



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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T.S.,

Complainant

Docket No.: 23-17-CP

Reprisal for Disclosure Proceeding

v.

OIG: I22EAS03683

**Triangle Charter Education Association,
Inc. and Charter Schools USA,**

Grantee

Appearances: T.S., Complainant, for self.

Tory Summey, Esq., for Cardinal Charter Academy

Before: Robert G. Layton, 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 TS (Complainant) against her former employer, Cardinal Charter Academy, Triangle Charter Education Association, Inc., and Charter Schools USA (in this decision the three entities are collectively referred to as "Cardinal"). This decision 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 Cardinal, a grantee of the Department, retaliated against

her for making protected disclosures and those reprisals violated of the protections provided by 41 U.S.C § 4712, the National Defense Authorization Act (the NDAA).

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. *See* 41 U.S.C. § 4712(b). If the Secretary or designee does not complete its review of the report and issuance of the agency decision within 30 days of receiving the report, then complainant shall be deemed to have exhausted all administrative remedies with respect to the complaint, and the complainant may bring a de novo action at law or equity against the contractor, subcontractor, grantee, subgrantee, or personal services contractor to seek compensatory damages and other relief available under this section in the appropriate district court of the United States. *See* 41 U.S.C. § 4712(c)(2).

The OIG concluded that S met the knowledge and timing requirements of the NDAA based on her showing of the preponderance of evidence of the following: that the official(s) taking the personnel action knew of the disclosure or protected activity, and that the personnel action occurred within a period of time such that a reasonable person would conclude that the disclosure or protected activity was a contributing factor in the personnel action.

The OIG did not substantiate S's allegation of whistleblower reprisal, however. The investigation found that Cardinal met its burden of providing clear and convincing evidence that it would have not renewed S's employment in the absence of her disclosure due to budgetary reasons resulting from declining enrollment.

This decision agrees with OIG's determination that S has met her burden of proving her disclosure was a contributing factor in Cardinal's subsequent personnel action. Contrary to OIG's determination, however, Cardinal has failed to show by clear and convincing evidence that it would have taken the personnel action in the absence of S's disclosure.

Cardinal is managed by Florida-based Charter Schools USA, a for-profit firm that manages more than 90 schools in five states, including nine schools in North Carolina. Triangle Charter Education Association Board (Board) is responsible for developing and outlining the mission, vision, and values of Cardinal and developing appropriate policies to ensure their mission is maintained. The Board is also responsible for the legal and financial obligations of Cardinal (*OES Docket # 4*, p. 5; Exhibit 14). Charter Schools USA (CSUSA) is the Education Management Organization (EMO) that provides human resources, administrative, and financial services support to Cardinal. Instructional staff at Cardinal are jointly employed by the Board and CSUSA (*OES Docket # 4*, p. 5, Exhibits 11 & 14).

Cardinal Charter Academy is a public charter school serving students in grades kindergarten through eighth grade in the Cary and Raleigh area of North Carolina. From School Year (SY) 2020 to 2023, Cardinal received approximately \$446,274 in IDEA Part B, Section 611 ED funds from DPI, as a sub-grantee (*OES Docket # 4*, p. 5, Exhibit 13).

As noted, in this decision, unless otherwise identified individually, the above three entities - Cardinal Charter Academy, Triangle Charter Education Association Board and Charter Schools USA are collectively referred to as "Cardinal".

From January 2, 2018 to June 10, 2022, Complainant was employed by Cardinal as a middle school core math teacher. Her position was a full-time, ten-month position with an annual salary of \$42,500 (*OES Docket # 4*, p. 7, Exhibits 11, 12 & 17).

In 2018, the Complainant was named a math interventionist or specialist. As a math interventionist, S's duties included math instruction, intervention, and mentoring for kindergarten through eighth grade (*OES Docket # 4*, p. 7, Exhibits 2-3).

On August 21, 2022, the Complainant filed a whistleblower complaint with the OIG. (*OES Docket # 4*, Exhibit 1). Her complaint states that

“I submitted a formal grievance to the school board about special education students not receiving services according to their IEP's under IDEA which violated IDEA. ... The employer fired me on June 10, 2022 in the middle of the state complaint. I was not given a reason for why I was terminated. I have documentation of performance reviews that show I did my job, glowing reviews. I had also been employed by CSUSA for the last 4 and 1/2 years with never any deficiencies in my work or performance.” *OES Docket # 4*, Exhibit 1.

OIG investigated the complaint, and on August 16, 2023, the OIG sent the Secretary its report of OIG's investigation. In this matter, the OIG found after Complainant met her initial burden, and that Cardinal then met its burden of providing clear and convincing evidence that it would have not renewed S's employment in the absence of her disclosure due to budgetary reasons resulting from declining enrollment. *OES Docket # 4*, p.1-2.

