UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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[Complainant] Complainant v. Texas Education Agency Defendant	Docket No.: 19-73-CP Reprisal for Disclosure of Certain Information Proceeding OIG: REDACTED

Appearances: Andrew D. Levy and Anisha S. Queen, Brown, Goldstein & Levy, Baltimore, MD for [Complainant].

Drew L. Harris, Glorieni Azeredo, and Cynthia Akatugba, Office of the Attorney General, Austin, TX for Texas Education Agency.

Before: Robert G. Layton, Administrative Law Judge

ORDER

This decision addresses a complaint filed by [Complainant], a former employee of the Texas Education Agency (TEA). TEA is the state agency overseeing elementary and secondary education in Texas. TEA participates in grant programs administered by the U.S. Department of Education (the Department), including 20 U.S.C. § 1400(a), the Individuals with Disabilities in Education Act (IDEA). On September 15, 2018, the Department's Office of the Inspector General (OIG) received [Complainant]'s complaint. The complaint alleges that TEA took unlawful personnel actions against her in violation of the whistleblower protections provided by 41 U.S.C § 4712 (The NDAA). On October 28, 2019, OIG sent the Secretary of Education (the

Secretary) a report from OIG's investigation and the next day, the Secretary delegated authority to the Director of the Office of Hearings and Appeals to render a final agency decision on behalf of the Secretary. On November 12, 2019, the parties appeared before the undersigned in a live hearing on the record to present additional evidence, facts, and arguments in support of their positions.

41 U.S.C. § 4712 addresses retaliation by a federal grant recipient (grantee) against an employee for whistleblowing. The statute prohibits a grantee from retaliating against an employee by discharging, demoting, or otherwise discriminating against the employee for disclosing "information that the employee reasonably believes is evidence of gross mismanagement of a Federal . . . grant, a gross waste of Federal funds, an abuse of authority relating to a Federal . . . grant, . . or a violation of law, rule, or regulation related to a Federal . . . grant".[1] It protects employee's disclosures to seven groups of individuals, including an Inspector General or a "management official or other employee of the . . . grantee who has the responsibility to investigate, discover, or address misconduct."[2]

If an employee believes they have been subject to a reprisal in violation of the statute, the employee may submit a complaint to OIG within three years of the reprisal.[3] If OIG determines that the complaint is not frivolous, that it alleges a violation of the statute, and that it has not been previously addressed in another Federal or State judicial or administrative proceeding initiated by the employee, OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the employer, and the Secretary.[4]

[1] 41 U.S.C. § 4712(a)(1).
[2] 41 U.S.C. § 4712(a).
[3] 41 U.S.C. § 4712(b).
[4] Id.

Upon receipt of the OIG report, the Secretary or her designee must issue the agency decision within 30 days.[5] The decision must address "whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal."[6] If the decision determines there was reprisal, it may order the entity to :

(1) "take affirmative action to abate the reprisal"

(2) reinstate the employee "to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken" or

(3) "pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency."[7]

The OIG report "sustained [Complainant]'s allegations of whistleblower reprisal."[8] The OIG report found that [Complainant]'s communications with OIG and TEA's internal audit office were a contributing factor in TEA's decision to terminate her employment. Although TEA asserted other reasons for firing [Complainant], the OIG report found TEA did not provide clear and convincing evidence that it would have taken the same the personnel action without [Complainant]'s disclosure.[9]

ISSUES

[Complainant]'s complaint states she received a verbal and a written reprimand.[10] [Complainant] states her employment was terminated after she made disclosures to OIG, to

[5] 41 U.S.C. § 4712(c)(1).
[6] Id.
[7] Id.
[8] U.S. Dep't of Educ., Office of Inspector General Report of Investigation (Sept. 5, 2019) (hereafter OIG Report) at 2 [3] [Bracketed References to page in the PDF of the Redacted OIG Report, Docket Number 2]
[9] Id.
[10] OIG Report at 1-2 [2-3]; [Complainant], ED-OIG Whistleblower Complaint Form (Sept. 15, 2018) (hereafter OIG Complaint) at 3,5 [78, 80].

TEA's Internal Audit office (IA office), to the Travis County District Attorney, to Ruth Ryder at the United States Department of Education's Office of Special Education Programs, and to the State Comptroller's and Auditor's offices[11] that TEA was not compliant with the law in its administration of IDEA funds. IDEA funds were paid by TEA to a contractor, SPEDx. [Complainant] complained that, among other issues, the contract was awarded as a sole source contract because of a personal relationship between the vendor and the Deputy Commissioner of Academics for TEA, Penny Schwinn.[12]

TEA asserts that although [Complainant] made protected disclosures to TEA's internal auditor and to the OIG, she failed to show that her protected disclosures were contributing factors in the decisions to issue verbal and written reprimands.[13] TEA also claims that although [Complainant] showed that the disclosure to TEA's internal auditor was a contributing factor, she failed to show that her request to OIG and other bodies asking for an investigation was a contributing factor in their decision to fire [Complainant].[14] On its shifted burden of proof, TEA argues it has provided "clear and convincing" evidence that it would have fired [Complainant] absent her disclosures.[15] TEA claims the Commissioner of Education made that decision based on news reports of allegations in a lawsuit where [Complainant] was accused, while in a prior position, of interfering with the reporting of abuse of a minor special education student.[16]

The issues to be addressed are:

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[11] OIG Complaint at 2,4,6 [77, 79, 81]. The Travis County District Attorney and the State Comptroller's and Auditor's offices indicated that they did not have jurisdiction over the matter. [Complainant], *Letter to Marcus Culpepper, Ass't Special Agent in Charge, U.S. Dep't of Education Office of the Inspector General* (Nov. 21, 2017) (hereafter OIG Investigation Request) [359].
[12] Bill Wilson, Texas Education Agency, *Investigation Memorandum* (November 17, 2017) (hereafter TEA Investigation Memo) at 1 [59]; OIG Investigation Request [359].
[13] Respondent's Post-Hearing Brief at 18.
[14] Id. at 18-19.
[15] Id at 21, 29.
[16] Id at 21-29

1. Did [Complainant] meet her initial burden of showing that (1) she was an employee of a grantee of a grant administered by the Department; (2) she made a disclosure or disclosures protected by 41 U.S.C. § 4712; and (3) the disclosure was "a contributing factor" in the personnel actions taken against her by TEA?
2. Did TEA demonstrate, by clear and convincing evidence, that it would have taken the same personnel actions in the absence of [Complainant]'s disclosures?

SUMMARY OF ORDER

This decision finds [Complainant] has not met her initial burden to show her disclosures were a contributing factor in her verbal and written reprimands by TEA. This decision further finds that [Complainant] has met her initial burden to show that her disclosures were a contributing factor in her firing by TEA, and finds that TEA has not met its shifted burden to show by clear and convincing evidence that it would have fired [Complainant] even without [Complainant]'s disclosures. [Complainant] is entitled to damages as set forth in this order to address her retaliatory firing by TEA.

FINDINGS OF FACT

[Complainant]'s Hiring and Background

[Complainant] began her job as TEA's Director of Special Education on August 15, 2017.[17] Her role as State Director of Special Education included overseeing the work of IDEA Support for the state.[18] In her role, [Complainant] reported directly to the Executive Director of

[17] Letter from Lisa Adame to [Complainant] (Aug. 2, 2017) [716].
[18] TEA, Job Bulletin, Director II (Director of Special Education Continuous Improvement), at 1 [267].

Special Populations, Justin Porter (Porter).[19] The salary for her job listing was between $76,356 and $129,136.92 annually.[20] [Complainant] was offered the job for $125,004 annually.[21] [Complainant] was informed that TEA would not pay for moving expenses, but her salary would be reviewed again in six months.[22]

Prior to joining TEA, [Complainant] served in different roles in education in the state of Oregon.[23] She was the subject of two separate claims. In 2007, [Complainant] was accused of improper physical contact with a student, and a subsequent investigation cleared her of the allegation.[24] In 2015, two teaching assistants accused [Complainant] of attempting to prevent the reporting of alleged abuse of a six year old student.[25]

Before hiring [Complainant], Porter and other TEA staff conducted a background check. This check included speaking to numerous references.[26] One of those references was [Complainant]'s former colleague and a former TEA Director, Greg Sampson (Sampson), who had worked with TEA from February until September 2017 and who recommended [Complainant]'s hiring.[27] TEA conducted Google searches and determined that the 2007 allegation was without merit and elected to move forward with hiring [Complainant].[28] Porter says he did not know of the allegations from 2015 of impeding the reporting of abuse, and first

[19] Id.
[20] Id.
[21] Letter from Lisa Adame to [Complainant] (Aug. 2, 2017) [716].
[22] C45 – "Texts [Complainant] to J Porter," at 1, 2.
[23] C37 – "[Complainant] CV."
[24] OIG Report at 13 [14]; Memorandum from Justin Porter to Penny Schwinn (July 27, 2017) [697].
[25] *Eastman v. Rainer Sch. Dist.*, Complaint (D. Or. Nov. 14, 2017) at 2 [289].
[26] TEA Employment Reference Form [713-715].
[27] Letter from Greg Sampson (Sept. 10, 2018) [57]; OIG Notes from Interview with Justin Porter (Nov. 20, 2018) [246].
[28] OIG Notes from Interview with Justin Porter at 1 (Nov. 20, 2018) [246]; Memorandum from Justin Porter to Penny Schwinn (July 27, 2017) [697].

learned about these allegations from a news article published after the lawsuit was filed in November, 2017.[29]

Counseling and Verbal Reprimand of [Complainant]

During the OIG's investigation, Porter submitted notes memorializing conversations he had with or about [Complainant] between September 12 and November 7, 2017.[30] Porter's notes indicate that [Complainant] was counseled three times between September 14 and October 4, 2017.[31] She was told that as the Director of Special Education for the state, her words carried more weight than in her previous job and that her words were "de facto policy", so she could not share as much personal information and could not act as casually in her interactions.[32] In text messages submitted by [Complainant], on September 25, 2017 she said she appreciated Porter's feedback and asked Porter not to stop the feedback.[33] Those same text messages included very casual and informal communication between Porter and [Complainant], discussing their pets and joking about finding Porter a date.[34]

[Complainant] also submitted notes of her time at TEA.[35] She indicates she had a conversation with SPEDx and a subcontractor on the SPEDx contract, where she expressed "concerns about the process and product" and said that "we needed to expect more so that people didn't think the vendors were just [Schwinn's] friends and colleagues."[36]

On October 5, 2017, [Complainant] told Porter that [Complainant]'s predecessor had told her "the entire SPEDx project was unnecessary and only a way to funnel money to Schwinn's

[29] OIG Notes from Interview with Justin Porter at 2 (Nov. 20, 2018) [247], Memorandum from Justin Porter to Penny Schwinn (Dec. 10, 2017) [696].
[30] Justin Porter, Notes [271-276].
[31] Id. at 1 [272]
[32] Id.
[33] C45 – "Texts [Complainant] to J Porter," at 12.
[34] Id. at 17, 19.
[35] [Complainant], Notes [146-154].
[36] Id. at 2 [146].

friend Richard Nyankoni."[37] [Complainant] agreed with that assessment. Schwinn was Porter's first-line supervisor. Porter disagreed and said that was a serious allegation. Porter said the analysis SPEDx was doing was crucial and they were the only company in the market able to produce the analysis.[38]

On October 6, 2017, [Complainant] met with an advocacy group who expressed concerns about the ethics of SPEDx and the contract.[39] [Complainant] shared the concerns with Porter in writing.[40] The same day, Porter asked [Complainant] if she had "spread rumors about the SPEDx contract" being awarded to Schwinn's friends.[41] [Complainant] said she had only told the two vendors.[42] Porter's notes indicate that on October 6, 2017, Schwinn contacted Porter to let him know that she had heard that she was being accused of impropriety.[43] Porter confronted [Complainant], and indicated that Schwinn would want to talk to [Complainant] about [Complainant]'s communication on the matter.[44]

On October 9, [Complainant] received a verbal reprimand from Schwinn and Porter. This was one of the personnel actions that [Complainant] describes as retaliation for a protected whistleblower disclosure.[45] According to [Complainant], "Schwinn verbally reprimanded me because I had asked the SPEDx vendors to step up their work and mentioned their personal connection to her."[46] [Complainant] said "[Schwinn] reprimanded me for mentioning that the SPEDx vendors were her colleagues and friends," stating that it was "incredibly unprofessional

[37] Justin Porter, Notes at 3 [273].
[38] Id.
[39] [Complainant], Notes at 2 [146]
[40] Id.
[41] Id.
[42] Id.
[43] Justin Porter, Notes at 3 [273].
[44] Id.
[45] OIG Complaint at 3 [78]
[46] Id.

for insinuating" that Schwinn was committing an illegal act.[47] Schwinn said she had heard "a litany of unprofessional things" about [Complainant] from other people in the office and that [Complainant] is known as someone who talks too much and has "loose lips."[48]

Porter's notes say that on October 11, 2017, [Complainant] complained she had been targeted by Schwinn during the October 9 meeting, and that Schwinn and the CEO of the SPEDx subcontractor (Heitz) would continue to "gang up on her."[49] When Porter indicated that he did not believe that was the case, and that he wanted to help [Complainant] find a way forward, [Complainant] indicated that she did not think that was possible and indicated that she would be looking for another job.[50]

[Complainant]'s Disclosures to TEA's Internal Audit Office

The morning before the meeting with Porter and Schwinn where [Complainant] has indicated that she was verbally reprimanded, [Complainant] brought her concerns to Bill Wilson (Wilson), who was the Director of TEA's internal audit office.[51] Wilson indicates in his investigation memorandum that [Complainant] mentioned she was going into a meeting with Schwinn and was worried she might be in trouble for criticizing Schwinn's decision to sole source a contract.[52] [Complainant] outlined her accusations about the SPEDx contract to Wilson.[53] Wilson's report states [Complainant] expressed her hope that things would get worked out in the meeting and Wilson asked [Complainant] to get back to him.[54] Wilson reported that [Complainant] did not get back to Wilson until November 6, 2017.[55] In contrast,

[47] Id.
[48] [Complainant], Notes at 4 [148].
[49] Justin Porter, Notes at 3 [273].
[50] Id.
[51] [Complainant], Notes at 3 [147], TEA Investigation Memo at 1 [59].
[52] TEA Investigation Memo at 1 [59].
[53] Id.
[54] Id.
[55] Id.

