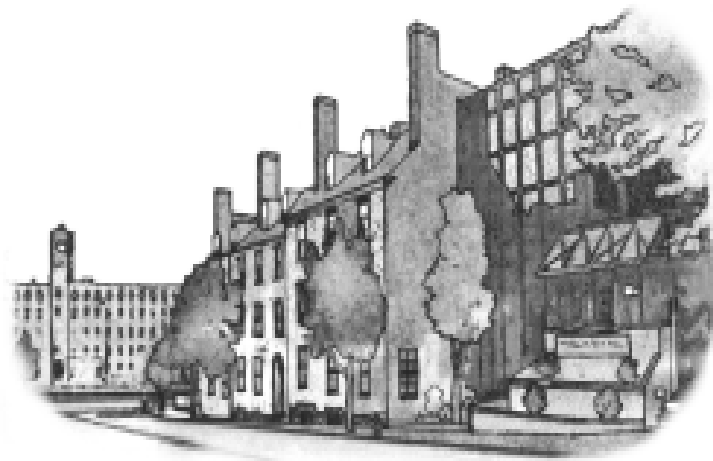


Avoiding and Defending Retaliation Claims Under Section 504 and the IDEA

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A Word of Caution

The purpose of this material is to provide educators with an overview of the law pertaining to retaliation under Section 504 and the IDEA. The focus of this material is on preventing and defending retaliation claims. This material is not intended to substitute for legal counsel and it does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

One of the increasing trends in the area of special education law is the parental complaint of retaliatory conduct on the part of a district. Parents are complaining that school personnel have taken adverse action against a student in response to the parent's decision to assert his or her rights under the IDEA or other laws affording rights to parents of disabled students. This concept has become known in the case law as "retaliation." The purpose of this material is to provide educators with the tools necessary to prevent and defend retaliation claims under Section 504 and the IDEA. This material does not cover retaliation claims made by district employees. In addition, this material is not intended to substitute for legal counsel and it does not encompass all aspects of Section 504 or the IDEA. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

II. The Statutory Framework

A. Section 504

Section 504 applies to the recipients of grants from the federal government. Essentially, all public school districts are covered by Section 504 because they receive some form of federal financial assistance. See Marshall v. Sisters of the Holy Family of Nazareth, 44 IDELR 190, 399 F.Supp.2d 597 (E.D. Pa. 2005) (Section 504 does not apply to a private religious school that receives no federal funding).

Fundamentally, Section 504 is an anti-discrimination statute. In the educational system, it prohibits districts from discriminating against qualified students with disabilities on the basis of handicap. Public schools are required to provide students with disabilities with a free, appropriate education at public expense. 34 C.F.R. § 104.33(a). Schools are also required to provide students with disabilities with an "equal opportunity for participation" in "non-academic and extracurricular services and activities." 34 C.F.R. § 104.37(a).

The Section 504 Regulations (found at 34 C.F.R. § 104.61) and the Americans with Disabilities Act ("ADA") incorporate by reference the procedural provisions contained in 34 C.F.R. § 100.7(e) of the Regulations implementing Title VI of the Civil Rights Act of 1964. These provisions prohibit recipients or other persons (including districts) from intimidating, threatening, coercing or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504 and/or the ADA or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under Section 504 and/or the ADA or the Regulations.

A bill that would amend the ADA and Section 504 by, among other things, redefining the terms “disability” and “major life activities” is currently pending in Congress. See S.3406 (2008). The bill states, in part, that the “definition of disability . . . shall be construed in favor of broad coverage of individuals under th[e] Act, to the maximum extent permitted by the terms of the Act.” (Emphasis added). It also states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Finally, when deciding whether an impairment substantially limits a major life activity, the determination “shall be made without regard to the ameliorative effects of mitigating measures such as:

- Medication, medical supplies, equipment, or appliances, low-vision devices (excluding ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies
- The use of assistive technology
- Reasonable accommodations or auxiliary aids or services or
- Learned behavior or adaptive neurological modifications”

The definition of major life activities would be expanded to include components of learning, such as reading concentrating, thinking and communicating, which could increase the number of students who are eligible for services. The bill would also clarify that a “substantial limitation” is one that “materially restricts” the individual.