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. *See* 41 U.S.C. § 4701(a).

I. ISSUES

In her initial complaint and in interviews with OIG investigators, Complainant alleges she was fired as an act of reprisal for her grievances and complaints relating to special education students not receiving services according to their IEP's under IDEA.

Cardinal admits Schmitz' contract was not renewed, but claims that it was not as a

reprisal for her 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 Cardinal?

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

II. SUMMARY OF ORDER

The record establishes that Complainant made protected disclosures, that she reasonably believed were evidence of a violation of law, rule, or regulation related to a Federal grant, to Cardinal’s Board on September 30, 2021 and again on March 23, 2022, and to the North Carolina Department of Public Instruction (DPI) on May 20, 2022. S disclosure was that special education students at Cardinal did not receive services in accordance with their Individualized Education Program (IEP) in violation of the Individuals with Disabilities Education Act (IDEA), and that students with disabilities did not receive required accommodations specified in their 504 plans.

Complainant has met her prima facie burden regarding the decisions to terminate her employment on June 10, 2022. Cardinal has failed to show, by clear and convincing evidence, that it would have not renewed Complainant’s contract in the absence of her protected disclosures.

III. FINDINGS OF FACT

A. Individuals with Disabilities Education Act

IDEA governs how states and public agencies provide early intervention, special education, and related services to eligible infants, toddlers, children, and youth with disabilities. *See* 20 U.S.C. § 1400. IDEA authorizes funding from ED to state education agencies to support special education and related services and early intervention services. IDEA Part B, Section 611 funds assist states in providing free appropriate public education (FAPE) in the least restrictive environment for children with disabilities, ages 3 through 21. Local educational agencies (LEA) in North Carolina may apply to DPI for IDEA Part B, Section 611 funds. IDEA funding may only be used to pay the excess costs of providing special education and related services to children with disabilities. At the beginning of each school year, each child with a disability, as defined in IDEA, within a LEA must have an IEP. An IEP is a written statement for a child with a disability that details the child's individualized learning requirements.

B. Cardinal Personnel

Cardinal Principal April Goff was S's supervisor at Cardinal beginning on November 1, 2021. In her position, Goff supervised 70 Cardinal staff members, provided oversight of Cardinal, resolved parent concerns, managed school facilities, and evaluated staff (*OES Docket # 4*, Exhibits 12 & 22).

Margaret Nampon was the North Carolina State Director of Charter Schools USA, (CSUSA). Nampon supervised 11 principals, including Goff. Nampon also oversaw the academic functions of the schools to ensure it met CSUSA expectations (*OES Docket # 4*, Exhibit 11).

Charlene Smith was the HR manager for CSUSA. She supervised eight HR business partners (formerly known as HR generalists). Smith was supervised by Wilda Malara (Malara), CSUSA vice-president of HR. Smith acted as Cardinal's HR business partner during the renewal process when Goff decided not to renew S. During the renewal process, Smith provided guidance to Nampon and Goff on how to notify S she was not renewed (*OES Docket # 4, Exhibit 23*).

Allen Taylor was President of the Triangle Charter Education Association Board, which monitored Cardinal and held CSUSA and Cardinal accountable to policies and regulations, as well as providing strategic oversight. The Board approved new hires, rehires, and budgets. The Board did not decide who is rehired for the upcoming school year. Rehires are decided by the principal in coordination with CSUSA (*OES Docket # 4, Exhibits 11-12 & 22-24*).

During the 2021-2022 school year, Diana Minotti was a teacher at Cardinal. Minotti was an English Language Learner (ELL) teacher at Cardinal from March 2020 to June 10, 2022. As discussed below, S and Minotti drafted a letter which was signed by themselves and nine other teachers raising concerns about whether special education services were being provided in compliance with IEPs and Section 504 of the Rehabilitation Act. Minotti sent the letter to the Board and CSUSA in March 2022. On June 10, 2022, Minotti was notified she was not renewed for the 2022-2023 school year due to budget and for refusing to cover classes (*OES Docket # 4, Exhibits 11-12 & 25*).

According to board meeting minutes dated September 24, 2021, state CSUSA Deputy Director Cande Killian-Wood was acting principal of Cardinal. Killian-Wood was S's supervisor while she was acting principal (ROI, Exhibits 2 & 30). CSUSA HR Generalist Stephanie McKenzie was responsible for HR at Cardinal. (*OES Docket # 4, p. 3*).

C. Complainant's Disclosures

In September 2021, S learned from a board meeting that teachers had complained about not receiving IEPs and 504 plans for students (*OES Docket # 4, Exhibit 9*).

On September 8, 2021, S emailed Nampon and David Christiansen and stated teachers did not receive a list of accommodations for testing (*OES Docket # 4, Exhibit 9*).

