



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF HEARINGS AND APPEALS  
400 MARYLAND AVENUE, S.W.  
WASHINGTON, D.C. 20202  
TELEPHONE (202) 245-8300

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[Complainant]

Complainant

v.

Cherry Creek School District

Defendant

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Docket No.: 22-28-CP

Reprisal for Disclosure  
Proceeding

Appearances: Michael Nolt, Esq., Kishinevsky & Raykin, for Complainant [Complainant]

Sonja S. McKenzi, General Counsel, Office of Legal Resources,  
for Defendant Cherry Creek School District

Before: Elizabeth Figueroa, Administrative Law Judge

**FINAL AGENCY DECISION AND ORDER**

**I. Introduction**

**A. Summary of this Final Agency Decision and Order**

This decision finds that Complainant has not met her initial burden to show her disclosures were a contributing factor for Defendant's employment actions. Therefore, this decision finds that the School District did not subject Complainant to a reprisal in violation of the protections provided by the National Defense Authorization Act (NDAA) and denies any relief to Complainant.

**B. Background**

This decision addresses whether there is sufficient basis to conclude that Defendant, the

Cherry Hill School District (School District), subjected [Complainant] ([redacted] or Complainant) to a reprisal prohibited by 41 U.S.C. § 4712(a). [Complainant] filed a Whistleblower Reprisal Complaint against the School District. The United States Department of Education's (Department) Office of Inspector General (OIG) investigated the complaint and issued a Report of Investigation (OIG Report or Report of Investigation). The OIG Report of Investigation is now before the Office of Hearings and Appeals (OHA), as designee of the Secretary of the Department (the Secretary), to determine whether there is sufficient basis to conclude that the School District subjected [Complainant] to a prohibited reprisal.

### **C. The Parties**

[Complainant] is a 57 year old Special Education (SPED) teacher.<sup>1</sup> She has worked for the School District as a SPED teacher continuously since August 2015.<sup>2</sup> [Complainant] was hired as a Moderate Needs (LD)/Severe Needs Cognitive (ILD) SPED Intervention Specialist teacher assigned to the Sky Vista Middle School (School).<sup>3</sup> Prior to working for the School District, [Complainant] worked as an elementary school teacher for approximately seven years and then as a SPED teacher for approximately three years at other schools outside of the School District.<sup>4</sup>

The School District, headquartered in Greenwood Village, Colorado, serves 55,000 students across eight municipalities.<sup>5</sup> It receives Special Education Grants to States and Special Education Preschool Grants from the Department through the Colorado Department of Education (CDE), the pass-through entity.<sup>6</sup>

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<sup>1</sup> OIG Report, Attachment 18, e-mail thread dated January 22, 2021, at (unnumbered) 4.

<sup>2</sup> OIG Report, Attachment 33, New Hire Teacher Worksheet.

<sup>3</sup> OIG Report at 3.

<sup>4</sup> OIG Report, Attachment 33, New Hire Teacher Worksheet.

<sup>5</sup> OIG Report at 3.

<sup>6</sup> OIG Report at 1 and at 3, FN 2.

The school where [Complainant] is employed, Sky Vista Middle School, is administered by the School District.<sup>7</sup> The School has approximately 900 middle-school students in grades 6 through 8.<sup>8</sup> Approximately 200 of those students have some type of learning disability that requires intervention.<sup>9</sup>

#### **D. Procedural History**

##### **1. The Whistleblower Reprisal Complaint**

On July 20, 2021, the Department's OIG received [Complainant's] Whistleblower Reprisal Complaint. In the Complaint, [Complainant] asserted that the School District took three adverse employment actions against her for reporting misuse of Special Education funds and that the actions were retaliation in violation of whistleblower protections. The remedy [Complainant] requested in the Complaint was cessation of the retaliation against her by the School District's management.<sup>10</sup>

##### **2. The OIG Investigation**

The OIG investigated the allegations in [Complainant's] complaint and assessed her allegations pursuant to the protections provided by 41 U.S.C § 4712, the National Defense Authorization Act of FY 2013 (NDAA).<sup>11</sup> As provided by the NDAA, the OIG was required to

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<sup>7</sup> OIG Report, Attachment 2, Interview of Complainant, at 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> OIG Report at 1, FN 1. Complainant checked the box on her whistleblower reprisal complaint indicating that she was alleging that there was a reprisal in violation of the Whistleblower Protection Act or other authority protecting Federal employees. OIG Report, Attachment 1 at 1. The Whistleblower Protection Act protects whistleblowers who work for the federal government. 5 U.S.C. Chapter 23. The NDAA, not the Whistleblower Protection Act, protects whistleblowers who are employed by Federal agency grantees. 41 U.S.C. § 4712. Complainant is not a federal employee but employed by a Department of Education grantee. Therefore, the NDAA, not the Whistleblower Protection Act, applies to Complainant. When interviewed by OIG investigators, Complainant confirmed that she mistakenly checked the wrong box in the complaint form and meant to specify retaliation in violation of the NDAA. OIG Report, Attachment 2, Interview of Complainant, at 2. OIG assessed Complainant's allegations and conducted an investigation under the NDAA. OIG Report at 1, FN 1.

complete its investigation and submit a report of its findings within 180 days, on January 16, 2022.<sup>12</sup> As allowed by the NDAA, the OIG requested an extension of that deadline, Complainant agreed to the extension, and the deadline for the OIG's completion and submission of a report of its findings was extended to April 16, 2022.<sup>13</sup>

### **3. Issuance of OIG Report of Investigation**

On April 14, 2022, the OIG issued a Report of Investigation, following its investigation of [Complainant's] Whistleblower Reprisal Complaint. The OIG's findings, as well as documents the OIG obtained and interviews it conducted and relied on for its findings, are set out in Section III below.

### **4. Hearing and Decision Process Before OHA**

On April 14, 2022, the OIG delivered its Report of Investigation to the Secretary. On April 15, 2022, the Acting Director of OHA assigned responsibility for overseeing this case and rendering a final agency decision in this matter to the undersigned.<sup>14</sup>

The statute requires that this decision be issued within 30 days of the Secretary's receipt of the OIG Report of Investigation on April 14, 2022, or by May 16, 2022.<sup>15</sup>

On April 18, 2022, OHA issued a Notice of Hearing and Order Governing Proceeding. That Order provided the parties the opportunity to submit additional evidence and to appear for a live hearing to make arguments, confront adverse evidence, and cross-examine witnesses, and set deadlines for submissions and dates for a pre-hearing conference and a live hearing. The pre-

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<sup>12</sup> 41 U.S.C. § 4712(b)(2)(A).

<sup>13</sup> 41 U.S.C. § 4712(b)(2)(B); OIG Report at 2.

<sup>14</sup> Correspondence to the parties from Acting Director of OHA (Item Number 5 in OES, OHA's electronic filing system). On October 29, 2019, pursuant to 20 U.S.C. § 3472, the Secretary of Education delegated their authority to carry out and perform all functions and duties to be performed by the Secretary under 41 U.S.C. § 4712(c) to the Director of OHA, together with authority to redelegate those functions and duties to an Administrative Law Judge.

<sup>15</sup> 42 U.S.C. § 4712(c)(1).

hearing conference was scheduled for April 19, 2022, and the hearing to take live testimony for May 5, 2022, only 17 days later because of the statutorily imposed short timeline for issuing a final agency decision. The parties were required to file and exchange witness lists and exhibits by April 28, 2022. An OHA attorney was made available to answer questions and assist the parties with procedural matters throughout the process.

On April 19, 2022, counsel for both parties appeared for a remote pre-hearing conference conducted via Microsoft TEAMS. At the pre-hearing conference, both parties affirmatively agreed to waive the live hearing scheduled for May 5, 2022, and requested that the deadline for filing documents be extended from April 28, 2022 to May 5, 2022, and also that they be allowed to proceed by filing written arguments.

On April 19, 2022, after the pre-hearing conference, the parties filed a Joint Request to Waive Hearing, and asked to continue with the matter by submitting written argument and documents. On April 21, 2022, the undersigned issued an Order, granting the parties' request and allowing them until May 5, 2022 by which to file written arguments and documents.

On May 5, 2022, both parties filed briefs and exhibits and the record closed.

While not controlling, the procedures followed in this proceeding were guided by the due process considerations from the United States Court of Appeals for the Eighth Circuit's decision in *Business Communications, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374 (8th Cir. 2013), which identified due process requirements when making a final agency decision in a whistleblower case like this.<sup>16</sup>

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<sup>16</sup> *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 applied only to contracts funded by the stimulus bill and Congress wanted to expand the provisions of Section 1553 to all federal contractors and grantees in 41 U.S.C. § 4712. S. Rep. 114-270, at 2-3 (2016).

## **II. Complainant's Whistleblower Reprisal Complaint**

### **A. Complainant's Assertions**

In her Whistleblower Reprisal Complaint, [Complainant] asserted that she was subjected to three employment actions that she believed to be acts of reprisal. Specifically, [Complainant] alleged she was discriminated against in the following ways: (1) she was placed on a Directed Improvement Plan (DIP) that placed additional administrative burdens on her; (2) she was given additional tasks that other teachers did not have; and (3) she was encouraged to retire.<sup>17</sup>

[Complainant] alleged that these actions were taken to retaliate against her for three disclosures she made to employees and management officials at the School District. Specifically, [Complainant] alleged that the School District violated laws, rules, or regulations and abused its authority related to Special Education grant funds it receives because teachers predetermined outcomes for two special education students on their Individualized Education Programs (IEP) on January 21 and February 26, 2021, and failed to hold a re-evaluation meeting for a third student on April 9, 2021.<sup>18</sup>

### **B. The School District's Response**

In response, during the OIG investigation, the School District asserted that its actions were neither adverse employment actions nor retaliatory, but rather taken before any disclosures were made. The School District contended that its actions were done to address concerns with [Complainant's] performance as an IEP case manager. Additionally, the School District denied that [Complainant] made disclosures involving teachers predetermining outcomes for two special education students on their IEPs or that it encouraged [Complainant] to retire.<sup>19</sup>

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<sup>17</sup> OIG Report at 4; OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 4.