[Complainant]'s notes indicate that she spoke to Wilson on October 10, 2017 and October 12, 2017, but her notes indicate that those conversations were about wanting whistleblower protection, but do not indicate that she brought forth any new information or claims.[56]

Letter of Reprimand

On November 3, 2017, Porter issued a Letter of Reprimand to [Complainant] for "inadequate job performance and conduct that negatively impacts TEA."[57] The letter set out four areas of challenges.

First, the letter said that on October 6, 2017, [Complainant] made accusations about Schwinn and the SPEDx contract to a subcontractor on the SPEDx contract.[58] The letter indicates that, while [Complainant] had the option of reporting the allegations "through appropriate channels, such as the agency's internal auditor of the State Auditor's Office," that it was "not appropriate to make an allegation of illegal or unethical conduct to a vendor."[59] Additionally, the letter indicates that the allegation could have damaged Schwinn's reputation and "negatively impacted the work of the agency. . . ."[60]

Next, the letter said that, in an October 24, 2017 meeting with Education Service Center Directors of Special Education, [Complainant] publicly criticized the TEA's decision to engage in an analysis of IEP data, which was the work being done by SPEDx.[61] The letter indicates that [Complainant] had informed Porter that she "candidly expressed personal opinions to the group, including that the project had 'gotten off on the wrong foot' and 'could have been launched more

[56] [Complainant], Notes at 4, 5 [148-149]
[57] Letter of Reprimand from Justin Porter to [Complainant] (Nov. 3, 2017) at 1 [85].
[58] Id.
[59] Id.
[60] Id.
[61] Id. at 2 [86]. In Porter's notes of his discussions with [Complainant], he indicates that his defense that the SPEDx contract was necessary on October 5, 2017 was that the "IEP analysis" was crucial and that SPEDx was the only company in the market able to produce the analysis. Justin Porter, Notes at 3 [273].

efficiently.'"[62] The letter indicates that these comments were taken by some in attendance as criticism of TEA and the project as a whole, and that as Director of Special Education, [Complainant] had a responsibility to represent TEA's position and not [Complainant]'s own "personal preferences and opinions" because it "weakens the effectiveness of the work."[63]

The letter also said during the week of October 16, 2017, while [Complainant] was representing TEA at the National Association of State Directors of Special Education Conference, she "openly discussed data from a Louisiana data analysis report that had been shared with you in confidence by the vendor." The letter indicates that leaders from two other states' Departments of Education expressed concern, and that TEA would likely need to issue formal apologies to both states to repair trust and state-level relationships. The letter indicated that this "behavior reflected a lack of professional judgement and discretion." The letter also addressed that during the same conference [Complainant] had spoken "disparagingly, in an open setting, of TEA leadership staff and of the decision made by TEA to engage in an analysis of data contained in IEP documentation," which was inappropriate when representing TEA as Special Education Director.[64]

The letter further addresses "multiple examples of both internal and external stakeholders voicing concern over comments that you have made about the agency, the agency leadership, and your colleagues." The letter said that [Complainant]'s comments caused discomfort and offense and that her criticism of agency programs and initiatives conflicts with her job responsibilities, asserting that they were "inaccurate, unfounded, and inappropriate."[65]

[62] Letter of Reprimand from Justin Porter to [Complainant] (Nov. 3, 2017) at 2 [86]
[63] Id.
[64] Id.
[65] Id. at 2-3 [86-87].

The letter of reprimand goes on to restate previous counseling that [Complainant], as the Director of Special Education, cannot express "negative opinions regarding agency policies, practices, or decisions." It said [Complainant] is welcome to discuss her concerns with Porter "in a solutions-oriented manner" or, can raise "concerns through the chain of command in accordance with agency operating procedures."[66]

The letter of reprimand established a plan to improve [Complainant]'s performance moving forward, which included requiring that Porter be physically present when [Complainant] interacts with external stakeholders and that [Complainant] respond to emails and text messages only by email from her TEA email account with Porter copied on the email.[67] Porter indicated that this would provide an opportunity for additional coaching regarding "appropriate communications."[68] The letter goes through additional requirements for [Complainant], and ends with a note that there is an "overall expectation" that she would conduct herself in a professional manner when representing TEA or engaging with stakeholders as the TEA Special Education Director.[69] It stated that failure to meet the expectations in the letter "may result in further disciplinary action up to and including termination."[70]

The letter states that, "these directives are not intended to prohibit the reporting of conduct which you believe to be illegal or unethical," and that "such conduct may be reported through your chain of command or to appropriate authorities."[71] Finally, the letter of reprimand indicates that [Complainant] was hired for her knowledge of special education, her alignment with a student-first philosophy, and openness to new ideas and sets forth optimism about moving

[66] Id. at 3 [87].
[67] Id.
[68] Id.
[69] Id.
[70] Id.
[71] Id. at 4 [88].

forward.[72]

Period after Reprimand Letter

On November 6, 2017, [Complainant] called Wilson to report that she had been "thrown 'under the bus' by [Schwinn] and might lose her job."[73] [Complainant] also told Wilson that she had reported her concerns about the sole source contract to the State Auditor's Office, the Attorney General's Office, and OIG.[74] The date of [Complainant]'s actual complaint to OIG alleging improprieties surrounding the SPEDx contract was November 21, 2017.

Porter stated that on November 7, 2017, [Complainant] came into his office and said she knew she was going to be fired because she had been warned by her attorney that Texas whistleblower laws did not offer much protection.[75] Additionally, Porter's notes indicate that [Complainant] had "off-handedly" mentioned that she had discussed her concerns with the Director of Special Education at ESC Region 4 over the weekend.[76] Porter told her that this contact with an external stakeholder was inappropriate and, pursuant to the letter of reprimand, she was not to have a discussion like this with an external stakeholder without Porter being present.[77] Porter told her that "while she had the duty and the right to report misconduct, externally discussing unsubstantiated claims or unethical conduct on the part of TEA leadership amounted to defamation and slander and that she could lose her job for it and be held personally liable."[78] According to Porter, [Complainant] responded that she would be talking to her attorney about this on November 9th.[79]

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[72] Id.
[73] TEA Investigation Memo at 1 [59].
[74] Id.
[75] Justin Porter, Notes at 6 [276].
[76] Id.
[77] Id.
[78] Id.
[79] Id.

TEA's Internal Investigation

In his notes, Porter indicates that while discussing the letter of reprimand with [Complainant] on November 3, 2017, she said "she had informed internal auditing staff member Bill Wilson of her concerns" regarding the SPEDx contract and that "she felt that that gave her whistleblower protection status," and that she did not want Porter to share this with "our chain of command."[80] On November 6, 2017, Porter sent an email to Wilson asking him to confirm that [Complainant] had reported concerns about the SPEDx contract and whether those concerns were expressed before October 9, 2017, which was the day of the "verbal reprimand."[81] Also on November 6, 2017, Wilson met with Schwinn and Porter to discuss [Complainant]'s allegations.[82] The next day, November 7, 2017, Schwinn formally asked Wilson to conduct an internal investigation "into program's actions related to the SPEDx contract."[83] The request by Schwinn, who was accused of the contract actions, said that "given the offensive accusations related to agency staff misconduct, I would actually like this cleared up as soon as possible."[84] The Deputy Commissioner of Finance, who had been copied on the request for an investigation, called Wilson on November 9, 2017. He told Wilson that Texas Commissioner of Education Mike Morath wanted the investigation completed by November 17, 2017.[85] Wilson reviewed a number of documents, and interviewed Schwinn, Porter, and the CEO of SPEDx and Heitz, as well as TEA's Director of Purchasing and Contracts. Wilson issued an Investigation Memorandum on November 17, 2017.[86] The determination of the investigation by Wilson's office that was reported in the Investigation Memorandum was that "the accusations could not be

[80] Id. at 5 [275].
[81] Email from Justin Porter to William Wilson (Nov. 6, 2017) [490].
[82] TEA Investigation Memo at 2 [60].
[83] Email from Penny Schwinn to William Wilson (Nov. 7, 2017) [491], TEA Investigation Memo at 2 [60].
[84] Email from Penny Schwinn to William Wilson (Nov. 7, 2017) [491].
[85] Bill Wilson, Notes [496].
[86] TEA Investigation Memo at 1, 3 [59, 61]

substantiated, and the complainant's charges were made without basis and were not supportable."[87] The Memorandum also said [Complainant] had reported her concerns to the Texas State Auditor, the Attorney General's Office, and to OIG.[88]

On November 7, 2017, the same day that the internal investigation was requested, [Complainant] came to Porter's office to express concern that she would be fired.[89] During that conversation she indicated to Porter that she had brought her allegations to the Travis County District Attorney and to Ruth Ryder (Ryder) at the United States Department of Education's Office of Special Education Programs (OSEP), which oversees the IDEA grant.[90] Porter's notes further indicate that [Complainant] told him that Ryder expressed that she had "been concerned about Texas and IDEA funds for some time and would be looking into it."[91]

2015 Oregon Lawsuit

On November 14, 2017, two former instructional assistants with the Rainer School District (RSD) in Oregon filed a civil lawsuit in the federal district court in Portland, Oregon against [Complainant], her husband, and the school district.[92] The lawsuit alleged that [Complainant] and her husband attempted to prevent the plaintiffs from reporting allegations of abuse of a special education student, and when the plaintiffs did report the abuse they were harassed and retaliated against.[93] Articles began appearing in newspapers in the days that followed.[94] [Complainant] learned of the lawsuit on November 17, 2017.[95]

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[87] Id. at 2 [60].
[88] Id. at 1 [59]
[89] Justin Porter, Notes at 6 [276].
[90] Id.
[91] Id.
[92] *Eastman v. Rainer Sch. Dist.*, Complaint (D. Or. Nov. 14, 2017) at 1-3 [288-291].
[93] Id. at 2.
[94] *See* Aimee Green, *School employees were ostracized for reporting suspected child abuse, $1.8m suit says*, PACIFIC NORTHWEST NEWS, Nov. 17, 2017 [337-341]; *School employees file $1.8M lawsuit over alleged harassment*, ASSOCIATED PRESS, Nov. 18, 2017 [345].
[95] OIG Complaint at 6 [81].

