UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
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REDACTED,
Complainant

v.

Aurora Public School District,
Grantee

Docket No.: 23-16-CP

Reprisal for Disclosure Proceeding

OIG: REDACTED

Appearances: REDACTED, Complainant, for self.

Brandon Eyre, Esq., for Aurora Public Schools

Before: Daniel J. McGinn-Shapiro, Administrative Law Judge

Decision and Order

This Decision and Order addresses a complaint filed with the U.S. Department of Education's Office of the Inspector General (OIG) by REDACTED[1] (Complainant) against her former employer, the Aurora Public School District (APS). Specifically, it addresses the subsequent investigation completed by OIG investigators and constitutes the final agency decision on behalf of the Secretary of the U.S. Department of Education (Secretary). Complainant alleged that APS, a grantee of the Department, retaliated against her for making protected disclosures and

[1] When she filed her Complaint, Complainant's last name was REDACTED, but she has changed it to REDACTED.

those reprisals violated of the protections provided by 41 U.S.C § 4712, the National Defense Authorization Act of FY 2013 (the NDAA). The OIG investigation concluded that Complainant did not substantiate any of the allegations she made against APS and its employees. This decision concludes that the record supports OIG's conclusion.

The NDAA addresses retaliation by a federal grant recipient (grantee) against its employee for whistleblowing. If an employee believes they have been subjected to retaliation in violation of the NDAA statute, the employee submits a complaint to OIG. If OIG determines that the complaint meets the requirements for investigation, then OIG will investigate the complaint and, upon completion of the investigation, submit a report of the findings of the investigation to the employee, the employer, and the Secretary.[2] Upon receipt of the OIG report, the Secretary or designee must review the report and issue the agency decision and order within 30 days.[3]

APS is a public school district in Aurora, Colorado and was, during the time relevant to this matter, a recipient of federal grants, including for special education funding, from the U.S. Department of Education (the Department).[4] Complainant was employed by APS as a middle school special education teacher at Aurora Hills Middle School (AHMS), a middle school in APS, beginning August 6, 2021.[5] She was previously a special education teacher at APS, splitting her time between teaching students at a private school and teaching students in their homes.[6] Complainant resigned from her position at AHMS on January 4, 2022.[7]

On July 19, 2022, OIG received Complainant's written complaint.[8] Her complaint asserts

[2] *See* 41 U.S.C. § 4712(b).
[3] *See* 41 U.S.C. § 4712(c)(1).
[4] *See* Stipulated Facts 1 and 2.
[5] *See* Stipulated Facts 4, 5, and 6; Office of the Inspector General Report of Investigation Attachment (hereafter ROI Att.) 32; ROI Att. 33.
[6] *See* ROI Att. 5 at 8.
[7] *See* Stipulated Fact 5; ROI Att. 1 at 15.
[8] *See* Office of the Inspector General Report of Investigation (hereafter ROI) at 4; ROI Att. 1.

that she reported concerns that "some of [the AHMS] teachers were out of compliance with their students [individual education plans (IEPs)] and updating progress reports showing that students were receiving services they needed, but weren't."[9] Complainant contends that, as a result of her disclosures, she faced numerous acts of reprisal in late 2021 and early 2022.[10] OIG conducted an investigation and, on July 13, 2023, OIG sent the Secretary its report of OIG's investigation.[11] In this matter, OIG's investigation concluded that the evidence collected did not corroborate that there were any actions of retaliation in violation of the NDAA.

The Secretary has delegated to the Office of Hearings and Appeals the responsibility of rendering a final agency decision and order on behalf of the Secretary in matters relating to whistleblower reprisal complaints filed pursuant to the NDAA.[12]

I. ISSUES

In her initial complaint and in interviews with OIG investigators, Complainant alleges six acts of reprisal. First, she asserts that she was initially denied use of Family Medical Leave Act (FMLA) leave. Second, Complainant contends that she was initially denied use of leave from the teacher Health Leave Bank. Third, Complainant asserts that the AHMS principal, Marcella Garcia, mentioned that she was concerned about Complainant's fit in the school, which Complainant believed was a threat to her job because she was in probationary status. Fourth, Complainant states that her job duties were changed from being a classroom teacher to a push-in/pull-out teacher. A push-in/pull-out teacher assists other teachers and pulls students out of class to work with them

[9] ROI Att. 1 at 7, 15.
[10] *See* ROI Att. 1 at 8.
[11] *See* Letter from Sandra D. Bruce to Miguel Cardona (July 13, 2023).
[12] *See* 41 U.S.C. § 4701(a).

one-on-one or in small groups.[13] Fifth, Complainant asserts that when her position was changed, she was directed to move from her classroom to an office, she was not given assistance in moving, and was required to produce medical information when she could not move her own belongings due to an injury. Sixth, she contends that other APS employees were unresponsive to her emails and did not speak to her when she returned from recovering from an injury.

APS asserts that the employment actions either did not happen or were not reprisals for whistleblowing under the NDAA.

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 disclosures were "contributing factors" in relevant personnel actions taken by APS?

2. For those actions for which Complainant met her initial burden, did APS demonstrate, by clear and convincing evidence, that it would have taken the same employment actions in the absence of Complainant's disclosures?

II. SUMMARY OF ORDER

The record establishes that Complainant made protected disclosures to the AHMS principal, an assistant principal at AHMS, a special education coordinator, and two other special education teachers at AHMS. Complainant has met her prima facie burden regarding the decisions to convert her role to a push-in/pull-out teacher. She has not met her burden of showing that her disclosures were contributing factors to personnel actions covered by the NDAA regarding the other alleged actions. APS has shown, by clear and convincing evidence, that it would have converted her position in the absence of her protected disclosures.

[13] *See* ROI Att. 2 at 2.

III. FINDINGS OF FACT

A. Complainant Joins AHMS

After a career in broadcasting, Complainant earned her teaching credentials in 2004.[14] In August 2021, Complainant began teaching at AHMS as a special education middle school teacher.[15] When hired, and throughout her time at AHMS, Complainant was on probationary status.[16] Throughout Complainant's time at AHMS, Marcella Garcia was the principal of the school and Don Zapfel was one of the assistant principals at the school.[17]

B. Complainant's Disclosures

Complainant reported concerns that "some of [the AHMS] teachers were out of compliance with their students [individual education plans (IEPs)] and updating progress reports showing that students were receiving services they needed, but weren't."[18] Complainant placed much of the blame for the lack of compliance with IEPs on two AHMS special education teachers, Vanessa Riggs and Claire Chastain.[19] Chastain also served as the special education department's staffing chair.[20]

On October 4, 2021, Complainant verbally told Garcia and Zapfel that three students were being placed in regular math classes in violation of their IEPs.[21] Then, on October 7, 2021, Complainant expressed her concerns again.[22] Specifically, she emailed Garcia expressing "concern about the three students on my caseload who should have a [special education] math

[14] *See* ROI Att. 2 at 1.
[15] *See* Id. at 1; Stipulated Facts 4 and 6.
[16] *See* Stipulated Fact 7.
[17] *See* Stipulated Facts 8 and 9.
[18] ROI Att. 1 at 7, 15.
[19] *See* Stipulated Facts 15 and 16; ROI Att. 27 at 1.
[20] *See* ROI Att. 28 at 1.
[21] *See* Stipulated Fact 22; ROI Att. 2 at 1.
[22] *See* Stipulated Facts 23 and 24; ROI Att. 2 at 1.

teacher but don't."[23] She also wrote that she was concerned that the students' progress reports were not being updated and that Complainant did not feel comfortable updating the reports "knowing they haven't been receiving their services."[24]

Throughout Complainant's time at AHMS, Stacey Mundis was a special education coordinator in APS.[25] In that role, she provided guidance to APS schools on special education matters.[26] Garcia told OIG investigators that, after Complainant raised her concerns, Garcia spoke to Mundis to request help looking into the issue.[27] Garcia stated that she also reached out to the staffing chairs at AHMS for assistance determining if students were placed in the correct classes based on their IEPs.[28] Garcia told OIG investigator that she discovered that some of Complainant's concerns were correct, and that the reason students were not in the correct classes was because of a shortage of special education teachers.[29]

On October 8, 2021, Complainant had a conversation with Garcia in the AHMS hallway about the students who were not receiving core replacement math classes. Garcia responded that she had spoken with Mundis about the students' math goals.[30] Garcia also relayed that Mundis asked if Complainant could gather the students' math data and update progress reports.[31] Complainant stated that she declined to do so.[32]

On October 9, 2021, Complainant emailed Garcia to let her know that Complainant would update the students' progress reports with some math data but was not comfortable doing more as

[23] ROI Att. 1 at 39.
[24] ROI Att. 1 at 39.
[25] *See* Stipulated Fact 10.
[26] *See* Stipulated Fact 11.
[27] *See* ROI Att. 8 at 1.
[28] *See* ROI Att. 8 at 1.
[29] *See* ROI Att.8 at 1.
[30] *See* Stipulated Fact 25.
[31] *See* Stipulated Fact 25.
[32] *See* ROI Att. 1 at 17.