The Office for Civil Rights (“OCR”), a component of the US Department of Education, enforces Section 504, as well as Title II of the ADA which extends the prohibition against discrimination to the full range of state or local government services (including public schools), programs, or activities regardless of whether they receive any federal funding. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. However, the Title II regulations applicable to Free and Appropriate Public Education issues do not provide greater protection than that available under the Section 504 regulations.

OCR becomes involved in disability issues within a school district when it receives complaints from parents, students or advocates. In addition, OCR provides technical assistance to school districts, parents and students on request. As a general rule, OCR does not review the result of an individual placement or other educational decisions, so long as the school district has complied with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of those students and due process. It is rare that OCR will evaluate the contents of a Section 504 plan or an IEP in light of the fact that any disagreement can be resolved through a due process hearing.

OCR does examine the procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. For example, OCR will be concerned about the unwarranted exclusion of disabled students from educational programs and services.

OCR also investigates complaints of retaliation. A district is prohibited from intimidating, threatening, coercing or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504.

B. The IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities.

The fundamental concept behind the IDEA is that every student is entitled to a free appropriate education at public expense ("FAPE"). The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a FAPE. A School District satisfies the requirement to provide a FAPE by providing personalized instruction with sufficient support services to permit the child to benefit educationally, in the least restrictive environment, from that instruction.

1. Retaliation under the IDEA and Section 504: An Overview

In New Hampshire, as well as the majority of other states, parents who establish that a district violated the IDEA may obtain compensatory education and/or reimbursement for educational expenses (unilateral placements, related services). However, they cannot recover damages for things such as lost wages and emotional distress. See e.g. Nieves-Marquez v. Puerto Rico, 40 IDELR 90, 353 F.3d 108 (1st Cir. 2003); see also Blanchard v. Morton School District, 48 IDELR 207 (9th Cir. Dec. 3, 2007), cert. denied 128 S. Ct. 1447 (U.S. Feb. 25, 2008).

Section 1415(*l*) of the IDEA preserves the rights, procedures, and remedies independently available under federal statutes, including the

Rehabilitation Act;¹ the First Circuit has interpreted this provision as “intend[ing] to ensure that the IDEA does not restrict rights and remedies that were already independently available through other sources of law,” and that “where the underlying claim is one of violation of the IDEA, plaintiffs may not use section 1983 – or any other federal statute . . . – in an attempt to evade the limited remedial structure of the IDEA.” Diaz-Fonseca v. Puerto Rico, 45 IDELR 268, 451 F.3d 13 (1st Cir. 2006); see also Mark H. v. Lemahieu, 49 IDELR 91, 513 F.3d 922 (9th Cir. 2008) (“availability of relief under the IDEA does not limit the availability of a damages remedy under Section 504 for failure to provide the FAPE *independently* required by Section 504 and its implementing regulations) (emphasis added).

Claims, including allegations of retaliation, that are “closely related to the identification, evaluation, and educational placement” of a child with a disability are not independent of the IDEA. See Burke v. Brookline School District, 47 IDELR 63, 2007 DNH 012 (D.N.H. 2007), motion for reconsideration denied by 47 IDELR 193 (D.N.H. March 5, 2007), *aff’d* 107 LRP 71566 (1st Cir. Dec. 2007), cert denied, ___ U.S. ___ (U.S. June 16, 2008). Parents must exhaust administrative remedies before filing retaliation claims premised on rights created by the IDEA. Id.; see also Weber v. Cranston School Committee, 32 IDELR 141, 212 F.3d 41 (1st Cir. 2000) (parents may file retaliation claims under the IDEA and must comply with exhaustion requirements before doing such); M.T.V. v. Dekalb County School District, 45 IDELR 177, 446 F.3d 1153 (11th Cir. 2006) (allegations that the district “harassed [parents] at IEP meetings, wrote them intimidating letters in response to their educational demands, and subjected M.T.V. to needless and intrusive testing,” relate to their child’s evaluation and education and are subject to the IDEA’s exhaustion requirements). In addition, compliance with the IDEA will likely preclude a retaliation claim under the IDEA, Section 504 and the ADA. See Bradley v. Arkansas Dep’t of Educ., 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006) (noting that the prior holding that the district “did not violate [the] IDEA” means that “a retaliation suit under Section 504 based on IDEA violations is precluded”).