On September 30, 2021, S sent a formal grievance through email to McKenzie stating Cardinal special education students did not receive accommodations and services in accordance with their IEP in violation of IDEA. In the grievance, S stated special education students did not receive services within required time frames. S further alleged special education students and students with disabilities did not receive required testing accommodations as specified in their IEPs and 504 plans (*OES Docket # 4, Exhibits 2-4*). On September 30, 2021, McKenzie forwarded the grievance to Nampon (*OES Docket # 4, Exhibits 9 & 31*).

At an October 6, 2021, Board meeting, the Board asked Killian-Wood to respond to parent concerns about special education and 504 students. Killian-Wood responded by highlighting that the school coordinated with CSUSA and contracted special education services and other available resources to meet the needs of students. Killian-Wood stated there was the possibility that some students would need some compensatory time and that working with 504 students was challenging with the turnover of the 504 coordinator. Killian-Wood further stated use of existing software to support these students required training of new staff members (*OES Docket # 4, Exhibit 32*).

On October 8, 2021, S emailed Board President Taylor and notified him that she filed a grievance with McKenzie (*OES Docket # 4, Exhibit 5*).

On November 1, 2021, Goff became principal of Cardinal (*OES Docket # 4, Exhibits 12*

& 29).

On March 8, 2022, Goff sent an email to teachers reminding them the letters of intent to renew or transfer to another CSUSA school were due on March 11, 2022. Schmitz completed her letter of intent online by the deadline (*OES Docket # 4*, Exhibits 3 & 35-36).

On March 23, 2022, Minotti emailed the Board and Christiansen a letter signed by 11 teachers, including herself and S. The letter stated 504 plans and IEPs, including accommodations, were not communicated to teachers and not adhered to. Goff learned about the letter when a staff member told her that S approached staff to ask for/solicit signatures for the letter. Nampon stated she became aware of the letter from an email she received on March 22, 2022, and knew S signed it (*OES Docket # 4*, Exhibits 6-7, 11-12 & 37). The record also contains information on deficiencies the Complainant identified in the 504 plan and IEP for the Complainant's son. The Complainant believed the issues were not being addressed, and also believed Cardinal had unaddressed systemic deficiencies.

On March 30, 2022, Goff sent an email to S informing her that she was scheduled to meet with her and CSUSA Vice President of Human Resources, Malara, on March 31, 2022. The purpose of the meeting was to discuss the letter signed by S and ten other teachers (*OES Docket # 4*, Exhibits 12 & 38).

On March 31, 2022, Goff and Malara met with each teacher who signed the letter to get details from the teachers about their concerns and to see how their concerns could be addressed. Minotti and S were present with each teacher who met with Goff and Malara. In her interview with the OIG, S stated she and Minotti offered to attend the meetings because the teachers were scared to speak alone. Goff and Malara listened to the teachers' concerns during the meetings (*OES Docket # 4*, Exhibits 3, 12 & 22).

In its brief, Cardinal stated that the concerns S raised in September 2021 were being addressed in October 2021 (*OES Docket # 29*, at p. 9).

On May 20, 2022, S emailed a complaint to the North Carolina Department of Public Instruction and the Board, and Christiansen. S disclosed in her complaint that students with special needs still did not receive required services as per IDEA and their 504 plans. In addition, teachers were not informed which students had IEPs and 504 plans. The complaint included the grievance S sent to CSUSA HR on September 30, 2021 and the letter sent to the Board and Christiansen on March 23, 2022. On May 23, 2022, Christiansen forwarded the complaint to Nampon. Goff learned about the complaint when she received an email from DPI on May 23, 2022. Goff had the authority to address and correct the issues regarding S's disclosure (*OES Docket # 4*, Exhibits 8-10, 12).

On June 10, 2022, Goff and Nampon notified S she was not renewed for the 2022-2023 SY (*OES Docket # 4*, Exhibits 2-3 & 10-12). Prior to this notification, S had not been disciplined and had not received any negative performance evaluations while employed at Cardinal (*OES Docket # 4*, Exhibits 2-3, 10-12 & 46).

D. Cardinal's 2022 Contract Renewals

Goff stated she did not renew S for budget reasons and provided current fiscal year budget numbers describing a budgetary shortfall. Cardinal's enrollment at the beginning of the 2021-2022 SY was 990 students. Cardinal had an instructional compensation budget of \$4,681,753 based on the 990 enrolled students. By the end of March 2022, Cardinal stated that its enrollment had fallen to 735. (*OES Docket # 4*, Exhibit 29). Cardinal asserts that its budget and staffing data is unreliable, and its staffing information is inconsistent. The Respondent

asserts there were 61 teacher positions for 2021-2022 SY and that teaching positions were reduced to 50 for 2022-2023 SY. *See OES Docket # 29* at 7; *OES Docket # 4* at 925. But in a July 21, 2022 Board meeting, that 2021-2022 SY staffing for teachers was stated to be 50 teachers, not 61 teachers. Yet the *OES Docket # 4*, Exhibit 41, which was provided to the OIG, shows only 34 teachers who would be offered recommit offers for the 2022-2023 SY. That list was also inaccurate. For example, the list does not show the math teacher, John Williams, who taught 6th grade math during 2021-2022 SY, as being offered a renewal despite evidence he was renewed for the 2022-2023 SY. (*OES Dockets # 24 & 25*, Exhibits). The Respondent has not provided any explanation of the discrepancy.