Complainant did not work on the students' math goals.[33]

The next day, on October 10, 2021, Complainant emailed Garcia and Zapfel stating that Complainant would only update the three students' literacy goals but not their math goals because the three students were not receiving math services that they were required to receive under their respective IEPs.[34] In that email, she told Garcia that she would also be contacting the students' counselors to change the students' schedule and have them placed in the core replacement math classes.[35] Additionally, Complainant accused Riggs and Chastain of acting intentionally to avoid placing certain students in Riggs's core replacement math class.[36]

On October 18. 2021, Complainant was invited to a meeting scheduled for the next day, October 19, 2021, with Garcia and Zapfel.[37] Complainant, however, declined that meeting, emailing Garcia that she did not trust Garcia and that she felt that the problem was Riggs and Chastain acting "unethical" and improperly assigning students to classes to alleviate the teachers' schedules.[38]

Despite declining the invitation to meet with Garcia and Zapfel, on October 19, 2021, Complainant met with Garcia and Mundis. During that meeting, Complainant was told that Garcia and Mundis were taking her concerns seriously.[39] Complainant contends that during the meeting Garcia and Mundis expressed that they interpreted the language in the students' IEPs differently than Complainant.[40] Mundis also acknowledged that if the students were not receiving adequate services that the school would offer compensatory services, which were provided through summer

[33] *See* Stipulated Fact 26; ROI Att. 1 at 40.
[34] *See* Stipulated Fact 27; ROI Att. 1 at 41.
[35] *See* ROI Att. 1 at 41.
[36] *See* ROI Att. 1 at 41.
[37] *See* ROI Att. 1 at 42.
[38] *See* ROI Att. 1 at 42-44.
[39] *See* Stipulated Fact 29.
[40] *See* ROI Att. 1 at 18.

school.[41] Complainant told OIG investigators that when she expressed that she was concerned with simply waiting to offer compensatory services during the summer, Garcia agreed that the students should be moved as soon as possible.[42] Additionally, Garcia told OIG investigators that the parents of students placed in incorrect classes were notified and compensatory services were offered.[43]

On October 20, 2021, Complainant emailed Garcia and Mundis to discuss the prior day's meeting.[44] In the email, Complainant further reasserted her understanding of the requirements of the students' IEPs and suggested that the students on her caseload who were in improper classes should be moved immediately. She also noted that a new student had started the previous day and was placed in a math core replacement class and contended that there must be room for her students. That same day, Mundis sent an email replying that she appreciated the information Complainant provided and that she would meet the next day with Garcia to work on exploring whether changes needed to be made.[45]

On October 22, 2021, a Friday, Complainant emailed that she was concerned that none of the three students had been moved to the math classes they needed to be in, and Garcia responded that the students' schedules would be changed first thing Monday morning.[46]

Chastain told OIG investigators that she was aware of Complainant's concerns that students were not being placed in the correct classrooms.[47] Riggs similarly told OIG Investigators that at times while working together, Complainant told her about her concerns that students were

[41] *See* ROI Att. 1 at 18; ROI Att. 2 at 1-2.
[42] *See* ROI Att. 2 at 2.
[43] *See* ROI Att. 8 at 1.
[44] *See* ROI Att.1 at 18, 45.
[45] *See* ROI Att. 1 at 45.
[46] *See* ROI Att. 1 at 19, 46.
[47] *See* ROI Att. 28 at 1.

being placed in the wrong classes based on their IEPs.[48] Riggs informed OIG that, at times, Complainant was correct about misassignment of students, and, at other times, she was incorrect.[49] Chastain stated that she thought students were correctly placed but approximately four students were moved because Complainant kept bringing up the issue.[50]

Garcia told OIG investigators that she did not object to Complainant raising concerns about IEPs that were not followed, but rather believed if the students were not getting the right services that would need to be fixed and the students would get compensatory services.[51] Garcia also expressed that she did not think Complainant's concerns would have affected her negatively.[52]

C. Garcia Addresses Complainant's "Fit" and Complainant is Injured.

In late September or early October, Complainant walked out of her classroom during the middle of a class.[53] Garcia told OIG investigators that, on the day she left, Complainant yelled at another special education teacher and one of the school social workers, and because of her leaving, Zapfel needed to teach Complainant's class. Garcia and Zapfel both reported to OIG that Complainant left for approximately one week.[54] In her brief, Complainant challenges that she yelled at any AHMS employee as she left.[55] She further asserts that she left on a Wednesday and returned the following Monday.[56]

Complainant explained the incident to OIG investigators. Specifically, Complainant stated that she had just been given a new special education class that was full of students who were extremely difficult to work with and she did not receive the assistance she requested and so she

[48] *See* ROI Att. 27 at 1.
[49] *See* ROI Att. 27 at 1.
[50] *See* ROI Att. 28 at 1.
[51] *See* ROI Att. 10 at 3.
[52] *See* ROI Att. 10 at 3.
[53] *See* ROI Att. 2 at 2; ROI Att. 10 at 3.
[54] *See* ROI Att. 8 at 1; ROI Att. 24 at 1.
[55] *See* Complainant Initial Brief at 5-6.
[56] *See* Complainant Initial Brief at 5-6.

walked out of the classroom.[57] Garcia told OIG investigators that when Complainant returned, she explained to Garcia that she was going through a divorce and was having a difficult time.[58]

Complainant says that when she returned, she apologized to the students.[59] Complainant told OIG investigators that she was not formally reprimanded for this incident.[60]

On October 12, 2021, Complainant met with Garcia and Garcia told Complainant that she was not sure Complainant was a good fit for the school.[61] Complainant asserts that Garcia told her that it was up to Complainant to "restore her fit."[62] Complainant stated in her complaint and to OIG investigators that, because she was on a probationary status at AHMS, she viewed this as a threat of non-renewal of her contract as retaliation for her disclosures.[63] Garcia stated that when Complainant expressed concerns that she would lose her job, Garcia told her that she was not going to fire her, and that there were three reasons to fire a teacher, performance, fit, or budget, and that she would have the opportunity to talk with other team members and rebuild her relationships with them.[64]

Complainant acknowledged that Garcia told her that her fit "started to unravel when I left the building."[65] She, however, asserted that she believed that the lack of fit was because teachers were not following students' IEPs, those teachers were not being held accountable, and she did not want to be a good "fit" with those teachers.[66]

Also on October 12, 2021, Complainant tore the meniscus in her right knee.[67] Based on

[57] *See* ROI Att.2 at 2.
[58] *See* ROI Att. 8 at 1.
[59] *See* ROI Att.2 at 2.
[60] *See* ROI Att. 3 at 2.
[61] *See* Stipulated Fact 28.
[62] *See* ROI Att. 1 at 17.
[63] *See* ROI Att. 1 at 17; ROI Att. 2 at 1.
[64] *See* ROI Att. 8 at 1-2; ROI Att. 10 at 3.
[65] *See* ROI Att. 1 at 42.
[66] *See* ROI Att. 1 at 43.
[67] *See* ROI Att. 1 at 17.

the advice of two surgeons, she underwent surgery on her knee on October 26, 2021.[68] Because of the nature of the injury, her recovery took a while.[69] She was told not to put any weight on her knee until the end of December 2021.[70]

D. Complainant Seeks FMLA and Health Leave Bank Leave.

Patty Shaw worked as the leave of absence coordinator within APS's Human Resources Department.[71] On October 27, 2021, Complainant contacted Shaw to explore options for leave while she recovered from her injury. Complainant was told her options were to apply for Family Medical Leave Act (FMLA) leave and to use the teacher's Health Leave Bank leave (Leave Bank).[72] She emailed Shaw to ask how to file a request for FMLA leave and leave from the Leave Bank.[73]

Shaw explained to OIG investigators that whenever an employee will be on medical leave for more than 10 days, the employee needs to go on a leave of absence.[74] For a teacher like Complainant to take FMLA leave, the principal must mark whether they approve or disapprove the request on the leave request form and, once the form is completed by the principal, Shaw will give the request, with medical certification, to the chief personnel officer (CPO).[75] Damon Smith was, throughout Complainant's time in APS, the CPO within APS's human resources department.[76] The CPO's decision is final as to whether the leave is granted.[77] If a principal declined to approve leave or acknowledge an employee's request, Shaw would refer the matter to

[68] *See* ROI Att. 3 at 1.
[69] *See* ROI Att. 3 at 1.
[70] *See* ROI Att. 3 at 1.
[71] *See* Stipulated Fact 12; ROI Att. 11 at 1.
[72] *See* ROI Att. 3 at 1.
[73] *See* Stipulated Facts 30 and 31.
[74] *See* ROI Att. 11 at 1.
[75] *See* ROI Att. 11 at 1.
[76] *See* Stipulated Fact 14.
[77] *See* ROI Att. 11 at 1.

the CPO, who, in turn, would decide whether to approve the leave request or conduct further inquiries with the principal.[78]

On October 27, 2021, Shaw sent Complainant the FMLA forms she needed to fill out.[79] Complainant states that the FMLA leave forms had to be completed by herself, her doctor, and Garcia.[80] On October 27, 2021, Complainant sent Garcia the FMLA forms.[81] Complainant told OIG investigators that, despite requesting them numerous times, she never received a copy of the forms that Garcia filled out. On October 28, 2021, the day after Complainant sent the forms to Garcia, Garcia signed and approved Complainant's FMLA forms.[82] Sara Tansey, who was Garcia's executive assistant at that time, submitted the signed forms to Shaw on November 2, 2021.[83]

On November 8, 2021, Complainant asked Shaw about the status of her FMLA leave request.[84] That same day, Shaw wrote to Complainant that her FMLA leave "has not yet been approved" because she had not received all of the forms.[85] Later that day, Complainant resent her FMLA forms and Shaw clarified that she had all of the forms from Complainant, but they had not been signed by the CPO, who had the forms.[86] On November 8, 2021, the CPO approved Complainant's request for FMLA.[87] The CPO told OIG investigators that the reason it took nearly a week for him to approve Complainant's FMLA request was because he was unavailable.[88]

