

Avoiding and Defending Retaliation Claims

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By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 23 years he has had extensive experience representing school districts in its special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., Franklin Pierce Law Center; B.A. Brandeis University) is an associate in the firm of Wadleigh, Starr & Peters, P.L.L.C. Ms. Minutelli practices in the areas of school law and civil litigation.

A Word of Caution

No two cases are exactly alike. 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 focuses on claims filed by students and/or parents, and does not cover retaliation claims made by district employees. This material it is not intended to substitute for legal counsel and it does not cover all aspects of Section 504 or the IDEA.

I. Overview

Parental claims of retaliatory conduct in the area of special education law are increasing at an alarming rate. 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 Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq. (Section 504), the Individuals with Disabilities Education Improvement Act, 20 U.S.C. § 1400 et seq. (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 focuses on claims filed by students and/or parents, and does not cover retaliation claims made by district employees. This material it is not intended to substitute for legal counsel and it does not cover all aspects of Section 504 or the IDEA.

II. A Brief Overview of Section 504 and the IDEA

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 their disability. Public schools are required to provide qualified students with disabilities with a free, appropriate education at public expense (FAPE). 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 incorporate by reference the procedural provisions contained in 34 C.F.R. § 100.7(e) of the federal regulations implementing Title VI of the Civil Rights Act of 1964. See 34 C.F.R. § 104.61. 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, or because the individual has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Section 504. 34 C.F.R. § 100.7(e).

The definition of the terms “disability” and “individual with a disability” in Section 504 have recently been amended by the ADA Amendments Act of 2008. See Pub. Law 110-325, S.3406 (2008). The amended definitions may result in an increased number of qualified students with disabilities under Section 504. This, in turn, could result in an increased number of discrimination and retaliation claims under Section 504.

B. The IDEA

The IDEA is an entitlement statute, not an anti-discrimination law. The fundamental concept behind the IDEA is that every student is entitled to a FAPE. The IDEA does not require that a school 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.

The definition of FAPE under Section 504 is broader than the definition of FAPE under the IDEA. While the IDEA defines FAPE to include the provision of special education and related services, the Section 504 definition includes the provision of regular or special education and related aids and services. However, the implementation of an IEP developed in accord with the IDEA is one means of meeting the “appropriate education” standard under Section 504. 34 C.F.R. § 104.33(b)(2). Thus, as a general premise, a district can assume that meeting its obligations under the IDEA to an identified child will constitute compliance with Section 504’s FAPE requirement.

C. The Hybrid Retaliation Claim

Recently, courts have begun to recognize a new type of retaliation claim, arising out of the IDEA. See e.g. M.T.V. v. Perdue, 107 LRP 62829, 2004 WL 3826047 (N.D. Ga. Feb. 3, 2004) (recognizing a claim for IDEA-based retaliation); Oman v. Portland Pub. Schs., 109 LRP 8172, 2005 WL 5748555 (D. Or. 2005) (same), related proceedings at 44 IDELR 278, 406 F. Supp. 2d 1157 (D. Ore. 2005), C.O. v. Portland Pub. Schs., 46 IDELR 243 (D. Or. 2006); Hesling v. Avon Grove Sch. Dist., 45 IDELR 190, 428 F. Supp. 2d 262 (E.D. Pa. 2006), reconsideration denied by 47 IDELR 256 (E.D. Pa. 2007), aff’d, 108 LRP 39506, 286 Fed.Appx. 773 (3d Cir. 2008); Grine v. Sylvania City Sch. Dist. Bd. of Educ., 47 IDELR 225, 2007 WL 949757 (Ohio Ct. App. 2007) (claim that a district failed to follow an IEP in retaliation for a parent filing a due process request is a valid retaliation claim under the IDEA).

Practice Pointer: A hybrid retaliation claim will allege retaliation that is “related to the identification, evaluation, or

educational placement” of a child with an educational disability. See Weber v. Cranston Sch. Comm., 32 IDELR 141, 212 F.3d 41 (1st Cir. 2000).