In a recent case, the First Circuit Court of Appeals affirmed a denial of a motion for summary judgment on the issue of retaliation. M.M.R.-Z. v. Puerto Rico, 50 IDELR 61, 528 F.3d 9 (1st Cir. 2008). In that case, the parents of a student with disabilities who was receiving home-bound instruction began to suspect that he was being sexually abused by his teacher; the family investigated and then filed a complaint with the police. The teacher was arrested and found guilty of misdemeanor aggravated assault and institutional abuse. The student, his parents and grandmother then filed suit based on the abuse and alleged deprivation of educational services in the one-year period following the teacher’s termination. The teacher was named in his official and individual capacity, as

¹ The First Circuit has indicated that in order to recover damages under Section 504, plaintiffs must establish intentional discrimination. Nieves-Marquez v. Puerto Rico, 40 IDELR 90, 353 F.3d 108 (1st Cir. 2003).

were the Commonwealth Secretary of Education (official capacity) and the Commonwealth of Puerto Rico. In their complaint, the plaintiffs alleged violations of Title II of the ADA, Section 504, Title IX, Section 1983, and Puerto Rico law. Plaintiffs sought \$5 million in compensatory damages, punitive damages, and injunctive relief.

The Secretary and the Commonwealth filed for summary judgment on the federal claims, arguing that they were unaware of the teacher's abusive behavior and that when they learned of it, they took immediate action to remove him. They also argued that they were entitled to qualified immunity or sovereign immunity. The court partially granted the motion, finding that they did not participate in or act recklessly with regard to the teacher's misconduct. However, the judge found that material disputes of fact remained regarding defendants' actions after the teacher was terminated, primarily with regard to the claims that the defendants had retaliated against the student for complaining to the police.

The defendants filed an interlocutory appeal, arguing in relevant part, that the claim based on delay in providing special education services after the teacher was terminated was cognizable only under the IDEA, which does not provide for the damages that plaintiffs sought. They also argued that the plaintiffs were required to exhaust administrative remedies before pursuing their IDEA-based claim.

The First Circuit court held that the IDEA preemption lacked merit. The court noted that section 1415(*l*) of the IDEA does not preclude claims under the ADA, Section 504, or Title IX, because the claims in raised were "independently available through other sources of law, namely, the retaliation provisions of the three statutes" invoked by the plaintiffs. The court distinguished plaintiffs' claims from those in *Diaz-Fonseca*, noting that the claims in the MMRZ case "rest on improper retaliatory intent."

In another case, the Tenth Circuit Court of Appeals reversed a dismissal of claims brought under Section 504 and the ADA because they were "separate and distinct from the [plaintiff's] IDEA claim; thus, it was not necessary for the plaintiffs to exhaust their administrative remedies with regard to the Section 504 and ADA claims. Ellenberg v. New Mexico Military Institute, 47 IDELR 153, 478 F.3d 1262 (10th Cir. 2007). The court affirmed the dismissal of the IDEA claim because the plaintiffs had failed to exhaust administrative remedies, and had not requested an amendment to their child's IEP before filing suit in federal court.

III. Avoiding and Defending Retaliation Claims

A. OCR and Investigations of Retaliation

Parents have frequently complained that school personnel have taken adverse action against a student in response to a parent's decision to assert his

or her rights under Section 504. This concept has become known as “retaliation” in the case law. While it would be a rare case for an educator to intentionally take adverse action against a student in retaliation for assertion of his or her legal rights, the focus is not simply the educator’s intent, but rather, how the educator’s action is perceived in hindsight. OCR has developed a five-part test to determine whether a district has engaged in prohibited retaliation. It may be useful for you to consider the steps of this test before taking action with respect to a student who is involved in due process proceedings or whose parents have filed a complaint with OCR or the State Department of Education.

