Special Educator Advocacy: A Case of Retaliation?[*]

Perry A. Zirkel

Ms. D, a special education teacher in New York, became frustrated with what she perceived as her school's shortcomings in relation to the requirements of the Individuals with Disabilities Education Act (IDEA). In September 2014, she filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR) alleging that the evaluations and services for students with disabilities at her school did not meet applicable standards. In April 2015, OCR asked her whether she was willing to mediate her claim. She declined, insisting that OCR proceed with an investigation. In September, OCR again asked about, and she again declined, mediation.

Eleven days later, she began to receive letters of reprimand that alleged various acts of professional misconduct, including unsatisfactory lesson plans and insubordination. Within the next five months, she received a total of sixteen letters of reprimand and three unsatisfactory performance evaluations. Her prior record did not contain any negative feedback.

In February 2016, a few days before OCR's scheduled visit to the school, the district sent her a notice of disciplinary charges, suspending her subject to the school board's ultimate determination. The charges were specific to Ms. D's interactions with one of her students and the student's parent, which accounted for three of the previous sixteen reprimands. After a hearing, the school board terminated her employment. Ms. D filed suit in federal court, alleging that the school board's action constituted retaliation for her advocacy on behalf of students with disabilities. Her primary claim was under Section 504 of the Rehabilitation Act. The defendant

[*] This article was published in *Exceptionality*, v. 30, pp. 57–62 (2022).

filed a motion for dismissal of the lawsuit, which would end the case prior to the "discovery" step, which includes sworn depositions, before a trial.

This case illustrates the legal difficulties that arise upon termination or other adverse employment action in the wake of an employee's special education advocacy. During the pretrial phases of the litigation, the court predictably follows the successive steps of a flowchart-like analysis. The next part illustrates the courts' multi-step analysis under Ms. D's primary legal basis, Section 504, followed by a brief illustrative recap of the alternative legal bases for retaliation claims, such as First Amendment expression.

Section 504

Threshold Step

For Section 504, which here implicitly extends to its sister statute, the Americans with Disabilities Act, the first step is what courts refer to as the "prima facie," or rebuttable, case. More generally, the prima facie case consists of the essential elements that the plaintiff, or suing party, needs to show as a threshold matter before any further judicial proceedings with the claim. For a retaliation claim under Section 504, the requisite elements are that (a) the plaintiff engaged in *protected activity*, such as advocacy for an individual with a disability; (b) the employer took *adverse action* against the plaintiff; and (c) there was a *causal connection* between the protected activity and the adverse action. If the plaintiff sufficiently establishes these requisite elements, the burden shifts to the defendant to establish the next step in the legal analysis.

In Ms. D's case, the court found that the allegations were sufficient for a jury to conclude that she had established the three prerequisites: (a) the filing of the OCR complaint constituted protected activity; (b) the series of written reprimands and negative evaluations, the formal

disciplinary charges, and the termination constituted the requisite adverse action; and (c) the short time period between her reaffirmed insistence on OCR moving ahead to the investigation and the start of the series of reprimands and negative evaluations here sufficed for an inference of causation (*Denicolo v. Board of Education of the City of New York*, 2018).

Another recent special education advocacy case further illustrates the contents and boundaries of these Step 1 elements. In *Norris v. Opelika City Board of Education* (2020), a federal court concluded that (a) the protected activity was a special education teacher's protest to the principal that one of her students was being segregated in physical education class along with her participation in the parent's initiation of an IDEA hearing challenge to this practice; (b) the administration's subsequent removal of her from her classroom without reduction in pay or benefits did not qualify as the requisite adverse employment action, but the administration's reporting her for child abuse and the nonrenewal of her probationary contract each sufficed for this threshold purpose; and (c) the temporal proximity between "a" and "b" was sufficient upon combination with the employer's inferable awareness of "a" to meet the final threshold element of causation.

Intermediate Step

In Section 504 retaliation cases that proceed past the threshold step, the logical next step is for the employer to show that it has a legitimate, nonretaliatory reason for taking the adverse action. Thus, rebutting the teacher's claim, the school district identifies a justifiable cause for its adverse action against the teacher. Ms. D's case did not reach this step, because the district's dismissal motion was limited to challenging whether she has established a prima facie case. In the absence of a subsequent published decision in her case, it is likely that the parties reached a settlement.