D. Exhaustion of Administrative Remedies

As with other IDEA claims, an IDEA-based retaliation claim is subject to administrative exhaustion. Weber, 32 IDELR 141; see also 20 U.S.C. § 1415(f); M.T.V. v. DeKalb County Sch. Dist., 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; thus, they are subject to the IDEA’s exhaustion requirements). Similarly, retaliation claims filed solely under Section 504 may also be subject to exhaustion, unless they are completely independent of the IDEA. M.T.V. v. Perdue, 107 LRP 62829 (dismissing retaliation claims brought under Section 504, the ADA, and the IDEA based on failure to exhaust). However, a court may find that a parent is not required to exhaust administrative remedies if parents can show that resorting to administrative remedies would be futile or inadequate given the relief sought. M.T.V. v. DeKalb, 45 IDELR 177.

A Section 504 claim that is completely independent of the IDEA, such as a pure discrimination claim, will not be subject to administrative exhaustion. Ellenberg v. New Mexico Military Institute, 47 IDELR 153, 478 F.3d 1262 (10th Cir. 2007) (holding that plaintiffs are not required to exhaust administrative remedies because their claims under Section 504 were “pure discrimination claims,” which were “separate and distinct from the [plaintiff’s] IDEA claim”).

III. The Elements of a Retaliation Claim

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.

Practice Pointer: A viable claim for retaliation arises when a parent or student is subjected to an adverse action as a result of engaging in a protected activity.

Retaliation claims may be filed with OCR or with the courts. The forum chosen by the complaining party will impact the elements of the claim.

A. The OCR Test

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. The five questions you should consider are:

1. Has the parent/student engaged in a protected activity?

Examples of protected activities include, but are not limited to:

- Initiating due process proceedings;
- Filing suit in court;
- Filing a complaint with OCR; and,
- Filing a complaint with the district.

2. Is the district 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 his/her status or ability to access the benefits of the program?
- Did the action preclude the individual from pursuing discrimination claims?
- Might the action dissuade a reasonable person from engaging in a protected activity?
- Did the action make it more difficult for the individual to engage in the protected activity?

Examples of adverse action may include:

- Suspension/expulsion from school or athletics/extra-curricular activities; and,
- 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?

- Did or 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?
 - Was the individual treated differently compared to other similarly situated persons?
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 2003); Shelby County (AL) Sch. Dist., 37 IDELR 41 (OCR 2002).

B. The Judicial Test

Several courts have adopted a three-part retaliation test, requiring plaintiffs to prove:

1. That they engaged in a protected activity;
2. That the defendant's retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights; and,
3. That there was a causal connection between the protected activity and the retaliation.

Lauren W. v. DeFlaminis, 47 IDELR 183, 480 F.3d 259 (3d Cir. 2007); Bradley v. Arkansas Dept. of Educ., 45 IDELR 149, 443 F.3d 965 (8th Cir. 2006).

In this context, a plaintiff will establish that a causal connection exists when:

1. There is an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or
2. There is a pattern of antagonism coupled with timing to establish a causal link, or
3. That based on the evidence in the record before the court, the trier of fact should infer causation.

Lauren W., 47 IDELR 183.

IV. Remedies

A. OCR

When OCR finds that a district has failed to comply with Section 504, the district has the opportunity to enter into a voluntary resolution agreement. Those agreements set forth the actions that the district will take to remedy the violation. Generally, those actions include revisions of policies and procedures, additional training, development of policies and procedures, and monitoring. If the district refuses to enter into a voluntary resolution agreement, OCR may institute proceedings to suspend, terminate, or refuse to grant Federal assistance to that district. In the alternative, OCR may refer the case to the Department of Justice for further action.

B. Judicial

The majority of courts that have addressed the issue have held that compensatory damages are not an available remedy under the IDEA. Instead, a prevailing parent may recover compensatory education and/or reimbursement for educational expenses such as unilateral placements and related services. See e.g. Blanchard v. Morton Sch. Dist., 48 IDELR 207, 504 F.3d 771 (9th Cir. 2007), decision amended by 107 LRP 69255, 509 F.3d 934 (9th Cir. 2007), cert. denied, 128 S. Ct. 1447 (U.S. Feb. 25, 2008).