The five questions you should consider are:

- (1) Has the parent/student engaged in a protected activity?

Examples of protected activities include:

- initiating due process proceedings,
- filing suit in court,
- filing a complaint with OCR
- filing a complaint with the District

- (2) Is the district or its agents aware of the protected activity?

- How and when did district receive notice of the activity?
- Is there a rumor or verified action?

- (3) Was the parent/student subjected to an adverse action?

- Did the action significantly disadvantage the complainant as to her/his status or ability to access the benefits of the program?
- Did the action reasonably act as a deterrent to further protected activity or preclude the individual from pursuing discrimination claims?

Examples of adverse action may include:

- Suspension/Expulsion from school or athletics/extra-curricular activities
- Preventing parents from entering school grounds

- (4) Will a neutral third-party decide there is a causal relationship or connection between the protected activity and the adverse action?

- Will the adverse action against the student occur prior to, at the same time as, or after the parent/student engaged in the protected activity?
 - Is there sufficient evidence to raise an inference that the protected activity was likely the reason for the adverse action?
- (5) Can the district offer legitimate, nondiscriminatory reasons for the adverse action, which a neutral third-party will not consider to be pretextual?

Superintendent of Public Schools (NY), 104 LRP 11453 (OCR April 30, 2003); Shelby County (AL) School District, 37 IDELR 41 (OCR March 12, 2002).

B. Avoiding Allegations of Retaliation: Six Examples

1. Barring Parent Participation

In the case of Spencer County (KY) School District, 31 IDELR 38 (OCR Dec. 31, 1998), the parent of home-schooled child, who was receiving some special reading and writing instruction at a district school, alleged that district retaliated against her for filing a complaint, by banning her from the school and refusing to let her volunteer in her son's class. The school principal had denied the parent's request to volunteer in her son's classroom, because he had received complaints from school staff regarding the parent's failure to adhere to student confidentiality rules. Under the five part test for retaliation, OCR found no causal relationship existed between the principal's action and the filing of the complaint. The school had documented the complaints regarding the parent's conduct, so even if there was a causal connection, there was sufficient evidence to establish that the school's action was consistent with school's rules, and that the school acted for legitimate, non-discriminatory, non-pretextual reasons.

2. Using Confidential Information

In another case, Forest Grove (OR) School District 15, 31 IDELR 15 (OCR Oct. 9, 1998), the parent of a child suffering from post-traumatic stress disorder claimed a district retaliated against her after she complained that her child's teachers were not following her child's Section 504 plan. The parent raised concerns that the student failed gym class because the teacher refused to follow the plan. The principal wrote to the parent, outlining the steps that would be taken to allow the student to make up the grade; at the same time, the principal informed the parent that she could not contact school staff to discuss their performance without first making an appointment with an administrator. When asked for clarification, the principal informed the parent that she could continue to meet with teachers to discuss her child.

The parent claimed that the district retaliated against her by cancelling a parent-requested meeting with teachers and by using sensitive information about the student's hospitalization and emotional condition to intimidate the parent. OCR determined that the district did not retaliate against the parent, because the principal had provided an acceptable reason for canceling the meeting: all necessary parties were not able to attend. Also, the superintendent testified that his reasons for questioning the parent about the student's hospitalization and recovery were not for the purpose of discouraging parent from pursuing the student's rights, or in retaliation against the parent. His actions were justified by his desire to see that school staff was informed sufficiently to provide the student the services she would need upon return to school.