However, the issues in the *Norris v. Opelika City Board of Education* case extended to this second step. Here the court concluded that the district sufficiently established that a jury could reasonably determine that the special education teacher's performance deficiencies accounted for her nonrenewal. More specifically, the school district showed that the outside consultant it used to support struggling teachers had identified various classroom management problems of the teacher and had provided various recommendations for improvement, yet the teacher did not effectively implement these strategies upon receiving another year for supervision and improvement. Similarly, the district sufficiently showed that the mandatory nature of child abuse reporting was a legitimate, nonretaliatory reason for this other adverse action.

Final Step

Upon a sufficient showing of Steps 1 and 2 of a Section 504 retaliation claim, the burden shifts back to the plaintiff to show that the asserted legitimate, nonretaliatory reason was merely a pretext, thus leaving the protected activity as the true reason for the adverse action. In the *Norris* case, the court concluded that the teacher had sufficiently met this burden to move the claim to trial for jury determination as to the real reason for the two adverse actions. For the nonrenewal, she did so by showing that her official evaluations resulted in satisfactory ratings and did not show any violations of the requirements of the IDEA. Thus, the back-and-forth for the three steps a genuine factual issue as to whether alleged poor performance was merely a pretext masking retaliation for her protected advocacy as the true reason for her nonrenewal. For the child abuse report, she similarly raised a sufficient factual issue at Step 3, because (a) the principal's report relied on the physical education teachers' accusations that Ms. D had grabbed and dropped one of her students; (b) the principal did not ask for her side of the story or

otherwise investigate whether the suspicion of child abuse was reasonable, and (c) the district had never previously reported a teacher for child abuse.

Similarly, in *Pistello v. Board of Education of Canastota Central School District* (2020) a federal appellate court ruled that the plaintiff special education teacher had sufficiently alleged a factual issue for all three steps to survive the defendant's motion for pretrial rejection of the claim. In this case, the teacher with a long and exemplary record rather suddenly received a series of reprimands and evaluations that culminated in her reassignment in the immediate wake of her sending e-mails to the administration accusing the district of noncompliance with the IEPs of some of her students. Pointing out that a defendant's motions for pretrial disposition requires interpreting ambiguities in favor of the plaintiff, which would put it within the scope of what a jury could reasonably accept or reject, the appellate court identified various reasonable possibilities for inferring Step 3 pretext. For example, she was the only teacher in the district reassigned that year to a different academic level and subject area. Similarly, the district corrected her evaluation reports and reassignment after she obtained legal counsel. However, all that the teacher won in this case was the right to move beyond the district's motion for dismissal of her

As a converse illustration, a federal appellate court concluded that a special education teacher's Section 504 claim that his termination in November 2016 was retaliation for his e-mails to district administrators in September 2016 about his lack of a paraprofessional failed at Step 3, thus ending his case (*Wilbanks v. Ypsilanti Community Schools*, 2018). The district had shown at Step 2 that, as the legitimate, nonretaliatory reason for the termination, he had physically engaged with two of his students in separate incidents in the intervening month of October. Concluding that he did not meet his burden to show pretext, the court pointed out that (a) the

school's video cameras confirmed both incidents; (b) these two teacher actions were contrary to district policy; (c) the district clearly warned him after the first incident that no further instances of such conduct would be tolerated; and (d) the district was duly diligent in investigating the matter prior to the school board's disciplinary determination.

Serving as an additional example, in *Cottrell v. Newport-Mesa Unified School District* (2021) a federal court in California granted the district motion for summary judgment in response to the Section 504 retaliation claim of the district's special education director, who was also the 504 compliance officer. She had engaged in protected advocacy activity for students with IEPs and 504 plans and was subjected to the adverse action of demotion to a teaching role. However, at Step 3, she failed to show that the district's legitimate nondiscriminatory reason for the demotion—the ineffective way she had addressed a teacher's alleged noncompliance with Section 504, exhibiting inappropriate exercise of professional judgment and positional power—was pretextual. The court concluded that various arguments, including her performance record, were not sufficient to establish that this proffered reason was a merely a pretext for retaliation.

Most of the published court decisions concerning retaliation are at the pretrial stage, with the ultimate outcome for those that survive defendants' motions for summary disposition inferably being settlement, abandonment, or an unreported trial. Nevertheless, they show the applicable multi-step sequence that the case law has gradually developed for a logical and disciplined analysis.