In contrast, many courts allow prevailing parties to recover damages in Section 504 cases. As a result, more plaintiffs have begun captioning their hybrid, IDEA-based retaliation claims as Section 504 retaliation claims. Thus, it is important to review the complaint to determine whether the factual allegations pertain to the provision of a FAPE under the IDEA, or whether the allegations are truly independent of the IDEA. Compare Burke v. Brookline Sch. Dist., 47 IDELR 63 (D.N.H. 2007) (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), motion for reconsideration denied by 47 IDELR 193 (D.N.H. 2007), aff’d, 107 LRP 71566, 257 Fed.Appx. 335 (1st Cir. 2007), cert denied, 128 S.Ct. 2934 (U.S. June 16, 2008); with M.M.R.-Z. v. Commonwealth of Puerto Rico, 50 IDELR 61, 528 F.3d 9 (1st Cir. 2008) (noting that section 1415(l) of the IDEA did not preclude claims under the ADA, Section 504, or Title IX, because the claims “rest[ed] on improper retaliatory intent,” and therefore, they were “independently available through other sources of law, namely, the retaliation provisions of the three statutes”); 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); Ellenberg v. New Mexico Military Institute, 47 IDELR 153, 478 F.3d 1262 (10th Cir. 2007) (reversing 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).

In addition, compliance with the IDEA may 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”).

Practice Pointer: One of the first inquiries one should make when faced with a Section 504 claim is whether the claim is subsumed within the scope of the IDEA.

V. Defending and Preventing Retaliation Claims

A. Case Studies

1. Defenses

a. Failure to Engage in a Protected Activity

In Excel Academy Inc. (OH), 50 IDELR 264 (OCR 2007), the complainant alleged that the Academy retaliated against the student by terminating his services after his uncle complained that the student was being educated by an uncertified teacher. During the 2006-07 school year, the student was placed at the Academy by his resident district. In November 2006, the student’s uncle complained that an uncertified teacher was teaching several of the student’s subjects. Immediately thereafter, the uncle reported that he was told that the student’s placement at the Academy was terminated, and his family had 10 days to find another placement.

OCR found that students remain in one classroom throughout the school day, and teachers rotate into the classroom. In addition, each classroom had several aides and behavior intervention specialists. The Academy established that all of the individuals employed as teachers were certified; aides and behavior intervention specialists were not required to have a certification. Approximately one month after the start of the school year, the Academy rearranged the classes, so that several students with more severe behavior problems, including the complainant’s nephew, were in one classroom with a particular behavior intervention specialist.

The Academy admitted that it informed the uncle that the student’s placement was terminated, but indicated that it did so in response to the uncle’s demand that the student have no contact with the behavior intervention specialist

to whom he was assigned. The Academy also produced a statement, written by the uncle, asserting that the behavior specialist “had gang affiliations and supported inappropriate ideologies.” *Id.* OCR found that the uncle’s complaint that the student was taught by an uncertified teacher was unfounded, and his complaints about the behavior specialist, including his complaints about the individual’s fitness to teach, did not rise to the level of a protected activity. Thus, the Academy did not retaliate by terminating the placement.

Practice Pointers:

- *Not all advocacy will rise to the level of a protected activity, nor does prevailing on a Section 504 complaint mean that a school district has no further exposure.*
- *Investigative findings by OCR, absent a hearing, may not have preclusive effect on subsequent litigation.*

b. No Adverse Activity

In *Aztec (NM) Municipal Schs.*, 47 IDELR 108 (OCR 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 the parent 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.

Practice Pointer: *This case suggests that OCR uses a strict construction for adverse actions. Query: Will Congress’ desire for a “broad construction” of definition of disability under the ADA Amendments Act open the door to a broad construction with regard to adverse actions?*

c. Failure to Establish a Causal Connection

In *Hesling v. Seidenberger*, 108 LRP 39506, 286 Fed. Appx. 773 (3d Cir. 2008), the court affirmed an order granting summary judgment in favor of the school district’s superintendent. The parent alleged that the district had violated Section 504, the ADA, and the IDEA by retaliating against her after she succeeded on two due process proceedings. The parent, a journalist for a local newspaper, alleged that several administrators retained an attorney, who wrote a

letter to the local paper. In the letter, the attorney contended that the parent had a conflict of interest in reporting on district activities because she had been involved in litigation with the district for the past two years. Although the letter was shown to the superintendent, the superintendent did not retain the attorney, nor did he request that the letter be written.

The court concluded that the parent could not establish a causal connection between her administrative success and the adverse action. The record reflected that district administrators were frustrated with the plaintiff, but the letter was not written at the request of the superintendent, and he had no connection with the letter, other than the fact that he had seen it before it was printed in the paper. Nor did the superintendent have the authority to discipline the administrators for writing the letter.