3. Engaging in Student Discipline; Failing to Qualify the Student for Honor Roll

In Barker (New York) Central School District, 35 IDELR 253 (OCR April 24, 2001), the parent alleged that the student's discipline and her subsequent arrest were related to the parent's protected activity of filing a complaint with OCR. Additionally, the parent alleged that the district's determination that the student was not qualified for honor roll status was in retaliation to her complaint. OCR considered both of the allegations and rejected both allegations as unsubstantiated. First, OCR reviewed the District's policies and procedures and criteria for participation in its honor roll program. OCR found that while the student's academic record was good her failure to receive passing grades in physical education class disqualified her from the district's honor roll criteria. Based on that evidence OCR found that the district's determination that the student was not qualified for honor roll status was consistent with the district's stated policies and procedures. On that basis OCR concluded that the evidence was insufficient to support a finding of retaliation.

The student had also made complaints that she wanted three district personnel dead and warned that when she was gone the place was going to be "blown up." As a result, the student was arrested. The student also received an out-of-school suspension for five (5) days. OCR concluded that there was insufficient evidence to support the allegation that the student's discipline and her arrest were related to the complainant's engaging in the protected activity of filing a complaint with OCR. Instead, the district found the disciplinary episode to have been credibly accounted by the district and OCR concluded that the district's reason for disciplining the student was not a pre-text for discrimination.

4. Engaging in Bus Suspensions

In Conecuh County (Al) School District, 35 IDELR 193 (OCR March 28, 2001) the parent alleged that the district discriminated against a student by suspending that student from the school bus for the first semester. OCR found that the student violated school bus rules by standing up, yelling out the bus window and using profanity toward the bus driver. OCR found that while the student had a learning disability in reading the IEP did not list bus transportation as a service to be provided in accord with the student's IEP. The conduct of the student was perceived by OCR to have been warranting punishment and since riding the bus was considered a privilege by the district, OCR found there was insufficient evidence to support a finding that the district failed to adhere to the provisions of Section 504.

5. Reporting Abuse and Neglect

In Citrus County (Fl.) School District, 35 IDELR 192 (OCR 2001) a parent met with the superintendent of schools and requested an investigation as to why her child's IEP was not being followed. The district looked into the matter and assured the parent that her child's IEP was indeed being followed. Shortly thereafter certain personnel of the district became aware of facts which they considered to constitute abuse and neglect. On that basis, the personnel called a child services hotline and reported the conditions in the parent's home. The parent filed a complaint with OCR alleging that the abuse and neglect report was retaliatory in nature.

While OCR noted the close proximity between the parental complaint and the reporting of the abuse and neglect, OCR then concluded that the evidence was insufficient to show that the complainant was treated any differently after she engaged in the protected activity. OCR considered the reason why the parent was reported to the Division of Children Services and found that the teachers made their reports on the basis of what they observed in the parents' home. Of particular note was that none of the teachers were directed by district administrators to make their report. On that basis OCR determined the district provided legitimate non-discriminatory reasons for its actions and rejected the parents' complaint.

6. Parental Advocacy

In Aztec (NM) Municipal Schools, 47 IDELR 108 (OCR May 22, 2006), a parent alleged (in part) that the district retaliated against her for advocating on behalf of her son. OCR found that the parent had advocated on behalf of the student and that the district was aware that she believed that her son was being mistreated because of his disabilities. OCR also found that the district excluded the parent from school property from December 14, 2004 through the end of the school year, due to an incident where the parent confronted another parent on school grounds. The parent was still permitted to communicate with staff via telephone or email, and was allowed to attend IEP meetings and parent

conferences. There was no evidence that the district's actions precluded the parent from asserting her or the student's rights; thus, the exclusion did not rise to the level of an "adverse activity" and there was no retaliation.

C. Extra-Curricular Activities and Athletics

Section 504 extends two legal principles to non-academic programming. The first principle is that a student with disabilities shall participate with non-disabled students in non-academic settings and extracurricular activities "to the maximum extent appropriate" to the needs of the students with disabilities. 34 CFR 104.34(b). The second legal principle is that schools must provide non-academic and extracurricular services and activities in a way that allows students with disabilities an equal opportunity for participation in such services and activities. 34 CFR 104.37(a). The regulations do not define the term "to the maximum extent appropriate" nor do they define "an equal opportunity." The definition of these two terms has been left to the courts.