On April 29, 2022, Smith emailed Goff and cc'd Nampon and Malara. Smith asked Goff if she could provide the names of the individuals not renewed for employment because of budget and the reason for not selecting them. Goff was tasked with selecting positions that could be eliminated due to a decrease in budget as a result of current fiscal year low enrollment (*OES Docket # 4*, Exhibits 29 & 39).

On May 3, 2022, Goff emailed Smith a table containing notes and a list of 15 individuals not renewed for the 2022-2023 SY. Seven individuals, including Schmitz, were listed as not renewed for budget reasons. Of the seven individuals Goff identified as not being renewed for budget reasons, four were individuals who signed the grievance letter. (*OES Docket # 4*, Exhibit 39).

As noted, Goff's May 3, 2022 email to Smith provided Goff's choices of which personnel would be rehired for the next year. It included her notes on why each person was not rehired. Of the ten teachers who signed the March 23, 2022 letter about Cardinal violations of 504 and IEP requirements, eight teachers applied to be rehired for the next year. (*OES Docket # 4*, Exhibit

59). Of those eight letter signers who sought to return the next year, four were not rehired. (*OES Docket # 4*, Exhibit 39). In her May 3, 2022, Goff identified seven individuals as not renewed for budget reasons. Of those seven individuals who Goff claimed were not renewed for budget reasons, four had signed the letter (*OES Docket # 4*, Exhibit 39). Among the forty teaching staff who did not sign the letter, three were not rehired for budgetary reasons. The percentage of staffers who did not sign the letter and were not rehired is 7.5%. *OES Docket # 4*, Exhibit 41. Among the seven staff who did sign the letter, four were not rehired for budgetary reasons. The percentage of staffers who were prepared to return and did sign the letter but were not rehired is 57 %. (*OES Docket # 4*, Exhibit 39).

At an April 6, 2022 Board Meeting it was disclosed that enrollment applications for 2022-2023 SY had already been discussed with Goff. *Cardinal Charter Academy, Video: TCEA Board Meeting*, Facebook (April 6, 2022) at 24:33.¹ Goff, who was in attendance at the meeting, knew that the anticipated enrollment sent to the Office of Charter Schools was 920 for 2022-2023 SY. *Id.* at 26:20. Goff did not make her final decision for the 2022-2023 SY nonrenewal until May 3, 2022, almost a month after the April Board meeting. Further, on May 4, 2022, Goff provided an update on enrollment to the Board of Directors for next year. The only reasonable conclusion is that on May 3, 2022, Goff had knowledge on the enrollment trends for next year. Nonetheless, Cardinal provides no explanation on how these relevant facts' affected Goff's decision process used to meet next year's staffing level requirements. Instead, Cardinal relies upon outdated data from February and March to justify a nonrenewal of Schmitz based on budget reasons knowing Goff expected to enrollment to climb from 730+ to 920. *Id.* at 22:32.

On May 18, 2022, Smith finalized a spreadsheet that included all of Cardinal's

¹ Last visited on September 14, 2023.

employees and their status for the 2022-2023 SY. S was listed on the spreadsheet as not renewed (*OES Docket # 4, Exhibit 41*).

On June 3, 2022, the Board of Directors for TCEA held a special meeting to approve those offered recommits for the 2022-2023 SY. *Cardinal Charter Academy, Board of Directors Special Meeting Minutes* (June 3, 20022) at 1, <https://www.cardinalcharter.org/ourpages/auto/2019/9/25/46446618/TCEA%20Special%20Meeting%20Minutes%2006.03.22%20FOR%20SIGNATURE%20-%20signed%5B75%5D.pdf?rnd=1672512152924>.²

Then, a month later, when the 2022-2023 fiscal budget was set in July 2022, Cardinal stated that “staffing levels were based upon 732 enrolled students.” *Cardinal Charter Academy, Video: TCEA, Facebook* (July 21, 2022) at 20:14, <https://www.facebook.com/watch/?v=1106785463581403>.³ For teachers, the staffing level would be the same as the prior fiscal year, 50 teachers. Those 50 teacher positions included “vacancies or positions mitigated this year [2021-2022] and we are assuming them back for [2022-2023]”. *Id* at 21:53. The vacant teaching positions included positions that were made vacant from nonrenewal of other teachers, like S. In addition, in little over a month from when S’s employment was not renewed, the Board was advised that current year enrollment for fully verified students at Cardinal was then 913. *Id* at 4:59. At that time, the Board noted that it may need to add more staff due to increased enrollment numbers. As a result, on July 28, 2022, Cardinal posted it was seeking new teachers for middle school math (6th grade and 8th grade) and 8th grade science. *Cardinal Charter Academy, Post: Cardinal Charter Hiring Fair, Facebook*

² Last visited on September 14, 2023.