Practice Pointer: This case illustrates the need for a causal, rather than a casual, connection between the alleged adverse activity and the protected activity.

2. You Did What?: Adverse Actions

a. Engaging in Student Discipline

In Jones County (GA) School District, 49 IDELR 199 (OCR 2007), the parent alleged that the district retaliated against her son by subjecting him to certain disciplinary sanctions, including walking laps and facing the wall. The parent alleged that these disciplinary actions occurred after the parent requested that her son receive services under Section 504 or the IDEA. The district had knowledge of the parent's advocacy because it met with her on several occasions, and the student discipline (walking laps) was an adverse action.¹ OCR determined that there was a causal connection between the parent's advocacy and the district's adverse action because the discipline occurred during the time period in which the parent was requesting Section 504 services. However, OCR concluded that the student's misbehavior was a legitimate reason for disciplining the student, and the district produced documentation that it had put parents on notice of the methods that would be used to discipline all students, which included walking laps. Thus, the discipline was not retaliatory and the district did not violate Section 504.

Practice Pointer: This case provides an illustration of a situation where a parent may be able to obtain relief in a different forum, despite the positive finding from OCR. For example, State regulations may mandate the use of positive behavioral interventions and supports and the disciplinary techniques utilized by the district may constitute a prohibited aversive behavioral

¹ OCR found that there was insufficient evidence to establish that the student was forced to sit facing a wall.

intervention. If those regulations exist in your state, they might trump the district's discipline policies, and there could be FAPE repercussions if aversive disciplinary techniques are used. Similarly, the result here may have been different had the child had an IEP in place with a behavior intervention plan that precluded or limited access to traditional disciplinary methods.

b. I Smell a Rat: Reporting Abuse and Neglect

Educators have a statutory obligation to file a report if they have a good-faith belief that a child has been subjected to abuse and/or neglect. See e.g. RSA 169-C:29. As a result, this is an area where educators lack the ability to exercise discretion and instead, are required to file a report, regardless of whether the report will be perceived as retaliatory in nature.

In Canisteo-Greenwood (NY) Sch. Dist., 50 IDELR 232 (OCR 2007), the grandparents of a student with a disability filed a complaint with OCR, alleging that the district retaliated against them as a result of their advocacy by 1) referring them to Child Protective Services (CPS) and 2) restricting their access to school. At the outset, OCR determined that the complainants had engaged in a protected activity by asserting their rights under Section 504, that the district was aware of that activity, and that the district had subjected the grandparents to an adverse action – filing a report with CPS. OCR determined that the district filed the report after a student stated that rats had chewed on his medical clamps. District staff spoke with the student's sister, who confirmed that there were rats in their house. OCR concluded that the district's decision to report was based on a concern for the students, which was a legitimate, non-discriminatory reason.

OCR also found that the superintendent had written to the grandfather, informing him that he was required to make an appointment prior to coming to the school, and that while at the school, he would be escorted by a district employee. These procedures were implemented because the complainant spoke in a rude and disrespectful manner to school staff, and similar procedures were implemented with other individuals who engaged in similar behavior. Thus, the district had a legitimate, non-discriminatory reason for sending the letter and implementing the procedures, and there was no retaliation.

In Hot Springs County (WY) Sch. Dist., 50 IDELR 140 (OCR 2007), OCR found that the district had a legitimate, non-discriminatory reason for reporting the parents for educational neglect; therefore, the district did not retaliate against the parents. In that case, the district had placed the student at a private day program. The parent filed criminal abuse charges against several employees at the program, alleging that they had inappropriately restrained and abused her son. Shortly thereafter, the district reported the parent for educational neglect. The parent filed a complaint with OCR, alleging that the district retaliated against

her by notifying the county attorney that it wished to file charges of educational neglect against the complainant.

OCR assumed that by filing criminal abuse charges, the parent engaged in a protected activity, despite the fact that the proceedings were filed under criminal laws, rather than Section 504 or the ADA. OCR found that when the district filed for educational neglect, it was aware that the parent had filed criminal charges. Thus, OCR assumed that the district's report was causally connected to the complainant's protected activity because the district and the private day school had a commonality of interests and the district had notice that the parents had filed charges.