Conversely, as a relatively rare example of a published decision after a trial, *Richard v. Regional School Unit 57* (2018) addressed the Section 504 retaliation claim of a general education teacher who engaged in advocacy for more IDEA evaluations and services for students in her inclusionary class. Her allegations and supporting affidavits sufficiently met the three

successive steps for a trial. However, after the trial in which the parties agreed to the judge rather than a jury serving as the fact finder, the verdict was in favor of the defendant-district. On appeal, the plaintiff-teacher pointed to her accepted evidence of pretext, but the appellate court explained that the trial judge had a sufficient basis to find, as a matter of preponderant proof, that the true reason for the adverse action against her was her classroom management problems, not her advocacy for more referrals and alternative placements. Consequently, as the appellate court observed, successfully getting through the three successive hurdles for a Section 504 retaliation trial does not "guarantee . . . a win" at the finish line (p. 58).

Alternate Legal Bases

For retaliation claims in the wake of special education advocacy, the generally less frequent and less productive legal bases are the First Amendment expression clause and state whistleblower laws. For First Amendment expression, a similar multi-step analysis applies, but the Step 1 protected conduct poses a high and often fatal hurdle. More specifically, as the result of a more general Supreme Court public employee decision (*Garcetti v. Ceballos*, 2006), protected activity under the First Amendment does not extend to advocacy or other teacher expression that is pursuant to the teacher's official duties. As canvassed in earlier articles (e.g., DiPietro & Zirkel, 2010; Kallio & Geisel, 2011), this significant narrowing of the scope of expression that the First Amendment covers has defeated most of the subsequent constitutional claims of retaliation for special education advocacy. As a recent example, the U.S. Court of Appeals for the Third Circuit upheld the dismissal of the First Amendment retaliation claim of a special education teacher, because her communications to administrators on behalf of the IDEA rights of her students were solely related to her work responsibilities and assignment rather than constituting expression as a private citizen on matters of public concern (*Cuff v. Camden City*

School District, 2019).

The plaintiff-teacher in *Cuff* fared no better on her alternative legal basis for the alleged retaliation—the state whistleblower law. Pointing out that New Jersey's whistleblower law requires assertions of criminal conduct by public officials, the Third Circuit Court of Appeals concluded that the teacher did not "allege any facts showing that she reasonably believed that the defendants committed a crime in reassigning her to a shared classroom to teach a subject in which she did not specialize" (p. 417). Similarly, despite the variations in the provisions of state whistleblower laws, special education teachers' and supervisors' advocacy-related claims often fail to meet the respective specific requirements, such as employer "wrongdoing" under Pennsylvania's law (*Anderson v. Board of School Directors*, 2014; *Schellbach v. Colonial Intermediate Uni*t, 2017), adverse action under Georgia's law (*Lamar v. Clayton County School District*, 2015), or causal connection under Minnesota's law (*A Xiong v. Minneapolis Public Schools*, 2019).

As a result of the courts' disciplined analysis, only rarely does the plaintiff educator survive the pretrial prerequisites for a Section 504, First Amendment, or whistleblower claim in the wake of special education advocacy. A case that was such an exception was *Molloy v. Acero Charter Schools* (2019). Here, a court denied the defendant's motion to dismiss all of these alternative legal claims of a reading specialist who was terminated after criticizing her school's implementation of the response to intervention approach to not only her supervisors but also her outside hiring agency. However, this initial win merely entitles her to move to the next stage in a costly and increasingly uphill battle to establish an unlikely victorious precedent.

Practical Implications

The clear-cut message for special education personnel and for their employing districts is

to think thrice rather than engaging in kneejerk actions of advocacy and adverse actions, respectively. For the advocacy side, there is no doubt that speaking out for students with disabilities is part of the professional norms of a special education teacher, specialist, or supervisor. Yet, the content, form, and timing of such advocacy merits careful consideration along with the likely consequences of these alternatives, based in least in part on their reasonableness under the circumstances. For the employer side, adverse action is also part of the district's accountability duties, but again careful consideration of the basis and reasonableness of this action is essential.

First, law and ethics are not identical. The "shall" and "shall not" often but not always go in the same direction and to the same extent as the "should" and "should not." Moreover, ethical codes depend on the identified role group and are often broad and aspirational, thus subject to varying interpretations. For example, the Council for Exceptional Children's Code of Ethics (2015) is aimed at "professional special educators" and its advocacy provisions are rather general but not without limits. For example, one provision for advocacy is specific to "professional conditions and resources that will improve learning conditions of individuals with exceptionalities." The other implicitly recognizes possible conflicts between law and ethics, calling for "advocating improvements in the laws, regulations, and policies." Finally, except to the limited extent that state certification laws or local employment policies incorporate the provisions of a particular ethical code (e.g., Zirkel, 2015), fulfilling an ethical provision for advocacy does not equate to legal protection.