On the evening of Saturday, November 18, 2017, Porter sent an email to Schwinn, Von Byer (Byer), TEA's General Counsel, and another attorney in the General Counsel's office notifying them that an article about the lawsuit was posted on Facebook by "a local Austin independent advocate."[96] Porter asked if there was anything he should do, and said he was meeting with Byer "on a related topic" on Monday.[97]

Morath admitted during the live hearing that he learned about the lawsuit and the allegations in the lawsuit during the weekend of November 18 and 19, 2017 through a phone call from Schwinn, who [Complainant] had accused of wrongdoing in the SPEDx contract.[98] Morath said he read the complaint when he came into the office on Monday, November 20th.[99] Morath's testimony was contradictory. He testified that he found the allegations "unbelievable", but then said he knew that "any red-blooded Texas parent" who read the allegations was going to have "basically the same reaction that he did, which is unbelievable righteous indignation and disgust that TEA should employ somebody like this that's credibly accused of this kind of crime."[100]

Morath used the term "credibly accused," despite finding it unbelievable, despite not seeking [Complainant]'s version of the events, and despite not conducting any investigation. Morath claimed during his live testimony that after reading the complaint he made the decision that [Complainant] "had to go" and that, on that very same day, November 20, 2017, Morath told his "general counsel they needed to get rid of her effectively immediately."[101] Morath said that once [Complainant] was accused, her side of the story "fundamentally didn't matter".[102] Aside

[96] Email from Justin Porter to Von Byer, Gene Acuna, and Penny Schwinn (Nov. 18, 2017) [344]
[97] Id.
[98] Hearing Transcript 200:15 - 201:10.
[99] Hearing Transcript 201:11-12; 229:2-5.
[100] Hearing Transcript 201:16 – 203:13.
[101] Hearing Transcript 203:14-204:2.
[102] Hearing Transcript 204:6-21; 231:1-18.

from Morath's uncorroborated live testimony, there is no evidence that an intent to fire [Complainant] was expressed to anyone before November 22, 2017.

OIG Whistleblower Complaint

On November 21, 2017, [Complainant] sent a letter to the OIG Assistant Special Agent in Charge of the Dallas OIG office asking OIG to "conduct an investigation" of the award on the SPEDx contract on a "noncompetitive sole-source basis" using "IDEA federal funds."[103]

On that same day, November 21, 2017, Bill Aleshire sent a letter via email to Morath with copies sent to Schwinn and Porter, indicating that he was representing [Complainant] and informing the TEA leadership that [Complainant] "filed a formal complaint with the DOE office of Inspector General seeking an investigation of the SPEDx contracting."[104]

Although they were aware of [Complainant]'s earlier communications with TEA's internal auditor, Mr. Aleshire's letter was the first concrete notification Morath, Schwinn, and Porter received of [Complainant]'s OIG filing. [Complainant] had also told Wilson that she had contacted the OIG.[105] In Wilson's November 17, 2017 Investigation Memorandum, Wilson stated that [Complainant] "said that she reported her concerns about the sole source contract to the SAO [State Auditor Office], the AG [Attorney General] Office, and OIG."[106]

[Complainant]'s Firing

On November 22, 2017, TEA sent [Complainant] a letter signed by TEA's Interim Human Resources Director notifying her that her employment with TEA was terminated effective the end of the business day that same day.[107] The Interim Human Resources Director

[103] OIG Investigation Request [359].
[104] Letter from Bill Aleshire to Mike Morath, Commission of TEA (Nov. 21, 2017) [214].
[105] Hearing Transcript 207:4-10.
[106] TEA Investigation Memo at 1 [59].
[107] Letter from Lisa Adame to [Complainant] (Nov. 22, 2017) [163]

stated she had not heard of any employment action against [Complainant] prior to November 22, 2017, and that normally she would be aware of any such action prior to the date of the action.[108] Copies of this letter were sent to Schwinn and Porter.[109] Attached to the letter was a memorandum from Porter to Morath entitled "Recommendation of Termination – [Complainant]" and dated November 22, 2017.[110] The memorandum recommend the termination of [Complainant]. At the bottom of the memorandum is an approval of the action signed by Morath, with the approval dated November 22, 2017.[111] Porter and the Interim Human Resources Director have both indicated that the termination letter was emailed to [Complainant] after she did not respond to calls from Porter or the Interim HR Director.[112] [Complainant] indicated that because November 22, 2017 was the day before Thanksgiving, she left work at noon and was driving with her husband and 32 year old foster son when she was called by her attorney telling her that a newspaper reporter had called indicating that [Complainant] had been fired, and when she checked her email she found the termination letter.[113]

[Complainant]'s Whistleblower Complaint

Marcus Culpepper is the OIG employee that [Complainant] contacted on November 21, 2017 to ask that the SPEDx contract be investigated. On April 6, 2018, Culpepper informed [Complainant] that she could file a complaint as a whistleblower.[114] Culpepper sent [Complainant] a complaint form, which she submitted on September 15, 2018. In her complaint, [Complainant] requested as a remedy that she would be "[s]atisfied with $283,833 in compensation for my losses (plus legal fees if any)" which include pay from November 22, 2017

[108] OIG Notes from Interview of Lisa Adame (Nov. 20, 2018), C3, at 2.
[109] Letter from Lisa Adame to [Complainant] (Nov. 22, 2017) [163]
[110] Memorandum from Justin Porter to Mike Morath (Nov. 22, 2017) [164].
[111] Id.
[112] OIG Report at 12 [13]; OIG Notes from Interview with Justin Porter at 2 (Nov. 20, 2018) [247].
[113] Hearing Transcript 79:11 - 80:19.
[114] OIG Complaint at 1 [76]; OIG Report at 1 [2].

through the end of the 2018-2019 school year, a claimed overtime of $2,000, moving expenses, estimated "reputation reconciliation" costs, and legal costs for an attorney to draft the request for an OIG investigation and $3,000 of pro bono work that [Complainant] "would like to reimburse."

OIG Investigation

Upon receipt of [Complainant]'s whistleblower complaint, OIG launched an investigation. OIG interviewed a number of current and former TEA employees between November 2018 and April 2019, including, [Complainant], Porter, Schwinn, Wilson, the Interim Director of Human Resources at the time [Complainant] was terminated, and Greg Sampson, the former TEA employee who had recommended that [Complainant] be hired by TEA.[115]

In addition to the interviews, OIG investigators considered a number of submitted documents, including notes submitted by Porter recalling his conversations with and about [Complainant] between September 12, and November 7, 2018, and notes submitted by [Complainant] with her complaint recalling her impressions of conversations between May 2017 and November 22, 2017, the day she was terminated.[116] Additionally, TEA sent supplemental information on December 20, 2018 to OIG regarding its hiring processes and changes made in the time since TEA hired [Complainant].[117] On December 21, 2018, OIG sent an email to Byer requesting clarification about the reasons for [Complainant]'s termination.[118] On January 10, 2019, Jean Wagner sent a response email on behalf of the TEA General Counsel's office.[119] On April 1, 2019, OIG also issued an Inspector General Subpoena to TEA requesting "documents

[115] OIG Report at 10-12, 13-15 [11-13, 14-16]. *see also* Hearing Transcript 226:8-13; Declaration of Penny Schwinn (Nov. 5, 2019) at 1; OIG Notes from Interview with [Complainant] (Feb. 21, 219) [264-265].
[116] Notes of [Complainant] [145-153].
[117] OIG Report at 12 [13].
[118] OIG Report at 12 [13]; Email from Todd Gearman to Von Byer (Dec. 21, 2018) [752].
[119] OIG Report 12-13 [13-14]; Email from Jean Wagner to Montgomery Meitler (Jan. 10, 2019) [754-756].

and records relating to the employment of [Complainant]."[120]

On September 5, 2019, OIG issued its report of investigation. OIG concluded that the verbal and written reprimand were not done in retaliation for protected disclosures because all protected disclosures occurred after or contemporaneous with the reprimands.[121] But the OIG investigation "sustained [Complainant]'s allegations of whistleblower reprisal" as it relates to the decision to terminate her employment.[122] OIG concluded that TEA knew of [Complainant]'s disclosure to Wilson on November 6 and knew of [Complainant]'s OIG complaint on November 21, 2017 when it decided to fire her and failed to provide clear and convincing evidence that it decided to terminate [Complainant]'s employment prior to the disclosures.[123] Additionally, the OIG investigation concluded that TEA failed to meet its burden to provide clear and convincing evidence that it would have fired [Complainant] absent her disclosures.[124] OIG found the timing of the termination showed reprisal,[125] that TEA's motive to retaliate was evidenced by "statements made relating to protecting the reputation of TEA and the Deputy [Commissioner],"[126] and that TEA did not provide clear and convincing evidence that "it takes similar actions against employees who are otherwise similarly situated."[127]

Hearing and Decision Process Before OHA

On October 28, 2019, OIG hand delivered its report of the investigation to the Office of the Secretary of the U.S. Department of Education.[128] The following day, on October 29, 2019, the Secretary delegated to the Director of the Office of Hearings and Appeals (OHA) the

[120] OIG Report at 13 [14].
[121] Id. at 21-22 [22-23].
[122] Id. at 2 [3].
[123] Id. at 23-24 [24-25].
[124] OIG Report at 24 [25].
[125] Id. at 20 [21].
[126] Id. at 24 [25].
[127] Id.
[128] Email from Antigone Potamianos to Robert Layton and Howard Sorensen (October 31, 2019).

authority to render a final agency decision on behalf of the Secretary or to delegate that responsibility to an Administrative Law Judge or Administrative Judge.[129] As Acting Director of OHA and as an Administrative Law Judge, the undersigned was assigned responsibility for overseeing this case and rendering a final agency decision.

The next day, on October 30, 2019, a Notice of Hearing and Order Governing Proceeding was issued establishing the schedule for filings and live testimony in this matter. The statute requires that this decision be issued within 30 days of the October 28, 2019 Secretary's receipt of the OIG investigation report, or by November 27, 2019.[130] Additionally, the undersigned looked to the decision from the United States Court of Appeals for the Eighth Circuit's decision in *Bus. Comm., Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013) for guidance as to the due process requirements when rending a final agency decision in a whistleblower case like this.[131]

Because of the short timeline, a live hearing was scheduled for 13 days later, on November 12, 2019. A week before the hearing, the parties were required to file and exchange their respective witness lists and the exhibits they would use in this matter. Because of the shortened timeline, the parties were permitted to retain counsel up until the start of the hearing. Additionally, an OHA attorney was made available to answer questions and assist the parties with procedural matters throughout the process.

On November 5, 2019, the parties filed their witness lists and respective exhibits. TEA also filed multiple Motions in Limine to exclude (1) discussions of TEA contracts other than the

[129] Memorandum: Delegation of Authority from Secretary of Education to Director of the Office of Hearings and Appeals (October 29, 2019).
[130] 42 U.S.C. § 4712(c)(1).
[131] *Business Communications Inc.* addresses the whistleblower protections in Section 1553 of the American Recovery and Reinvestment Act, Pub.L. No 111-5, (ARRA) and not 41 U.S.C. § 4712. 41 U.S.C. § 4712, however, uses nearly identical language to Section 1553 of the ARRA. Additionally, 41 U.S.C. § 4712 was enacted in part because Section 1553 of the ARRA only applied to contracts funded by the stimulus bill and Congress wanted to expand the provisions of 1553 to all federal contractors and grantees it 41 U.S.C. § 4712. S. Rep. 114-270, at 2-3 (2016).

SPEDx contract, (2) broader discussions of special education in Texas, and (3) references to the probable testimony of individuals not called as witnesses by either party. TEA chose not to file any motions raising any issues of procedural due process either before or during the hearing.

On November 6, 2017, a telephonic prehearing conference was conducted, the contents of which were memorialized in an Order After Prehearing Conference issued the same day. During that conference, TEA's first two motions in limine were granted, but the motion to limit probable testimony of absent witnesses was denied.[132] Additionally during that conference the parties agreed to change the time of the hearing.[133] The originally scheduled live hearing was scheduled to begin at 11am EST, but the parties agreed to move the starting time up two hours to begin at 9am EST. Additionally, the parties had been informed that the hearing was intended to end at 6pm EST, but the parties both requested that the hearing be cut shorter, to end two hours earlier, at 4pm EST, so that participants would be on time for flights they had scheduled for that same night.

During the prehearing teleconference, the parties were also informed that the tribunal would provide expedited overnight transcripts of the hearing to both parties at no cost. The parties were also informed of their right to file post-hearing briefs by Friday November 15, 2019. Finally, [Complainant] was ordered to submit her proposed attorneys' fees by midnight on November 13, 2019 to give TEA an opportunity to respond to the requested fees by November 15, 2019.[134]

Before the hearing, on Saturday November 9, 2019, TEA submitted a sworn declaration from Schwinn, in lieu of her appearing for live testimony. Neither party objected to its

[132] Order after Prehearing Conference (Nov. 6, 2019)
[133] Id.
[134] Id.

admission and it was admitted into evidence.[135]

On November 12, 2019, the parties appeared at a live hearing beginning at 9:10 am. During the hearing both parties were permitted to give opening arguments summarizing their respective cases. Additionally, both parties were permitted to put on witnesses and cross examine the opposing party's witnesses. Specifically, [Complainant] appeared on her own behalf and TEA called Morath and Wilson in support of their case. At the end of the live hearing, the undersigned ordered that the parties present their closing arguments in their submissions scheduled to be filed on or before November 15, 2019.[136] Additionally, the undersigned encouraged the parties to submit legal authority on the question of damages.[137] The hearing concluded before the 4pm EST deadline, and both parties were able to completely present all their witnesses and proof and conduct all their cross-examination without time restrictions.