The process for Leave Bank applications is that the employee submits the application for

[78] *See* ROI Att. 11 at 1.
[79] *See* ROI Att. 4 at 1.
[80] *See* ROI Att. 3 at 1.
[81] *See* ROI Att. 4 at 2-3.
[82] *See* ROI Att. 7 at 2.
[83] *See* Stipulated Fact 17; ROI Att. 12.
[84] *See* ROI Att. 4 at 11.
[85] *See* ROI Att. 4 at 11.
[86] *See* ROI Att. 4 at 13.
[87] *See* ROI Att. 7 at 2.
[88] *See* ROI Att. 13 at 2.

leave from the Leave Bank to Shaw, who then sends the application, with proper medical documentation, to the committee for consideration.[89] Once a decision is made by the committee, Shaw will typically inform the employee of the decision. [90]

On October 27, 2021, Shaw sent Complainant the Leave Bank forms she needed to complete and submit by November 4, 2021.[91] On November 3, 2021, Complainant submitted the forms to Shaw.[92] On November 8, 2021, Shaw emailed Complainant that she had received the forms and that she would inform her of the committee's decision after the committee met that same day.[93] Also on November 8, 2021, Complainant emailed Shaw to inquire about the committee's decision process and, the same day, Shaw called Complainant to inform her that her Leave Bank request had been denied.[94] The next day, Complainant submitted a rebuttal letter, and Complainant's Leave Bank request was subsequently approved by the committee on November 9, 2021[95] and signed off by the CPO on November 22, 2021.[96] Smith told OIG investigators that the delay between the committee approving her leave and his signing off was because he was busy.[97]

The Leave Bank committee consists of the CPO or his designee and three other members.[98] The committee that voted on Complainant's request consisted of one APS employee who voted no both initially and after Complainant's rebuttal letter,[99] and two other APS employees who initially voted against granting leave but changed their votes to grant the leave after receiving Complainant's rebuttal letter.[100] Both APS employees who changed their vote to grant leave

[89] *See* Stipulated Fact 36.
[90] *See* Stipulated Fact 36.
[91] *See* ROI Att. 4 at 4.
[92] *See* ROI Att. 4 at 4.
[93] *See* ROI Att. 4 at 11.
[94] *See* Stipulated Facts 33 and 34.
[95] *See* ROI Att. 7 at 19, 21.
[96] *See* Stipulated Fact 35; ROI Att. 7 at 16.
[97] *See* ROI Att. 13 at 2.
[98] *See* ROI Att. 30 at 37.
[99] *See* ROI Att. 7 at 11, 18; ROI Att. 15.
[100] *See* ROI Att. 7 at 12, 13, 19, 21; ROI Att. 17.

indicated that their change was a result of additional medical information that Complainant provided.[101] Garcia did not have a role in the approval process for leave from the Leave Bank and did not speak with anyone about her request.[102] The two Leave Bank committee members who were interviewed both told OIG investigators that they did not know Complainant, they did not know about her disclosures, nor did they have any conversations with anyone outside the committee about Complainant.[103] One of the members told OIG that the member of the committee would recuse themselves from voting on the request of any APS employee who they know.[104]

Complainant asserts that she received a call from APS that her use of FMLA leave and Health Leave Bank leave were denied because of her previous absences.[105] APS asserts that Complainant was never denied FMLA leave. Complainant contends that she then wrote a rebuttal addressing all of her absences and that either the same day or the next day she received an email informing her that she had been approved for both FMLA and Health Leave Bank Leave.[106]

Initially, Complainant was scheduled to return on November 25, 2021, but her FMLA form states that she was approved to extend her time out until as late as February 8, 2022.[107]

E. Complainant's Communications While on Leave and Once Returning to AHMS.

John Buch was an assistant principal at AHMS throughout Complainant's time at the school.[108] Complainant contends that she was instructed by Garcia to make Buch a teacher in her Google classrooms so that he could help the substitute teacher covering her classes review the students' work.[109] Complainant asserts that Buch, however, did not accept Complainant's

[101] *See* ROI Att. 7 at 19, 21; ROI Att. 17.
[102] *See* ROI Att. 10 at 1; ROI Att. 11 at 2; ROI Att. 13 at 2.
[103] *See* ROI Att. 15; ROI Att. 16; ROI Att. 18.
[104] *See* ROI Att. 15.
[105] *See* ROI Att. 3 at 1.
[106] *See* ROI Att. 3 at 1.
[107] *See* ROI Att. 7 at 2-4.
[108] *See* Stipulated Fact 19.
[109] *See* ROI Att. 1 at 19.

invitations to join her Google classroom and her students stopped doing the work she posted for them "shortly after her leave began."[110]

Complainant states in her complaint that, on November 29, 2021, she sent messages to two teachers at AHMS wishing them a Happy Hannukah and only one teacher responded.[111]

Complainant asserts that, on December 7, 2021, she emailed a simple question to a general education literacy teacher to help her prepare for the second semester and the teacher never responded.[112]

Complainant also told OIG investigators that when she returned to school in January 2022, she felt that she received "strange" looks, people did not say hello to her, and she had other odd encounters with other teachers but could not provide specific examples.[113]

F. Complainant's Position is Changed, and She is Directed to Move from Her Classroom.

Complainant contends that, on December 8, 2021, she emailed Garcia questions about preparing her classes because she would be returning in January 2022 and Garcia did not respond to the email.[114] Garcia explained to OIG investigators that both she and the APS director of human resources responded to numerous work-related emails from Complainant by telling her not to work while on leave.[115] So when Complainant emailed Garcia on December 8, 2021, Garcia did not respond because Complainant continued to email while on leave. [116]

Riggs told OIG investigators that, prior to winter break, AHMS's special education department had a meeting with Garcia and Mundis about Complainant's classes.[117] Riggs said the

[110] *See* ROI Att. 1 at 19.
[111] *See* ROI Att. 1 at 20.
[112] *See* ROI Att. 1 at 20.
[113] *See* ROI Att. 3 at 2.
[114] *See* ROI Att. 2 at 2.
[115] *See* ROI Att. 10 at 2.
[116] *See* ROI Att. 10 at 2.
[117] *See* ROI Att. 27 at 1.

meeting was because the department did not know when Complainant was going to return.[118] Chastain similarly characterized the meeting as addressing what could be done if Complainant did not return from her extended medical leave.[119]

On December 28, 2021, Garcia emailed Complainant to inform Complainant that she would no longer be teaching five literacy core replacement classes, but instead of being a classroom teacher, Complainant would be working as an 8th grade push-in/pull-out teacher for the remainder of the school year.[120] Complainant asserts both that when she asked, she was told that the change was because Complainant did not participate in special education restructuring discussions and that she was not invited to this meeting.[121]

Garcia told OIG investigators that there were several factors that led to the change of Complainant's position during winter break.[122] Specifically, Garcia stated that AHMS had a shortage of special education teachers and had added more special education teachers in late 2021.[123] In September 2021, two special education teachers left AHMS and then in December 2021, a third special education teacher left AHMS.[124] With the addition of new teachers, AHMS restructured the special education department so that teachers' caseloads were evenly distributed.[125] Additionally, Garcia noted that she was unsure when Complainant would return from her extended leave and felt that the school needed a permanent teacher in the classroom.[126]

Garcia noted in her email to Complainant explaining Complainant's change to a push-in/pull-out teacher role that AHMS had hired three new teachers. Garcia stated that two of the

[118] *See* ROI Att. 27 at 1.
[119] *See* ROI Att. 28 at 1-2.
[120] *See* Stipulated Fact 37; ROI Att. 2 at 2; ROI Att. 6.
[121] *See* ROI Att. 2 at 2.
[122] *See* ROI Att. 8 at 2.
[123] *See* ROI Att. 8 at 2; ROI Att. 9; ROI Att. 23.
[124] *See* Stipulated Facts 20 and 21; ROI Att. 20, 21, 22.
[125] *See* ROI Att. 8 at 2.
[126] *See* ROI Att. 8 at 2; ROI Att. 9.

new teachers would be serving as push-in/pull out teachers and one who would be serving as the math core replacement teacher for all levels.[127] Garcia also wrote that one of the teachers who was already at AHMS would now serve as core replacement teacher for literacy for all grade levels.[128] The email further explained that the caseloads would be redivided as a result of the new hires.[129]

Garcia told OIG that, typically, when she hires a teacher, they are placed where they are needed, and can serve as a push-in/pull-out teacher, a core teacher, or both.[130] AHMS does not have separate job announcements for core teachers and push-in/pull-out teachers because the qualifications are the same.[131] A change to the role of push-in/pull-out teacher did not result in a change of pay or benefits.[132] Complainant told OIG investigators that she, nevertheless, felt it was a demotion.[133] Specifically, Complainant felt that it was a demotion to lose all her classes in the middle of the school year and go from teaching five classes to assisting other teachers.[134]

As a result of the change, Garcia instructed Complainant to move into an office space, rather than keep the classroom she had before going on medical leave.[135] The school was combining two math classes into one and needed a larger space and so they combined Complainant's old classroom with another for the larger class.[136] As a push-in/pull out teacher, Complainant did not need the classroom space.[137]

Garcia informed Complainant that boxes would be provided for Complainant to box up her

