

MEMORANDUM

TO: Interested Persons

FROM: Disability Rights California

RE: State and Federal Laws Prohibit Schools from Retaliating Against Parents and Against Individuals Assisting Parents

DATE: August 7, 2003

I. Introduction

Retaliation is the act of using official resources to punish a person for exercising their rights. 34 C.F.R. Part 100. Section 100.7 (e). Retaliation is illegal under both federal and state laws. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act are federal laws that prohibit discrimination based on an individual's disability. Both of these federal anti-discrimination laws make it illegal for a school district to retaliate against a parent who has advocated on behalf of a student's education or who has filed a complaint with the Office of Civil Rights (OCR).

In addition, under California Education Code section 56046, an employee or contractor of a school district has the right to help a parent or guardian of a student with exceptional needs to get services or accommodations for that student without interference from the employer.

II. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act

Section 504 of the Rehabilitation Act of 1973 is a federal law that protects individuals from discrimination based on their disability. Section 504 forbids organizations and employers that receive government funding from excluding or

denying individuals with disabilities an equal opportunity to receive program benefits and services. Under Section 504, schools must provide reasonable accommodations to qualified students. Section 504 prohibits retaliation for filing a complaint under Section 504 in order to advocate for a right protected by that section. 34 C.F.R. § 104.61.

The Americans with Disabilities Act (ADA) prohibits schools from discrimination based on disability. It also prohibits retaliation, coercion or threats against people who file complaints under the ADA. 28 C.F.R. § 35.134.

1. What action is prohibited?

A school district is not allowed to retaliate against an individual because the individual made a complaint or participated in an investigation, hearing or other proceeding regarding an alleged violation of Section 504. Under Section 504, a parent has a right to file a claim and a school district cannot retaliate against an individual with the purpose of interfering with that right. *Elk Grove (Cal.) Unified School District*, 36 IDELR 160 (OCR 2001).

2. What must you show in order to prove that the school retaliated against you?

In order to investigate a retaliation complaint, the OCR reviews the following factors:

- (1) Whether the complainant engaged in an activity protected under Section 504 or Title II. *Advocating on behalf of a child's education is a protected activity*;
- (2) Whether the complainant was subsequently subjected to adverse action by the recipient; and,
- (3) Whether there is sufficient evidence of a connection between the protected activity and the adverse action to give rise to an inference of retaliation.

3. What is an “adverse action”?

In *San Ramon Valley (Cal.) Unified School District*, 38 IDELR 73 (OCR 2002), the OCR rejected a parent's retaliation charge because the second factor, i.e. “adverse action” was not present. In this particular case, OCR found that no adverse action occurred when a coach allegedly discouraged a student-athlete from associating with the student because of the parent's advocacy efforts. OCR

reasoned that the district did not retaliate against the parent or the student because the student was not significantly disadvantaged as to her status as a student and the coach's remark was not sufficiently serious to be considered a deterrent to the parent's advocacy efforts.

4. What if the school has a legitimate, non-retaliatory reason for the adverse action?

After the three factors above have been established, OCR looks at whether the school district has a legitimate, non-retaliatory reason for the adverse action. For example, in *Elk Grove Unified School District*, 36 IDELR 160 (2001), a teacher alleged that the district retaliated against her when it permanently relocated her pull out RSP classes to inadequate instructional space. The district denied that its decision was in retaliation for the teacher's past advocacy. The reason the district gave for moving her was that the school was out of compliance because of the lack of space for instruction. The district also said that the configuration of placing RSP in small instructional areas was recommended by California Department of Education as a corrective action. OCR failed to find sufficient evidence that the district's reasons for relocating the teacher's classes were a pretext for any retaliation against her.