On November 13, 2019, [Complainant] submitted her petition for attorneys' fees. On November 15, 2019, both parties submitted post-hearing briefs and TEA submitted a separate response on the issue of attorneys' fees and damages. Having considered the OIG investigation report, those documents attached to that report, as well as testimony, briefing, and documents submitted by the parties, the file is closed and ready for decision.

PRINCIPLES OF LAW

Jurisdiction

In its brief filed November 15, 2019, TEA makes a series of arguments that this decision

[135] Hearing Transcript 7:6-10:9.
[136] Hearing Transcript 282:10-20.
[137] Hearing Transcript 282:24-284:5.

is barred from awarding damages in this case and lacks jurisdiction over the matter. The head of an executive agency (hereinafter "Decisionmaker") acting as a tribunal, like established administrative tribunals within agencies, is the arbiter of his or her own jurisdiction.[138] Each argument is addressed separately below, concluding that none of TEA's theories prevail and that this decision properly has jurisdiction over this matter.

The last-minute and unscheduled raising of these arguments by TEA after the hearing was dropped into the authorized but unrelated brief on the issue of the amount of attorneys' fees in a pleading styled as a "Brief on Damages." On November 20, 2019, [Complainant]'s counsel wrote a letter objecting, asking that the arguments not be considered and that [Complainant] be allowed to substantively respond. Although the letter from [Complainant]'s counsel raises valid points and is retained in the record, due to the reality of the time constraints for issuing this decision, [Complainant] was not allowed to substantively respond, and TEA's arguments are considered and individually addressed below.

Sovereign Immunity

TEA argues that its "sovereign immunity bars the award of damages" in this case.[139] TEA cites *Williams v. Morgan State Univ.*, in which the court considered the application of sovereign immunity to be a question of subject-matter jurisdiction.[140] Finding that the doctrine of sovereign immunity barred suit against a state instrumentality, the court dismissed the

[138] *See Wein v. U.S. Dep't of the Navy*, 37 MSPR 379, 381 (Jul. 15, 1988); *Or. Cedar Products, Co.*, 1991 WL 255505, U.S. Dep't of the Interior, 119 IBLA 89, 93 (Apr. 9, 1991).
[139] Respondent's Brief on Damages at 1.
[140] *Williams v. Morgan State Univ.*, 2019 WL 4752778 (D. Md. 2019), at *4. Subject-matter jurisdiction is the power of a tribunal to hear a case; resolution of a tribunal's subject-matter jurisdiction cannot be forfeited or waived. *Adkison v. C.I.R.*, 592 F.3d 1050, 1055 (9th Cir. 2010). Notably, the U.S. Court of Appeals for the D.C. Circuit has held that "the question whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is an open one." *U.S. ex rel Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 890, 892 (D.C. Cir 1999). For the purposes of this decision, I will treat TEA's sovereign immunity argument as implicating my subject-matter jurisdiction over the case.

plaintiff's anti-retaliation claim for lack of jurisdiction.[141]

The first determination must be the authority of this decision to rule on a constitutional question. An administrative tribunal or the head of an executive agency does not have general jurisdiction like an Article III court, but has jurisdiction over controversies based on specific statutory or regulatory mandates.[142] In the NDAA, Congress specifically gave jurisdiction to the tribunal to make a final decision for the agency to either grant or deny relief.[143] Under the statute, the tribunal "*shall* determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal prohibited by subsection (a) and *shall* either issue an order denying relief or *shall* take one or more of the following actions."[144]

This tribunal, like an administrative appeals board within an agency, cannot declare a statute unconstitutional, but may rule on whether an agency's application of a particular statute to a particular entity satisfies constitutional requirements.[145]

Based on this analysis, this tribunal has the authority to interpret the constitutionality of the statute as it applies to TEA in this case. With this authority, the decision must now consider whether the Eleventh Amendment shields TEA from this suit, depriving this decision of subject-matter jurisdiction.

The doctrine of sovereign immunity established by the Eleventh Amendment protects states from suit by private citizens in federal court.[146] The protection extends to state agents and

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[141] TEA also cites *Slack v. Wash. Metro. Area Transit Auth*., 353 F.Supp.3d 1 (D.D.C. 2019). Ultimately, that case is inapposite to the facts before me, because the plaintiff conceded that the statute at issue did not abrogate sovereign immunity, but the institutional defendant had voluntarily waived sovereign immunity.
[142] *Saunders v. MSPB*, 757 F.2d 1288, 1290 (Fed. Cir. 1985).
[143] 41 U.S.C. § 4712(c).
[144] *Id*. § 4712(c)(1) (emphasis added).
[145] *Martinez v. OPM*, 2016 WL 4425125, MSPB (Aug. 19, 2016).
[146] *Williams*, 2019 WL 4752778, at *4.

state instrumentalities.[147] Congress can abrogate a state's sovereign immunity when it unequivocally intends to do it.[148] Generally allowing lawsuits under a statute, or requiring a recipient of federal funds to comply with applicable law, is not "unmistakably clear . . . language" sufficient to abrogate sovereign immunity.[149]

In *Williams v. Morgan State Univ*., a complainant brought a suit in part based on the anti-retaliation provisions of the American Reinvestment and Recovery Act (ARRA) and NDAA.[150] The court did not describe specifically which statute authorized the federal funds that were the subject of the complainant's protected whistleblowing activity. The court noted that the University had a Federal Communications Commission license, received "federal funding" from the U.S. Department of Education and Corporation for Public Broadcasting, and received American Recovery and Reinvestment Act (ARRA) funds through the State of Maryland.[151] The court analyzed whether either the ARRA or NDAA contained unequivocal abrogation of sovereign immunity by Congress, concluding that they did not. Regarding the NDAA, the court held that "Congress did not expressly condition receipt of NDAA funds on a waiver of sovereign immunity."[152] Accordingly, the complainant's retaliation claim was barred by the Eleventh Amendment.

The court in *Williams* referred to "receipt of NDAA funds." However, the NDAA provides a whistleblower remedy for employees of federal contractors and grantees working with any federal contract, grant or allocation of funds. The NDAA's retaliation protections are not limited to funds distributed under the NDAA because Congress does not allocate funds under the

[147] *Id*.
[148] *Id*. at *5. States may also waive their sovereign immunity, but that scenario is not presented by the facts of the case at issue and will not be discussed further.
[149] *Id*.
[150] *Id*. *2.
[151] *Id*. at *1.
[152] *Id.* at *6.

NDAA. The only reasonable interpretation of the court's language is that "NDAA funds" are any funds allocated under a contract, grant or other allocation of funds to which the NDAA provides retaliation protections. In *Williams*, presumably the "NDAA funds" were funds allocated under the ARRA, although the court did not explicitly make this analysis. In the case at issue, it is critical to note that the "NDAA funds" are the funds allocated to TEA under IDEA.

The constitutional question in the case is whether Congress expressly conditioned receipt of IDEA funds on a waiver of sovereign immunity. Unlike *Williams*, in this case Congress expressly abrogated sovereign immunity. Congress unequivocally provided that "[a] State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter" and allowed remedies "to the same extent as those remedies" available for a suit against a "public entity other than a State."[153] Courts have held that the IDEA's sovereign immunity abrogation was a constitutional and enforceable act of Congress.[154] Therefore, TEA is not immune from complainant's NDAA anti-retaliation suit based on a protected whistleblowing activity implicated by TEA's management of IDEA funds. As such, this decision has subject-matter jurisdiction over this case and may grant relief in the form of damages authorized by the NDAA.

Timing of Department of Education's Order

TEA next argues that the Department of Education failed to issue a timely order required by the NDAA, and by doing so, the Department lost jurisdiction over the case and became barred from issuing a damages order. The Secretary must issue an order within 30 days of receipt of an Inspector General report under the NDAA.[155] If the Secretary fails to do so, the complainant is

[153] 20 U.S.C. § 1403.
[154] *Chester Upland Sch. Dist. v. Pa.*, 861 F.Supp.2d 492, 511–12 (E.D. Pa. 2012).
[155] 41 U.S.C. § 4712(c)(1).

deemed to have exhausted administrative remedies and may file a de novo action against the contractor or grantee in federal district court.[156]

Exhaustion of administrative remedies is a question of whether an administrative agency retains exclusive jurisdiction over a matter until it reaches a final decision, or whether a court may have jurisdiction prior to such a decision.[157] The doctrine of administrative exhaustion aims at "preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review."[158] How the doctrine of administrative exhaustion is applied in any given case depends on the particular administrative scheme in question.[159] In certain schemes, exhaustion is jurisdictional, meaning that failure to exhaust administrative remedies bars jurisdiction by a court.[160] In other schemes, exhaustion is non-jurisdictional, meaning a statutory requirement to exhaust administrative remedies is merely "favored" under the common law exhaustion principle, but may be excused by certain exceptions to the rule.[161]

TEA's argument fails on multiple levels. First, TEA incorrectly assumes the Secretary received the OIG report on September 5, 2019, the date appearing on the first page of the OIG report. However, counsel for OIG confirms that the Secretary received the OIG report by hand-delivery on October 28, 2019.[162]

Second, even if the Secretary was deemed to have received the OIG report on September 5, 2019, that fact would not conclusively bar the Department from issuing a decision.

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[156] *Id*. § 4712(c)(2).
[157] *Weinberger v. Salfi*, 422 U.S. 749, 764–767 (1975).
[158] *Id*. at 765.
[159] *Id*.
[160] *Ace Prop. and Cas. Ins. Co. v. Fed. Crop Ins. Corp.*, 992, 996 (8th Cir. 2006).
[161] *Id.*
[162] Email from Antigone Potamianos to Robert Layton and Howard Sorensen (October 31, 2019).

The statute does not impose such a consequence, but rather allows a complainant to seek de novo review in district court in lieu of a timely decision. The operative statutory term is that the complainant *may* file such an action. The implication is that the complainant may also continue to await a decision from the Department, utilizing its "experience and expertise," which is the goal of the common law doctrine of administrative exhaustion. TEA makes no argument as to why it would be prejudiced by the Department issuing a decision in these circumstances where the complainant prefers to exhaust administrative remedies and not immediately seek the optional suit in district court. Accordingly, this decision rejects TEA's argument that the timing of the Department's order extinguishes jurisdiction to issue this decision.

Delegation of Authority

TEA argues that the Secretary of Education lacked the ability to delegate her authority as head of the executive agency under the NDAA. TEA cites 34 C.F.R. § 81.3(b), establishing the jurisdiction of the Office of Administrative Law Judges (OALJ), including a provision that the Department publishes a notice in the Federal Register when the OALJ is "designated" to conduct certain proceedings.[163] TEA's theory is that, without such a published Federal Register notice, "the ALJ in this case lacks authority to issue an order on damages in this case."[164]

Publication in the Federal Register provides notice and is generally required for substantive rulemakings. Interpretive rulemakings are not subject to such strict requirements. Even where an interpretive rule should have been published in the Federal Register, failure to so publish did not "invalidate an otherwise proper rule where the party adversely affected had 'actual and timely notice.'"[165]

In this case, the Secretary exercised her general authority under the Department of Education Organization Act. "[T]he Secretary may delegate any function to such officers and employees of the Department as the Secretary may designate, and may authorize such successive redelegations of such functions within the Department as may be necessary and appropriate."[166] This statutory provision specifically authorizes the Secretary to delegate her responsibilities as head of the executive agency under the NDAA, which she delegated to the Director of the Office of Hearings and Appeals. TEA and complainant were timely notified of the delegation and the identity of the officer who would conduct the hearing. Because neither party was prejudiced, and the Secretary acted under an appropriate statutory provision, her delegation of authority was

[163] 34 C.F.R. § 81.3(b).
[164] Respondent's Brief on Damages at 5.
[165] *Nason v. Kennebec County CETA*, 646 F.2d 10, 19 (1st Cir. 1981).
[166] 20 U.S.C. § 3472.

proper and effective.

Due Process

TEA effectively makes two arguments as to why awarding damages in this proceeding would violate its right to due process: 1) § 4712 is unconstitutional on its face; 2) the procedures of the hearing on this matter, including the submission of evidence, availability of discovery, and imposition of deadlines, were insufficient to provide due process to TEA. I will consider each argument in turn.