Nonacademic and extracurricular services and activities include:

- Counseling services
- Physical recreational athletics
- Transportation
- Health services
- Recreational activities
- Special interest groups or clubs sponsored by the recipients
- Referrals to agencies which provide assistance to handicapped persons
- Employment of students, including employment by the school and assistance in making available outside employment.

34 CFR 104.37(a)(2).

In addition, when providing personal, academic, or vocational counseling, guidance or placement services, physical education courses, athletics, and similar aids, benefits or services, schools school may not discriminate on the basis of handicap. 34 CFR 104.37(b)-(c)(1). Schools must also ensure that qualified students with disabilities are not counseled toward more restrictive career objectives than non-disabled students with similar interests and abilities, and schools that offer physical education courses or operate or sponsor interscholastic clubs, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation. Id.

A school may offer physical education and athletic activities to handicapped students that are separate or different from those offered to non-handicapped students only if separation or differentiation is consistent with the requirements of 34 CFR 104.34 and only if no qualified handicapped student is

denied the opportunity to compete for a team; or to participate in courses that are not separate or different.

1. The Impact of the IDEA

The IDEA buttresses the concept that a school is obligated to ensure that students with disabilities have an equal opportunity to participate in non-academic and extracurricular activities along with their non-disabled peers. 20 USC 1414(d) requires that an IEP include “a statement of the special education and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child...(II)...to participate in extracurricular and other non-academic activities; and (III) to be educated and participate with other children with disabilities and non-disabled children in the activities described in this paragraph.” See also 34 CFR 300.107 (public agencies must “take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities”).

In the case of Socorro Independent School District 36 IDELR 180 (SEA TX 2002), a hearing officer ordered the school district to permit a 16 year old student with multiple disabilities to participate in softball games in his position as team manager over the objections of the varsity coach. The student's IEP provided for his involvement in extracurricular activities in order to afford social interaction.

Practice Pointer: The implication of this decision is that if an IEP calls for participation in non-academic services and extracurricular activities, that participation may become a part of FAPE and can only be terminated in accord with the procedures governing IEP amendment.

A contrary result was found in a case where the district scheduled an algebra tutorial in conflict with a high school student's spring football practice. The hearing officer ruled that because the high school student's IEP did not include participation in football, the district had not violated the IDEA. Perhaps the result would have been similar to the Socorro decision if the student's IEP team had determined that participation in football was a necessary component of FAPE for the student and included that participation in the student's IEP. See Lauderdale County Board of Education, 36 IDELR 178 (SEA AL 2002).

In a case close to home, OCR determined that a student's suspension from football did not constitute a significant change in placement. The student's IEP mentioned football as an activity that might be beneficial for him, but OCR concluded that his participation in the sport could not be characterized as an IEP

related service. See Amherst, Mont Vernon, and Souhegan Cooperative School Districts (NH) 35 IDELR 167 (OCR 2001).

2. Extracurricular Activities: Case Studies

a. Cheerleading

A mother filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of disability by failing to afford her an equal opportunity to participate in the tryouts for the cheerleading squad. The mother indicated that the school district had refused her request to videotape the cheerleading practice. Most likely the district's refusal had been based on the privacy interest of other students. Nevertheless, the district and the Office for Civil Rights (OCR) entered into a resolution agreement where the district agreed to take the following actions:

1. The district will develop a procedure to ensure that qualified students with disabilities are afforded an equal opportunity to participate in the district's extracurricular activities and interscholastic athletic programs. The procedure will specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extracurricular and interscholastic programs. The procedure will also ensure that the necessary related aids and services and/or program modification are determined on an individual basis.
2. The district will conduct training on the new procedure with the appropriate staff and district officials.
3. The district will ensure that if the student tries out for the cheerleading squad, the district will provide the student with effective accommodations, including but not limited to, the opportunity to videotape the cheerleading sponsor's instructions and demonstrations.¹

Practice Pointer: 34 CFR 104.37(a)(1) does not require that districts adopt a written policy with regard to equal opportunity for participation in non-academic and extracurricular services and activities. However, the effective result of this resolution was that the district was required to adopt a procedure to ensure that equal opportunity was afforded to students with disabilities. The other lesson from this resolution agreement is that districts, when faced with