[127] *See* ROI Att. 6 at 1.
[128] *See* ROI Att. 6 at 1.
[129] *See* ROI Att. 6 at 1.
[130] *See* ROI Att. 8 at 2.
[131] *See* ROI Att. 8 at 2.
[132] *See* Stipulated Fact 38.
[133] *See* ROI Att. 2 at 2; ROI Att. 3 at 2.
[134] *See* ROI Att. 3 at 2
[135] *See* Stipulated Fact 39; ROI Att. 6.
[136] *See* ROI Att. 10 at 2; ROI Att. 26.
[137] *See* ROI Att. 26.

stuff and move her belongings from the classroom.[138] Complainant told OIG investigators that she informed Garcia that she could not lift boxes due to her surgery and Garcia responded by asking Complainant to produce a doctor's note listing her restrictions.[139] In her initial complaint, however, Complainant wrote that she was not asked to provide a doctor's note.[140]

Garcia told OIG investigators that Complainant's former classroom was needed for an expanded math class, and because she did not want to upset Complainant by allowing another person to touch Complainant's personal items, she asked Complainant to move the items.[141] Garcia also told investigators that she offered Complainant the assistance of three custodial staff members, including the head custodian, to help her move.[142]

G. Complainant Returns to AHMS and Resigns.

On January 4, 2022, Complainant was given her first assignment as a push-in/pull-out teacher. Rico Munn, the APS superintendent, was also in the classroom where Complainant was assigned push-in/pull-out duties that day.[143] Complainant says she spoke to Munn, who told her that she needed to be flexible.[144]

Complainant resigned from APS that day.[145]

H. Complainant Files Written Complaint to OIG

On July 19, 2022, Complainant filed a formal complaint with OIG.[146] She told OIG investigators that her complaint was prepared by an attorney but that she did not continue to be

[138] *See* ROI Att. 6.
[139] *See* ROI Att. 2 at 2.
[140] *See* Complainant's Initial Brief at 9.
[141] *See* ROI Att. 10 at 2.
[142] *See* ROI Att. 10 at 2.
[143] *See* ROI Att. 2 at 2; Stipulated Fact 18.
[144] *See* ROI Att. 2 at 2.
[145] *See* ROI Att. 1 at 8; ROI Att. 2 at 1; Stipulated Fact at 5.
[146] *See* ROI at 1.

represented after the complaint was filed.[147] In her complaint, Complainant asks for eighteen months of salary, a "clean record" saying that she resigned voluntarily, and that APS not interfere with her future employment opportunities.[148]

I. OIG Investigation

After receiving Complainant's written complaint, OIG began its investigation. OIG interviewed Complainant and at least eleven other people.[149] OIG concluded that none of Complainant's allegations of whistleblower reprisal were substantiated.[150] OIG determined that Complainant made protected disclosures but did not satisfy her initial burden of showing that those disclosures were contributing factors to any actions except the decision to change her position from a core replacement teacher to a push-in/pull-out teacher.[151] For the decision to change her position, OIG concluded that the clear and convincing evidence showed that APS "would have taken the same action even if [Complainant] had not made the protected disclosures."[152]

J. Hearing and Decision Process Before the Office of Hearings and Appeals

On July 13, 2023, OIG sent its report of investigation to the Secretary and sent copies to the parties.[153] On July 14, 2023, I issued an order asking the parties to provide their availability for a status conference.[154] On July 18, 2023, I met with the parties, using Microsoft Teams, to

[147] *See* ROI Att. 2 at 1.
[148] *See* ROI Att. 1 at 11. The record in this matter does not demonstrate that APS retaliated against Complainant in violation of the NDAA. Even if the record had shown that APS violated the protections provided by the NDAA, Complainant's remedies would not have included eighteen months salary. Complainant voluntarily resigned after less than five months in her position and none of the alleged employment actions would satisfy the high burden of showing that working at AHMS was "so intolerable that [Complainant] has no option but to resign" and that she was constructively discharged. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 894 (1984); *see also Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1133 (10th Cir. 2013); *Wilson v. Bd. of County Commissioners of Adams County*, 703 P.2d 1257, 1259-1260 (Col. 1985).
[149] *See* ROI at 16-17.
[150] *See* ROI at 1.
[151] *See* ROI at 1, 7-8, 10, 13-15.
[152] ROI at 15.
[153] *See* Letter from Sandra D. Bruce to the Hon. Miguel Cardona (July 13, 2023); Letter from Sandra D. Bruce to Michael Giles (July 13, 2023); Letter from Sandra D. Bruce to REDACTED (July 13, 2023).
[154] *See* Order Scheduling Status Conference (July 14, 2023).

discuss the process and procedures for this proceeding. During the conference, I offered both parties the opportunity to submit initial briefs and to have a live hearing. I also offered the parties that, if both parties wished to waive the hearing, the parties could file responsive briefs instead. The parties did not agree to waive the hearing, and so a briefing schedule was established and a live hearing, via Teams, was scheduled. Additionally, during the conference, I discussed a list of proposed stipulations with the parties, and the parties agreed to a list of agreed upon stipulated facts.

On July 18, 2023, I also issued a Notice of Hearing and Order Governing Proceedings (OGP). The OGP stated that the OIG Report of Investigation and all attachments to the Report were part of the record. It also directed initial briefs with additional exhibits be filed on or before August 1, 2023. It further stated "[d]ue to the short legal timeframes for issuing a decision, the dates established in this Order cannot be postponed, rescheduled, or otherwise extended."

On July 31, 2023, the parties filed a joint motion to waive the live hearing and file responsive briefs instead. Complainant also filed an unopposed request for an extension of time to file initial briefs. Also on July 31, 2023, I issued an order granting the joint motion to waive the hearing and permitting the parties to file responsive briefs on or before August 7, 2023. The order, however, denied Complainant's request for extension of time noting that the parties were told no extensions would be granted. On August 1, 2023 and August 7, 2023, respectively, the parties filed initial and responsive briefs.

1. Complainant's Initial Brief

In her initial brief, Complainant challenges some of the statements made by Garcia and other AHMS employees to OIG about some of the facts at issue in the case. Specifically, Complainant argues that, contrary to what was told to OIG investigators, she was not initially being

assigned push-in/pull-out duties,[155] that she was gone for less than one week when she walked out of class and did not yell at other AHMS employees when she left,[156] that Garcia and other AHMS employees were not unsure about the date she would return from her medical leave,[157] and that her FMLA was initially denied.[158] Complainant also reiterates that she feels that her disclosures covered both AHMS's failure to follow IEPs and an effort by Garcia and AHMS to have her inaccurately reflect information in the students' progress reports.[159] Finally, she argues that based on her credentials, Complainant, rather than the newly hired teacher, should have been assigned core replacement classes and the failure to make that assignment had to have been an act of retaliation.[160]

2. APS's Initial Brief

In its initial brief, APS notes that it is "in substantial agreement with the Report of Investigation" and focuses on certain conclusions in the report.[161] APS notes that it does not contest that Complainant made statements about the placement of three students in incorrect math classes but agrees with OIG's conclusion that Complainant failed to substantiate any claims of retaliation. Regarding FMLA leave, APS specifically asserts: (1) that Complainant was never denied FMLA leave; and (2) that if she was, Garcia and Zapfel did not make that decision.[162] Addressing the denial of Leave Bank leave, APS argues that: (1) a denial of leave that is reversed the following day does not rise to the level of an action covered by the NDAA; (2) the decisions related to the leave were made by the Leave Bank committee, not the persons who were the

[155] *See* Complainant Initial Brief at 3-4.
[156] *See* Complainant Initial Brief at 5-6.
[157] *See* Complainant Initial Brief at 7.
[158] *See* Complainant Initial Brief at 7.
[159] *See* Complainant Initial Brief at 9.
[160] *See* Complainant Initial Brief at 10.
[161] Aurora Public School District Initial Brief (APS Initial Brief) at 1.
[162] *See* APS Initial Brief at 1-2.

audience for Complainant's disclosures; and (3) there is no evidence that the committee knew of the disclosures or even knew Complainant outside the leave request process.[163] Finally, as to the change in Complainant's position to a push-in/pull-out teacher, APS asserts: (1) that the decision was made "in response to unique and challenging staffing issues faced by Ms. Garcia;" (2) that APS clearly and convincingly demonstrated it would have taken the same action regardless of the disclosures; and (3) that the change was not a demotion or action that rose to the level of being a discriminatory action.[164]

3. Complainant's Responsive Brief

In her response brief, Complainant focuses on her allegation that changing her role to a push-in/pull-out teacher was retaliatory. After addressing how she has met her prima facie case, and that OIG concluded that she had met her burden regarding the change in job responsibilities, Complainant argues that APS did not have convincing evidence supporting its action but did have a strong motivation to retaliate.[165] Complainant challenges the existence of a legitimate reason of the change in her job role by first arguing that any staffing issues at AHMS were solved by the hiring of new teachers. She then states that her return date was only changed once by a doctor and that the statement on the FMLA form that her she had until February 8, 2022 to return was "created without reason by [APS]."[166] In support of APS's motivation to retaliate against her, Complainant argues that she had exposed APS's lack of compliance with IDEA requirements and that APS sought to "*maintain* its transgressions" by having her report incorrect information and was motivated to stop her from whistleblowing on "its misdeeds."[167]

[163] *See* APS Initial Brief at 2-3.
[164] *See* APS Initial Brief at 4-5.
[165] *See* Complainant Response Brief at 3-4.
[166] Complainant Response Brief at 4.
[167] Complainant Response Brief at 5.