First, this administrative proceeding is bound to follow statutes passed by Congress and lacks the authority to declare a federal law unconstitutional as written.[167] To the extent TEA argues that the statute as written is an unconstitutional denial of due process,[168] such an argument may not be addressed in this decision.

Second, TEA makes a series of arguments to support its theory that it was denied due process. These include: the failure to provide sufficient discovery in this hearing prevented it from adequately presenting its case; inadequate knowledge of evidence collected by the OIG, including redacted reports, prevented TEA from confronting witnesses or provide contradicting testimony; and the lack of the Decisionmaker's subpoena power.[169] TEA notes that it had only 13 days to prepare for the hearing from the date it received a redacted version of the complaint. Then, the complainant "made allegations and statements" at the hearing "that were not within the OIG Report or any exhibit."[170]

Due process is flexible and calls for such procedural protections as a particular situation

[167] *In the Matter of N.M. Dep't of Educ.*, Dkt. No. 13-41-O, U.S. Dep't of Educ. (Dec. of the Sec'y) (Oct. 8, 2015), p. 4 ("'[t]he Department is categorically bound to follow what Congress lays down in plain language.'").
[168] Respondent's Brief on Damages at. 6–7, 8–10 (arguing in both sections B and C that the statute as-written does not provide for an adequate hearing, and should provide certain timeframes and safeguards).
[169] Respondent's Brief on Damages at 5–6, 7–10.
[170] Id. at. 5.

demands.[171] The key provision is some form of hearing that allows the individual a meaningful opportunity to be heard.[172] Due process in an administrative proceeding is not the same as in a judicial proceeding, because administrative and judicial proceedings are inherently different.[173] Each administrative proceeding must be carefully assessed to determine what process is due based on the circumstances.[174]

TEA argues that this tribunal's failure to allow for discovery categorically denied due process to TEA.[175] As a foundational matter, discovery in an administrative hearing is not a constitutional right.[176] For the proposition that discovery is nevertheless provided for in this case, TEA cites 34 C.F.R. § 81.16, which sets forth procedures for administrative appeals of decisions issued under the General Education Provisions Act (GEPA). Those rules do not apply to the case before this tribunal. This case does not arise under GEPA, but under the NDAA.

The regulation cited by TEA derives from 20 U.S.C. § 1234(g)(1), establishing the OALJ within the Department of Education. The case before this tribunal is not a proceeding designated to the OALJ. Rather, the Secretary delegated her authority under the NDAA in a specific delegation to the Director of the Office of Hearings and Appeals.[177]

Furthermore, 20 U.S.C. § 1234(g)(1) permits, but does not require, a judge to order discovery. Even if this tribunal was inclined to shape this hearing process around the language of that statute, its discovery procedure cannot apply to this proceeding for practical reasons.

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[171] *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013).
[172] *Mathews v. Elridge*, 424 U.S. 319, 333 (1975).
[173] *Id*.; *Beverly Enterprises Inc. v. Herman*, 130 F. Supp. 2d 1, 18 (D.C. Cir. 2000) ("procedural due process in an administrative hearing does not always require all of the protections afforded a party in a judicial trial").
[174] *Ching*, 725 F.3d at 1157.
[175] Respondent's Brief on Damages at 5-6.
[176] *Kelly v. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) ("there is no constitutional right to pretrial discovery in administrative proceedings"); *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 741 (8th Cir. 1999) ("due process requires only that an administrative hearing be fundamentally fair. We have never held that there is a constitutional right to pretrial discovery in all such proceedings").
[177] Memorandum: Delegation of Authority from Secretary of Education to Director of the Office of Hearings and Appeals (October 29, 2019).

Under those discovery rules, a judge "shall set a time limit of 90 days on the discovery period" which may be extended but not shortened.[178] A hearing on a whistleblower action under the NDAA must be completed within 30 days from the date the Secretary receives the OIG report.[179] The hearing process under the NDAA must necessarily conform to the statutory time limit and cannot incorporate incompatible procedures.

Despite TEA's protest that it was denied discovery, this tribunal provided a limited form of discovery to ensure a fair and robust process. As described earlier in this decision, prior to the hearing the parties were required to file and exchange their witness lists and exhibits to be used in the proceeding. The parties also had the opportunity to file pre-hearing motions. Thus, the parties had the benefit of all the discovery that was necessary and possible within the constraints of the NDAA.

The tribunal's lack of authority to issue subpoenas also does not create a denial of due process. TEA did not establish that it took any steps or even made any effort to communicate in an attempt to secure any witness who it sought to subpoena. This proceeding also allowed the parties to call any witness through televideo testimony as necessary, to accommodate far-away witnesses. Nor is there any absolute or independent right to subpoena witnesses during administrative proceedings. Procedural due process does not require an absolute or independent right to subpoena witnesses in administrative hearings.[180]

On the remaining arguments, in this case, the process afforded to the parties had to thread a needle between the competing factors of the statutory time limit and the procedures mandated in a previous federal court decision. Under the NDAA, the Decisionmaker has no more than 30

[178] 20 U.S.C. § 1234(g)(1).
[179] 41 U.S.C. § 4712(c)(1).
[180] *Travers v. Jones,* 323 F.3d 1294 (11th Cir. 2003).

days from receiving an Inspector General report to issue a final decision either denying or granting relief.[181] The Inspector General report is the culmination of up to 360 days of investigatory activity.[182] In a whistleblower case similar to the one under consideration here, the U.S. Court of Appeals for the Eighth Circuit found that the Department of Education must provide an administrative hearing to allow an employer to confront and cross-examine available witnesses.[183]

Therefore, the process due to the parties in this case is a hearing, at a meaningful time and in a meaningful manner, providing for cross-examination of witnesses, conducted expeditiously enough to be entirely completed with an adequately considered final decision, within the statutory 30-day time limit. The parties to this case received such a hearing and a timely decision. The specific due process protections in this decision have been identified in careful and full detail above in the Findings of Fact section, under the heading of "Hearing and Decision Process Before OHA".

Those protections more than adequately protect the due process rights of the parties. Furthermore, at no point did TEA ever raise any such issue by motion or otherwise, either before or during the hearing. Having never given the tribunal an opportunity to address any of these matters, TEA's assertions cannot now be used to avoid a decision on the merits, particularly when considered in the context of the protections set forth for this process. TEA's arguments that it did not receive adequate due process are rejected.

41 U.S.C. § 4712

41 U.S.C. § 4712 prohibits retaliation by a grantee such as TEA against an employee for

[181] 41 U.S.C. § 4712(c)(1).
[182] *Id*. § 4712(b)(2).
[183] *Bus. Commc'n, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374, 381 (8th Cir. 2013).

whistleblowing. The grantee cannot retaliate against an employee by discharging, demoting or discriminating against the employee for disclosing "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant" to (1) a "Member of Congress or a representative of a committee of Congress;" (2) an Inspector General; (3) the GAO; (4) a "Federal employee responsible for contract or grant oversight or management at the relevant agency;" (5) an "authorized official of the Department of Justice or other law enforcement agency;" (6) a court or grand jury; or (7) a "management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct."[184]

When an employee believes that he or she has been subject to a reprisal prohibited by the statute the employee may submit a complaint to OIG within three years of the reprisal.[185] If OIG determines that the complaint is not frivolous, that it alleges a violation of the statute, and that it has not been previously addressed in another Federal or State judicial or administrative proceeding initiated by the employee, OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the entity, and the Secretary. OIG must either make its determination that an investigation is not warranted or submit its report of an investigation within 180 days after receiving the complaint. If the employee agrees, the OIG can extend the time to investigate and report for an additional

[184] 41 U.S.C. § 4712(a).
[185] 41 U.S.C. § 4712(b).

180 days.[186]

After receiving the OIG report, the Secretary or her designee must decide within 30 days whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a prohibited reprisal.[187]

The whistleblower statute also specifies that this decision must use the burden of proof found in 5 U.S.C. § 1221(e).[188] The employee has the burden of first showing that (1) she or he was an employee of a federal grantee or contractor; (2) she or he made a disclosure protected by 41 U.S.C. § 4712; and (3) the disclosure was "a contributing factor" in the action taken against the employee.[189] This burden can be met through circumstantial evidence, including evidence that "the official taking the personnel action knew of the [whistleblower] activity" and that the "personnel action occurred within a period of time such that a reasonable person could conclude that the "whistleblower" activity was a contributing factor in the personnel action."[190] The Federal Circuit has called this the "knowledge/timing" test.[191] It follows, however, that in order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the employer had knowledge of the disclosures before beginning personnel action.[192]

If an employee adequately meets that burden, then the burden shifts to the employer to demonstrate "by clear and convincing evidence that it would have taken the same personnel

[186] Id.
[187] 41 U.S.C. § 4712(c)(1).
[188] 41 U.S.C. § 4712(c)(6).
[189] *See Armstrong v. Arcanum Group, Inc*., 897 F.3d 1283, 1287 (10th Cir. 2018); *Omwenga v. United Nations Found.*, 2019 WL 4860818, at *12 (D.D.C. Sept. 20, 2019); *Armstrong v. Arcanum Grp. Inc.*, 2017 WL 4236315, at *7 (D. Colo. Sept. 25, 2017).
[190] *See* U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc*., 897 F.3d 1283, 1287 (10th Cir. 2018).
[191] *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).
[192] *Armstrong v. Arcanum Group, Inc*., 897 F.3d 1283, 1287 (10th Cir. 2018).

action in the absence of such disclosure."[193] In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit provided a guideline for analyzing whether an employer, in that case a federal agency, has met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel action absent a protected whistleblower disclosure. The factors to be considered are: "the strength of the [employer's] evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the [employer's] officials who were involved in the decision; and any evidence that the [employer] takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated."[194]

As indicated above, after weighing the evidence, the Secretary, or her designee must issue an order either denying the relief requested by the employee or requiring one or more of the following actions by the employer:

(1) "take affirmative action to abate the reprisal;"

(2) reinstate the employee "to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken;" or

(3) "pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency."[195]

ANALYSIS

[Complainant] argues she faced disciplinary actions as a response to her allegations about

[193] *See* U.S.C. § 1221(e)(1); *Omwenga*, at *12; *Armstrong*, 2017 WL 4236315, at *7.
[194] *Carr v. Social Security Administration,* 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Greyer v. Dep't of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997)).
[195] 41 U.S.C. § 4712(c)(1).

improprieties with the SPEDx contract. TEA argues she received a written and verbal reprimand because of her performance issues and that she was fired because of the allegations in a 2017 lawsuit alleging she attempted to prevent the reporting of the abuse of a young special education student in 2015. TEA also suggests it believes [Complainant] filed her whistleblower complaints as a shield to protect her from adverse personnel actions resulting from her poor performance and the allegations about her covering up the abuse of a special education student.[196]

[Complainant] Shows That Her Protected Disclosures Were Contributing Factors For The Decision To Fire Her But Not For The Verbal and Written Reprimand

[Complainant] has the initial burden to show (1) she was an employee of a federal grantee or contractor; (2) she made a disclosure protected by 41 U.S.C. § 4712; and (3) the disclosure was "a contributing factor" in the action taken against the her as an employee.

It is undisputed that [Complainant] was an employee of a recipient of a Department administered grant during the relevant time. TEA is a recipient of the IDEA grant program administered by the Department. [Complainant] began in her position as Director of Special Education on August 15, 2017 and served in that position until she was terminated on November 22, 2017. The three personnel actions forming the basis for [Complainant]'s complaint were a verbal reprimand on October 9, 2017, a written reprimand on November 3, 2017, and the decision to termination of her employment on November 22, 2017, all of which occurred while she was an employee of TEA.

[Complainant] has to further show that she made a series of protected disclosures. [Complainant] contends that she was retaliated against for disclosing: (1) that the SPEDx contract was arrived at without a proper bid process; (2) that Schwinn had a personal relationship with at least one of the leaders of the SPEDx / Cambria contract group and part of the group that

[196] E-23, Declaration of Justin Porter (Nov. 5, 2019) at 3 (paragraph 16).

developed the project; (3) that TEA paid for deliverables that it did not receive because the contract was not properly formed; and (4) that SPEDx did not provide additional useful insights that TEA did not already provide.[197] The statute covers disclosures of "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant."[198] These allegations would be subjects covered by the statute. If the SPEDx contract was awarded as a sole source contract without a proper bid process, [Complainant] would reasonably believe that this is a violation of a "law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant." If Schwinn's personal relationships played a role in SPEDx being hired, it could reasonably be an abuse of authority and a violation of a rule, law, or regulation. If TEA was paying for deliverables that it was not receiving, [Complainant] could have reasonably believed that there was a gross mismanagement of the IDEA grant money. These allegations are clearly protected subject matter under 41 U.S.C. § 4712(a)(1).