<sup>18</sup> OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 4 and (unnumbered) 10-11.

<sup>19</sup> OIG Report at 7.

### **III. The OIG Report of Investigation**

#### **A. Summary of OIG Report of Investigation**

The OIG's investigation "did not substantiate [Complainant's] allegations of whistleblower reprisal."<sup>20</sup> The OIG investigation found that [Complainant] made only one, not three, protected disclosures as she had asserted in the Whistleblower Reprisal Complaint, and that she did not meet her burden of showing that the disclosure was a contributing factor to the employment actions taken by the School District as the disclosure occurred after the employment actions were taken.<sup>21</sup> Additionally, OIG's investigation concluded that the School District provided clear and convincing evidence that it would have taken the employment actions independent of the disclosures.<sup>22</sup>

The OIG conducted a nine-months long investigation into [Complainant's] claims. It based its report on interviews of [Complainant] and six individuals identified by both [Complainant] and the School District, as well as materials related to [Complainant's] claims.

The six witnesses the OIG interviewed were Witness 1, a SPED teacher and colleague of [Complainant]<sup>23</sup>; Witness 2, a SPED teacher and colleague of [Complainant]<sup>24</sup>; Bryan Terry, Assistant Principal at the School and [Complainant's] immediate supervisor and evaluator<sup>25</sup>; Chellie McCourt, Principal at the School and [Complainant's] second-line supervisor<sup>26</sup>; Alan

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<sup>20</sup> OIG Report at 1-2.

<sup>21</sup> *Id.*

<sup>22</sup> OIG Report at 2.

<sup>23</sup> OIG Report, Attachment 4, Interview of Witness 1.

<sup>24</sup> OIG Report, Attachment 5, Interview of Witness 2.

<sup>25</sup> OIG Report at 3; OIG Report, Attachment 6, Interview of Bryan Terry, and Attachment 8, Interview of Chellie McCourt.

<sup>26</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 1.

Lavizzo, the human resources director for the School District<sup>27</sup>; and, Dr. Mary Page, the Secondary SPED Director for the School District<sup>28</sup>.

The following documents were obtained by and relied upon by the OIG in its Report of Investigation and included as attachments to the OIG Report of Investigation:

Attachment # 1: Complainant's Whistleblower Reprisal Complaint dated July 20, 2021

Attachment #2: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Complainant dated August 17, 2021

Attachment #3: SF Form SF-5C showing Federal Awards expended by the School District for the fiscal year ending in 2020

Attachment #4: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Witness 1 dated November 2, 2021

Attachment #5: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Witness 2 dated November 2, 2021

Attachment #6: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Bryan Terry dated November 2, 2021

Attachment #7: Waiver Authorizing Disclosure executed by Bryan Terry

Attachment #8: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Chellie McCourt dated November 2, 2021

Attachment #9: Waiver Authorizing Disclosure executed by Chellie McCourt

Attachment #10: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Alan Lavizzo dated November 10, 2021

Attachment #11: Waiver Authorizing Disclosure executed by Alan Lavizzo

Attachment #12: OIG Special Agents Ivan C. Anthony and Tchiu Lee's memorialization of their interview of Dr. Mary Page dated November 10, 2021

Attachment #13: Waiver Authorizing Disclosure executed by Dr. Mary Page

Attachment #14: Complainant's E-mail Disclosure dated April 13, 2021

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<sup>27</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 1.

<sup>28</sup> OIG Report at 4 and Attachment 12.

Attachment #15: Complainant's E-mail Disclosure dated April 14, 2021

Attachment #16: Dr. Mary Page's April 15, 2021 response E-mail to Complainant

Attachment #17: DIP executed January 8, 2021

Attachment #18: E-mail thread dated January 22, 2021 concerning early retirement

Attachment #19: School District's Teacher Negotiated Agreement 2020-2021 School Year

Attachment #20: E-mail dated October 26, 2020 to Human Resources concerning possible DIP

Attachment #21: E-mail dated December 3, 2020 to Human Resources concerning possible DIP Decision

Attachment #22: E-mail dated December 3, 2020 to Chellie McCourt concerning draft DIP

Attachment #23: E-mail dated December 14, 2020 to Human Resources concerning draft DIP

Attachment #24: E-mail thread dated January 7, 20, 21, 25, 2021 concerning DIP meeting

Attachment #25: E-mail dated January 26, 2021 concerning Union representation at DIP meetings

Attachment #26: Demographic Data (redacted) on Student 1

Attachment #27: Demographic Data (redacted) on Student 2

Attachment #28: E-mail thread concerning Complainant's DIP concerns

Attachment #29: Colorado Department of Education 2018 State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers

Attachment #30: E-mail thread dated March 26, 2021 concerning Data Tracker

Attachment #31: Mid-Year Review of Complainant for School Year 2020-2021

Attachment #32: Teacher Final Assessment of Complainant for School Year 2020-2021

Attachment #33: New Hire Teacher Worksheet for Complainant

Attachment #34: E-mail thread concerning OIG questions to Complaint

## B. OIG's Findings

The OIG Report of Investigation made findings based on witness interviews<sup>29</sup> and documentation. Each of those findings are supported by witness statements or documentation, or both.

At the conclusion of its Report of Investigation, the OIG made five findings:

- (1) [Complainant] is an employee of CCSD which is an ED subgrantee via the Colorado Department of Education, the pass-through entity.
- (2) ED OIG could not substantiate that [Complainant] made disclosures to CCSD officials regarding two incidents concerning two students (Students 1 and 2).
- (3) [Complainant] disclosed information about one student (Student 3) on April 13, 2021, as well as on April 14, 2021, to CCSD management officials that she reasonably believed was evidence of a violation of law, rule, or regulation related to a Federal grant, gross mismanagement of an ED grant, a gross waste of ED funds, and abuse of authority.
- (4) [Complainant] disclosed the information to management officials at CCSD who had the responsibility to investigate, discovery, or address misconduct.
- (5) ED OIG found the disclosures made on April 13 and 14, 2021, regarding Student 3 were not a contributing factor in the actions that CSD took against [Complainant]. Therefore, ED OIG did not substantiate the complaint.<sup>30</sup>

In short, the OIG concluded that an impermissible reprisal had not occurred and that the School District had established by clear and convincing evidence that [Complainant] would have been placed on the DIP and assigned administrative tasks she complained of regardless of her disclosure. Thus, the OIG recommended that [Complainant's] complaint be denied.

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<sup>29</sup> Two of the six witnesses did not execute Waivers Authorizing Disclosure Under the Privacy Act of 1974 (5 U.S.C. § 552a) and Section 828 of the NDAA. These two witnesses are referred to herein as Witness 1 and Witness 2. The memoranda memorializing their statements that OIG investigators prepared were redacted to prevent the disclosure of personal information. OIG Report, Attachments 4 and 5.

<sup>30</sup> OIG Report at 13.

#### **IV. Fact Findings**

The facts, based on interviews and documentation in the OIG Report of Investigation and evidence submitted by the parties in this proceeding, are as follows:

##### **Complainant's Role and Job Responsibilities**

[Complainant] is a 57-year-old SPED teacher.<sup>31</sup> She has worked for the School District as a Special Education teacher continuously since 2015.<sup>32</sup> Since being hired by the School District in 2015, [Complainant] has worked as a Learning Disabilities teacher at Sky Vista Middle School.<sup>33</sup> Prior to working for the School District, [Complainant] worked as an educator for approximately ten years, including as a special education teacher for approximately three years at schools outside of the School District.<sup>34</sup>

As part of her duties as a SPED teacher, [Complainant] is assigned to manage the cases of students with disabilities and facilitate IEP team meetings.<sup>35</sup> [Complainant] manages about 25 student cases.<sup>36</sup> Progress reporting and data tracking skills are an essential part of SPED case manager/teacher's responsibilities.<sup>37</sup>

##### **IEP Case Management**

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<sup>31</sup> OIG Report, Attachment 18, E-mail thread dated January 22, 2021, at (unnumbered) 4.

<sup>32</sup> OIG Report, Attachment 2, Interview of Complainant; OIG Report, Attachment 33, New Hire Teacher Worksheet.

<sup>33</sup> OIG Report, Attachment 33, New Hire Teacher Worksheet.

<sup>34</sup> OIG Report, Attachment 2, Interview of Complainant; OIG Report, Attachment 33, New Hire Teacher Worksheet.

<sup>35</sup> OIG Report at 3.

<sup>36</sup> OIG Report, Attachment 2, Interview of Complainant, at 1.