³ Last visited on September 14, 2023.

(July 28, 2022, 9:15 AM),

<https://www.facebook.com/CardinalCharter/posts/pfbid035CkkAxMwnqv26eK1ES7Tx5RboFtmYEx6uvEhL9NPSH2kdTMySN8HZj9oYkRCCjfl>.⁴

On June 10th, Goff did not renew at least seven instructor positions because of the budget. (*OES Docket # 4*, ROI E41). 48 days later, however, Goff was hiring for seven instructional positions plus an additional two instructor positions.

On August 3, 2022, the Board was advised that the current fiscal year enrollment could be 946 with 860 students fully verified, and an additional 86 students needing to be verified before the start of the school year. Goff advised the Board that Cardinal had nine unfilled positions, including middle school math which she was having trouble filling. *Cardinal Charter Academy, Video: TCEA Board Meeting, Facebook* (August 3, 2022) at 9:56-11:50; 38:43, <https://facebook.com/CardinalCharter/videos/475223327843803>.⁵ Cardinal fails to demonstrate how a budget and staffing decisions, premised on an enrollment of 732 and including 50 teaching positions (some vacant due to the nonrenewal letters from June 10, 2022, which were based on a 730 enrollment), support a conclusion that nonrenewal for S was budgetary. This is especially true when the nonrenewal came on June 10, 2022, twenty-one days after S filed her complaint with North Carolina. (*OES Docket # 21*, p. 7).

⁴ Last visited on September 14, 2023.

⁵ Last visited on September 14, 2023.

E. Complainant's Job History and Performance Evaluations Before and After Filing Her Grievance

S was a career educator, originally licensed in Ohio (OH) in 1996. During five or six years of teaching in OH, S earned her master's degree. In 2013, S obtained her teaching license in NC. S taught in the NC public school system prior to her most recent employment. Throughout her career, S confirmed she had taught at all grades levels from kindergarten through eighth grade. (*OES Docket # 4 Exhibit 2*).

S was employed at Cardinal Charter Academy (Cardinal) from January 2018 until June 2022. S's initial contract with Cardinal was effective from her start date until the conclusion of the 2017 - 2018 school year. Since that time, every year in March or April, S received an "Intent to Return" form either by email or paper. Upon receipt, S and other teachers would sign and return the form confirming their intent to return or not return the following school year. (*OES Docket # 4, Exhibit. 2*).

In August 2018, S was named to a math coach which included duties as a math specialist and interventionist. For the 2018 - 2019 and 2019 - 2020 school years, S confirmed she did not have any issues with her performance and received a \$1,000 raise.

Throughout her employment at Cardinal, from the time she was hired in 2018, S's evaluations contained no negative remarks, including her April 2022 evaluation. (*OES Docket # 4, Exhibit. 2*). Despite those evaluations, after the Complainant initiated her grievances, numerous documents and emails were generated that purported to portray the Complainant's work performance in a negative light.

On May 26, 2022, Goff sent an email to Smith and Malara containing screenshots of

comments made by S on the Cardinal Facebook page in violation of Cardinal's Social Media Guidelines (*OES Docket # 4*, Exhibits 12, 22, 26, & 43-44).

As noted above, the Complainant and Diana Minotti were the authors and organizers of the March 23, 2022, letter signed by eleven staff members at Cardinal. Shortly after the letter was sent, on May 3, 2022, Goff emailed a table containing notes and a list of 15 individuals not renewed for the 2022-2023 SY. (*OES Docket # 4*, Exhibit 39). Seven individuals, including S, were listed as not renewed for budget reasons. Notes were included for each employee. Despite the reason given that the two were not renewed for budget reasons, for the Complainant and Minotti, Goff's notes for each state "An additional area of concern is the rebuilding of culture and trust" (*OES Docket # 4*, Exhibit 39). That negative notation was only entered about the authors of the March 23, 2022 letter.

Goff stated she also received complaints from parents that S was rude, disrespectful, and demanding. However, no documentation was submitted to substantiate that Goff received complaints from parents about S. Goff stated she received verbal complaints from S's colleagues about her combativeness (*OES Docket # 4*, Exhibit 12). This assertion was also uncorroborated.