Nevertheless, OCR found that the district had a legitimate, non-discriminatory reason for filing the educational neglect report: it reasonably believed that the student was not making progress; and that the parent would not allow the team's recommendations occur, which endangered the student's well being. The County Attorney's neglect petition stated: "mother has failed and refused on numerous occasions, to provide adequate educational, medical, psychological and other care necessary for the minor child's well-being due to her uncooperative nature and unwillingness to support and follow program guidelines with educational providers." *Id.* The petition contained examples of instances when the parent refused recommendations from the IEP team, refused to complete an intake interview (required in order for the child to receive residential services), refused an independent evaluation, and refused to tour a residential facility. The district also informed OCR that it had filed the report "because of the 'continuing inconsistencies with attendance and medication.'" *Id.* OCR also found that those reasons were not a pretext for discrimination, noting that when the student was in the care of other individuals, he was absent less frequently and took his medication with more regularity. In addition, OCR noted that a court held a hearing on the petition for educational neglect.

Similarly, in Citrus County (FL) Sch. Dist., 35 IDELR 192 (OCR 2001), a parent met with the superintendent of schools, alleged that her child's IEP was not being followed, and requested that the district investigate the matter. 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 that they believed constituted abuse and neglect. On that basis, the personnel called a child services hotline and filed a report. 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 filing of the abuse/neglect report, OCR 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.

In contrast, in Hermosa Beach (CA) City Sch. Dist., 108 LRP 57696 (OCR 2008), parents alleged that the district retaliated against their son after they advocated for his right to a FAPE. Parents alleged that the district filed a false abuse and neglect report, and improperly disciplined the student by suspending him without properly notifying the parent. Using the five-part test for retaliation, OCR determined that the parents' advocacy on behalf of the student (disagreement with the district's eligibility determination and filing requests for due process) was a protected activity, that the district was aware of the parents' advocacy, and that the parents and student were subjected to adverse actions (the filing of two abuse and neglect reports and disciplining the student without providing the parent with proper notice). OCR also determined that the adverse action was causally connected to the parents' advocacy; this decision was based on the proximity in time between the parents' advocacy and the district's actions. Specifically, OCR found that the parents advocated on behalf of their child during the 2005-06 school year, and that the district filed reports of abuse and neglect during that school year, and that it failed to follow established procedures prior to imposing certain disciplinary measures, including notifying the parent that the student had received a Saturday detention, and subsequently failing to notify the parents that the student had been suspended.

OCR found that the district had a legitimate, nondiscriminatory reason for filing the abuse/neglect report, but that the district did not have a legitimate reason for subsequently informing the investigative agency that the parents' home was unclean and that one parent was verbally abusive to district staff. OCR also found that the district did not have a legitimate, non-discriminatory reason for failing to follow established disciplinary procedures. Instead, OCR determined that the student was disciplined in retaliation for the parents' protected activity. The District agreed to enter into a resolution agreement, pursuant to which it was required to modify its policies, publish and distribute the modified policies, and provide training to staff on Section 504, including retaliation. OCR declined to award an individual remedy to the student because "any individual remedies that could be provided to the Student were previously agreed upon by the Parent and the District in the settlement of a related due process proceeding." Id.

Practice Pointers:

- *Timing is everything. What starts as a legitimate, nondiscriminatory reason may end up being a retaliatory action if it is pursued for the wrong reasons.*

- *One should seek the advice of counsel with regard to the relationship between state statutes, which may provide immunity for good-faith reporting of abuse and neglect, and the ability of OCR to use the report as an adverse action.*

c. Filing Criminal Charges

As with abuse and neglect cases, a district's decision to file criminal charges against a student may result in a retaliation complaint being filed with OCR. Fairfield City (OH) Sch. Dist., 50 IDELR 201 (OCR 2007). In that case, the parent alleged that the district retaliated against her child by filing misdemeanor criminal charges against him after his parents filed a discrimination complaint with the Ohio Department of Education. Parents also alleged that the district engaged in a subsequent retaliatory act by re-filing the charges as felony assault charges when the parent refused to withdraw her complaint. Parent alleged that on February 8, 2007, the student

had a 'full-blown meltdown' at school. . . . [H]e was sleeping in class and school staff members tried to wake him by having him walk in the hallways. When he woke up he became angry, began cursing, and tried to leave the building. The principal tried to step in front of him as he was leaving the building and he pushed her out of the way.

Id.

After the incident occurred, the district suspended the student and recommended that he be expelled. Approximately one week after that incident, the parent alleged that the district discovered that she had filed a complaint with the Ohio Department of Education; thereafter, the district filed misdemeanor assault charges. The parent further alleged that those charges were subsequently re-filed as felony assault charges when she refused to withdraw her complaint.