<sup>37</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

In IEP case management, it is important to understand the process in order to satisfactorily adjust for all student performance deficits, to examine student progress, and to be able to speak to team members and families as part of the decision-making process.<sup>38</sup> IEPs require a lot of work and preplanning is absolutely necessary.<sup>39</sup> Preplanning for an IEP involves extensive review of the data as well as batteries of tests to assess students' needs.<sup>40</sup> "IEP planning is a collaborative effort among multiple disciplines to determine the disabilities that a student can qualify for."<sup>41</sup> Eligibility can only occur once the IEP meeting is held with the participation of the parents; there is no determination without the meeting.<sup>42</sup> All SPED case managers are required to document all aspects of IEP case management, either electronically or via hard copy.<sup>43</sup> IEP data tracking is required of all SPED teachers in order to be effective in their case management and it also is required by law in order to track progress.<sup>44</sup> Progress reporting and data tracking skills are an essential part of case manager/teacher's responsibilities.<sup>45</sup>

### **[Complainant's] Evaluator and Supervisors**

Bryan Terry, Assistant Principal at the School, and Chellie McCourt, Principal at the School, are [Complainant's] supervisors.<sup>46</sup>

Mr. Terry was [Complainant's] immediate supervisor and her evaluator for the three years preceding the investigation in this case and at all relevant times concerning the events at issue in this matter.<sup>47</sup> Mr. Terry has been employed by the School District for approximately 17 years and

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<sup>38</sup> OIG Report, Attachment 5, Interview of Witness 2, at 2.

<sup>39</sup> OIG Report, Attachment 4, Interview of Witness 1, at 2.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 3.

<sup>43</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>44</sup> *Id.*

<sup>45</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

<sup>46</sup> OIG Report at 3; OIG Report, Attachment 2, Interview of Complainant.

<sup>47</sup> OIG Report at 3; OIG Report, Attachment 6, Interview of Bryan Terry; OIG Report, Attachment 8, Interview of Chellie McCourt; OIG Report, Attachment 2, Interview of Complainant.

Assistant Principal at the School for four years.<sup>48</sup>

Ms. McCourt is the final approving authority for personnel administrative actions such as evaluations and corrective actions.<sup>49</sup> Ms. McCourt has been employed by the School District for approximately 24 years.<sup>50</sup> She has been principal at the School for six years.<sup>51</sup> Before becoming principal, Ms. McCourt was a dean of students and a teacher.<sup>52</sup> As principal, Ms. McCourt served as [Complainant's] second-line supervisor.<sup>53</sup> Sometime after [Complainant] filed the Whistleblower Reprisal Complaint and before the OIG conducted its investigation, Ms. McCourt assumed the role of [Complainant's] evaluator.<sup>54</sup>

### **Other School District Administrators involved**

Mr. Lavizzo has been employed by the School District since 2013.<sup>55</sup> He is the human resources director.<sup>56</sup> Prior to his tenure as human resources director, Mr. Lavizzo was an assistant principal as well as a principal for the School District.<sup>57</sup>

Dr. Page has been employed by the School District for two years as its Secondary Special Education director.<sup>58</sup>

### **Other Witnesses**

Witness 1 is a SPED teacher and a colleague of [Complainant].<sup>59</sup>

Witness 2 is a SPED teacher and a colleague of [Complainant].<sup>60</sup>

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<sup>48</sup> OIG Report, Attachment 6, Interview of Bryan Terry.

<sup>49</sup> OIG Report, Attachment 2, Interview of Complainant, at 2.

<sup>50</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 1.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> OIG Report, Attachment 12, Interview of Dr. Mary Page.

<sup>59</sup> OIG Report; OIG Report, Attachment 4, Interview of Witness 1.

<sup>60</sup> OIG Report; OIG Report, Attachment 5, Interview of Witness 2.

### **Other School employees referenced**

Lynn Edelschein is a SPED teacher and colleague of [Complainant] in the Student Achievement Services (SAS) Department at the School. She does not have supervisory authority over [Complainant]<sup>61</sup>

Aimee Kroeschen is a SPED teacher and coordinator of the SAS Department at the School as well as [Complainant's] colleague. She does not have supervisory authority over [Complainant].<sup>62</sup>

### **Teacher Evaluations**

Colorado's Senate Bill 10-191 requires schools, school districts, and the Colorado Department of Education (CDE) to evaluate all licensed educators with state approved quality standards and elements at least annually.<sup>63</sup> The School District performs mid-year reviews and final assessments of its teachers each school year.<sup>64</sup> The assessments are performed by individuals who have completed training in evaluation skills approved by the CDE.<sup>65</sup>

In Winter 2018, the Colorado Department of Education (CDE) published a brief on evaluation of Special Education Teachers, "Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers."<sup>66</sup> CDE's brief acknowledged the unique challenges presented for both evaluators and special education teachers being evaluated

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<sup>61</sup> OIG Report at 3.

<sup>62</sup> OIG Report at 3.

<sup>63</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers, at 4.

<sup>64</sup> OIG Report, Attachment 19, Teachers 2020-2021 SY Negotiated Agreement, at 76 -77.

<sup>65</sup> *Id.* at 76.

<sup>66</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers.

and that SPED teachers' full range of responsibilities is not reflected in the rubric for evaluating Colorado teachers.<sup>67</sup> CDE noted that one of the basic purposes of the evaluation system is to ensure educators receive adequate feedback and professional learning support to provide them a meaningful opportunity to improve their effectiveness.<sup>68</sup> CDE also noted that the model evaluation system involves a year-long cycle that includes continuous communication between the evaluator and the educator and focuses on continuous improvement of skills, knowledge, and student outcomes through educator evaluations.<sup>69</sup>

CDE's brief presented suggestions, but not policy requirements, on ways in which SPED teachers could be evaluated and ways in which evaluators and teachers might discuss teacher performance.<sup>70</sup> The CDE brief expressly states that data should inform decisions in SPED cases.<sup>71</sup> In the Quality Standards and Examples of Practices that May be Evidence during Classroom Observations, CDE includes an expectation that special education teachers regularly collect progress monitoring data to inform their instruction and next steps for students in meeting their IEP goals as well as to use that data to facilitate students' meaningful engagement, participation, and access to the general curriculum.<sup>72</sup>

### **The Directed Improvement Plan (DIP) Process**

Under the Teachers 2020-2021 SY Negotiated Agreement between the School District and the teachers association, if the assessment evaluator determines that performance concerns exist,

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<sup>67</sup> *Id.* at 17.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers, at (unnumbered) 5,

<sup>70</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers.

<sup>71</sup> *Id.* at (unnumbered) 5.

<sup>72</sup> OIG Report, Attachment 29, CDE Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers, at 15.

the principal or site administrator contacts the Office of Human Resources to ascertain what steps will be taken to address the issue.<sup>73</sup> With the agreement of Human Resources, the principal or site administrator may develop a Directed Improvement Plan (DIP) for the teacher.<sup>74</sup>

A DIP is not a disciplinary or punitive measure.<sup>75</sup> Rather, a DIP provides the necessary support to a teacher having difficulties and who is in danger of receiving a less-than-effective rating in their end of year evaluation.<sup>76</sup> It is designed to support the teacher in achieving both school and personal goals and attaining an effective or better rating prior to a final rating at the end of the school year.<sup>77</sup> The DIP specifically ties to the areas that need improvement.<sup>78</sup> It must specifically address the areas of concern and include correlating support resources and a timeline for implementation.<sup>79</sup>

The DIP process may be initiated at any time during the school year, including at mid-year, when it is determined that the teacher may receive a less than effective rating.<sup>80</sup> A mid-year DIP represents an optional, intermediary step to provide further support prior to an end of the year DIP, if one becomes necessary.<sup>81</sup>

If a teacher's performance is judged by the site/program administrator to be ineffective, and the performance of the teacher does not sufficiently improve as a result of the evaluation process and/or the DIP, the site/program administrator can move the teacher to the remediation

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<sup>73</sup> OIG Report, Attachment 19, CCSD Teacher Negotiated Agreement 2020-2021 School Year, at 84.

<sup>74</sup> *Id.*

<sup>75</sup> OIG Report, Attachment 6 Interview of Bryan Terry, at 3; OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2; Attachment 19, Teachers' Negotiated Agreement, at 84.

<sup>76</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 3; OIG Report Attachment 8, Interview of Chellie McCourt, at 2.

<sup>77</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 3; OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

<sup>78</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2; OIG Report, Attachment 19, Teacher Negotiated Agreement, at 84.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> OIG Report, Attachment 19, Teacher Negotiated Agreement, at 84.

process following two DIP processes lasting a minimum of sixty (60) calendar days within the teacher’s work year.<sup>82</sup>

**[Complainant’s] Annual Teacher Assessments**

From the time she was hired by the School District in 2015, [Complainant] was assessed each year at the end of the school year.<sup>83</sup> The Teacher Final Assessment uses Quality Standards to assess teachers and results in an overall score based on the average scores for each Quality Standard. The six Quality Standards assessed are: Quality Standard I: Pedagogy, Quality Standard II: Culture and Climate, Quality Standard III: Instruction, Quality Standard IV: Professionalism, Quality Standard V: Leadership, and Quality Standard VI: Measures of Student Learning.<sup>84</sup>

Assessment scores range from 0.00 to 4.00, and are assigned corresponding ratings as follows:<sup>85</sup>

- 2.71 – 4.00 Highly Effective
- 1.71 – 2.70 Effective
- .71 – 1.70 Partially Effective
- 0.00 – 0.70 Ineffective

From 2015 through 2020, [Complainant] was assessed as follows<sup>86</sup>:

School Year	Standards Assessment Scores	Overall Score	Rating
2015-2016	Standard I: 2.67/4.00 Standard II: 3.17/4.00 Standard III: 2.38/4.00 Standard IV:2.33/4.00 Standard V: 2.25/4.00	3.27/4.00	Highly Effective

<sup>82</sup> *Id.* at 85.