In a March 8, 2023 interview, Goff told OIG investigators that aside from S and Minotti, none of the other teachers that signed the letter were terminated by not having their employment renewed. That statement is not consistent with the facts in the earlier documentation generated by Goff, which shows that two other letter signers were also not rehired. (*OES Docket # 4*, Exhibit 39).

During her interview with OIG investigators, Goff was asked what she meant by "an additional area of concern is the rebuilding of culture and trust." Goff replied S was not part of the teamwork culture she was trying to create and S refused to do assignments. Goff stated there

were no performance issues with S in the classroom and she did not have concerns with S's instruction. However, Goff began to have issues with S shortly after she filed her grievance in September, 2021. Goff began serving as principal in November 2021. The issues relating to S behavior outside the classroom purportedly began immediately after that, in November 2021 when S refused to cover a class. Goff stated she asked S to cover a 7th grade math class and S refused. After Goff told S she did not have an option, S agreed to cover the class (*OES Docket # 4, Exhibits 3, 22, & 29*).

S presented her own proof on the coverage of classes. On November 10, 2021, Complainant emailed Goff, stating,

“One last thing! If you need me to cover that 7+ class, first period, I would be willing to do that. Those students need a consistent teacher. I have witnessed too much frustration from them this week. Just that first period. It would not interfere with my MTSS classes since my first group I have I can push to 8:45.

I hope we are actively seeking teachers. I will cover until that time. A stipend would be appreciated since that is another prep.

Hope that helps some.” *OES Docket # 17*.

Moreover, there is no evidence in the record whether Complainant ever was asked to cover a class and refused prior to November 2021, including when Complainant was receiving positive reviews.

F. North Carolina Department of Public Instruction's Investigation and Report

On July 19, 2022, North Carolina's Department of Public Instruction, Office of Exceptional Children, issued the results of its investigation of Schmitz' May 20, 2022 Complaint against Cardinal. (Compl. Exhibit (*OES Docket # 10*)).

In response to Schmitz complaint, North Carolina's report confirmed numerous individual

and systemic violations at Cardinal, including not providing parents with IEPs in a timely manner, not providing general education teachers with access to students' IEPs, and not having required full state certification for special education teachers. Cardinal was found to be in violation of the policies regarding personnel qualifications, implementation of the students' IEPs, and access of the students' IEPs for general education teachers and others. Cardinal was ordered to take several actions to address systemic policy violations. (*Id.* p.16-18).

G. Complainant Files Written Complaint to OIG

On August 21, 2022, Complainant filed a formal complaint with OIG, detailing the grievance and what she believes was her resulting termination. (*OES Docket # 4*, Exhibit 1).

H. OIG Investigation

After receiving Complainant's written complaint, the OIG began its investigation. OIG interviewed Complainant and at least six other people.

The OIG determined S's disclosures on September 30, 2021, March 23, 2022, and May 20, 2022 were protected disclosures under the NDAA and made to officials and entities with the responsibility and authority to review and address Schmitz's concerns. The OIG concluded that S reasonably believed Cardinal was out of compliance with a federal grant in violation of a law, rule, or regulation, gross mismanagement of an ED grant, or abuse of authority related to a Federal grant. (*OES Docket # 4*, p.1).

The OIG determined Schmitz met the knowledge and timing requirements of the NDAA based on her showing of the preponderance of evidence of the following: that the official(s) 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 would conclude that the disclosure or protected activity was a contributing factor in the personnel action. Cardinal Principal Goff had knowledge of S's disclosure on March 30, 2022, and in coordination with her supervisor and CSUSA's human resources (HR), notified Schmitz on June 10, 2022 that her employment was not renewed. (*OES Docket # 4*, p.1).

The OIG did not substantiate S's allegation of whistleblower reprisal. The investigation found that the Board, CSUSA, and Cardinal met its burden of providing clear and convincing evidence that it would have not renewed S's employment in the absence of her disclosure due to budgetary reasons resulting from declining enrollment. (*OES Docket # 4*, p. 2).

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

On August 16, 2023, OIG sent its report of investigation to the Secretary and sent copies to the parties. A telephonic prehearing conference was conducted with the parties on the afternoon of Friday, August 18, 2023. During the conference (which was recorded using Microsoft Teams), a schedule was discussed that was agreeable to the parties. The possibility of a live hearing was raised, but neither party requested a live hearing.

On August 21, 2023, an order governing this proceeding was entered, which included a briefing schedule consistent with the discussions during the prehearing conference. Consistent with that schedule, the parties have filed their briefs and evidence.