OCR found that the parent did not file her complaint with the Department of Education until March 2007, approximately one month after the district had filed criminal charges against the student. In her complaint, the parent requested that the charges be dropped. OCR also found that the prosecutor recommended that the district re-file the charges as felony assault charges; this decision was made after the prosecutor reviewed the file, which contained several police reports pertaining to the February 8 incident. OCR concluded that the parent had engaged in a protected activity – filing a complaint with the Department of Education – but that there was no causal connection between the protected activity and the first allegedly adverse action, the filing of the criminal charges, because the charges were filed before the parent filed the complaint. Nor was

the decision to re-file the charges as felony assault charges causally connected to the parent's protected activity because the district neither filed the felony assault charges, nor requested that the charges be filed. Thus, there was no retaliation.

Practice Pointers:

- *Again, timing is everything. The outcome of this case might have been very different if the parent had filed the OCR complaint one month earlier. In addition, district attorneys cannot threaten to pursue criminal action for refusal to withdraw a complaint.*
- *Remember, Section 504 provides equal access and opportunity through accommodation; it does not immunize children with disabilities from their criminal conduct.*

d. Barring Parent Participation

In the case of Albuquerque (NM) Pub. Schs., 50 IDELR 263 (OCR 2007), the parent complained that the district retaliated against her after she requested that it convene an IEP team meeting. The district allegedly retaliated by:

1. "Banning her from the school;
2. Not allowing the student to participate in an after-school program;
3. Assigning a teacher to work with another daughter, even though the complainant had a conflict with that teacher, and,
4. Staff covered the complainant's picture on a poster concerning Outstanding Citizens East Mountain Celebration."

Id.

With respect to the first alleged action, OCR found that the district had informed the parent that she was banned from the campus, unless she had prior authorization from the principal. The parent alleged that the campus ban prevented her from helping her daughter, who needed assistance with her backpack, exit the car. OCR confirmed that allegation, and determined that the district's ban had an adverse impact on the parent's "ability to deliver the Student safely to school." OCR inferred that a causal connection existed between the two actions "due to the proximity in time between the complainant's advocacy and the District's letter." However, OCR found that the district had a legitimate,

non-discriminatory reason for banning the parent – she had been creating a “climate of unrest for staff and students, unrelated to her disability-related advocacy.” Id. (emphasis added). The parent’s behavior “actually disrupted school proceedings on multiple days” and “staff members felt personally threatened by her.” Id. In addition, other parents who had engaged in similar behavior had also been banned from the school. Thus, the district’s decision to ban the parent from school was not a pretext for retaliation.

OCR determined that the facts did not support the parent’s allegation that the student was not allowed to participate in an after-school program. Rather, OCR found that the student attended the program. Although one of the teachers the district assigned to the student’s class had a conflict with the complainant, the assignment was not an adverse action. In addition, the student’s grades did not suffer, the student attended the class, and the parent was able to communicate with the teacher. Similarly, OCR found that the fourth alleged activity, covering the complainant’s picture on a poster, was not an adverse action. Thus, the district did not retaliate against the parent.

In the case of Adams County (CO) School District, 51 IDELR 167 (OCR 2008), the parent alleged that the district retaliated against him by restricting communications with school staff and by changing the student’s teachers. At the outset, OCR determined that the parent had engaged in a protected activity by advocating for educational services for his son; this advocacy began in the fall of 2005, and continued throughout the 2006-07 school year, the school year during which the alleged retaliation took place. OCR also found that the district was aware of the advocacy.

With regard to the first allegation, restricting parent’s communication with staff, OCR found that the parent’s ability to communicate with staff was restricted by the school principal. In January 2007, the Principal and the Director of Special Education met to discuss issues that the parent had raised regarding his son’s education. During that discussion, the two determined that the parent was receiving conflicting information from various educators, and that this resulted from the high volume of emails that the parent sent to multiple staff members, requesting responses that were not within the staff members’ authority. The conflicting information increased the number of problems between the parent and the district. Thus, they decided that the principal would be the parent’s single point of contact. Thereafter, the district requested that the parent direct all communication to the principal; despite this request, and despite a request made to staff to forward all communication from the parent to the principal, the parent continued to contact staff members, and several staff members continued to respond to the parent. In March 2007, the communication restriction was removed.