In another recent decision, OCR dismissed a complaint of retaliation, finding that the district offered legitimate non-retaliatory reasons for their actions. In this particular case, the student's mother complained that the district was retaliating against her son because of her advocacy efforts. One incident cited involved the student being made to stand outside the classroom as a discipline for misbehaving. However, OCR found that evidence showed that 3 other students were also sent outside in the same incident, also for misbehavior. Another incident involved the student being removed from the summer school program because the district found he engaged in sexual harassment. OCR found that the District's process of weighing information regarding the accusation that the Student sexually harassed another student was adequate to disprove the allegation that the Student's exclusion was an arbitrary retaliatory act. *Fontana (Cal.) Unified School District*, 36 IDELR 187 (OCR 2001).

In this decision, OCR also said that in order to be retaliatory the action must directly impact the student. An incident was described where the principal allegedly told the Student that she was "waiting" for him to accumulate enough discipline referrals for her to be able to "kick" the Student out of the school. OCR determined that although the principal's wording may not have been diplomatic,

the observation that the student could be expelled if his current behavior continued was not, in and of itself, a retaliatory action since it did not directly impact the student. *Fontana (Cal.) Unified School District*, 36 IDELR 187 (OCR 2001).

III. California Education Code 56046

Calif. Education Code 56046, which became effective January 1, 2003, allows an employee or contractor of a school district, county office of education, or special education local plan area (SELPA) to help a parent or guardian of a student with exceptional needs to obtain services or accommodations for that student without interference from the school district. The teacher or service provider can provide information and assistance as long as it does not interfere with his regular duties for the local educational agency.¹

Education Code 56046 says that an employee of a school district, county office of education, or a SELPA cannot use their official authority or influence for the purpose of intimidating, threatening or coercing a person with the intent of interfering with that person's right to assist a parent or guardian of a student with exceptional needs to obtain services or accommodations for that student.

1. What activities are prohibited?

A public school official may not do the following to a person who is protected by Education Code 56046:

- â Promise to give any benefit;
- â threaten punishment or disciplinary action; or
- â Take, direct others to take, recommend, process, or approve any personnel action, including appointment, promotion, transfer, assignment, performance of evaluation, or suspension.

For example, if a teacher helps a parent obtain services for a student with exceptional needs, the school district cannot threaten or punish the teacher for assisting the parent.

2. What activities are protected?

- â Good faith advocacy,
- â Providing information or assistance that would help a parent or guardian obtain a free appropriate education for his or her child as guaranteed under IDEA, and

â Other services or accommodations guaranteed under Section 504 and the ADA.

3. Who is protected by Calif. Ed. Code 56046?

Employees of a school district, county office of education or SELPA are protected by Ed. Code 56046. This may include, but is not limited to the following: a teacher, a provider of designated instruction and services (e.g. speech therapy, physical therapy, and occupational therapy), a paraprofessional, an instructional aide, a behavioral aide, a health aide, and other educators or staff of the school district.

4. Why is Section 56046 important?

- (1) First, parents and guardians can benefit greatly from assistance provided by individuals who are knowledgeable about the needs and strengths of a particular student and about the process of getting services.
- (2) Second, employees of school districts, county offices of education and SELPAs have a right to provide information and to express in good faith opinions to parents about their rights under the IDEA, Section 504 of the Rehabilitation Act of 1973, the federal ADA, and state laws regarding individuals with exceptional needs.

5. What can you do if you believe your rights under Section 56046 have been violated?

If the employee or contractor believes there has been a violation of Section 56046 of the Education Code, that person may file a compliance complaint with the California Department of Education under the Uniform Complaint Procedures as set forth in Title 5 of the California Code of Regulations.² The California Department of Education must intervene directly by investigating the complaint. For more about compliance complaints, see chapter 6 of Disability Rights California's *Special Education Rights and Responsibilities* manual, publication number 5046.01 at www.disabilityrightsca.org or call (213) 427-3200.

¹ A public school official can still direct or discipline an employee or contractor. Furthermore, a local educational agency can still enforce a law or regulation

regarding conflicts of interest, incompatible activities, or the confidentiality of pupil records. Ed Code 56046 does not change the existing rights, privileges, or remedies of a public school employee under any other federal or state law or under an employment contract or collective bargaining agreement.

² Section 56046 does not limit the right of a person to file a complaint pursuant to either a governing board-adopted grievance process or a collectively bargained grievance process.