J. Stipulated Facts

Also consistent with that schedule, on August 25, 2023, the parties have agreed to and filed the following stipulated facts:

1. S began working as a math teacher at Cardinal effective January 2, 2018.
2. Starting with the 2018-19 school year, S worked as a Math Interventionist.
3. S' employment with Cardinal ended on June 10, 2022.
4. April Goff started working as Principal of Cardinal on November 1, 2021.
5. Cardinal experienced a decline in student enrollment during the 2021-22 school year.
6. The North Carolina Department of Public Instruction sent Cardinal a letter dated May 31, 2022, addressed to Principal Goff, noting that it would be investigating a complaint filed by S alleging that Cardinal failed to follow federal and state law regarding children with disabilities.
7. S has worked as a Math Interventionist at the Swift Creek Elementary School since the beginning of the 2022-23 school year. *OES Docket #20*.

1. Complainant's Brief

In her first brief, S contends that the reasons given for her not being rehired are pretextual, and that the real reason “was due to whistleblower reprisal, which would afford me protections under Section 828 of the National Defense Authorization Act (NDAA).” *OES Docket #21, p. 1-2*

S also contends her characterization as an ancillary teacher was false, and that two months after she was not rehired due to declining enrollment and budget, in August 2022 very different enrollment figures were presented at the board meeting. *OES Docket #21, p.2*. At that Board meeting two months after S was not renewed as a math teacher, Goff stated at the board meeting that she is still struggling to find middle school math teachers. *Id.*

S submitted an October 2022 advertisement from LinkedIn a few months after she was

terminated for what Cardinal stated were budgetary reasons. The school was advertising to hire a middle school math position, a position S points out she could have filled. *OES Docket # 16*.

S also argues that there were four different and inconsistent reasons given for her termination on June 10, 2022. On June 10, by email, S was asked why her employment was ending, and was told her employment had simply “expired”. *OES Docket # 18*. In S unemployment benefits hearing, Cardinal stated she was fired due to unsatisfactory work performance, despite her years of positive annual reviews, her positive feedback, and her lack of any disciplinary actions. *OES Docket # 4, p. 17, Ex. 46*. As noted above, Cardinal also attributed S’ firing to budgetary reasons, and the fourth reason, also previously noted, was that Goff wanted to rebuild “culture and trust”.

S also points out that despite filing a grievance on the issues on September 30, 2021, the problems were not resolved. As a result, the 11 teachers signed the March 30, 2022 letter to Cardinal, and finally, on May 20, 2022, S filed a complaint with the North Carolina State Board of Education, whose investigation also found Cardinal in violation of IDEA and 504 law. *OES Docket # 10*.

2. *Cardinal’s Brief*

Cardinal argues that it had already begun addressing the program violations before S’s complaint in September 2021. It also states that in the months after S filed her complaint, the school for the first time began to have problems with S, although it provided no evidence to corroborate any problem beyond the topic of Schmitz covering an extra class, which she agreed to do for a stipend. *OES Docket # 29, p.6*.

Without denying the underlying program violations against it, Cardinal argued that some

of the 11 signers, for whatever reason, felt they must reverse course and disassociate themselves from the signed petition. Without any corroborating proof, Cardinal says that parents had complained, and for some reason also said that S colleagues were "laughing" when they knew S' employment would not be renewed. *Id.*

IV. PRINCIPLES OF LAW

As noted, 41 U.S.C. § 4712 prohibits retaliation by Cardinal against an employee for whistleblowing. More specifically, Cardinal 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] who has the responsibility to investigate, discover, or address misconduct.” *See* 41 U.S.C. § 4712(a).

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. *See* 41 U.S.C. § 4712(b). 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. *See* 41 U.S.C. § 4712(b).

After receiving the OIG report, the Secretary or designee must decide whether there is

sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a prohibited reprisal. See 41 U.S.C. § 4712(c)(1). 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] . . .” *Id.*

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
- (4) “[c]onsider disciplinary or corrective action against any official of the executive agency, if appropriate.” See 41 U.S.C. § 4712.

The whistleblower statute requires this decision to use the burdens of proof found in 5 U.S.C. § 1221(e). See 41 U.S.C. § 4712(c)(6). 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. 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). Complainant must also show that the actions were personnel actions covered by the NDAA. See *In re Hawaii Dept. of Educ.*, Dkt. No 19-81-CP, U.S. Dep’t of Educ. (Dec. 31, 2019) at 39-40. 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.” *See* U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018). 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. *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.

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.” *See* 5 U.S.C. § 1221(e)(1). In *Carr v. Social Security Administration*, 185 F.3d 1318 (Fed. Cir. 1999), the United States Court of Appeals for the Federal Circuit provided a guideline for analyzing whether an employer 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 Cardinal’s failure to follow students’ IEPs and whether those IEPs were accurate. Either through Complainant directly informing them or because they heard about the disclosures, Principal Goff, Board President Taylor, HR generalist McKenzie, David Christiansen, and Nampon 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. Cardinal is a recipient of, among other federal moneys, Individuals with Disabilities Education Act (IDEA) funds. Complainant was a math teacher at Cardinal.