¹Note the right to videotape does not extend beyond the cheerleading sponsor's instructions and demonstrations, perhaps addressing the district's concern as to privacy.

competing interests, such as privacy interests and access issues should seek in the first instance to broach a balanced compromise. OCR frequently uses the complaint resolution process as an opportunity to see that district staff receive further training on Section 504. See Marion County School District (FL) 37 IDELR 13 (OCR 2001). For a similar result see Moses Lake School District No. 161, 36 IDELR 218 (OCR 2002).

3. Athletics: Case Studies

a. Dismissal for unexcused absences.

In Shelby County School District (AL), 37 IDELR 41 (OCR 2002), a parent filed a complaint with OCR alleging that the school district discriminated against her daughter on the basis of her disability (Bipolar Rapid Recycler Depression and ADHD) by not allowing her to participate on the high school volleyball team. The mother specifically alleged:

- that the district did not follow her daughter's IEP amendment which called for participation in athletics until after the district filed an eligibility form for the student;
- that the district dismissed the student from the team for unexcused absences that were due to her disability and for unexcused absences that occurred during the time frame when she was ineligible for the team;
- that the varsity volleyball coach retaliated against the student because of a complaint that the parent had filed with the Alabama High School Athletic Association challenging its “no pass, no play” rule; and
- that the coach made embarrassing remarks about her daughter to the team and inquired about her attendance at school when she had an excused absence approved through the school office.

OCR found that the state code pertaining to athletics dictated the decision regarding a student with a disability's participation in extracurricular activities and that all students who compete on an interscholastic sports team in Alabama must file an eligibility form five days prior to the competition. As to the unexcused absences, the OCR pointed to the fact that the team rules state that three unexcused absences from practices or meetings will result in dismissal from the team. OCR found that the team rule in regards to unexcused absences was applied uniformly and therefore, the district did not fail to provide the student with an equal opportunity for participation on the district's volleyball team and did not treat the student in a different manner than any other student in regards to this allegation.

OCR found that the filing of the complaint with the Athletic Association was a protected activity and that the district was aware of the complaint and thus, aware of the protected activity. The district concluded that the alleged adverse actions, to wit the remarks about the student, even if true, did not constitute adverse actions. The actions did not result in any denial of benefits to the student in that they did not result in the student being dismissed from the team.

Practice Pointer. The lesson from this case is that school districts remain free to uniformly exercise and impose team rules in the context of athletics. The key point the district needs to demonstrate is that the team rules are uniformly applied and that they do not result in treatment of the disabled student in a different manner than any other student.

Practice Pointer. Team rules, if applied uniformly, will generally not be deemed discriminatory. See Little Axe Public Schools (OK) 37 IDELR 103 (OCR 2002).

b. Attitude and teamwork requirements.

In Kaneland Community Unit School District No. 302 (IL), 37 IDELR 287 (OCR 2002), the high school basketball coach cut a student from the varsity baseball team on the final day of tryouts. The coach cited the student's attitude and teamwork skills as the reason for his decision to cut the student. The student's mother filed a complaint with OCR alleging that the district discriminated against her son on the basis of disability because her son was on the baseball team the previous year, was one of the best players on the team and his disciplinary record was no worse than some of the players who made the team. The district pointed to its extracurricular activities behavior code which governed student participation in any extracurricular activity. The code stated that "participation in these events at Kaneland is a privilege granted to students who can and do uphold the ideals of good citizenship, who abide by the rules and regulations of the school community and who commit themselves to academic success." Student participation in baseball was also governed by the baseball guidelines which established criteria necessary for participation in baseball. These criteria included attitude, ability, skills, teamwork and the ability to fit into the team's style and system. All students were provided a copy of those guidelines.