<sup>83</sup> Complainant Exhibit C2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup>*Id.*

	Standard VI: 3.98/4.00		
2016-2017	Standard I: 2.71/4.00 Standard II: 3.33/4.00 Standard III: 3.00/4.00 Standard IV: 3.33/4.00 Standard V: 2.50/4.00 Standard VI: 3.00/4.00	2.99/4.00	Highly Effective
2017-2018	Standard I: 2.29/4.00 Standard II: 2.83/4.00 Standard III: 2.00/4.00 Standard IV: 2.33/4.00 Standard V: 2.50/4.00 Standard VI: 3.00/4.00	2.70/4.00	Effective
2018-2019	Standard I: 1.33/4.00 Standard II: 2.75/4.00 Standard III: 2.67/4.00 Standard IV: 2.50/4.00 Standard V: 3.00/4.00 Standard VI: 3.00/4.00	2.65/4.00	Effective

Due to the Covid-19 pandemic, the School District, in collaboration with the teachers association, and in response to the Colorado Governor’s Executive Order D 2020-021 and the CDE’s recommendation, suspended all evaluation processes soon after February 2020, including any work on a DIP or remediation.<sup>87</sup> Consequently, [Complainant] was not evaluated for the School Year 2019- 2020.<sup>88</sup>

**Placement of [Complainant] on a Case Manager Support Plan**

Beginning in early 2020, school administrators became concerned about [Complainant] performance as an IEP case manager and teacher for SPED students.<sup>89</sup> A particular case illustrated [Complainant] struggles with IEP case management, including comprehensive report writing, data tracking and progress monitoring.<sup>90</sup> Mr. Terry felt that [Complainant] was not prepared to conduct

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<sup>87</sup> OIG Report at 8, FN 6.  
<sup>88</sup> OIG Report, Attachment 2, Interview of Complainant, at 2.  
<sup>89</sup> OIG Report at 8; OIG Report, Attachment 6, Interview of Bryan Terry, at 2.  
<sup>90</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

IEP meetings and that she needed informal support.<sup>91</sup> Mr. Terry's plan to address this and to provide informal support to [Complainant] were delayed due to the Covid-19 pandemic and the change to remote instruction.<sup>92</sup>

Upon observing IEP meetings managed by [Complainant] in September and October 2020, Mr. Terry saw that [Complainant] was still struggling with presenting data and facilitating the meetings.<sup>93</sup>

Mr. Terry met with Ms. McCourt to discuss a support plan to assist [Complainant] in conducting IEP meetings, data tracking, and progress monitoring, which Mr. Terry identified as the goal of all Special Education teachers.<sup>94</sup> In late October 2020, Mr. Terry drafted a model case manager support plan to build up [Complainant's] confidence in her IEP case management skills and update her professional goals.<sup>95</sup>

In October 2020, [Complainant] was placed on a Case Manager Support Plan, an informal plan designed to provide her review two enumerated Colorado State Standards and Elements for SPED teachers.<sup>96</sup> The two standards addressed in the Case Manager Support Plan were Quality Standard III on Instruction, Element B: Evidence, which requires teachers to use formal and informal methods to assess student learning, and Quality Standard IV on Professionalism, Element B: Professional Growth/Goals, which includes a component on data monitoring to use in evaluating instructional strategies.<sup>97</sup> The Case Manager Support Plan stated as follows:

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<sup>91</sup> *Id.*

<sup>92</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2; OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>93</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

<sup>94</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2; OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>95</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

<sup>96</sup> Defendant Exhibit E1.

<sup>97</sup> *Id.*

In an effort to support [Complainant] in successfully completing her responsibilities as a case manager and in facilitating IEP's, we have met and put the following supports and expectations in place.

[Complainant] will:

Update the progress monitoring tracker (Shared google doc) for all students being case managed.

Use the IEP Get Ready, Do, Done, Get Done (GRDD) checklist and send to Bryan upon completion of initial or reval.

CC or BCC Bryan on all emails related to case management students.

Double check that all participants of IEP meetings are invited (virtually, or in person) at least 10 days in advance.

Transition to using Read Theory for progress reporting of reading comprehension Aimee will show you how Read Theory works.

Continue to use Easy CBM for progress monitoring of reading fluency.

Ensure understanding and ability to present and explain all academic measurements and progress monitoring tools being used to assess case management students.

Use resources provided from testing and measurements and communicate with team members, if needed, to ensure understanding.

Ensure understanding and ability to present data from all academic measurements and progress reporting. Know what the data says and what it means. Be able to synthesize data into terms parents and guardians can understand.

Communicate with team members, if needed, to ensure understanding.

Reach out to Bryan, Aimee, or Erin if help is needed at any time for supports in completing tasks and goals or in communication with team members or stakeholders.<sup>98</sup>

At this stage, the process to assist [Complainant] was still informal.<sup>99</sup>

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<sup>98</sup> Defendant Exhibit E1 at 2-3.

<sup>99</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

## Placement of [Complainant] on a DIP

[Complainant] did not adhere to the informal support plans that were developed for her and continued to struggle.<sup>100</sup>

On October 26, 2020, the Principal of [Complainant's] school, Chellie McCourt, sent an e-mail to Alan Lavizzo, the School District's Director of Human Resources, informing him [Complainant] was "struggling with some IEP writing, conducting IEP meetings and providing effective instruction in her lab classes."<sup>101</sup> Ms. McCourt informed Mr. Lavizzo that Assistant Principal Terry Bryan was working with [Complainant].<sup>102</sup> Ms. McCourt also informed Mr. Lavizzo that Mr. Bryan was working with the SPED Coordinator to develop support plans to help [Complainant] and that if there were not changes they would be looking at a DIP for her.<sup>103</sup> Mr. Terry and Ms. McCourt also had several telephone calls with Mr. Lavizzo concerning [Complainant's] performance.<sup>104</sup> Mr. Terry and Ms. McCourt told Mr. Lavizzo that they were considering a DIP for [Complainant] because of her difficulties with IEP case management, including progress monitoring and data tracking.<sup>105</sup> Mr. Lavizzo replied that they should be sure a mid-year assessment of [Complainant] was completed by December 15<sup>th</sup>, and that if she had not made progress by that time she should be placed on a DIP.<sup>106</sup>

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<sup>100</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>101</sup> OIG Report, Attachment 20, Email concerning DIP to OHR, dated October 26, 2020, at 1.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

<sup>105</sup> *Id.*

<sup>106</sup> OIG Report, Attachment 20, Email concerning DIP to OHR, dated October 26, 2020.

On December 3, 2020, Mr. Terry and Ms. McCourt decided to place [Complainant] on a formalized DIP because [Complainant] was having difficulty complying with her Case Manager Support Plan.<sup>107</sup> That same day, Ms. McCourt, sent an e-mail to Mr. Lavizzo, informing him that [Complainant] had missed some key directives in a recent IEP meeting and that she would be moved to a DIP.<sup>108</sup>

Mr. Terry was the Evaluator for [Complainant's] 2020-2021 Mid-Year review and final assessment.<sup>109</sup> In the 2020-2021 Mid-Year review completed on December 18, 2020, Mr. Terry stated that Complainant demonstrated adequate mid-year progress in Quality Standards I and II on the teacher evaluation rubric, but that they discussed a Directed Improvement Plan and had recently updated her professional practice goal to ensure growth and meeting goals in Quality Standard II, Element B, Evidence, and Quality Standard IV, Element B, Professional Growth.<sup>110</sup> Mr. Terry advised [Complainant] that she would be placed on a DIP given deficits noted in her mid-year evaluation.<sup>111</sup>

Following completion of the mid-year review assessment, Mr. Bryan prepared a DIP for [Complainant].<sup>112</sup> The DIP's stated goal was to support [Complainant] in successfully completing her responsibilities as a case manager and in facilitating IEP's, in attaining adequate progress on her Professional Practice goal, and to support her in attaining adequate ratings on two elements of the teacher evaluation rubric, Quality Standard III, Element B: Evidence and Quality Standard IV, Element B, Professional Growth/Goals.<sup>113</sup>

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<sup>107</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

<sup>108</sup> OIG Report, Attachment 22, email concerning OHR Response to McCourt December 3, 2020, Email, Dated December 3, 2020.

<sup>109</sup> OIG Report, Attachment 31, Mid-Year Review 2020-2021 School Year.

<sup>110</sup> *Id.* at 1.

<sup>111</sup> OIG Report at 10; OIG Report, Attachment 31, Mid-Year Review 2020-2021 School Year, at 1.

<sup>112</sup> OIG Report, Attachment 23, Email Concerning Terry Draft DIP to OHR, Dated December 14, 2020.

<sup>113</sup> *Id.*

The DIP, as executed, contained 9 Action Plan items:

(1) update the progress monitoring tracker monthly for all students being case managed. Typically students are progress monitored every 4-6 weeks; (2) use the IEP Get Ready, Do, Done, Get Done (GRDD) checklist and send to Evaluator upon completion of initial or re-eval; (3) cc or bcc evaluator on all emails related to case management students; (4) double check that all participants of IEP meetings are invited (virtually, or in person) at least 10 days in advance; (5) transition to using Read Theory for progress monitoring of reading comprehension. Continue to use Easy CBM for progress monitoring of reading fluency; (6) use resources provided from testing and measurement tools and communicate with team members, if needed, to ensure understanding; (7) ensure understanding and ability to present data, with fidelity, from all academic measurements and progress monitoring tools being used to assess case management students. Know what the data says and what it means. Be able to synthesize data into terms parents and guardians can understand; (8) have Department Coordinators review IEP and Re-eval paperwork before locking the documents. Department Coordinators will review and respond within 48 hours; and, (9) reach out to Evaluator and Department Coordinators if help is needed at any time for supports in completing tasks and goals or in communication with team members or stakeholders.<sup>114</sup>

The DIP contained three measurements: three formal observations of IEP meetings with pre and post conference feedback for each; check-in meetings every Monday between [Complainant] and Mr. Terry, and artifacts that included data tracker, GRDD Form, evaluation notes and feedback, case management e-mails, IEP and re-evaluation paperwork.<sup>115</sup>

On January 8, 2021, Mr. Terry, Ms. McCourt, Mr. Lavizzo, [Complainant], and [Complainant's] union representative met to discuss initiation of [Complainant's] DIP.<sup>116</sup> That same day, the parties signed the DIP.<sup>117</sup> The DIP contained a timeline of January 11 through March 12, 2021.<sup>118</sup>

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<sup>114</sup> OIG Report, Attachment 17, Directed Improvement Plan – [Complainant].