4. APS's Responsive Brief

In its responsive brief, APS addresses Complainant's arguments related to her change of duties to a push-in/pull-out teacher role.[168] APS first asserts that although it does not contest that Complainant brought her concerns to AHMS leadership, the fact that she made disclosures is not determinative that any action must have been in retaliation for those disclosures. APS argues that the proper analysis also looks at whether there is clear and convincing evidence that Complainant would have been moved absent the disclosure.[169] The school district notes that, even if Complainant was better credentialed than some of her colleagues, the stated reason for her change in duties was the uncertainty about her return to work and the need to "limit negative impact" on students.[170] APS further contends that the move to a push-in/pull-out role was not a negative personnel action and so could not be retaliatory.[171]

IV. PRINCIPLES OF LAW

As noted, 41 U.S.C. § 4712 prohibits retaliation by APS against an employee for whistleblowing. More specifically, APS cannot retaliate against an employee for disclosing "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant" to among others, a "management official or other employee of the [employer]

[168] *See* Aurora Public School District Reply Brief at 1.
[169] *See Id.* at 1
[170] *See Id.* at 2.
[171] *See Id.* at 2.

who has the responsibility to investigate, discover, or address misconduct."[172]

When an employee believes that he or she has been subject to a reprisal prohibited by the statute, the employee may submit a complaint to OIG within three years of the reprisal.[173] If OIG determines that the complaint is not frivolous, that it alleges a violation of the statute, and that it has not been previously addressed in another federal or state judicial or administrative proceeding initiated by the employee, OIG will investigate the complaint. Once OIG has completed its investigation, it submits a report of the findings of the investigation to the employee, the entity, and the Secretary.[174]

After receiving the OIG report, the Secretary or 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.[175] The decision must address "whether there is sufficient basis to conclude that the . . . grantee . . . concerned has subjected the complainant to a reprisal prohibited by [the NDAA] . . . ."[176] The statute provides that if there was a reprisal, the Secretary will order the entity to:

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

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

(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;" and

[172] 41 U.S.C. § 4712(a).
[173] *See* 41 U.S.C. § 4712(b).
[174] *See* 41 U.S.C. § 4712(b).
[175] *See* 41 U.S.C. § 4712(c)(1).
[176] *Id.*

(4) "[c]onsider disciplinary or corrective action against any official of the executive agency, if appropriate."[177]

The whistleblower statute requires this decision to use the burdens of proof found in 5 U.S.C. § 1221(e).[178] First, Complainant must show that (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 actions taken against her.[179] Complainant must also show that the actions were personnel actions covered by the NDAA.[180] Proving that a disclosure was a "contributing factor" in an action can be done 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."[181] It follows, however, that in order to show that a protected disclosure was a contributing factor in the adverse personnel action, the employee must show that the individual who initiated the personnel action had knowledge of the disclosures before ordering or initiating the personnel action.[182]

If an employee meets that burden, then the burden shifts to the employer to demonstrate "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure."[183] In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit provided a guideline for

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[177] *Id.*
[178] *See* 41 U.S.C. § 4712(c)(6).
[179] *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).
[180] *See In re Hawaii Dept. of Educ.*, Dkt. No 19-81-CP, U.S. Dep't of Educ. (Dec. 31, 2019) at 39-40.
[181] *See* U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc*., 897 F.3d 1283, 1287 (10th Cir. 2018).
[182] *See DuPage Regional Office of Educ. v. U.S. Dep;t of Educ.*, 58 F.4th 326, 351 (7th Cir. 2023); *Armstrong v. Arcanum Group, Inc*., 897 F.3d 1283, 1287 (10th Cir. 2018); *In re Haw. Dep't of Educ.*, Dkt. No. 19-81-CP, U.S. Dep't of Educ. (Dec. 31, 2019) at 34-35, 41-42.
[183] *See* 5 U.S.C. § 1221(e)(1).

analyzing whether an employer has met its burden of showing by clear and convincing evidence that it would have taken the same adverse personnel action absent a protected whistleblower disclosure.

V. ANALYSIS

In her complaint to OIG, Complainant identifies disclosures related to whether students' IEPs were being followed and whether information related to IEP compliance was accurate. Either through Complainant directly informing them or because they heard about the disclosures, Garcia, Zapfel, Mundis, Riggs, and Chastain were all aware of these disclosures.

A. Complainant's Initial Burden

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

1. *Complainant has proven that she was an employee of a federal grantee during the relevant time.*

It is undisputed that Plaintiff was an employee of a recipient of Department-administered grants during the relevant time. APS is a recipient of, among other federal moneys, Individuals with Disabilities Education Act (IDEA) funds. Complainant was a special education teacher at AHMS, a middle school in APS.

2. *Complainant has shown that she made protected disclosures regarding whether the placement of students in math classes violated the students' IEPs and whether information was incorrectly being reported.*

i. COMPLAINANT'S ALLEGATIONS ARE COVERED BY THE NDAA.

Complainant made disclosures about whether students' IEPs were being followed and

whether reporting about special education services was inaccurate.[184]

The NDAA covers disclosures of

> [I]nformation that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.[185]

If Complainant believed that AHMS was violating the students' IEPs and incorrectly reporting information about the students' education, it would be reasonable to also believe the school was violating of a law, rule, or regulation related to, among other federal grants, IDEA funds. In other words, the content of Complainant's allegations would make the disclosure applicable to the NDAA protection against reprisal.

ii. COMPLAINANT'S DISCLOSURE WAS MADE TO AUDIENCES COVERED BY THE NDAA.

Complainant made her disclosures to Garcia, Zapfel, and Mundis.[186] Riggs and Chastain also told OIG investigators that they knew about Complainant's concerns.[187] The NDAA covers disclosures to, among others, a "management official or other employee of the [employer] who has the responsibility to investigate, discover, or address misconduct."[188] The people who Complainant made aware of her concerns included the school's principal, the assistant principal, a special education coordinator, and the special education department staffing chair. All these people are either APS management officials or employees who have the responsibility to investigate, discover, or address Complainant's concerns about whether classroom assignments

[184] *See* ROI Att. 1 at 7.
[185] 41 U.S.C. § 4712(a)(1).
[186] *See* ROI Att. 1 at 7.
[187] *See* ROI Att. 27, 28.
[188] 41 U.S.C. § 4712(a)(2).

violated IEPs and whether incorrect information had been reported about compliance with IEPs.

3. Complainant has met her burden of showing that the protected disclosures were contributing factors in the decisions to take personnel actions under the Act as to one allegation.

As to the final prong, Complainant sufficiently demonstrated that her protected disclosures were contributing factors in the decision to convert her position to a push-in/pull-out teacher. As to the other alleged actions, however, Complainant did not meet her burden of showing that these were personnel actions for which her disclosures were contributing factors under the NDAA.

i. COMPLAINANT HAS FAILED TO MEET HER BURDEN OF SHOWING THAT HER DISCLOSURES WERE A CONTRIBUTING FACTOR IN THE DECISIONS RELATED TO HER LEAVE REQUESTS AND TO THE UNRESPONSIVENESS OF HER COWORKERS.

If there is a relevant decision from the United States Court of Appeal to which this proceeding may be appealed, then I must follow that decision.[189] This case comes out of Colorado and, therefore, this decision may be appealed to the United States Court of Appeals for the Tenth Circuit.[190] In *Armstrong v. Arcanum Group, Inc.*, the United States Court of Appeals for the Tenth Circuit provided guidance on the complainant's burden of showing that a disclosure was a contributing factor in a personnel action.

> We agree with the parties that one element of a [NDAA] claim is that a plaintiff's protected activity was a contributing factor in the employer's decision to take an adverse employment action. Protected activity can play that role only if the employer knew of the activity. Also, we note that [the NDAA] incorporates the legal burdens of proof specified in 5 U.S.C. § 1221(e) for determining in administrative or judicial proceedings whether discrimination prohibited by [the NDAA] has occurred. And 5 U.S.C. § 1221(e)(1) includes a knowledge requirement.[191]

[189] *See Grant Medical Center v. Burwell*, 204 F.Supp.3d 68, 78 (D.D.C. 2016); *see also Grant Medical Center v. Hargan*, 875 F.3d 701, 708 (D.C. Cir. 2017); *Reich v. Contractors Welding of Western New York, Inc.*, 996 F.2d 1409, 1413 (2d Cir. 1993); *Anderson v. Heckler*, 756 F.2d 1011, 1013 (4th Cir. 1985); *Polaski v. Heckler*, 739 F.2d 1320, 1322 (8th Cir. 1984); *Jones and Laughlin Steel Corp. v. Marshall*, 636 F.2d 32, 33 (3d Cir. 1980); *Mary Thompson Hospital v. NLRB*, 621 F.2d 858, 864 (7th Cir. 1980); *Valdez v. Schweiker*, 575 F.Supp. 1203, 1206 (D. Col. 1983).
[190] *See* 41 U.S.C. § 4712(c)(5).
[191] 897 F.3d 1283, 1287 (10th Cir. 2018) (further citations and quotations omitted).

To summarize, without a showing that the person who took the alleged employment action knew of the protected disclosures, Complainant cannot show that her disclosures were contributing factors to the action.

OIG concluded that Complainant did not meet her burden of showing that her disclosures were contributing factors in the actions related to her Leave Bank leave.[192] This determination was based, in part, on Complainant's failure to "meet her burden of proof" of showing that the persons she made her disclosures to "had any role or responsibility in the approval process for the Health Leave Bank request being denied."[193] The record substantiates this determination.