The statute protects disclosures made to one of seven peoples or entities. In this case, [Complainant] made disclosures to five people or entities that are covered under 41 U.S.C. § 4712. First, [Complainant] spoke to Bill Wilson, the head of TEA's internal audit office, who would be a "management official or other employee of the . . . grantee who has the responsibility to investigate, discover, or address misconduct."[199] [Complainant] first met with Wilson on

[197] OIG Complaint at 2 [77].
[198] 41 U.S.C. § 4712(a)(1)
[199] 41 U.S.C. § 4712(a)(2)(G)

October 9, 2017.[200] [Complainant] claims to have spoken with Ryder, the Director of OSEP, who would be a "Federal employee responsible for contract or grant oversight or management at the relevant agency."[201] In her complaint, [Complainant] also indicates that she brought her allegations to the Travis County District Attorney, the Texas State Auditor, the Texas Attorney General, and the Texas Comptroller's Office, all of which are ""authorized official[]s of [an] other law enforcement agency."[202] Finally, [Complainant]'s letter to OIG on November 21, 2017 is a protected disclosure to an "Inspector General."[203]

As to the final prong, [Complainant] demonstrated her protected disclosures were contributing factors to the decision to terminate her employment, although she fails to show they contributed to the decision to reprimand her.

[Complainant]'s initial burden requires her to show that the employer official who initiated the adverse personnel action had knowledge of the disclosures. The earliest that the evidence shows any TEA management officials having knowledge of a protected disclosure is on November 3, 2017, when in response to receiving the letter of reprimand, [Complainant] told Porter that she had been in contact with Wilson.[204] The earliest the TEA leadership learned of the disclosures to Ryder and the Travis County District Attorney was when [Complainant] told Porter on November 7, 2017,[205] and of the disclosures to the Texas State Auditor, the Texas Attorney General, and OIG was when Morath, Schwinn, and Porter received Wilson's

[200] OIG Complaint at 2 [77]; TEA Investigation Memo at 1 [59].
[201] 41 U.S.C. § 4712 (a)(2)(D).
[202] 42 U.S.C. § 4712(a)(2)(E)
[203] 42 U.S.C. § 4712(a)(2)(B). [Complainant] argues that her comments to Porter and Schwinn related to the SPEDx contract were protected disclosures. The disclosures in this case were that TEA was using IDEA money to hire SPEDx as a sole source contractor and were not holding them accountable because of personal relationships with Schwinn. Porter could not be a "management official or other employee of the . . grantee who has the responsibility to investigate, discover, or address misconduct," 41 USC 4712(a)(2)(G), allegedly concerning his direct supervisor, and Schwinn cannot fill the same role as to accusations about herself.
[204] Justin Porter, Notes at 5 [275].
[205] Justin Porter, Notes at 6 [276].

Investigation Report on November 17, 2017.[206]

[Complainant] failed to present evidence that TEA had knowledge of a protected disclosure when she was verbally reprimanded and when she was issued a written reprimand. Therefore, as to those personnel actions, [Complainant] has failed to meet her burden of showing that the disclosures were a contributing factor.

TEA admitted that Morath, Schwinn, and Porter all knew of the protected disclosure to Bill Wilson before she was terminated on November 22, 2017.[207] Porter's own notes indicate that on November 3, 2017, [Complainant] told him that she was talking with Wilson about her concerns about the SPEDx contract and that same day Porter told Schwinn that [Complainant] was speaking with Wilson.[208] Within a couple days of Schwinn formally asking Wilson to conduct an internal investigation on November 7, 2017, Wilson was told Morath knew about the investigation and that he wanted the investigation be complete within a little over a week.[209] Furthermore, Porter was told by [Complainant] that she was speaking to Ryder and the Travis County District Attorney on November 7 and Bill Wilson's investigative report was received by TEA leadership on November 17 and reflects that [Complainant] told him she had contacted the Texas State Auditor and Texas Attorney General.[210]

TEA argues [Complainant] failed to meet her burden of showing that the November 21, 2017 disclosure to OIG was an "contributing factor" for the decision to fire her. TEA purports the decision to fire her was made by Morath on November 20, 2017.[211] As indicated below, there is significant conflicting information whether the decision to terminate [Complainant]'s

[206] TEA Investigation Memo at 1 [59].
[207] Respondent's Post-Hearing Brief at 18, 29.
[208] Justin Porter, Notes at 5 [275].
[209] Hearing Transcript 264:5-18.
[210] Justin Porter, Notes at 6 [276]; TEA Investigation Memo at 1 [59].
[211] Respondent's Post-Hearing Brief at 18-19.

employment was made on November 20, 2017 or November 22, 2017. In other words, there is conflicting testimony and evidence whether the decision was made the day before or the day after [Complainant] filed her formal request for an OIG investigation and [Complainant]'s attorney sent TEA leadership notice of that request. Neither party disputes that [Complainant] had told Wilson that she has made reports to OIG and [Complainant]'s assertion was documented in Wilson's Memorandum which TEA leadership received on November 17, 2017.[212] Whether the decision to terminate [Complainant] was made on November 20, 2017 or November 22, 2017, the submitted evidence conclusively proves that Morath, Schwinn, and Porter had knowledge of the protected disclosures weeks before she was fired. [Complainant] has met her burden of showing that the disclosures were contributing factors in the decision to fire her.

TEA Fails to Prove By Clear and Convincing Evidence That It Would Have Fired [Complainant] Regardless of the Protected Disclosures

Because [Complainant] has met her initial burden, TEA is required to show by clear and convincing evidence that it would have terminated her employment in the absence of her protected disclosures. The factors to be considered when determining if TEA has met its burden are the strength of TEA's evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of the TEA officials who were involved in the decision, and any evidence that TEA has taken "similar actions against employees who are not whistleblowers but who are otherwise similarly situated."[213]

During the live hearing, Morath indicated that the decision to terminate [Complainant]

[212] Hearing Transcript 207:4-10; 59.
[213] *Carr*, 185 F.3d at 1323

was made by him without consulting with Porter,[214] was based completely on the allegations made in the lawsuit about [Complainant]'s actions in 2015.[215] Morath testified the decision was made on November 20, 2017, before he saw the letter from [Complainant]'s attorney indicating that she was filing a whistleblower complaint with OIG.[216] There is nothing else in the voluminous record to corroborate this recent testimony by Morath. Morath admitted he was aware of [Complainant]'s earlier reports to TEA's internal auditor.

Morath said that after the news articles came out about the lawsuit, on November 20, 2017, he told the General Counsel that [Complainant] was to be fired.[217] Morath admits that TEA provided no documentation or corroborating testimony to support the purported November 20, 2017 termination decision date.[218]

In fact, the documents in this case contradict that Morath made the termination decision independent of any advice on November 20, 2017 or that it was based purely and only on the allegations in the lawsuit. The termination document itself is a "Recommendation of Termination" from Porter to Morath dated on November 22, 2017 and approved by Morath on November 22, 2017.[219] Morath indicated during his testimony that this delay was caused by attorneys needing to review the termination before it could be effective.[220]

There is contradictory evidence in the record from TEA sources about what the reason for firing [Complainant] was, who made the decision, and when the decision was made, undermining TEA's ability to meet its burden of providing clear and convincing evidence.

The first *Carr* factor is the strength of TEA's evidence for firing [Complainant]. Even

[214] Hearing Transcript 206:14-18.
[215] Hearing Transcript 215: 7-12.
[216] Hearing Transcript 206:24 – 207:3.
[217] Hearing Transcript 203:17 –204:2.
[218] Hearing Transcript 221:7-16.
[219] Memorandum from Justin Porter to Mike Morath (Nov. 22, 2017) [164].
[220] Hearing Transcript 207:11-20, 220:19-24.

accepting TEA's argument that the sole reason [Complainant] was terminated was the unproven allegations about events in 2015, there is significant evidence challenging this as a sufficient reason for TEA to have fired [Complainant].

On November 18, 2017, Porter sent a link to a news story about the website to Schwinn, Byer, and another attorney in TEA's general counsel's office. He indicated that he was already meeting on November 20, 2017 with Byer "on a related topic."[221] This was well after Porter knew about [Complainant]'s allegations made to Wilson, and the allegations made to Ryder and the Travis County District Attorney, and at least a day after he was informed about the allegations made to OIG, the Texas State Auditor and the Texas Attorney General's office. Other than a discussion about [Complainant]'s employment, it is not clear what would be a topic related to the lawsuit. The fact that [Complainant]'s direct supervisor and TEA's General Counsel already had planned a meeting about [Complainant] before learning about the lawsuit indicates that the lawsuit was not the only reason to terminate [Complainant].

Additionally, [Complainant] contends that TEA knew of the allegations against her when she was hired in the summer 2017. Morath indicated that [Complainant] had to be terminated because she could not be in the role of Director of Special Education if she was "credibly" accused of trying to undermine the reporting of sexual abuse of a six-year-old special education student.[222] It would not follow that TEA believed that [Complainant] had to be removed from the job as Special Education Director based on the allegations if TEA also hired [Complainant] less than half a year earlier knowing that she had such allegations against her.

In a September 10, 2018 letter, Greg Sampson indicated that in July 2017, before [Complainant] was hired, he had spoken to Morath, Schwinn, and Porter about the 2015

[221] Email from Justin Porter to Von Byer, Gene Acuna, and Penny Schwinn (November 18, 2017) [344].
[222] Hearing Transcript 204:13-21.

allegations.[223]

TEA asserts that its leadership first learned of the allegations of [Complainant] covering up the abuse of a young special education student when they heard of the news reports of the lawsuit being filed in November 2017, and that the news reports of the unproven lawsuit were the basis for [Complainant] being fired. Morath in his testimony stated that "The proximal cause of that (her firing) was the lawsuit that we learned about independently, not because it was disclosed to us by [Complainant], but that we found out about it on the weekend of the 18th or 19th."[224] When asked who he meant when he said "we found out," Morath replied "Justin Porter, Penny Schwinn, me, my general counsel, God and country."[225] Morath also admitted that the way he learned about the unproven news report was from a weekend telephone call he got from Penny Schwinn, the very person who [Complainant] had accused of misconduct in her whistleblower complaint.[226]

Even if TEA leadership and Commissioner Morath first learned about the allegations in the lawsuit in November 2017, it is not clear that an unproven allegation of something that happened in another job in another state is a compelling reason to fire [Complainant]. During the live hearing, Morath testified that "it was unbelievable to me."[227] Morath further elaborated, stating:

> It was -- it was unbelievable to me, and so I'm reading this, and I know that any red-blooded Texas parent who reads this is going to have basically the same reaction that I am, which is unbelievable righteous indignation and disgust that the Texas Education Agency should employ somebody like this that's credibly accused of this kind of crime. And so, yeah, there's no way that -- after I read this -- I mean, she had to go. That was it.[228]

[223] Letter from Greg Sampson (Sept. 10, 2018) [57].
[224] Hearing Transcript 222:13-17.
[225] Hearing Transcript 222:18-20.
[226] Hearing Transcript 222:21-223:4.
[227] Hearing Transcript: 201: 22 –202:2.
[228] Hearing Transcript 203:6-16.

On cross-examination, Morath admitted that [Complainant] was never given an opportunity to explain the allegations.[229] When asked, Morath indicated that without asking [Complainant] about them or doing any investigation, he believed the allegations that he had described as unbelievable.[230] When pressed whether he acted on his belief in unproven and uninvestigated allegations without giving [Complainant] the opportunity to respond, Morath admitted it, but then suggested that it was acceptable for him to fire [Complainant] because she was a probationary employee.[231] Morath further indicated that he also was influenced by a terrible presentation she had given to him and an important group of TEA leaders, but when pressed Morath then returned to a position that the lawsuit was the only reason for the termination.[232]

TEA has the burden of providing clear and convincing evidence that it would have terminated [Complainant]'s employment in the absence of her protected disclosures. As to the first prong of the *Carr* test, where there is some fluctuation as to the reason for [Complainant]'s firing, where there is evidence that [Complainant]'s employment status was being discussed before TEA learned about the lawsuit, where the Commissioner of Education claims to be acting on a belief in what he describes as unbelievable accusations without investigation or even an opportunity for [Complainant] to respond, the strength of TEA's reasons for firing [Complainant] are, at a minimum, murky and unconvincing.