<sup>115</sup> *Id.*

<sup>116</sup> OIG Report at 9.

<sup>117</sup> OIG Report, Attachment 17, Directed Improvement Plan - [Complainant].

<sup>118</sup> *Id.* at 2.

[Complainant] believed that “everyone in the building” knew that she had been placed on a DIP.<sup>119</sup>

[Complainant] also believed the DIP included onerous administrative burdens such as logging her activities in Data Tracker.<sup>120</sup> After she was placed on the DIP, Mr. Bryan agreed to provide [Complainant] with examples of data trackers so that [Complainant] could adopt and use a better case management data tracking system.<sup>121</sup> Mr. Bryan warned [Complainant] on more than one occasions that she would be placed on a second DIP if she did not adhere to his request regarding logging her activities in Data Tracker.<sup>122</sup>

[Complainant] completed the DIP after she demonstrated sufficient improvement within the DIP’s 60-day timeline, and she was removed from the DIP process and returned to the standard evaluation process on March 12, 2021.<sup>123</sup> Mr. Terry and Ms. McCourt expected [Complainant] to continue tracking her cases in the same fashion as she was under the DIP.<sup>124</sup>

On March 25, 2021, [Complainant] communicated to Mr. Terry, by e-mail, that she did not feel she could move forward with adhering to his request regarding the data tracker because he had not provided her with examples of data trackers.<sup>125</sup> On March 26, 2021, Mr. Terry replied to [Complainant], by e-mail, that he was gathering examples of data tracking systems used by other case managers for keeping track of student progress monitoring data and would send her a meeting request for the following week to go through some examples.<sup>126</sup>

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<sup>119</sup> OIG Report, Attachment 2, Interview of Complainant, at 2.

<sup>120</sup> *Id.*

<sup>121</sup> OIG Report, Attachment 30, Email Thread Concerning Data Tracker, Dated March 26, 2021.

<sup>122</sup> *Id.* at 2.

<sup>123</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

<sup>124</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>125</sup> OIG Report, Attachment 30, Email Thread Concerning Data Tracker, Dated March 26, 2021.

<sup>126</sup> *Id.*

**[Complainant] reports that a teacher failed to hold a re-evaluation meeting for Student 3**

On April 9, 2021, Ms. Edelschein sent an e-mail to [Complainant] and others concerning Student 3. In the e-mail, Ms. Edelschein stated that, “We will not be going over the eligibility criteria in the meeting. (Student 3) will qualify as a student with Autism, Specific Learning Disability and Speech-Language Impairment. Please pre-load (along with services, goals etc..).”<sup>127</sup> [Complainant] believed that Ms. Edelschein wanted to classify Student 3 as autistic to get him off her caseload.<sup>128</sup>

Student 3 was new to the School in 2021.<sup>129</sup> He had been first diagnosed with an autism spectrum disorder in 2010.<sup>130</sup> His mother had a second evaluation conducted in 2011, which confirmed the diagnosis.<sup>131</sup>

On April 13, 2021, [Complainant] e-mailed Mr. Terry, copying Ms. McCourt, and Aimee Kroeschen, regarding an IEP meeting scheduled for Student 3 the next day.<sup>132</sup> Student 3 was in one of [Complainant’s] classes.<sup>133</sup>

In her e-mail, [Complainant] informed Mr. Terry that the case manager had already determined the student eligible based on Autism, SLD and SL, stating it was her understanding that the team determines eligibility, and asking if the laws had changed.<sup>134</sup> [Complainant] went on to state that she was not comfortable attending a meeting where the case manager had already

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<sup>127</sup> OIG Report, Attachment 2, Interview of Complainant, at 1.

<sup>128</sup> *Id.* at 2.

<sup>129</sup> Defendant Exhibit E2.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> OIG Report, Attachment 2, Interview of Complainant; OIG Report, Attachment 14, Email-[Complainant]

Disclosure, Dated April 13, 2021.

<sup>133</sup> OIG Report, Attachment 2, Interview of Complainant.

<sup>134</sup> OIG Report, Attachment 14, Email-[Complainant] Disclosure, Dated April 13, 2021.

determined eligibility, that she believed this to be illegal, and that she did not want to take part in the meeting.<sup>135</sup> [Complainant] asked Mr. Terry for his recommendation.<sup>136</sup>

On April 14, 2021, [Complainant] e-mailed Dr. Mary Page, the School District’s Director of Secondary Special Education, informing Dr. Page that she was uncomfortable with a reevaluation being held the next day at her school and asking if a case manager can predetermine a student before the reevaluation is held.<sup>137</sup> [Complainant] further notified Dr. Page that she had informed her principal, AP, and SPED coordinator that she was not comfortable attending a meeting where eligibility had already been determined by the case manager or signing the participant’s page before the meeting and that she had been directed to write an excuse and not attend the meeting.<sup>138</sup> [Complainant] asked Dr. Page what she should do.<sup>139</sup> Responding, Dr. Page asked what time the IEP meeting was scheduled for and what [Complainant] meant by “predetermined.”<sup>140</sup> Dr. Page also told [Complainant] that she was in a conference but would try to touch base with her.<sup>141</sup> [Complainant] did not attend the IEP meeting for Student 3 after she was excused by Mr. Terry from the meeting because she did not feel comfortable attending.<sup>142</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> OIG Report, Attachment 15, Email-[Complainant] Disclosure, Dated April 14, 2021; OIG Report, Attachment 12, Interview of Dr. Mary Page.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> OIG Report, Attachment 16, Email-Dr. Mary Page Response to [Complainant]; Attachment 12, Interview of Dr. Mary Page.

<sup>141</sup> *Id.*

<sup>142</sup> OIG Report, Attachment 2, Interview of Complainant; OIG Report, Attachment 6, Interview of Bryan Terry, at 3; OIG Report, Attachment 8, Interview of Chellie McCourt, at 3.

On April 26, 2021, Dr. Page responded to [Complainant] by e-mail, stating that she reached out to the School’s Principal and offering [Complainant] support in answering questions about IEP processes and best practices.<sup>143</sup>

### **[Complainant’s] assertions concerning Students 1 and 2**

In her Whistleblower Reprisal Complaint, Complainant asserted that she made protected disclosures concerning Students 1 and 2, in addition to the disclosure concerning Student 3 discussed above.<sup>144</sup> Specifically, Complainant asserted that she reported that teachers predetermined outcomes for Students 1 and 2 on their Individualized Education Programs (IEP) on January 21 and February 26, 2021.<sup>145</sup> OIG investigators found no evidence that [Complainant] had made the purported disclosures concerning Students 1 and 2 to school administrators.<sup>146</sup> And, there is no record evidence that supports that [Complainant] made disclosures concerning Students 1 and 2. In this proceeding, Complainant does not maintain that she made three protected disclosures but, instead, asserts that she made only one protected disclosure, that concerning Student 3 made on April 13 and 14, 2021.

### **Complaint reports that a School District official encouraged her to retire**

During their January 12, 2021 weekly check-in meeting, held in accord with the terms of the DIP, Mr. Terry asked [Complainant] if she had seen a recent email regarding early retirement.<sup>147</sup> Complainant responded “yes,” and Mr. Terry asked if she was going to take it.<sup>148</sup> [Complainant] responded “no,” and Mr. Terry asked her “Why not? It’s a great deal.”<sup>149</sup> Mr.

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<sup>143</sup> OIG Report, Attachment 12, Interview of Dr. Mary Page.

<sup>144</sup> OIG Report, Attachment 1, Whistleblower Reprisal Complaint.

<sup>145</sup> OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 4, and (unnumbered) 10-11.

<sup>146</sup> OIG Report at 5-6.

<sup>147</sup> OIG Report, Attachment 18, Email-Thread Early Retirement, Dated January 22, 2021, at (unnumbered) 4.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

Terry then asked Complainant what her plans were for the future, and she replied that she planned on working at the School until she retired.<sup>150</sup> Mr. Terry also asked [Complainant] about a condominium that [Complainant] and her husband had purchased.<sup>151</sup> [Complainant] construed Mr. Terry's questioning as further effort to push her out of the school.<sup>152</sup> But Mr. Terry characterized his conversation with [Complainant] as small talk.<sup>153</sup>

### **Final Assessment for School Year 2020-2021**

In the 2020-2021 final assessment for [Complainant] completed on May 14, 2021, [Complainant] received scores on the teacher evaluation rubric ranging from 3.25 to 4.00 out of 5.00, for an overall professional practices rating of 3.69 out of 5.00.<sup>154</sup> [Complainant] received a score of 4.00/5.00 in Element B: Evidence and a score of 4.00/5.00 in Element B: Professional Growth/Goals, both of which were professional practices targeted for improvement in the DIP.<sup>155</sup> [Complainant's] comment on the scores was, "(T)his is the lowest rating I have ever received in my teaching career. I am very disappointed in the way this evaluation played out."<sup>156</sup>

### **School Administrators' and Other Witnesses' Knowledge of [Complainant's] Disclosures and Whistleblower Complaint**

When interviewed by OIG investigators, the witnesses told investigators the following:

Witness 1 was not aware of any disclosures [Complainant] may have made.<sup>157</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> OIG Report, Attachment 32, Teacher Final Assessment: 2020-2021 School Year- [Complainant].

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 10.

