



Be careful of 504 retaliation claims from employees who advocate for students

Key points:

- **Section 504's prohibition on retaliation can cover school employees**
- **Make employees aware of mechanisms for filing complaints regarding special ed services**
- **Document concerns with conduct; handle behavior as you would other employment matters**

A special education aide, who is also the parent of a child with a disability, complains about her child's services and tells parents about problems with their children's special education services in the classroom where she works.

The principal tells her to stop speaking to parents and to direct any questions from parents to the special education teacher or school officials. Later that year, he recommends that the district not renew the aide's contract. During testimony, he says the aide was stirring up trouble.

The aide files a First Amendment claim and a claim under Section 504/ADA for retaliation for advocacy on behalf of students with disabilities. The judge dismisses the First Amendment claim but allows the retaliation claim to proceed to court. *Hicks v. Benton County Bd. of Educ.*, [69 IDELR 32](#) (W.D. Tenn. 2016).

When a school acts against an employee who's engaging in advocacy, it could face a retaliation claim under Section 504, said Bennett Rodick, a school attorney with [Hodges, Loizzi, Eisenhammer, Rodick & Kohn LLP](#) in Arlington Heights, Ill.

The law explicitly prohibits retaliation against individuals who advocate on behalf of students with disabilities. That doesn't mean a school employee is immune to reprimand, however, Rodick said.

"Just because she's an employee of the district and has grievances about how they're doing special education, doesn't mean she has a right to disrupt the workplace," he said.

Below, learn about retaliation and how to handle disruptive behaviors from school employees without sparking a retaliation claim.

Understand elements of retaliation claims

1. Protected activity. "Not all advocacy on behalf of your student, or your son or daughter, will rise to the level of protected activity under Section 504," said Christina Stephanos, a school attorney with [Sweet, Stevens, Katz, Williams LLP](#) in Pennsylvania. According to the judge in *Brooks v. Capistrano United School District*, [114 LRP 10800](#) (C.D. Cal. 02/20/14), "A special education teacher must do more than merely assist her disabled students in order for there to be protected activity."

Complaining about deficiencies in services or programming could be considered protected activity, Stephanos said. Whether something is considered a protected activity is very dependent on the facts of the case, she said. It's clear, however, that protected activity "definitely includes a parent filing a formal complaint with OCR or filing for due process." In the *Hicks* case, the aide was also a parent of a child with a disability, which strengthened her case, Rodick said.

2. Adverse action. An adverse action could include firing an employee or choosing to not renew her contract, Rodick said. "Usually it has to be pretty serious. But nonrenewal of a contract, assuming it's for illegal reasons, could be an adverse action," he said.

3. Causal connection. Courts consider the timing and the totality of the circumstances in determining if there's a connection between the person engaging in the protected activity and the adverse action taken against her, Rodick said.

Recommendation: Separate advocacy from employment matters

"Going behind the backs of others and talking to parents is a problem we encounter all the time from school staff," Stephanos said.

An employee may be engaged in advocacy, but if he is also not doing his job, he's not immune from disciplinary action, Rodick said. "You reach a point where a person's advocacy can't cross a certain line and disrupt the work place," he said. "There are mechanisms for staff to advocate."

Make sure the employee is aware of the district's grievance procedures and how to file a complaint, he said. Then, if the employee continues to disrupt the work place and exhibit behavior that you would normally discipline, handle that as you would other employment matters, Rodick said. "Explain the behavior, why it's disrupting, and what the district is doing about it," he said.

If action is taken against the employee, make sure that the reason for that action is legitimate and clearly documented, Stephanos said. Schools should be conducting regular staff evaluations during the year and documenting any concerns, Rodick added. Any response to a staffer's conduct should align with how the district has handled similar behavior from employees in the past, he said.

"For almost everything a school district does, whether in employment or special education, regularity of process is so important," Rodick said. "The more you [deviate from] your normal process, the worse the case is going to be for you."

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