OCR found that the communication restriction was an adverse action but that there was no causal connection between the adverse action and the

protected activity. During the time period in which the communication restriction was in place, the parent continued to advocate on behalf of his son. In addition, the District restricted communication of other parents of students with and without disabilities during the same time period that the complaining parent's communication was restricted. The restrictions were put in place because the communications of all of the parents were disruptive to the educational environment. Thus, the district did not retaliate against the parents by establishing the communication restriction.

With regard to the second allegation, OCR found that changing the student's schedule was not an adverse action; thus, there was no retaliation by the district. This determination was based on the fact that the schedule had been generated in the same manner as all student schedules, and that his schedule was generated based on his course selections and his graduation requirements. The scheduling changes were not adverse because they did not significantly disadvantage the student as to his status as a student with a disability, nor did they significantly disadvantage his ability to gain the benefits of the program.

Practice Pointer: OCR is not in the business of creating new rights. However, one of the most dangerous areas for districts is when a parent asserts rights in an unprofessional, discourteous, or threatening manner.

e. Participation in Team Sports

In the case of Tolleson (AZ) Union High School District, 51 IDELR 81 (OCR 2008), parents filed a complaint alleging that the district retaliated against their son by prohibiting him from playing baseball at the start of the season. The district agreed that, prior to the start of the season, the parents had advocated on behalf of the student, and that the parents' attorney had sent the district a letter asserting that the district had violated Section 504. Thus, OCR found that the parents had engaged in a protected activity and that the district was aware of the same.

OCR also found that the student was not permitted to play in four baseball games. However, the prohibition was based on the student's ineligibility, which resulted from his failing grades. OCR interviewed three coaches, who confirmed that the student was not eligible to play baseball for the first two weeks/four games due to his failing grades. Once new (passing) grades were posted, the student was permitted to play baseball for the rest of the season. OCR also reviewed the student handbook, which indicated that students were not eligible to participate in extracurricular activities if they were failing any of their courses. OCR found that the coaches consistently enforced the grade requirements set forth in the handbook.

OCR found that the district consistently applied its eligibility requirements to all students, and that the district did not prevent the student from participating in the first four games of the season because of the parents' advocacy. The district's reason for preventing the student from playing in the first four games was not a pretext for discrimination and the district did not retaliate.

Practice Pointers:

- *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 disparate treatment of the disabled student.*
- *Team rules, if applied uniformly, will generally not be deemed discriminatory. See Little Axe (OK) Pub. Schs., 37 IDELR 103 (OCR 2002).*

VI. Conclusion

With the number of retaliation claims on the rise, it is important that the districts consider whether their actions, or the actions of organizations or programs that districts “substantially assist,” 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, unless there is a legitimate, non-discriminatory reason for engaging in the adverse act, 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.

A. Possible Defenses to a Retaliation Claim

Should your district be the subject of a retaliation claim, the following defenses may apply. Please note that this is not an exhaustive list, and the available defenses will depend on the facts of your particular case.

- Statute of limitations - 180 days for OCR complaints;
- Failure to state a retaliation claim due to any of the following:
 - Student is not a qualified student with a disability;
 - Parent did not engage in a protected activity;
 - District did not engage in an adverse action;

- The district’s adverse action was not causally connected to the parent’s protected activity:
 - The time period between the protected activity and the alleged retaliatory action is such that a reasonable person would not believe that the two were causally connected;
 - There is not a pattern of antagonism that would establish a causal connection between the protected activity and the adverse action; or,
 - Based on the facts, a reasonable person would not infer causation.
- Failure to exhaust administrative remedies;
- The action taken by the district would not deter a reasonable person from exercising his or her rights;
- The district had a legitimate, non-discriminatory reason for taking the action;
- The entity which is accused of retaliation is wholly independent of the district.

B. Avoiding Retaliation Claims

The old adage, “an ounce of prevention is worth a pound of cure,” applies to retaliation claims. The human factor is the one factor that renders a school district most vulnerable to retaliation claims. School districts need to create a culture that perpetuates the following values:

- Even discourteous parents are sometimes right;
- A student’s disability should never be the cause of an adverse action on the part of the school district;
- Advocacy, however zealous, should never be the cause of an adverse action on the part of the school district;
- Unprofessionalism should always be met with professionalism.

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