<sup>157</sup> OIG Report, Attachment 4, Interview of Witness 1, at 2.

Witness 2 was not aware of any disclosures that [Complainant] may have made concerning Students 1 and 2, but only concerning Student 3.<sup>158</sup>

Mr. Terry became aware that [Complainant] made an alleged protected disclosure in April 2021 concerning Student 3 after he received an e-mail from [Complainant].<sup>159</sup> Mr. Terry was not aware of any disclosures [Complainant] may have made concerning Students 1 and 2.<sup>160</sup> [Complainant] never relayed any concerns related to Students 1 and 2 either in conversation, electronically, or by any other type of media.<sup>161</sup>

Ms. McCourt became aware that [Complainant] made a disclosure in April 2021 concerning Student 3 because she received an e-mail from [Complainant] alleging that the case manager predetermined the student's eligibility prior to the IEP meeting.<sup>162</sup> [Complainant] never relayed any concerns related to Students 1 and 2 either in conversation, electronically, or by any other type of media.<sup>163</sup>

At the time Mr. Lavizzo was consulted on [Complainant's] DIP, he was unaware that [Complainant] had made any disclosure(s).<sup>164</sup> Neither Mr. Terry nor Ms. McCourt ever mentioned any of [Complainant's] disclosures during his consultations with them on the DIP process.<sup>165</sup> Mr. Lavizzo was unaware of any disclosure(s) [Complainant] had made or of her whistleblower complaint until about a week before OIG investigators interviewed him on November 10, 2021.<sup>166</sup>

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<sup>158</sup> OIG Report, Attachment 5, Interview of Witness 2, at 2.

<sup>159</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> *Id.*

<sup>162</sup> OIG Report, Attachment 8, Interview of Chellie McCourt, at 3.

<sup>163</sup> *Id.*

<sup>164</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

<sup>165</sup> *Id.*; OIG Report, Attachment 8, Interview of Chellie McCourt, at 3.

<sup>166</sup> OIG Report, Attachment 10, Interview of Alan Lavizzo, at 2.

Dr. Page was unaware of any disclosure(s) [Complainant] had made until about a month before the School District's General Legal Counsel informed that she would be interviewed by OIG investigators.<sup>167</sup> OIG investigators interviewed Dr. Page on November 10, 2021.<sup>168</sup>

## **V. Statement of Law**

### **A. Prohibitions, protections, and procedures under the NDAA**

The National Defense Authorization Act (NDAA) 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”.<sup>169</sup> It protects the 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.”<sup>170</sup>

If an employee believes they have been subject to a reprisal in violation of the statute, the employee may submit a complaint to the OIG within three years of the reprisal.<sup>171</sup> If the 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, the OIG will investigate the complaint and, upon completion of the

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<sup>167</sup> OIG Report, Attachment 12, Interview of Dr. Mary Page.

<sup>168</sup> *Id.*

<sup>169</sup> 41 U.S.C. § 4712(a)(1).

<sup>170</sup> 41 U.S.C. § 4712(a).

<sup>171</sup> 41 U.S.C. § 4712(b).

investigation, submit a report of the findings of the investigation to the employee, the employer, and the Secretary.<sup>172</sup> The 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 180 days.<sup>173</sup>

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.<sup>174</sup> The decision must address “whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a reprisal.”<sup>175</sup>

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 enumerated actions by the employer:<sup>176</sup>

- (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

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<sup>172</sup> *Id.* In her Whistleblower Reprisal Complaint, Complainant stated that she had filed a complaint with the Equal Employment Opportunity Commission (EEOC). OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 7. Defendant filed a copy of the Amended Charge of Discrimination that Complainant filed with the EEOC on August 5, 2021, in which she asserts that the School discriminated against her between August 9, 2020 and March 3, 2021, by putting expectations and job requirements on her that were not placed on others, telling her she should take early retirement, and placing her on a DIP, after she informed her employer that she had severe asthma and needed accommodations. Defendant Exhibit E3. There is no other evidence on this record concerning the EEOC complaint or the status of the EEOC case.

<sup>173</sup> 41 U.S.C. § 4712(b).

<sup>174</sup> 41 U.S.C. § 4712(c)(1).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

- (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.

## **B. Burdens of proof**

The whistleblower statute requires the decision maker to use the burdens of proof found in 5 U.S.C. § 1221(e).<sup>177</sup> Section 1221(e) provides as follows:

the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under **section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D)** was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that--

- (A) the official taking the personnel action knew of the disclosure or protected activity; and
- (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.<sup>178</sup>

In short, the initial burden requires the employee to show 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.<sup>179</sup> 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.”<sup>180</sup> The Federal Circuit has called this

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<sup>177</sup> 41 U.S.C. § 4712(c)(6).

<sup>178</sup> 5 U.S.C. § 1221(e).

<sup>179</sup> 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 Group, Inc.*, 2017 WL 4236315, at \*7 (D. Colo. Sept. 25, 2017).

<sup>180</sup> 5 U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

the “knowledge/timing” test.<sup>181</sup> It follows that in order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the alleged retaliation was a personnel action.<sup>182</sup> Additionally, the employee must show that the employer had knowledge of the disclosures before beginning the personnel action.<sup>183</sup>

If an employee adequately meets their burden, then the burden shifts to the employer to demonstrate “by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.”<sup>184</sup> In determining whether the employer showed, by clear and convincing evidence, that it would have taken the same personnel action in the absence of whistleblowing, the following factors are considered: 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.<sup>185</sup>

## **VI. Issues presented in this case**

The issues to be addressed are:

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 employment actions taken against her by the School District?
2. If Complainant met her initial burden, did Defendant demonstrate, by clear and convincing evidence, that it would have taken the same employment actions in the absence of Complainant’s disclosures?

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<sup>181</sup> *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998).

<sup>182</sup> *See Hook v. NASA*, 2012 WL 1358171 (MSPB, April 3, 2012).

<sup>183</sup> *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

<sup>184</sup> 5 U.S.C. § 1221(e)(2); *Omwenga*, at \*12; *Armstrong*, 2017 WL 4236315, at \*7.

<sup>185</sup> *See (Complainant) v. Dekalb County School District*, OHA Docket No. 21-26-CP (Order, July 23, 2021), citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep’t of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff’d*, 116 F.3d 1497 (Fed. Cir. 1997)).

## **VII. The parties' arguments**

### **A. Complainant's arguments**

In her Whistleblower Reprisal Complaint, Complainant asserted that she was subjected to three employment actions that she believes were acts of reprisal. Specifically, Complainant alleged she was discriminated against in the following ways: (1) she was placed on a Directed Improvement Plan (DIP) that placed additional administrative burdens on her; (2) she was given additional tasks that other teachers did not have; and (3) she was encouraged to retire.<sup>186</sup> Complainant alleged that these actions were taken to retaliate for three disclosures that she made to employees and management officials at the School District. Specifically, Complainant contends that the School District violated laws, rules, or regulations and abused its authority related to Special Education grant funds it receives because teachers predetermined outcomes for two special education students on their IEPs on January 21 and February 26, 2021, and failed to hold a re-evaluation meeting for a third student on April 9, 2021.<sup>187</sup>

In this proceeding, however, Complainant does not maintain that she made three protected disclosures but asserts that she made only one protected disclosure, that concerning Student 3 made on April 13 and 14, 2021, and does not argue that the School's placement of her on the DIP, imposition of onerous administrative burdens during the DIP, or encouraging her to retire were retaliatory. Instead, Complainant now argues that she engaged in protected activity when she made a disclosure about Student 3 on April 13 and 14, 2021, and that her protected disclosure was a contributing factor in the School District's decision to impose onerous administrative burdens on her beyond expiration of her DIP. Complainant further argues that the School District has not

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<sup>186</sup> OIG Report at 4-6; OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 4.

<sup>187</sup> OIG Report, Attachment 1, Whistleblower Reprisal Complaint, at 4, and (unnumbered) 10-11.

provided clear and convincing evidence that it would have taken the same action in the absence of Complainant's protected disclosure.

In support of her argument, Complainant contends that her performance evaluations before she was placed on the DIP showed she was effective and that no prior concerns about her performance had been raised. Complainant further asserts that the School District's contention that the administrative burdens placed on her were an ordinary part of her job that applied to all SPED teachers is not supported but undermined by the fact that the administrative burdens only began when she was placed on the DIP.

#### **B. The School District's argument**

The School District argues that Complainant has failed to satisfy her burden of proof because she has not proven there was a protected disclosure or that the School District subjected her to any reprisals. In support thereof, the School District points to the fact findings in the OIG Report and asserts that Complainant only began to allege retaliation after she was placed on a DIP by the School District.<sup>188</sup> Specifically, the School District argues that Complainant did not make the three disclosures she claims; that, to the extent Complainant made a protected disclosure, the protected disclosure was made only after the reprisal acts Complainant claims; and, that there were no reprisal acts on the part of the School District.

### **VIII. Analysis**

Complainant argues that she was subjected to adverse personnel actions as a response to her allegations about misused Special Education Grant funds. In support of Whistleblower Reprisal Complaint, Complainant asserted that she made disclosures about three different students

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<sup>188</sup> In its brief, the School District adopts by reference the fact findings in the OIG Report with the exception of Finding 3, wherein the OIG found that Complainant reasonably believed there was evidence of a violation of law, rule, or regulation.

based on incidents that occurred on January 21, February 26, and April 9, 2021, and that the School District retaliated by placing her on a DIP, giving her additional administrative tasks that other teachers did not have, and encouraging her to retire. Complainant has modified her position in this proceeding to argue that School administrators retaliated by imposing onerous administrative burdens on her following completion of the DIP based on the protected disclosure she made on April 13 and 14, 2021 concerning Student 3.