Garcia specifically noted that she did not play a role in the decision whether to grant or deny Complainant leave from the Health Leave Bank.[194] Zapfel also reported that he did not play a role in the decision.[195] Both the APS CPO and the leave of absence coordinator for AHMS corroborated that a principal has no role in the decision.[196] There is no evidence in the record that indicates that Riggs, Chastain or Mundis had any role in the decisions related to Health Leave Bank leave. Rather, the decision to grant Leave Bank leave was made by the committee, none of whom were the five people the record shows knew of Complainant's disclosures.[197] The members of the committee all reported that they did not know Complainant or have any knowledge of her disclosures when they made the decisions related to her Leave Bank leave. Complainant has failed to connect the decisions related to her Leave Bank leave to anyone who had knowledge of her disclosures. Therefore, Complainant has failed to demonstrate that her disclosures were contributing factors in the decisions related to her Leave

[192] *See* ROI at 10.
[193] ROI at 10.
[194] *See* ROI Att. 10 at 1.
[195] *See* ROI Att. 25 at 2.
[196] *See* ROI Att. 11 at 2; ROI Att. 13 at 2.
[197] *See* ROI Att. 30 at 37.

Bank leave.

Similarly, Complainant fails to show that her protected disclosures were a contributing factor to any action or inaction related to FMLA leave. OIG concluded that Complainant failed to make her prima facie case. Specifically, OIG determined that the evidence did not demonstrate that Complainant was ever denied FMLA leave or that Garcia or Zapfel, who Complainant made her disclosures to, were involved in the final decision whether to grant FMLA leave.[198]

First, as OIG determined, the record indicated that Complainant was never denied FMLA leave. On October 27, 2021, Complainant sent Garcia the FMLA forms,[199] and the next day Garcia signed and approved Complainant's FMLA forms.[200] Sara Tansey, who was Garcia's executive assistant at that time, submitted the signed forms to Shaw two business days later, on November 2.[201] On November 8, 2021, Complainant asked Shaw about the status of her FMLA leave request and Shaw wrote to Complainant that her FMLA leave "has not **yet** been approved" because she had not received all of the forms.[202] The CPO took almost a week to approve the FMLA leave request, the delay for which he attributed to being unavailable.[203]

There is no indication that Complainant was ever denied FMLA. At most she was made to wait one week for the CPO's approval. Garcia, who had knowledge of the disclosure, approved Complainant's FMLA request within one day of receiving the forms. The CPO's decision is final as to whether FMLA leave is granted.[204] Smith, the CPO, did not learn about Complainant's protected disclosures until after Complainant resigned APS in 2022, long after the decision about

[198] *See* ROI at 7-8.
[199] *See* ROI Att. 4 at 2.-3
[200] *See* ROI Att. 7 at 2.
[201] *See* Stipulated Fact 17; ROI Att. 12.
[202] *See* ROI Att. 4 at 11 (emphasis added).
[203] *See* ROI Att. 13 at 2.
[204] *See* ROI Att. 11 at 1.

FMLA leave was made.[205] In short, the record does not demonstrate that anyone with knowledge of the disclosures denied or in any meaningful way even delayed the approval of Complainant's request for FMLA leave.

Complainant also asserted that there were other AHMS employees, including Buch, who were unresponsive to her emails, did not respond to her Happy Hannukah wishes, and were unfriendly when she returned. OIG concluded that this unresponsiveness did not rise to the level of being a covered act of reprisal under the NDAA.[206] As noted below, this conclusion is supported by the record. And, even if the non-responsiveness of the AHMS employees was a personnel action covered by the NDAA, the record does not provide a basis for concluding that any of those employees who were unresponsive to Complainant had knowledge of her disclosures.

ii. COMPLAINANT HAS NOT DEMONSTRATED THAT ALL OF THE ALLEGED REPRISALS WERE PERSONNEL ACTIONS COVERED BY THE NDAA.

As this tribunal said in *In re Hawaii Dep't of Education*:

> The NDAA dictates that this proceeding is controlled by the legal burdens of proof indicated in 5 U.S.C. § 1221(e). 5 U.S.C. § 1221(e) addresses cases "involving an alleged prohibited personnel practice as described under 5 U.S.C §§ 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D)]." Those provisions address either taking or failing to take a "personnel action." A personnel action is defined in 5 U.S.C § 2302 as "(i) an appointment; (ii) a promotion; (iii) [a suspension, removal, furlough, or reduction in grade] or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions." [207]

[205] *See* ROI Att. 13 at 1.
[206] *See* ROI at 6 n. 5.
[207] Dkt. No 19-81-CP, U.S. Dep't of Educ. (Dec. 31, 2019) at 39-40 (internal citations omitted).

Also in *In re Hawaii Department of Education*, this tribunal noted that in other contexts, the line between whether an action has a significant enough effect on a person's working conditions to rise to the level of a prohibited action of retaliation was whether it would deter a reasonable employee from acting.[208]

OIG concluded that three actions that Complainant alleged did not rise to the level of covered acts of reprisal: (1) other AHMS employees being unresponsive to Complainant; (2) Garcia speaking to Complainant about whether she was a good fit; and (3) Garcia asking Complainant to remove her personal items from her classroom and requesting a list of restrictions from Complainant's doctor when Complainant said she could not lift boxes. Specifically, OIG determined that "none of the allegations resulted in a negative personnel action or other action against [Complainant]; and none of the perceived allegations can be seen as deterring a reasonable person from making a protected disclosure."[209]

The conversation that Complainant had with Garcia about whether she was a good fit would also not be a personnel action under 5 U.S.C § 2302 and, therefore, is not addressed by the NDAA. Interpreting Section 2302, courts have concluded that a letter of reprimand is not considered a sufficient disciplinary action to constitute a personnel action.[210] Another federal circuit court concluded that disclosing personnel records to state prosecutors and refusing to return personal items to an employee after they resigned are not personnel actions.[211] Similarly, a federal district court concluded that an official discussion about attendance was not a personnel action

[208] *See* Dkt. No 19-81-CP (citing to *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 67-68 (2006); *Halliburton v. Administrative Review Bd.*, 771 F.3d 254, 259-260 (5th Cir. 2014); *McNeil v. Dep't of Labor*, 243 Fed. Appx. 93, 99-101 (6th Cir. 2007).
[209] OIG ROI at 6 n.5.
[210] *See Feds for Medical Freedom v. Biden*, 6 F.4th 366, 376 (5th Cir. 2023) (citing *Sistek v. Dep't of Vet. Affairs*, 955 F.3d 948, 955-57 (Fed. Cir. 2020) and *Graham v. Ashcroft*, 358 F.3d 931, 933 (D.C. Cir. 2004)).
[211] *See Manivannan v. U.S. Dep't of Energy*, 42 F.4th 163, 172-173 (3d. Cir. 2022).

under Section 2302.[212] A conversation between Garcia and Complainant where Garcia raises concerns about Complainant's fit and asks her to remedy the issues is less significant than a letter of reprimand or a refusal to return personal items or a decision to provide a criminal prosecutor with personnel information. This is especially true when the record indicates that even after leaving a classroom full of students, APS did not seek to terminate her or even reprimand her.[213] In summary, like an official discussion about attendance, Garcia's comment to Complainant would not rise to the level of a disciplinary or corrective action or any other personnel action under 5 U.S.C. § 2302 or an act of retaliation in an NDAA claim.[214]

Complainant asserts that she was directed to move from her classroom to her office and was not provided assistance. Garcia disputes this, saying that Complainant was offered the assistance of three custodial employees.[215] Even if Complainant was directed to move her belongings without assistance, this one-time request to move belongings is not a significant change in working conditions or any other personnel actions defined by 5 U.S.C § 2302. And while Complainant might have preferred to work in a classroom, requiring her to work in an office does not constitute a personnel action.[216] Complainant also said that she was asked by Garcia to provide a list of restrictions from her doctor. In her brief, however, she said she was not required to produce a doctor's note.[217] Moreover, as OIG concluded, none of these actions would on their own or collectively rise to the level of deterring a reasonable employee from making disclosures.[218]

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[212] *See Fortner v. DeJoy*, 2022 WL 4591647, *16.
[213] *See* ROI Att. 3 at 2.
[214] Moreover, if Complainant had shown that Garcia's comments about her fit were covered by the NDAA, Garcia and APS had a strong legitimate reason for the comment. Namely, Complainant left a classroom full of students in the middle of a school day and did not return for at least three school days. *See* Complainant Initial Brief at 5.
[215] *See* ROI Att. 10 at 2.
[216] *See Coulter v. Dept' of the Air Force*, 2023 WL 4494235 at *8 (MSPB 2023).
[217] *See* Complainant Initial Brief at 9.
[218] *See* OIG ROI at 6 n.5. *See McCray v. Dep't of Veterans Affairs*, 2023 WL 4828475 at 2 (MSPB 2023). Even if Complainant had shown that her disclosures were contributing factors in asking her to move to an office, the record shows, clearly and convincingly, that Garcia would have taken the action in the absence of her disclosures. As noted below, there was little motivation for Garcia to retaliate. Garcia had a strong motivation in needing Complainant's

Finally, the unresponsiveness of other AHMS employees would similarly not rise to the level of a personnel action under the NDAA. Other employees not responding to emails, especially when there were no further negative consequences from their unresponsiveness, would not have a significant effect on Complainant's working conditions or would not have met any other definition of personnel action under Section 2302. And, as OIG concluded, unresponsiveness of coworkers, without some other negative consequence, would not deter a reasonable person from making a protected disclosure.

iii. COMPLAINANT HAS MET HER PRIMA FACIE BURDEN REGARDING HER CHANGE IN DUTIES.

