



*California's Protection & Advocacy System
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Is the School Retaliating? A Guide to Your Rights

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Introduction

Retaliation is an act of discrimination, coercion, intimidation or threat against a person for the purpose of interfering with the exercise of a protected right.¹ 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.² Each of these federal anti-discrimination laws also prohibits retaliation for the exercise of the rights it protects.³

In addition, California Education Code Section 56046 protects an employee or contractor of a school district or other local educational agency who advocates, or assists the parent in advocating, for a student with exceptional needs to obtain services or accommodations for the student. An educational agency is barred from retaliating against the helpful staff member or contractor for the purpose of interfering with the action of that person.

¹ 34 C.F.R. Part 100. Sect. 100.7(e).

² 29 U.S.C. Sect. 701; 42 U.S.C. Chapter 126.

³ A.C. v. Shelby County Board of Education, 60 IDELR 271, 711 F.3d 687 (6th Cir. 2013); Andrews v. Ohio, 104 F.3d 803, 807 (6th Cir. 1997); Burns v. City of Columbus, 91 F.3d 836, 842 (6th Cir. 1996).

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, testifying, assisting or investigating in order to advocate for a right protected by that section.⁴

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.⁵

In some cases, there may be explicit evidence of retaliation. For example, an entry in the school district's minutes showing that the district staff discussed not putting the student into a foreign language class because an Office of Civil Rights' (OCR) complaint had been filed on his behalf was found to be sufficient evidence of retaliation.⁶ In most cases, however, retaliation is inferred from surrounding circumstances, requiring a four-step analysis.⁷

Did the complainant engage in statutorily protected activity?

The complaining party may have filed a complaint on behalf of a student, or participated in some other way in advocating for the student, including testifying, investigating, or assisting someone else in these activities.

⁴ 29 C.F.R. Sect. 33.13; 34 C.F.R. Sect. 100.7(e); 34 C.F.R. Sect. 104.61.

⁵ 42 U.S.C. Sect. 12203; 28 C.F.R. Sect. 35.134.

⁶ Pinellas County (Fl.) School Dis., 52 IDELR 23 (OCR 2009).

⁷ Wilbourne v. Forsyth County Sch. Dist., 38 NDLR 89, 36 F.App'x 473 (11th Cir. 2009); Edwards v. Gwinnet Co. Sch. Dist., 62 IDELR 3, 977 F.Supp.2d 1322 (N.D. Ga. 2013); Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000).

Was the complainant the target of adverse action?

Nearly any action with a harmful impact on the complainant might be found to be an adverse action. For example, parents were found to have pled a valid claim for retaliation when the school district denied their request for copies of school records and then subsequently offered to provide copies of school records for a charge of \$2,600. However, prior to the parents filing for a hearing, the district had provided free copies to the parents.⁸

In another decision, it was held that in order to be retaliatory the action must directly impact the student. 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, the 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 as it did not directly impact the student.⁹

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.

⁸ Pollack v. Regional Sch. Unit 75, 63 IDELR 72 (D.Me. 2014).

⁹ Fontana (Cal.) Unified School District, 36 IDELR 187 (OCR 2001).

Was there a connection between the protected activity and the adverse action, supporting an inference of retaliation?

To prevail in an action for retaliation, the complainant must show that the retaliatory action was taken as a result of the protected activity. One factor considered will be whether the adverse action was taken soon after the protected activity occurred.¹⁰

Showing the necessary causal connection may require showing that the allegedly retaliating entity was aware of the protected activity. This is not always an issue but may be important if the retaliating entity claims to have acted for reasons unrelated to the protected activity.¹¹

Did the school identify a legitimate, non-retaliatory reason for the adverse action?

After the three factors above have been established, OCR or the other decider of facts looks at whether the school district has stated a legitimate, non-retaliatory reason for the adverse action. If a plausible legitimate reason is articulated, the complainant must prove by a preponderance of the evidence that the offered reason for the action is not the true reason but a mere pretext.¹²

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

¹⁰ *Cherokee County (GA) Sch. Dist.*, 54 IDELR 301 (OCR 2009); *Davis v. Clark County Sch. Dist.*, 60 IDELR 152 (D. Nev. 2013).

¹¹ *Edwards v. Gwinnet Co. Sch. Dist.*, 62 IDELR 3, 977 F.Supp.2d 1322 (N.D. Ga.2013); *Cherokee County (GA) Sch. Dist.*, 54 IDELR 301 (OCR 2009); *Davis v. Clark County Sch. Dist.*, 60 IDELR 152 (D. Nev. 2013); *Weber v. Cranston Sch. Comm.*, 32 IDELR 141 (1st Cir. 2000).

¹² *A.C. v. Shelby County Board of Education*, 60 IDELR 271, 711 F.3d 687 (6th Cir. 2013); *Stengle v. Office of Dispute Resolution*, 109 LRP 24455 (M.D. Pa. 2009).

was out of compliance because of the lack of space for instruction. The district also said that the placing of the 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 decision, OCR dismissed a complaint of retaliation, finding that the district offered legitimate non-retaliatory reasons for its actions. The student's mother complained that the district was retaliating against her son because of her advocacy efforts. In one incident, the student was made to stand outside the classroom as a discipline for misbehaving. However, OCR found that evidence showed that three other students were also sent outside in the same incident, also for misbehavior. The student was also 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.¹³

California Education Code Section 56046

California Education Code Section 56046 protects any person, including a teacher, other staff, or contractor with the local educational agency from retaliation by an educational agency for advocating, or assisting in the advocating, for services or accommodations for a special education student.¹⁴

¹³ Fontana (Cal.) Unified School District, 36 IDELR 187 (OCR 2001).

¹⁴ 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. California 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. Also note that local education agencies have the responsibility to investigate all allegations of discrimination and implement effective corrective actions whenever necessary and appropriate; maintain

California Education Code Sect. 56046 states that employees 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 to interfere with that person acting to assist a parent or guardian of a student with exceptional needs to obtain services or accommodations for that student.

What activities are prohibited?

Prohibited use of official authority or influence by a public school official includes:

- A. Promising to give any benefit; or
- B. Taking or threatening any negative personnel action.

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.

What activities are protected?

- A. Good faith advocacy;
- B. 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; or
- C. Other services or accommodations guaranteed under Section 504 and the ADA.

documentation of complaints and their resolution for a minimum of one review cycle; and ensure that complainants are protected from retaliation and the identify remains confidential. California Ed. Code Sects. 234.1[b][e][f], 260; 5 CCR Sects. 4621 and 4962.

Who is protected by California Education Code Section 56046?

Employees of a school district, county office of education or SELPA are protected by California Education Code Sect. 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, as well as individuals or entities contracting with the school district.

Why is California Education Code Section 56046 important?

- A. 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.
- B. 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.

What can you do if you believe your rights under California Education Code 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 complaint with the California Department of Education under the Uniform Complaint Procedures as set forth in Title 5 of the California Code of Regulations.¹⁵ The California Department of Education must intervene directly by investigating the complaint. For more about compliance complaints, see

¹⁵ 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.

chapter 6 of Disability Rights California's *Special Education Rights and Responsibilities* manual, publication number 5046.01 at www.disabilityrightsca.org or call (800) 776-5746.

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