### **Complainant's Initial Burden**

To establish a prima facie case, 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 her as an employee. 41 U.S.C. § 4712 Complainant has met two, but not all three of the elements.

The parties do not dispute that Complainant was an employee of a federal grantee during the relevant time, satisfying the first element of the alleged violation of 41 U.S.C. § 4712. It is undisputed that Complainant was an employee of a recipient of a Department administered grant during the relevant time and continues to be through the present. The School District is a recipient of the Special Education Grants administered by the Department. Complainant has worked for the School District since 2015 and continues to do so. The personnel actions forming the basis for Complainant's complaint all occurred in 2021, while she was an employee of the School District.

The parties do dispute, however, whether Complainant made the three protected disclosures she claims to have made. Complainant initially asserted that she made three protected disclosures: a protected disclosure concerning Student 1 based on an e-mail she received on January 21, 2021; a protected disclosure concerning Student 2 based on an e-mail she received on February 26, 2021; and, a protected disclosure concerning Student 3 on April 13 and 14, 2021.

The evidence establishes that Claimant made only one disclosure protected under Section 4712.

Complainant provided no evidence to support her assertions that she made protected disclosures concerning Student 1 and Student 2. Complainant produced neither of the e-mails purportedly copied to her concerning Students 1 and 2. Nor did she submit any details or proof on when, where, or to whom she disclosed the violations that purportedly occurred in the e-mails on Students 1 and 2. Moreover, record evidence established that neither Student 1 nor Student 2 attended the School in 2021, when Complainant asserts she made protected disclosures and the underlying violations occurred. In its findings in the OIG Report, the OIG found that Complainant had not made protected disclosures with respect to Students 1 and 2, and in the brief filed on behalf of Complainant in this matter, Complainant does not rely on protected disclosures concerning Students 1 and 2.<sup>189</sup>

However, with respect to Student 3, Complainant has demonstrated that she made a protected disclosure on April 13 and 14, 2021, when she reported to School administrators that the student's case manager had already determined the student eligible based on Autism, SLD and SL, stating it was her understanding that the team, not the case manager, determines eligibility, and asking if the laws had changed.<sup>190</sup>

In its brief, the School District asserted, without supporting points or authorities, that Complainant did not reasonably believe there was evidence of a violation of law, rule or regulation. The proper test for determining whether an employee had such a reasonable belief is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by

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<sup>189</sup> OIG Report at 5-6; OIG Report, Attachment 34, Email Thread Concerning ED OIG Questions to [Complainant], at 3; Complainant's Brief at 1 – 5.

<sup>190</sup> OIG Report, Attachment 14, Email-[Complainant] Disclosure, Dated April 13, 2021; OIG Report, Attachment 15, Email-[Complainant] Disclosure, Dated April 14, 2021.

the whistleblower could reasonably conclude that the actions of the government evidenced one of the categories of wrongdoing.<sup>191</sup> Contrary to the School District's assertion that Complainant did not reasonably believe there was evidence of a violation of law, rule or regulation related to the Federal grant, the evidence establishes, based on the contents of Complainant's e-mails to school administrators, a disinterested observer with knowledge of the essential facts known to Complainant could reasonably conclude that pre-determining Student 3's eligibility for services was a violation of law, rule or regulation concerning Special Education funded programs. Thus Complainant satisfied the second element of her initial burden of proof.

But Complainant has failed to prove that the disclosure was a contributing factor in an adverse employer action. As initially asserted in the Whistleblower Reprisal Complaint, the adverse personnel actions that Complainant grieved were the School's placement of her on a DIP, assigning her administrative tasks others were not given that continued after her DIP concluded, and encouraging her to retire.

In order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the alleged retaliation was a personnel action.<sup>192</sup> A performance improvement plan is generally not considered to be an adverse employment action.<sup>193</sup> An employer's issuance of a performance improvement plan does not amount to an adverse action as it has not significant effect on pay, benefits, work assignments, or employment status.<sup>194</sup> There are no changes in terms and conditions of employment resulting from the performance improvement plan unless accompanied by changes to pay, benefits, work assignments, or

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<sup>191</sup> See *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Fisher v. Environmental Protection Agency*, 108 M.S.P.R. 296 (2008); *McCorcle v. Department of Agriculture*, 98 M.S.P.R. 363 (2005).

<sup>192</sup> See *Hook v. NASA*, 2012 WL 1358171 (MSPB, April 3, 2012).

<sup>193</sup> See *Armstrong v. Arcanum Group, Inc.*, 897 F.3d. 1283, 1287 (10<sup>th</sup> Cir. 2018).

<sup>194</sup> See *Foreman v. Western Freightways, LLC*, 958 F. Supp. 2d 1270, 1278-1279 (D.C. Colo. 2013)

employment status.<sup>195</sup> To the contrary, the performance improvement plan provides the employee with ways in which she can better perform her responsibilities.<sup>196</sup>

Complainant here was placed on a 60-day DIP to assist her in improving her performance. There were no changes to her pay, benefits, work assignments or employment status, and she successfully completed the DIP within 60 days. Thus, contrary to Complainant's assertion in her Whistler Blower Reprisal Complaint, the School District took no adverse employment action against her.

For similar reasons, the administrative tasks assigned to Complainant related to the DIP and the discussion she had with Mr. Terry were not adverse personnel actions. Complainant correctly argues that work assignments can be acts of reprisal. But the administrative tasks she complains of here, including student progress monitoring and data tracking, are shouldered by and routinely expected of all SPED teachers at the School. Further, neither involved changes to Complainant's pay, benefits, or employment status.

Nor has Complainant established that the disclosure was "a contributing factor" in the action taken against her.<sup>197</sup> To show the disclosure was a "contributing factor," the personnel action must have 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.<sup>198</sup> The Federal Circuit has called this the "knowledge/timing" test.<sup>199</sup> "(T)he knowledge/timing test of Section

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<sup>195</sup> See *Welsh v. Fort Bend Independent School*, 941 F.3d 818 (5<sup>th</sup> Cir. 2019).

<sup>196</sup> *Id.*

<sup>197</sup> See *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10<sup>th</sup> Cir. 2018); *Omwenga v. United Nations Found.*, 2019 WL 4860818, at \*12 (D.D.C. Sept. 20, 2019); *Armstrong v. Arcanum Group, Inc.*, 2017 WL 4236315, at \*7 (D. Colo. Sept. 25, 2017).

<sup>198</sup> See U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10<sup>th</sup> Cir. 2018).

<sup>199</sup> *Kewley v. Dep't of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998) (whistleblower's removal from employment six weeks after her protected disclosure satisfied the "knowledge/timing" test).

1221(e)(1) must be taken as a whole, but no other factor may be taken into account. In other words, the combination of subsections (A) and (B) must be weighed together to determine if the whistleblowing employee has met her burden of showing that the protected disclosure was a ‘contributing factor.’”<sup>200</sup> Put another way, the ALJ must “weigh the deciding official’s knowledge of the protected disclosure in combination with the reasonable time period, without more, to determine whether the protected closure is a contributing factor in the personnel action.<sup>201</sup> Satisfaction of the “knowledge/timing” test establishes, prima facie, that the disclosure was a contributing factor to the personnel action.<sup>202</sup> The employee must show that the decisionmaker had knowledge of the disclosures before beginning the personnel action.<sup>203</sup> The knowledge of someone who knew of the disclosures but was not a decision maker is irrelevant to motive.<sup>204</sup> It is the decisionmaker’s knowledge that is crucial.<sup>205</sup>

Weighing the School District’s knowledge of the protected disclosure in combination with the reasonable time factor leads me to conclude that Complainant has not shown that employer’s actions were a contributing factor to the action taken against her. Complainant made protected disclosures in April 2021, while the personnel actions that she grieved in the Whistleblower Reprisal Complaint, namely being placed on a DIP and given additional tasks related to the DIP, occurred on January 8, 2021, well before any of the purported disclosures. By the time that Complainant made the protected disclosure in April 2021, or even the two purported disclosures that I have not found credible, the DIP had already been put in place, effectuated, and successfully completed in March 2021. It is also material on this point that Complainant successfully completed

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 1363.

<sup>202</sup> *Id.* at 1361.

<sup>203</sup> *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018).

<sup>204</sup> *Id.* at 1289.

<sup>205</sup> *Id.* (citing *Halasa v. ITT Educ. Servs., Inc.* 690 F.3d 844, 848 (7<sup>th</sup> Cir. 2012)).

the DIP on March 8, 2021, and then at the end of the school year received higher ratings for the very areas in need of improvement that were targeted in the DIP.

Because the employer actions occurred first in time, *i.e.*, before any protected disclosure, there was no temporal proximity of Complainant's disclosure(s) to the School District's actions and thus they could not have been a contributing factor in the personnel action. Nor, for the same temporal reasons, has Complainant demonstrated that the School District had knowledge of the disclosures before beginning the purported personnel action, including its requirement that Complainant data track and monitor. Complainant fails the "knowledge/timing" test and thus fails to satisfy her burden of proof.

In an attempt to overcome her inability to meet the "knowledge/timing" test, Complainant now asserts that the School District retaliated against her by requiring her to continue to log her activities in Data Tracker following her completion of the DIP based on her protected disclosure concerning Student 3 in April 2021. Complainant's argument that circumstantial evidence supports a finding that her disclosure was a contributing factor to Mr. Terry's and the School District's decision to subject her to additional administrative burdens following expiration of her DIP is not persuasive. In support of her argument, Complainant points to the close proximity in time between Complainant's disclosure and the end of the DIP. But neither the chronology of events nor evidence concerning the administrative responsibilities borne by SPED teachers supports Complainant's argument.