Riggs told OIG investigators that, prior to winter break, AHMS's special education department had a meeting with Garcia and Mundis about Complainant's classes.[219] Riggs and Chastain said that the meeting was because the department did not know when Complainant was going to return.[220]

Garcia sent Complainant the email notifying her of the change. And Garcia explained the reasoning for the change to OIG investigators. It appears, from the information provided, that Garcia made the decision to convert Complainant's role from teaching core replacement classes to a push-in/pull-out teacher after consulting with Riggs, Chastain, and Mundis.[221] Garcia, Riggs, Chastain, and Mundis were all told by Complainant about her concerns or otherwise knew about the concerns. Garcia told OIG investigators, however, that Zapfel did not have a role in that

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former classroom for a large class of students. ROI Att. 10 at 2; ROI Att. 26. Although the record does not provide another teacher who was moved from a classroom to an office for comparison, it is not necessary "to produce evidence as to each of the *Carr* factors to weigh them individually in the [employer's] favor." *Chaudhuri v. Dep't of Veterans Affairs*, 2023 WL 2333178 (MSPB 2023), at *1 (citing to *Whitmore v. Department of Labor*, 680 F.3d 1353, 1374 (Fed. Cir. 2012)).

[219] *See* ROI Att. 27 at 1.

[220] *See* ROI Att. 27 at 1; ROI Att. 28 at 1-2.

[221] *See* ROI Att. 30 at 30 (noting that "[f]inal determination of intra-building assignments or reassignments shall be made by the principal").

decision to change Complainant to a push-in/pull-out role.[222]

Multiple APS and AHMS leaders an argued that the change from a core teacher to a push-in/pull-out teacher was not a demotion or an adverse action.[223] One of the covered personnel actions under the NDAA is a "reassignment." As noted for purposes of the NDAA, the definitions used are taken from 5 U.S.C. § 2302, which applies to actions taken against federal employees. The Office of Personnel Management's definition of "reassignment" for federal employees includes a "movement to a position in a new occupational series, or to another position in the same series."[224] A "position" is defined as "the work, consisting of the duties and responsibilities assigned by competent authority for performance by an employee."[225] Applying those definitions to Complainant for the purposes of an NDAA retaliation claim, the assignment of Complainant from a core replacement teacher with her own class roster to a push-in/pull-out teacher assisting other classes would be a reassignment, even if the change did not result in a change of salary or benefits and either role was part of being a special education teacher at AHMS.

As noted, the NDAA reprisal determination uses the burdens of proof found in 5 U.S.C. § 1221(e).[226] That statute dictates that Complainant may meet her burden of showing that her protected disclosures were contributing factors in the personnel action "through circumstantial evidence, such as evidence that . . . the official taking the personnel action knew of the disclosure or protected activity; and . . .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." In other words, if the change in her duties happened reasonably soon

[222] *See* ROI Att. 10 at 2.
[223] *See* ROI Att. 8 at 2; ROI Att. 13 at 2.
[224] *See* Office of Personnel Management, *The Guide to Processing Personnel Actions* at 14-4, *available at* Chapter 14 - Promotions, Changes to Lower Grade, Reassignments, Position Changes and Details (opm.gov).
[225] Id. at 35-9.
[226] *See* 41 U.S.C. § 4712(c)(6).

after her disclosure, it meets the burden of showing that it was a contributing factor.[227] In *Kewley v. Dep't of Health & Hum. Servs,* the Court stated that "Congress did suggest, however, that an action taken within the same performance evaluation period would normally be considered within a 'reasonable time.'"[228] In this case the decision to change Complainant's role was made within the same academic year and within three months of the protected disclosures. As OIG concluded, this proximity of time satisfies the contributing factor burden.[229]

B. APS's Burden of Showing by Clear and Convincing Evidence That It Would Have Changed Her Role to a Push-in/pull-out Teacher Regardless of Complainant's Disclosures.

Because Complainant met her initial burden of showing that her disclosures were contributing factors in the decision to convert her to serving in a push-in/pull-out role, APS must justify its actions by demonstrating by clear and convincing evidence that it would have taken this same action in the absence of Complainant's disclosures. *Carr v. Social Security Administration* provides the factors to be considered when determining if APS has met its burden.[230]

These three *Carr* factors are:

1. "the strength of the [employer's] evidence in support of its personnel action;"
2. "the existence and strength of any motive to retaliate on the part of the [employer's] officials who were involved in the decision [to take the action];" and
3. "any evidence that the [employer] takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated."[231]

As noted, Complainant has met her initial burden of showing that she made protected disclosures that were "contributing factors" in the decision to convert her from teaching five core

[227] *See Lockhead Martin Corp. v. Administrative Review Bd., U.S. Dep't of Labor*, 717 F.3d 1121, 1136-1137 (10th Cir. 2013).
[228] 153 F.3d 1357, 1363 (Fed. Cir. 1998); *See also DuPage Regional Office of Educ. v. U.S. Dep't of Educ.*, 58 F.4th 326, 351 (7th Cir. 2023); *Mottas v. Dep't of Army*, 720 Fed.Appx. 912, 915 (10th Cir. 2017).
[229] ROI at 14.
[230] *Carr*, 185 F.3d at 1323; *see also DuPage*, 58 F.4th at 352.
[231] *Mottas*, 720 Fed.Appx. at 915 (quoting *Carr*, 185 F.3d at 1324).

replacement classes to acting as a push-in/pull-out teacher. OIG concluded that APS met its burden of clearly and convincingly demonstrating that it would have altered her position regardless of her protected disclosures.[232] The record supports that conclusion.

1. Strength of APS's Reasons for Changing Complainant's Role

The first *Carr* factor is the strength of Garcia's legitimate reason for changing her duties.

Riggs told OIG investigators that, prior to winter break, AHMS's special education department had a meeting with Garcia and Mundis because they were unsure when Complainant was going to return from her injury.[233] Similar to what Riggs told OIG investigators, Garcia expressed that the change to all push-in/pull-out classes was in large part due to Garcia's uncertainty when Complainant would return and the desire not to have substitute teachers covering Complainant's classes if she extended her leave.[234]

As noted above, Complainant was initially scheduled to return in November 2021, but then extended her leave to early January with approval to extend her time out until as late as February 8, 2022.[235] Complainant asserts that Garcia and the other AHMS employees knew her return date.[236] This assertion, however, is not supported by any evidence and is contrary to what multiple AHMS employees have said. Moreover, the evidence that is part of the record shows that she changed her return date and that she was approved to return as late as February 8, 2022. In short, the record corroborates what Garcia, Riggs, and Chastain all said, that they could not be certain if Complainant would return on January 3, 2022.

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[232] *See* ROI at 30.
[233] *See* ROI Att. 27 at 1; ROI Att. 28 at 1-2.
[234] *See* ROI Att. 10 at 2.
[235] *See* ROI Att. 7 at 2-4. Complainant contends in her Response Brief that she does not know why a must return date of February 8, 2022 was added. This does not change that, as of the revision to the FMLA form on December 17, 2022, Garcia indicated that she did not know if Complainant was going to return before February 8, 2022. This was eleven days before she sent notice to Complainant of the plan to move her to a push-in/pull-out role.
[236] *See* Complainant Initial Brief at 7.

Additionally, when Garcia and the other AHMS employees met to discuss plans for after winter break, Complainant had only been at AHMS for four months and she had already walked out of a classroom and not returned for at least three days, leaving AHMS without a teacher at a moment's notice. During the prior year, when Complainant was working in a different capacity for APS, she took off the final eight days of the school year because she felt it was medically necessary but did not get a doctor's note to support her conclusion until the sixth day of her absence.[237] Complainant had, in her short career at APS, already shown herself to be unpredictable in her attendance.

The federal district court in Colorado has explained the importance of having reliable attendance from a teacher. Specifically, it stated:

> It is uncontroverted here that the [school district] has a legitimate interest in requiring the attendance of teachers. Without such attendance, the school district could not function, and the students would suffer. The teaching of children is not like the assembly of widgets. Where assembly line employees may be interchangeable to the point at which the continuous attendance of one worker is not essential, the continuity of instruction is of importance to the educational process. Even though a substitute teacher may be called in from time to time, there is a diminution—however grave or slight—in the educational process when a regular teacher is absent. For this reason alone, the attendance of teachers is of greater concern to the [school district] than attendance of employees might be to other employers.[238]

As principal, Garcia had a responsibility to be the "leader of a campus" because "the state's high interest in education . . . requires effective principals in its public schools."[239] Garcia had final authority to assign Complainant, and all other teachers, to certain classes within AHMS.[240] Throughout the year, AHMS adjusted its teacher assignments to respond to special education teachers leaving and joining AHMS. Garcia was making further changes to be effective after

[237] *See* ROI Att. 5 at 8-10.
[238] *Pinsker v. Jt. Dist. No. 28J of Adams and Arapahoe Counties*, 554 F.Supp. 1049, 1052 (D. Col. 1983).
[239] Dkt. No. 21-26-CP, U.S. Dep't of Educ. (July 23, 2021) at 48-49.
[240] *See* ROI Att. 30 at 30.

winter break. Garcia expressed to OIG that, in her experience, teachers often change the dates they come back from leave.[241] So, when she met with the special education department, she had doubts whether Complainant, who had an unpredictable attendance record and had already extended her leave once, would be available at the start of the semester. Under those circumstances, Garcia and the department had a strong motivation to make a decision that would protect the "continuity of instruction" and prevent a likelihood of instability in the classroom instruction again. Moving Complainant to a push-in/pull-out role and ensuring that there was a teacher to lead the classrooms at the beginning of the semester was a rational choice to achieve that stability.