The district conceded that the student had the athletic ability and skills required to be a member of the team, but contended that he did not meet the other important criteria. For example, the student had a hot temper, a bad attitude and was not a team player. The coach denied the allegation that he student's disciplinary record was the factor in his decision to cut him from the team and further indicated that he was unaware at the time he made the decision to cut the student from the varsity team that the student had a disability or that he

was a special education student. OCR specifically noted that the student's IEP did not preclude him from being subject to the same requirements for making the baseball team as other students. OCR observed that "He is subject to the district's established disciplinary policies and does not have a behavioral management plan that would preclude application of either the code or the guidelines." On that basis OCR determined the complaint to be unfounded.

Practice Pointer: The result might have been different if the student's IEP contained a behavioral management plan which was inconsistent with the district's athletic guidelines. This decision gives comfort to school districts that, absent IEP statements to the contrary, they may uniformly apply their team codes to students and that this uniform application may include behavioral considerations.

4. Non-District Programs/Substantial Assistance

Section 504 prohibits school districts from providing substantial assistance to entities that discriminate on the basis of disability in providing any aid, benefit, or service to beneficiaries of the program or activity. 34 CFR 104.4(b)(1)(v); see also Rose Tree Media (PA) School District, 40 IDELR 188 (OCR 2003) (District that provides substantial assistance to a private club must either ensure that the club complies with Section 504 and the ADA, or sever its relationship with the club). The Office for Civil Rights recently issued two opinions in which it found that two districts had discriminated against qualified individuals with disabilities by "significantly assisting" after-school programs.

In the first case, Puyallup (WA) School District No. 3, the parent filed a complaint with OCR, alleging that the district discriminated against a student by refusing to provide the student with accommodations during an after-school program. 49 IDELR 20 (OCR March 23, 2007). The parents enrolled the student in an after-school program operated by a religious organization and requested that the district provide the student, who was deaf, with an interpreter. The district refused to provide the interpreter because the after-school program was a non-district private program, run by several community groups. The parent then requested that the after-school program provide an interpreter; it attempted to locate a volunteer, but was unsuccessful. As a result, the student was not able to participate in the after-school program.

OCR found that the after-school program was not a district-operated program or activity. Nevertheless, the assistance that the district provided to the groups was deemed to be "significant."

The district provided the groups with:

- Organization and coordination assistance;
- Publicity on its website;

- Free use of space in district facilities after regular school hours;
- Office space;
- Computer services;
- A small grant to assist with program implementation.

However, the district did not:

- Exercise control over the content of the program;
- Provide direct funding to the groups that operated the program;
- Control or provide the staff for the after-school program activities; or
- Determine what students attended the programs, or whether students participated in the programs.

Similarly, in Capistrano (CA) Unified School District, parents filed a complaint with OCR, alleging that the district violated Section 504 by providing significant assistance to an after-school program that discriminated against students with disabilities. 108 LRP 17704 (OCR 2007). The program was operated by the YMCA as an independent contractor under a five-year contract. However, the district allowed the YMCA to rent one of its facilities at less than the market rate and promoted the programs by distributing literature to parents one time per year and by providing a link to the YMCA website. The district did not provide the YMCA with any direct financial support, staff materials or oversight. OCR found that the district significantly assisted the YMCA's program by permitting it to use district facilities at a discounted rate and by promoting the YMCA program to parents. Therefore, the district was obligated to end its relationship with the YMCA or to ensure that the YMCA did not discriminate.

Key Points:

- Based on these opinions, it appears that OCR will find that a district has provided a private program with significant assistance when the district allows the organization to use its facilities without charge, or at a reduced rate, and when the district provides the program with publicity.
- It is important to remember that if your district provides substantial assistance to an organization, the district must ensure that the organization complies with Section 504 and the ADA.

IV. Conclusion

It is important that the district employees consider whether their actions could be construed as "adverse" to a parent or student. If the answer to that inquiry is yes, then the district must also consider whether the action is caused

by or connected to the protected activity. If a causal relationship exists, then, as a general rule, the district should refrain from subjecting the parent or student to the adverse action. Engaging in these inquiries will assist districts in avoiding and defending retaliation claims under Section 504 and the IDEA.