Second, although seemingly complicated in terminology and criteria, judicial analysis provides a framework for not only possible litigation but also, as a proactive matter, for the sequential considerations for both the teacher's and the district's side of potential retaliation

cases. As markedly illustrated in the context of Section 504, which extends disability discrimination to retaliation for advocacy by nondisabled third parties on behalf of individuals with disabilities, the initial considerations include protected conduct and adverse action. In this context, both protected conduct and adverse action have broad boundaries. Protected conduct in this context rather easily encompasses expressions of advocacy on behalf of not only students with IEPs but also students under the wider Section 504 scope of disability and child find. Correspondingly, adverse action is not at all limited to termination, extending to nonrenewal and various other employer actions that "well might have dissuaded a reasonable [employee] from [engaging in protected conduct]" (*Denicolo v. Board of Education of the City of New York*, 2018, p. 213). Moreover, as all the steps under Section 504 and as the secondary alternatives of First Amendment expression and state whistleblower laws reveal, the ultimate critical question is whether the protected conduct caused the adverse action. For the answer, various rather common-sense circumstances, including but not at all limited to the temporal proximity between these two foundational elements, are relevant for a judge, a jury, and—proactively—the teacher and the district.

Third, to the extent that litigation is sometimes the inevitable forum for resolution of the two sides' conflicting positions, recognize that the process is rather complicated, costly, and ponderous. The reasons that Section 504 is the primary legal basis include that it has a significantly broader scope of protected conduct than does First Amendment expression and, compared to state whistleblower acts, offers direct access to the generally higher money damage awards and the recovery of attorneys' fees for prevailing plaintiffs. However, regardless of the legal basis or the judicial forum, this recent representative sampling of the relevant case law shows that the outcome odds of winning this steeplechase race of hurdles and puddles is not in

favor of the plaintiff teacher.

Thus, legal literacy is significantly useful but not entirely sufficient for special education personnel. “Advocacy” and “retaliation” are broad terms that warrant careful and proactive consideration. As a professional matter, it is in the interest of the teacher and the district as well as students with disabilities and their parents to engage in collaborative and transparent relationships and communication that builds trust in optimizing the use of limited resources for effective education rather than retaliation litigation.

References

Anderson v. Board of School Directors, 574 F. App'x 169 (3d Cir. 2014).

A Xiong v. Minneapolis Public Schools, 2019 WL 4409715 (Minn. Ct. App. Sept. 16, 2019).

Cottrell v. Newport-Mesa Unified School District, 78 IDELR ¶ 286 (C.D. Cal. 2021).

Council of Exceptional Education. (2015). Code of ethics. Retrieved from https://exceptionalchildren.org/standards/ethical-principles-and-practice-standards

Cuff v. Camden City School District, 790 F. App'x 413 (3d Cir. 2019).

Denicolo v. Board of Education of the City of New York, 328 F. Supp. 3d 204 (S.D.N.Y. 2018).

DePietro, G. K., & Zirkel, P. A. (2010). Employee special education advocacy: Retaliation claims under the First Amendment, Section 504 and the ADA. *West's Education Law Reporter, 257*, 823–838.

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Kallio, B. R., & Geisel, R. R. (2011). To speak or not to speak: Applying *Garcetti* and whistleblower laws to public school employee speech. *West's Education Law Reporter, 264*, 517– 532.

Lamar v. Clayton County School District, 605 F. App'x 804 (11th Cir. 2015).

Molloy v. Acero Charter Schools, 75 IDELR ¶ 91 (N.D. Ill. 2019).

Norris v. Opelika City Board of Education, 77 IDELR ¶ 250 (M.D. Ala. 2020).

Pistello v. Board of Education of Canastota Central School District, 808 F. App'x 19 (2d Cir. 2020).

Richard v. Regional School Unit 57, 901 F.3d 52 (1st Cir. 2018).

Schellbach v. Colonial Intermediate Unit, 2017 WL 4542372 (Pa. Commw. Ct. Oct. 12, 2017).

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (2018).

Wilbanks v. Ypsilanti Community Schools, 742 F. App'x 84 (6th Cir. 2018).

Zirkel, P. A. (2015). Revocation or suspension of educator certification: A systematic analysis of the case law. *Journal of Education and Law, 44*, 539–591.