Garcia told OIG investigators that Zapfel did not have a role in that decision.[242] Zapfel told investigators that he did not play a role in the decision to change Complainant's duties and did not talk to Garcia about the subject,[243] but did offer the OIG investigators his opinion about why her duties were changed. Zapfel said it was because Complainant was out too much and the need to protect the student from being affected by her absence and because she acted inappropriately, finding faults in what others were doing.[244] The second reason offered by Zapfel could be seen as referencing her disclosures. Specifically, that Complainant found faults with how students were being assigned to classes, whether IEPs were being violated, and whether AHMS was accurately reporting compliance. Zapfel, however, also said in a separate interview that the reason was based on the school being short staffed.[245] Both Zapfel and Garcia reported that Zapfel did not play a role in the decision to change Complainant's position and did not consult with Garcia

[241] *See* RO Att. 10 at 2.
[242] *See* ROI Att. 10 at 2.
[243] *See* ROI Att. 25 at 1.
[244] *See* ROI Att. 24 at 1-2.
[245] *See* ROI Att. 25. At 1.

about the change. It is unclear that Zapfel would have had any firsthand knowledge of the decision to move Complainant, and so his inconsistent opinion on the subject does not carry the same weight as that of Garcia, who clearly had first-hand knowledge.

2. Strength of Motives to Retaliate

The second *Carr* factor is the existence and strength of any motive to retaliate on the part of Garcia, Riggs, Chastain, and Mundis, who all played a role in the decision to change Complainant's role.

Complainant accused Riggs and Chastain of failing to follow IEPs to avoid students they did not like.[246] Complainant, however, has no support for this accusation other than her own uncorroborated account of what Riggs said to her and another teacher. Riggs told OIG investigators that a student could not be moved based on a teacher's preference.[247] Chastain, who was the special education department's staffing chair, similarly said that students were not moved based upon a teacher's preference but on the needs of the students.[248] Zapfel told OIG investigators that students were not assigned based on a teacher's preference.[249] In the absence of any corroboration to support Complainant's accusations that Riggs and Chastain acted improperly, the two teachers had little to fear from Complainant's accusations and little motivation to respond on their part. Additionally, Riggs told OIG that at times, Complainant was correct about misassignment of students.[250] It is unlikely that Riggs would be concerned about the accusations that the students' IEPs were not complied with and also admit that some student assignments were incorrect.

[246] *See* ROI Att. 1 at 43.
[247] *See* ROI Att. 27 at 1.
[248] *See* ROI Att. 28 at 1.
[249] *See* ROI Att. 24 at 1.
[250] *See* ROI Att. 27 at 1.

Complainant asserts, without support, that the AHMS leaders tried to falsify reporting. In the emails she sent to Garcia, Complainant expresses concerns that if she updated students' progress reports she would have to say that progress was made when it was not.[251] Although Complainant expressed that she believed that updating progress reports would require reporting inaccurate information, there is no evidence in the record that demonstrates that the only way to update progress reports was to falsify information. There is also no corroboration for the assertion that AHMS or APS employee asked Complainant to report any incorrect information when she updated progress reports. That Complainant refused to report incorrect information is not proof that Complainant was asked to do so or that updating progress reports would require reporting incorrect information. The record does not provide any basis for concluding that AHMS leaders tried to falsify information and, as Complainant asserts, have "intentional and continued violations of IDEA . . . and denial of [Free Appropriate Public Education] to students with disabilities.[252]

Although others may have made recommendations, Garcia made the decision on where to assign Complainant.[253] The evidence in this case demonstrates that Garcia did not try to silence Complainant or dismiss her concerns or attempt to continue violations of IEPs. As both parties agreed, on October 19, 2021, Complainant met with Garcia and Mundis and was told that Garcia and Mundis were taking her concerns seriously.[254] Garcia told OIG investigators that after Complainant raised her concerns, Garcia spoke to Mundis to request help looking into the issue.[255] Mundis told OIG investigators that within a week of meeting with Garcia and Complainant, the three students that Complainant was concerned about were moved.[256] Additionally, Mundis and

[251] *See* ROI Att. 1 at 39-40.
[252] Complainant Initial Brief at 7.
[253] *See* ROI Att. 30 at 30.
[254] *See* Stipulated Fact 29.
[255] *See* ROI Att. 8 at 1.
[256] *See* ROI Att. 31 at 1.

Garcia stated that the students were offered compensatory services.[257] In response to Complainant voicing concerns, Garcia and AHMS acted to rectify the errors that Complainant identified. This does not indicate a desire to silence Complainant or respond negatively to her disclosures.

3. Treatment of Other Similarly Situated Employees

During her interviews with OIG investigators, Garcia explained that at the beginning of the 2021-2022 academic year, there were five special education teachers at AHMS, including Complainant.[258] At that time, all five teachers had a mix of teaching core replacement classes and push-in/pull-out duties.[259] In early, September two special education teachers left the school.[260] As a result, Complainant was reassigned and became the core replacement teacher for five classes.[261]

In her email where Garcia informed Complainant of the change in her position to a push-in/pull-out teacher, Garcia noted that new special education teachers had joined AHMS, two of whom would be serving as push-in/pull out teachers and one of whom would be serving as the math core replacement teacher for all levels.[262] The email also noted that one of the teachers who was already at AHMS would now serve as core replacement teacher for literacy for all grade levels.[263] The email further noted that the caseloads would be redivided as a result of the new hires.[264]

With teachers leaving and others joining AHMS, multiple changes were made throughout

[257] *See* ROI Att. 1 at 18; ROI Att. 2 at 1-2; ROI Att. 8 at 1.
[258] *See* ROI Att. 10 at 1.
[259] *See* ROI Att. 10 at 1. Complainant disagrees that she was initially assigned any push-in/pull-out duties. Complainant contends that she was initially assigned to five classes with designated classrooms, two as a core replacement teacher and three as a flex teacher, and no push-in/pull-out classes. Complainant Initial Brief at 3-4. This does not change the fact that as a result of some teachers leaving AHMS and others joining, teachers were reassigned roles during the academic year.
[260] *See* ROI Att. 10 at 1.
[261] *See* ROI Att. 10 at 1; Exhibit C8.
[262] *See* ROI Att. 6 at 1.
[263] *See* ROI Att. 6 at 1.
[264] *See* ROI Att. 6 at 1.

the year. Complainant's role was changed from having two core classes to five because of teachers leaving in September.[265] Another teacher's role was changed after winter break to teaching literacy core replacement classes as part of the new alignment. Of the teachers hired, some did push-in/pull-out teaching and some served as core replacement classroom teachers. There is no indication that any of these changes or assignments happened after a teacher made a protected disclosure. In short, the evidence shows that the moving of teachers between teaching core replacement classes and push-in/pull-out roles was common during the 2021-2022 year and was not affected by any whistleblowing.[266]

4. Overall, it is highly probable that Garcia would have reassigned Complainant regardless of her disclosures.

Garcia had a strong motivation to provide consistent and stabile instructions to the students by not assigning a teacher whose attendance was unpredictable to lead a classroom. The special education department had the same strong motivation to recommend against Complainant being assigned a core replacement class when her return date was unknown. There was little or no reason for any of the people involved in the assignments to retaliate against Complainant. Finally, other teachers were assigned as push-in/pull-out teachers who did not make protected disclosures. In summary, the evidence clearly and convincingly demonstrates that the decision to reassign Complainant to push-in/pull-out duties was unaffected by any protected disclosures that she made.

VI. CONCLUSIONS OF LAW

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

[265] *See* Exhibit C8; Complainant Initial Brief at 4.

[266] Complainant asserts that there were reasons that teachers were assigned push-in/pull-out roles, such as not having certain credentials, and that she felt that she was more qualified to be assigned core replacement classes. *See* Complainant's Initial Brief at 5, 10; Complainant Reply Brief at 5. That credentials can be a factor in deciding whether a teacher was assigned to a push-in/pull-out role does not mean that it is the only factor or that other legitimate factors, like the unpredictability of a teacher's attendance cannot overcome a difference in credentials.

grantee.

2. Complainant has met her burden of showing that she made protected disclosures about whether students' IEPs were violated and whether information related to IEP compliance was inaccurate to AHMS's principal, an assistant principal at AHMS, an APS special education coordinator, and two special education teachers at AHMS.

3. Complainant has not demonstrated that her disclosures were contributing factors to the decisions regarding granting her FMLA leave or Health Leave Bank leave, or to the unresponsive nature of her coworkers at AHMS.

4. Complainant has not demonstrated that her conversation with Garcia about her fit, the unresponsive nature of her co-workers, or the direction to move her belongings were personnel actions addressed by the NDAA.

5. Complainant has demonstrated that her protected disclosures were contributing factors to the decision to change her from teaching five core replacement classes to serving only in a push-in/pull-out teacher role.

6. The record has demonstrated clearly and convincingly that Garcia would have changed Complainant's role in the school even if she had not made protected disclosures.

VII. ORDER

The relief requested by REDACTED is **DENIED**.

VIII. 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 the 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 Aurora Public 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."[267]

Additionally, any party 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.[268]

DATE OF DECISION: August 11, 2023

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Daniel J. McGinn-Shapiro
Administrative Law Judge

[267] 41 U.S.C. § 4712(c)(2).
[268] *See* 41 U.S.C. § 4712(c)(5).