Moving to the second *Carr* factor, the existence and strength of any motive to retaliate on the part of the TEA officials who were involved in the decision, TEA similarly fails to show that it did not have a substantial reason to retaliate for [Complainant]'s protected disclosures about

[229] Hearing Transcript 231:1-8.
[230] Hearing Transcript 232:9-19.
[231] Hearing Transcript 232:20 –233:1.
[232] Hearing Transcript 233:6 - 19.

issues with the SPEDx contract. As noted, Morath states that he made the decision to fire [Complainant] without input from others, but there is contrary evidence that other TEA leaders, including Porter, played a role in the decision to fire [Complainant]. Morath himself testified that Schwinn called him on the weekend of November 18 about [Complainant].

Even if the proof were convincing that on November 20, 2017, Morath made the decision to fire [Complainant] himself, at that point he would already have known about the protected disclosures and he had reason to want to quash allegations about improprieties with the SPEDx contract.

On November 20, 2017, Morath clearly knew about the disclosures to Wilson, who had completed his investigation by November 17. Morath also admitted in his testimony that Wilson's November 17 investigative report informed Morath that [Complainant] was making accusations to the OIG.[233]

Although during live testimony Morath indicated that the SPEDx contract was not a large contract compared to TEA's other contract[234] Morath indicated how seriously he considered these allegations anyway, including ordering that Wilson complete the investigation within a little more than a week.[235] Additionally, when discussing emails he received expressing concerns about the allegations in the lawsuit, Morath refers to a November 20, 2017 email from a group, Texans for Special Education Reform, or TxSER.[236] Although addressed to Morath, the email was also sent to the Governor and Lieutenant Governor of Texas, the Speaker of the Texas House and the Chairman of the Texas House and Senate, the Chairwoman of the State Board of

[233] TEA Investigation Memo at 1 [59].
[234] Hearing Transcript 211:15-21.
[235] Hearing Transcript 264:14-18. Bill Wilson, Notes [496].
[236] Hearing Transcript 205:23 - 206:13.

Education, and representatives from seven disability rights or parent advocacy groups.[237] But the second paragraph stated:

> We are also deeply concerned about "The IEP Analysis Project," a no-bid contract TEA entered with a newly chartered Georgia Company ("SPEDx"), with no proven work history, to data mine the highly personal and confidential information contained in student IEPs, without parent notification or permission. Especially troubling is the effective sale of this private student data by local school districts in exchange for financial incentives provided by TEA. We have tried several times to clarify the methodology and purpose of this project with both TEA and SPEDx without success. In fact, the more we have learned, the more concerned we have become.[238]

The termination document indicates Porter had a significant role in the firing of [Complainant], which makes the concerns about the SPEDx contract even more apparent. While in the letter of reprimand Porter told [Complainant] that she had the option of reporting her allegations "through the appropriate channels, such as the agency's internal auditor or the State Auditor's Office,"[239] Porter also reacted badly when he learned of advocate groups expressing concerns about SPEDx. [Complainant] texted Porter on October 6, 2017 about an advocate meeting she had attended she informed him that the advocate groups had "huge concerns about SPEDx," that their concerns could hit the papers soon, and that it could become a scandal on the scale of a prior scandal TEA had with its special education programs. Porter responded with a single word expletive.[240]

The evidence in this matter indicates that both Morath and Porter had an interest in bringing a swift conclusion to any allegations of wrongdoing around the SPEDx contract. TEA has not shown by clear and convincing evidence that the decision to fire [Complainant] was not made by someone with a significant motive to silence [Complainant].

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[237] E8, Email from Jana McKelvey, Texans for Special Education Reform (Nov. 20, 2017) [347-348].
[238] Id at 1 [347].
[239] Letter of Reprimand from Justin Porter to [Complainant] (Nov. 3, 2017) at 1 [85].
[240] C45 – "Texts [Complainant] to J Porter," at 14.

As to the *Carr* final factor, comparing the action taken against [Complainant] against other TEA employees who were not whistleblowers but who are otherwise similarly situated, it is inapplicable to this matter. In his testimony, Morath indicated that there has never been another TEA employee, whistleblower or not, who had accusations of covering up the sexual abuse of a young special education student.[241] And there is nothing in the OIG investigation or other documents that indicates there is a similarly situated TEA employee who was not a whistleblower to compare.

Remedies

41 U.S.C. § 4712(c) provides that for a violation of the statute, the agency decision shall enter one or more of the following remedial actions: (1) order the grantee to "take affirmative action to abate the reprisal;" (2) order the grantee "to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken;" or (3) order the grantee "to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency."

During the hearing, both parties agreed that neither party wants [Complainant] reinstated as Special Education Director at TEA.[242] Federal courts of appeal across the country have recognized that reinstatement is an inappropriate remedy when there is sufficient hostility

[241] Hearing Transcript 207:21 – 208: 2.
[242] Hearing Transcript 216:22 – 217:12.

between the parties.[243] Reinstatement will not be ordered in this case.

Compensatory Damages

[Complainant] seeks $382,253.30 in compensatory damages and $90,303.83 in attorneys' fees and expenses for a total request of $472,557.13. [Complainant] has submitted a list of compensatory damages she is seeking as a remedy for a violation of 41 U.S.C. § 4712, which includes overtime pay, start-up costs for a new business, "reputation reconciliation costs," moving expenses to and from Texas, backpay and benefits, and attorneys' fees and other fees associated with bringing and proving her whistleblower action. "Damages Sought under 41 U.S.C. § 4712(c)(1)(B) & (C)", C48, at 2. TEA argues that relief should not be awarded, but if it is awarded, the period of backpay should be limited. Respondent's Brief on Damages at 11-12. Specifically, TEA first argues that after-acquired evidence was obtained on January 17, 2018 that presented an independent ground for termination, and so the period of back bay should be limited to November 22, 2017, the day [Complainant] was fired, to January 17, 2018, the day the evidence was acquired. Id. at 11-12. TEA alternatively argues that [Complainant] was in a six-month probationary period and given her performance issues unrelated to any whistleblowing, it would be speculative to award back pay beyond the first six months of employment. Id. at 12.

[Complainant] seeks $2,000 for overtime worked during a conference in October 2017 that [Complainant] claims she had agreed with Porter would be credited to her "off the books" as payment when she was on a planned vacation in December 2017. [Complainant], however, provides no documentation to memorialize this questionable agreement. [Complainant] also requests $4,000 for the costs of starting a new business. She provided no specific documentation

[243] *Ogden v. Wax Works, Inc.*, 29 F. Supp. 2d 1003, 1008-9 (N.D. Iowa, 1998) (noting that decisions from the First, Second, Third, Eighth, Ninth, and Tenth Circuits have all determined that reinstatement is inappropriate when there is a sufficient level of hostility or animosity between the parties)

to support these costs or show that they are for her new business beyond representing that they are itemized on a spreadsheet and are for buying furniture, acquiring insurance, licensing an LLC, and obtaining books and supplies.[244] [Complainant] further indicates that she had $19,621 in expenses moving to Texas and then back to Oregon. [Complainant] has provided a spreadsheet to itemize these expenses and explained that they include the costs of breaking her lease when she was terminated in under one year.[245] As noted above, however, when [Complainant] took the position with TEA, she was specifically told that she would not be reimbursed for moving expenses moving to Texas.[246] [Complainant] has not indicated why she had to move from Texas back to Oregon after she was fired. Finally, [Complainant] indicates that in 2017 she contacted companies to find out the costs for a "reputation reconciliation" service and was told it would cost approximately $40,000. Two years later, there is no indication that she has utilized this service or made these expenditures.

Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct."[247] Additionally, they are intended to be "sufficient in amount to indemnify the injured person for the loss suffered."[248] [Complainant] has failed to establish that her requests for overtime pay, new business costs, reputation reconciliation, and moving costs are concrete losses that are necessary to indemnify her for actual losses she suffered as a result of her termination. However, [Complainant] is entitled to some backpay, benefits, attorneys' fees and other expenses associated with bringing her whistleblower complaint.

[244] Hearing Transcript 91:9-18.
[245] C48 - "Damages Sought under 41 U.S.C. § 4712(c)(1)(B) & (C), at 3; Hearing Transcript 93:25-95:7.
[246] C45 – "Texts [Complainant] to J Porter," at 1.
[247] *Cooper Indust. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).
[248] *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011) (internal quotations omitted).

[Complainant] seeks salary and benefits for the remainder of the 2017-2018 school year, her entire salary and benefits for the 2018-2019 school year, and salary for the first portion of the 2019-2020 school year. The compensatory damages provided for under 41 U.S.C. § 4712 specifically provide for back pay and benefits "that would apply to the person in that position if the reprisal had not been taken."[249]

The purpose of back pay is to put an employee "in the same position that they would have been had the violation never occurred."[250] In general, back pay is "awarded for lost compensation during the period between the date of the plaintiff's injury . . . and the date on which damages are determined" and is intended to be "the difference between the amount that the plaintiff actually earned while being discriminated against and the amount that the plaintiff would have earned if no discrimination had occurred."[251] Back pay, however, "must be limited to actual damages and proved with reasonable certainty."[252] In *Sure-Tan v. NLRB*, the Supreme Court articulated that "it remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practices."[253]

The evidence and testimony in this case indicate that even if [Complainant] weren't fired, it was unlikely [Complainant] would have worked for TEA for multiple years. Both parties provided evidence that [Complainant]'s work there was not likely to be long-term. During the live hearing, [Complainant] testified that her husband doubted that she would want to stay in her position at TEA for more than 6 months. [Complainant] testified that although her husband was

[249] 41 U.S.C. § 4712(c)(1)(B).
[250] *Carpenters Dis. Council of New Orleans & Viciniy v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283 (5th Cir. 1983).
[251] *Szeinbach v. Ohio State Univ.*, 820 F.3d 814, 820-821 (6th Cir. 2016).
[252] *McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1079 (6th Cir. 1989).
[253] *Sure-Tan v. NLRB*, 467 U.S. 883, 900 (1984).

certified as an administrator in Texas, when she came to work at TEA he stayed in Oregon because he wanted to "see how things go, how much [[Complainant]] liked her job," and then was going to start looking for jobs in Texas "in January or February."[254] [Complainant] was also in a six-month probationary period when she was fired. Respondent's Brief on Damages at 12.[255] That probationary period does not allow TEA to be excused for a retaliatory firing. However, beyond her comments about the SPEDx contract, [Complainant] was counseled and disciplined for unprofessional and overly casual behavior, and saying disparaging things about TEA and her colleagues.[256] Additionally, TEA policies require that a TEA employee "fully participate in internal or external agency investigations."[257] Despite repeated requests from Wilson for [Complainant] to participate in the Internal Investigation, claiming she was acting on advice of counsel, she refused to be interviewed.[258] Finally, Morath recalled a meeting he had with the directors of the 20 regional service centers where [Complainant] gave a presentation that Morath characterized as "terrible" and caused the Deputy Commissioner to order that [Complainant] was not permitted to come before the cabinet again.[259]

Given [Complainant]'s performance and conduct issues while on a probationary status, her comments about leaving TEA, and her own husband's demonstrated doubt that she would stay at TEA for a long period of time, this decision finds that [Complainant]'s damages should be limited to compensation she would have earned during the first year at TEA. Protection for employees from retaliatory firing is a public policy cornerstone of the statute, but still must be

[254] Hearing Testimony 37:1-13.
[255] TEA Operating Procedures, OP 07-08 at 1 (Section 7); *see also* Email from J. Wagner to M. Meitler (Jan. 10, 2019) at 3.
[256] Letter of Reprimand from Justin Porter to [Complainant] (Nov. 3, 2017) at 2-3 [86-87]; Justin Porter Notes at 3 [274].
[257] TEA Operating Procedures, OP 07-08 at 2 (Section 8(a)(4)(q)).
[258] TEA Investigation Memo at 3 [61].
[259] Hearing Transcript 216:9-19.

based on evidence of what [Complainant] would have earned had it not been for her retaliatory firing. Based on the above evidence, this decision finds [Complainant] would have earned her salary for 12 months had it not been for her retaliatory firing.

[Complainant] argues that her backpay should be calculated based on a raise in salary after six months from $125,000 to $130,000. Direct Examination Outline – Damages, C47 at 1-2. The text messages that [Complainant] submitted, however, indicate that what Porter represented to [Complainant] was that TEA would "look" at raising her salary from $125,000 per year to $130,000 per year after she had been in her position for six months. Texts L. [Complainant] to J. Porter, C45 at 2. Because [Complainant] had no reasonable expectation that her salary would necessarily be raised, her back pay will be calculated based on a salary of $125,000 for the entire period. [Complainant] was compensated for approximately 3 months or one quarter of the year. Her compensation for the rest of the year would have been $93,750.