Complainant's argument that the close proximity in time between her April 2021 disclosure and the end of the DIP in March 2021 establishes that the School District retaliated against her by requiring her to continue to log her activities in Data Tracker following completion of the DIP is not persuasive. The evidence establishes that Complainant was placed on the DIP on January 8,

2021. She successfully completed the DIP on March 12, 2021. She made the protected disclosure concerning Student 3 by e-mails sent on April 13 and 14, 2021. The School's directions to Complainant that she must continue to log her activities in Data Tracker beyond expiration of the DIP were made, by Mr. Terry, before completion of the DIP and not after or in response to the disclosure concerning Student 3 on April 13 and 14, 2021. Complainant again fails the "knowledge/timing" test and thus fails to satisfy her burden of proof.

At the heart of Complainant's claim is her grievance concerning the onerous administrative burden of having to use data tracking to monitor students' progress. On this record, it is not clear when the School District began to require its SPED teachers to data track. However, what is clear on this record, is that SPED teachers shoulder heavy administrative loads and that data tracking is a responsibility of SPED teachers.<sup>206</sup> Significantly, the Colorado Department of Education's (CDE) Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers, adopted in Winter 2018, expressly states that data should inform decisions concerning the education plans for SPED students.<sup>207</sup>

Complainant's claim that data tracking responsibilities are not required of SPED teachers is not supported by the evidence. The CDE's State Model Educator's guidance to SPED teachers advises the use of data to inform decision concerning education plans for SPED students and includes data tracking and monitoring in its teacher evaluation rubric.<sup>208</sup> By the accounts of all

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<sup>206</sup> OIG Report, Attachment 4, Interview of Witness 1; OIG Report, Attachment 5, Interview of Witness 2; OIG Report, Attachment 8, Interview of Chellie McCourt; OIG Report, Attachment 10, Interview of Alan Lavizzo.

<sup>207</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers, at (unnumbered) 5.

<sup>208</sup> OIG Report, Attachment 29, Colorado State Model Educator Evaluation System: Practical Ideas for Evaluating Special Education Teachers.

witnesses interview by the OIG, SPED teachers and school administrators alike, SPED teachers are required to data track.<sup>209</sup>

Complainant further asserts that despite her effective performance the School District placed her on a DIP and afterwards continued to require her to log her activities in Data Track, expressly and implicitly arguing that the School District only placed her on a DIP and required her to data track in retaliation for the protected disclosure she made. Here, too, the record evidence does not support Complainant's version of either the events or the catalysts for the events.

When she was interviewed, Complainant reported to OIG investigators that she had always gone above and beyond in her work performance and that her previous performance evaluations confirmed her exemplary work performance.<sup>210</sup> However, Complainant's previous performance evaluations do not confirm continuous exemplary work performance, but do show a downward trajectory in work performance prior to implementation of the DIP.<sup>211</sup> While Complainant's work performance was rated as Highly Effective for School Years 2015-2016 and 2016-2017, it was rated only as Effective for School Years 2017-2018 and 2018-2019, dropping from a 3.27 Overall Score to a 2.65/4.00 Overall Score.<sup>212</sup>

Beginning in early 2020, school administrators became concerned about Complainant's performance as an IEP case manager and teacher for SPED students.<sup>213</sup> A particular case illustrated Complainant's struggles with IEP case management, including comprehensive report writing, data tracking and progress monitoring.<sup>214</sup> Mr. Terry felt that Complainant was not

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<sup>209</sup> OIG Report, Attachment 4, Interview of Witness 1; OIG Report, Attachment 5, Interview of Witness 2; OIG Report, Attachment 6, Interview of Bryan Terry; OIG Report, Attachment 8, Interview of Chellie McCourt; OIG Report, Attachment 10, Interview of Alan Lavizzo.

<sup>210</sup> OIG Report, Attachment 2, Interview of Complainant, at 3.

<sup>211</sup> Complainant Exhibit C 2.

<sup>212</sup> *Id.*

<sup>213</sup> OIG Report at 8; OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

<sup>214</sup> OIG Report, Attachment 6, Interview of Bryan Terry, at 2.

prepared to conduct IEP meetings and that she needed informal support.<sup>215</sup> Mr. Terry's plan to address this and to provide informal support were delayed due to the Covid-19 pandemic and the change to remote instruction.<sup>216</sup>

Following-up on the concerns raised in early 2020, Complainant was placed on a Case Manager Support Plan designed to provide her a review of two enumerated Colorado State Standards and Elements for SPED teachers.<sup>217</sup> The Case Manager Support Plan addressed Quality Standard III on Instruction, Element B: Evidence, which requires teachers to use formal and informal methods to assess student learning, and Quality Standard IV on Professional Growth Goals, which includes a component on data monitoring to use in evaluating instructional strategies.<sup>218</sup> Complainant was required, among other things, to update the progress monitoring tracker.<sup>219</sup>

When the Case Manager Support Plan was not adhered to, the School District implemented a DIP. The DIP also required data tracking. During the DIP process and upon conclusion of the DIP in March 2021, Mr. Terry reminded Complainant that the data tracking responsibility would continue beyond conclusion of the DIP.

Throughout the Case Manager Support Plan and DIP process and continuing after the DIP process concluded in March 2021 and through the present, Complainant has complained about the onerous burden data tracking places on her and the extensive time it takes her to do data tracking. But, data tracking for purposes of student progress monitoring is a component of the Colorado

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*; OIG Report, Attachment 8, Interview of Chellie McCourt, at 2.

<sup>217</sup> Defendant Exhibit E1.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 2.

State Model Evaluation System’s Practical Ideas for Evaluating Special Education Teachers and by all accounts, except that of Complainant, an integral part of SPED.

Further, contrary to Complainant’s arguments, there is no evidence that the School District first communicated its requirement that Complainant continue to log her activities in Data Track or any other additional administrative work following Complainant’s April 2021 disclosure. Instead, the evidence suggests that the data tracking and other administrative work were tasks Complainant was required to do, but resisted doing, up through the time the School District developed a Case Manager Support Plan for her. The School District took steps to support Complainant in complying with the data tracking requirement as early as October 2020, when it developed the Case Manager Support Plan, and through March 2021, when the DIP was concluded. Throughout that period, the School District communicated to Complainant that data tracking was required for the Case Manager Support Plan, for the DIP, and as a continuing requirement. There is no evidence, direct or circumstantial, of a causal connection between the data tracking or other administrative work requirements placed on Complainant and her April 2021 disclosure. Nor does the evidence show a temporal connection.

Because she has not satisfied the third element, Complainant has not established a prima facie case of retaliation and, therefore, has not met her initial burden of proof, as was found in the OIG Report.

### **Burden shift to the School District**

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

in the absence of such disclosure.”<sup>220</sup> In determining whether the employer showed, by clear and convincing evidence, that it would have taken the same personnel action in the absence of whistleblowing, the following factors are considered: 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.<sup>221</sup>

Complainant argues that she satisfied her initial burden of proof and that the School District has not provided clear and convincing evidence that it would have taken the same action in the absence of Complainant’s protected disclosure.

In the OIG Report of Investigation, the OIG concluded that Complainant had not satisfied her initial burden of proof because her disclosures to the School administration occurred after the employer actions she had complained of and also concluded that the School District provided clear and convincing evidence that it took the actions complained of for reasons independent of Complainant’s disclosures.<sup>222</sup>

But, as the School District argues, because Complainant has not satisfied her initial burden of proof under 41 U.S.C. § 4712, the burden to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of Complainant’s disclosure does not shift to it.<sup>223</sup> Because Complainant did not meet her initial burden and, therefore, the burden did not shift to the School District, I need not analyze whether the School District demonstrated by clear and

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<sup>220</sup> See 5 U.S.C. § 1221(e)(2); *Omwenga*, at \*12; *Armstrong*, 2017 WL 4236315, at \*7.

<sup>221</sup> See *(Complainant) v. Dekalb County School District*, OHA Docket No. 21-26-CP (Order, July 23, 2021), citing *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (citing *Geyer v. Dep’t of Justice*, 70 M.S.P.R. 682, 688 (1996), *aff’d*, 116 F.3d 1497 (Fed. Cir. 1997)).

<sup>222</sup> OIG Report at 1-2.

<sup>223</sup> See 5 U.S.C. § 1221(e)(2).

convincing evidence that it would have taken the same employer action in the absence of a protected disclosure.

## **IX. CONCLUSIONS OF LAW**

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

2. Complainant has met her burden of showing that she made a protected disclosure to School District management officials.

3. Complainant has failed to show that her protected disclosure was a contributing factor in personnel actions in the decisions to place her on a Directed Improvement Plan (DIP) that placed additional administrative burdens on her, to give her additional tasks that other teachers did not have, to encourage her to retire, or to require her to continue to perform administrative tasks concerning student monitoring and data tracking after her DIP concluded.

4. There is an insufficient basis to conclude that the Cherry Creek School District retaliated against Complainant for disclosing a misuse of Special Education Grant funds.

## **X. Order**

The relief requested by Complainant is **ORDERED DENIED**.

## **XI. APPEAL RIGHTS**

This order constitutes an order denying 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.

Because a final agency order has been issued denying Complainant her requested relief, she has exhausted all administrative remedies and may, within two years of this decision, bring a de novo action at law or equity against the Cherry Creek School District "to seek compensatory damages and other relief available under this section in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy."<sup>224</sup>

Additionally, 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.<sup>225</sup>

**DATE OF DECISION: May 16, 2022**

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Elizabeth Figueroa  
Administrative Law Judge

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<sup>224</sup> 41 U.S.C. § 4712(c)(2).

<sup>225</sup> 41 U.S.C. § 4712(c)(5).

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