41 U.S.C. § 4712(c)(1)(B) explicitly provides for awarding benefits. [Complainant] asserts that as part of her training, she knows that salaried employees in education typically make between 38 and 42 percent of their salary in benefits, and that splitting the difference she was requesting 40% of her benefits. TEA does not challenge this calculation, and so applying it to her nine months of lost wages, [Complainant] should be compensated $37,500 for lost benefits.

In addition, prejudgment interest is often awarded to make a complainant whole.[260] The appropriate rate is that which is provided by 28 U.S.C. § 1961(a).[261] That rate "shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve

[260] *U.S. v. City of Warren Mich*., 138 F.3d 1083, 1096 (6th Cir. 1998).
[261] *Wilkins v. St. Louis Housing Authority*, 198 F. Supp. 2d 1080, 1090 (E.D. Mo. 2001).

System, for the calendar week preceding," and shall be compounded annually.[262] The average rate for the calendar week proceeding this decision is 1.54%.[263] Applying that rate to the total back pay of $131,250 ($93,750 in salary and $37,500 in benefits) the proper back pay is $135,323.62.

Attorneys' Fees and Costs

On November 13, 2019, Andrew Levy and Anisha Queen, counsel for [Complainant], submitted a Petition for Attorneys' Fees and Costs with an attached itemized billing statement. [Complainant]'s attorneys asserted that their law firm, Brown Goldstein & Levy (BGL) expended 209 hours to date and estimated that they would spend an additional 56.5 hours on the post-hearing briefing and fee petition over the next three days for a total of 265.5 hours with the combined total value of $84,381.50. BGL also reported incurred expenses of $172.33.

BGL reported that [Complainant] incurred legal fees from her prior attorney, Bill Aleshire, related to both her November 2017 request for an OIG investigation and her September 15, 2018 OIG whistleblower complaint totaling $5,750.00. TEA has indicated that they are not challenging the $5,750 attorneys' fee requested for Bill Aleshire or BGL's $172.33 in expenses.[264] Because they are unchallenged, [Complainant]'s request for attorneys' fees for Bill Aleshire and BGL's expenses are granted with one exception. Attached to its petition, BGL itemized its expenses, including $20 for Levy to park during the hearing. Levy parked in OHA's building during the hearing, where the rate is $19 per day, and so BGL's expenses will be reduced to $171.33.

Attorneys' fees are ordinarily not recoverable by the winning party in federal litigation

[262] 28 U.S.C. § § 1961(a) and (b).
[263] *Daily Treasury Yield Curve Rate*, U.S. Dep't of Treasury, https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yield (last visited on Nov. 22, 2019).
[264] Respondent's Brief on Damages at 12 and 15.

absent a statutory provision allowing it.[265] 41 U.S.C. § 4712(c)(1)(C) explicitly provides for the awarding of attorneys' fees that "were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal."[266] The operative terms are "reasonable" and "incurred" – the complainant must have actually incurred the expense, and further, the expense must be reasonable.

Federal courts in Washington D.C., the location of U.S. Department of Education and OHA, the Fifth Circuit, which includes Texas, use the lodestar method to calculate reasonable attorneys' fees.[267] This method requires "multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit" and then adjusting the total depending on the circumstances in the case.[268] As the party seeking attorneys' fees, [Complainant] and BGL have the burden of showing the reasonableness of the hours billed.[269] In a whistleblower reprisal case under the ARRA, the U.S. Department of the Interior also noted that an attorneys' fee request "must also be supported by citation to past fee awards or to comparable awards in the community to attorneys of comparable backgrounds, to demonstrate the reasonableness of the retainer rate."[270]

Attached to the petition for Attorneys' Fees and Expenses was a "detailed fees report" which broke down the time spent for different activities and indicated that Levy charged $650 per hour, Queen charged $355 per hour, and BGL's paralegal charged $225 per hour. BGL, however, did not provide any evidence or explanation to support those billing rates. In the

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[265] *Hammond v. Northland Counseling Ctr, Inc.*, 218 F.3d 886, 894 (8th Cir. 2000).
[266] 41 U.S.C. § 4712(c)(1)(C).
[267] *Copeland v. Marshall*, 641 F.2d 880, 890-891 (D.C. Cir. 1980), *Rutherford v. Harris Cnty. Tex.*, 197 F.3d 173, 192 (5th Cir. 1999). State courts in Maryland, the location of BGL's office, are also instructed that "the lodestar Approach" is "generally" the correct approach for calculating reasonable attorney's fees. *Manor Country Club v. Flaa*, 387 Md. 297, 300 (2005).
[268] *Copeland*, 641 F.2d at 891; *Rutherford*, 197 F.3d at 192.
[269] *Saizan v. Delta Concrete Prods. Co., Inc*, 448 F.3d 795, 799 (5th Cir. 2006).
[270] FINAL DISPOSITION, Case No. 0I-CO-13-0243-I, 2015 WL 1966775, *16 (IBLA 2015).

absence of such information, TEA has asked that the United States Attorney's Fee Matrix (USAO Fee Matrix) be applied. The USAO fee matrix "is intended for use in cases in which a feeshifting statute permits the prevailing party to recover "reasonable" attorney's fees."[271] Levy's profile on the BGL website indicates that he graduated from law school in 1982, and so would likely have 31 or more years of experience practicing law. Under the Fee Matrix, the proper rate to be charged should be $637, not the $650 BGL requests. Queen graduated from law school in 2014, and so the $355 rate requested by BGL is in line with the Fee Matrix.[272] Finally, BGL provides no indication that the level of experience or qualifications of its paralegal justifies a higher rate, and so the rate of $173 is applicable under the Fee Matrix.

TEA also challenges three categories of billing entries. First, TEA argues that the charge for 1.5 hours of Levy's time on November 1, 2019 described as "New Client intake; initial review of client documents; t/c with new client" is not recoverable. TEA notes that this appears to be client development which the United States Court of Federal Claims has stated should not be collected as attorneys' fees.[273] Client intake, however, is not the same as client development, and the entry indicates that this also included an initial review of [Complainant]'s documents. Therefore, this reduction in billing will not be granted.

Next, TEA challenges the 31.1 hours billed by Levy that are described only as "prepare for hearing" as too vague and asks that half of those hours be disallowed. TEA argues that a vague entry without any explanation of the activities being performed does not allow for a meaningful review of whether the time spent was reasonable. This tribunal is mindful of the

[271] USAO Attorneys' Fees Matrix 2015-2020, https://www.justice.gov/usao-dc/page/file/1189846/download (last visited November 21, 2019) at n. 1.
[272] Under the Matrix, it would have been reasonable to request up to $365 per hour because Queen would seemingly have four to five years of experience.
[273] *See Otay Mesa Prop. L.P. v. United States*, 124 Fed. Cl. 141, 147 (Fed. Cl. 2015).

complexities of this case and that, because BGL was retained less than two weeks before the hearing, Levy had to work on an accelerated time frame. Levy, however, also bills 25 hours between November 3 and November 6 that appear to be mostly spent reviewing the submissions in this case, including the OIG report, and becoming familiar with the applicable laws and case law at issue in this matter, which is part of preparation for the hearing. Therefore, TEA's request to reduce Levy's billing by 15.75 hours is granted.

In [Complainant]'s Petition for Attorneys' Fees, BGL bills estimates 56.5 hours for post hearing briefing and to prepare the Petition for Attorneys' fees. Specifically, Levy billed 2.5 hours to prepare a petition that is just over one page long with no citations to any law or explanation or justification for the rate charged by Levy, Queen, and their paralegal. Additionally, Levy billed 14 hours, Queen billed 23 hours, and their paralegal billed 17 hours preparing and submitting a nineteen and half page brief that cites only five cases or sources not already provided in the Notice of Hearings and Order Governing Proceedings. As the party requesting attorneys' fees, [Complainant] has a burden to prevent billing excessively for a single task.[274] Billing 56.5 hours for the fee petition and post hearing brief submitted in this case is excessive and is therefore reduced by half for Levy, Queen, and their paralegal.

Finally, citing *Bd. of Sup'rs of Louisana State Univ. v. Smack Apparel Co.*, 2009 WL 927996, at *6 (E.D. La. Apr. 2, 2009), TEA argues that in the Fifth Circuit, travel time is "usually compensated as 50% of actual time" and so Levy's and Queen's billing for travel of 2.5 and 2.6 hours respectively, should be reduced by half. TEA's citation appears to be to an argument raised before the court that the decision does not indicate was necessarily accepted. One U.S. Court of Appeals, however, has noted that "while travel time is frequently reimbursed

[274] *Copeland*, 641 F.2d at 891-892.

at reduced hourly rates, "there is no hard-and-fast rule" requiring such a discount."[275] This decision is reducing Levy and Queen's submitted travel costs by half.

Utilizing a billing rate of $637.00 per hour, reducing Mr. Levy's billable hours by 15.75 for "Prepare for Hearing" entries and another 8.25 hours for excessive post hearing briefing, and billing for Mr. Levy's travel at $318.50 per hour, Levy's attorneys' fees should total $42,901.95.[276] Reducing Queen's hours 11.5 hours for excessive post hearing briefing and reducing the rate for her 2.6 hours of travel from $355.00 to $177.50, her total attorneys' fees should be reduced to $12,247.50.[277] Finally, applying a rate of $173 for BGL's paralegal's time and reducing her time by 8.5 hours for excessive post hearing briefing, the correct calculation for her billable hours should be $5,518.70.[278] Including $171.33 for BGL's expenses and $5,750 for attorneys' fees for Bill Aleshire, in total, the attorneys' fees and expenses owed to [Complainant] are $66,589.48.

[Complainant] additionally requested reimbursement for her expenses incurred in making and defending her complaint above the already addressed attorneys' fees and costs. Specifically, [Complainant] seeks costs for shipping, via Federal Expense, her complaint to OIG and her documents to her attorney and her flights, hotel, and Uber fees associated with coming to Washington DC for the live hearing and meeting her attorney totaling $798.10. In support of these expenses, [Complainant] submits receipts for her travel. 41 U.S.C. § 4712(c)(1)(C) provides for damages for "costs and expenses . . . reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal . . .," which describes all the

[275] *Central Pension Fund of the Intern. Union of Operating Engineers and Participating Employees v. Ray Haluch Gravel Co.*, 745 F.3d 1, 7-8 (1st Cir. 2014).
[276] 66.1 hours at $637.00 per hour for non-travel fees ($42,105.70) plus 2.5 hours at $318.50 per hour for travel ($796.25).
[277] 33.2 hours at $355.00 per hour for non-travel fees ($11,786) plus 2.6 hours at $177.50 per hour for travel ($461.50)
[278] 31.9 hours at $173.00 per hour.

requested reimbursements. [Complainant]'s request for $798.10 in additional costs is granted.

The total sum of compensatory damages including backpay, attorneys' fees, and reasonable expenses in this matter are $202,711.20.

CONCLUSIONS OF LAW

1. [Complainant] has met her burden of showing that she was an employee of a federal grantee.

2. [Complainant] has met her burden of showing that she made protected disclosures to TEA's internal audit office, to the Department's Office of Special Education Programs, to the Travis County District Attorney, to the Texas State Auditor, to the Texas Attorney General, to the Texas Comptroller's office, and to the Department's Office of the Inspector General.

3. [Complainant] has failed to show that her protected disclosures were contributing factors in the decision to verbally reprimand her on October 9, 2017 and to issue a written reprimand on November 3, 2017.

4. [Complainant] has met her burden of showing that her protected disclosures were contributing factors in the decision to terminate her employment on November 22, 2017.

5. TEA has failed to prove by clear and convincing evidence that it would have terminated [Complainant]'s employment in the absence of her protected disclosures.

ORDER

Texas Education Agency is **ORDERED** to pay [Complainant] compensatory damages, employment benefits, and all cost and expenses, including attorneys' fees, in the total amount of $202,711.20.

APPEAL RIGHTS

This order constitutes an order of relief issued by the head of the executive agency under

41 U.S.C. § 4712(c)(1), pursuant to the authority delegated by the Secretary of Education. This is the final decision of the Department of Education on the matter. The statute does not authorize motions for reconsideration. The following language summarizes adversely affected parties' rights to appeal this order as set forth by the NDAA. This paragraph is not intended to alter or interpret the applicable rules or to provide legal advice. Any person adversely affected or aggrieved by this order may obtain review in the United States court of appeals for a circuit in which the reprisal is alleged to have occurred. No petition for review may be filed more than 60 days after issuance of this order. Review shall conform to chapter 7 of Title 5. Filing an appeal shall not act to stay the enforcement of this order, unless a stay is specifically entered by the court.

DATE OF DECISION: NOVEMBER 22, 2019

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Robert G. Layton
Judge