- 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.*

Complainant made disclosures about whether Cardinal was violating proper policy concerning students' IEPs.

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. See 41 U.S.C. § 4712(a)(1).

If Complainant believed that Cardinal was violating the students' IEPs, 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.

3. *Complainant has shown that the disclosures she made IDEA violations were a contributing factor in the decision to remove her as a teacher at Cardinal.*

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

- i. COMPLAINTANT’S DISCLOSURE WAS MADE TO AUDIENCES COVERED BY THE NDAA.

Complainant made her 2022 disclosures to Goff, McKenzie and Taylor, and the remaining Cardinal staff identified subsequently learned of the disclosure. 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.” *See* 41 U.S.C. § 4712(a)(2). The people who Complainant made aware of her concerns included the school’s principal, the board president, and an HR generalist. Goff was the principal at Cardinal, and Allen Taylor was President of the Triangle Charter Education Association Board, which monitored Cardinal and held CSUSA and Cardinal accountable to policies and regulations. As such, both had the responsibility to investigate, discover or address misconduct.

- ii. COMPLAINTANT HAS MET HER BURDEN OF SHOWING THAT HER DISCLOSURES WERE A CONTRIBUTING FACTOR IN THE DECISIONS RELATED TO HER NOT BEING REHIRED IN 2022.

After establishing the above elements, the employee must demonstrate that the disclosures were “a contributing factor” in the personnel action taken against the employee. *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). 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.” 5 U.S.C. § 1221(e)(1); *Armstrong v. Arcanum Group, Inc.*, 897 F.3d 1283, 1287 (10th Cir. 2018). The Federal Circuit has called this the “knowledge/timing” test. *Kewley v. Dep’t of Health and Human Servs.*, 153 F.3d 1357, 1362-63 (Fed. Cir. 1998). This contributing factor standard requires “something less than a substantial or motivating” factor standard. *Addis v. Dep’t of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009).

Cardinal Principal Goff was the official who took the personnel action alleged to be a reprisal. Goff stated she was not aware of the grievance that S filed on September 30, 2021, with Triangle and CSUSA until Cardinal’s counsel made her aware of it. However, Schmitz provided evidence that Goff was aware of the grievance shortly after her start date at Cardinal, on November 1, 2021. (ROI, Ex. 12). Even with this contradictory evidence, it is undisputed that shortly in time before removing S as a teacher, Goff was aware of the second grievance made on March 23, 2022, and the North Carolina complaint on May 20, 2022.

On March 23, 2022, Complainant's letter, signed by 11 of Cardinal's staff, was sent to the Board. (ROI, p. 12). On March 30, 2022, Goff sent an email to Complainant informing her that she was scheduled to meet with her to discuss the grievance letter signed by Schmitz and ten other teachers (ROI, Exhibits 12 & 38). This establishes that Goff was aware of the Complainant's grievance no later than March 30, 2022. The record shows that on May 3, 2022, Goff emailed Charlene Smith with a table identifying the Complainant as not being rehired for budgetary reasons, with the formal notification occurring on June 10, 2022. This is the table which also mentioned a concern of rebuilding of culture and trust. (ROI, Ex. 39). The above facts meet the knowledge and timing test. The Complainant has demonstrated that the disclosure was "a contributing factor" in the personnel action taken against her.

- iii. COMPLAINANT HAS DEMONSTRATED THAT THE ALLEGED REPRISAL WAS A PERSONNEL ACTION 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." Dkt. No 19-81-CP, *U.S. Dep't of Educ.* (Dec. 31, 2019) at 39-40 (internal citations omitted).

April Goff's removal of the Complainant's as a teacher is explicitly identified in the above

statute as a personnel action under the NDAA. S has met her prima facie burden regarding her removal.

B. Cardinal Has Failed to Meet its Burden of Showing by Clear and Convincing Evidence That It Would Have Ended S' Employment Regardless of Complainant's Disclosures.

Because Complainant met her initial burden of showing that her disclosures were contributing factors in the decision to not renew her position, Cardinal 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 Cardinal has met its burden. *Carr*, 185 F.3d at 1323; see also *DuPage*, 58 F.4th at 352.

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." *Mottas*, 720 Fed.Appx. at 915 (quoting *Carr*, 185 F.3d at 1324).

As noted, Complainant has met her initial burden of showing that she made protected disclosures that were "contributing factors" in the decision to not rehire her in 2022. The burden now shifts to Cardinal to prove by clear and convincing evidence that it would have not renewed S's employment in the absence of her disclosure due to budgetary reasons resulting from declining enrollment. *See OES Docket # 4*, at 3.

1. First *Carr* Factor: Strength of Cardinal's Evidence in Support of Its Personnel Action.

As noted in the above findings, Goff said S was not renewed for budget reasons, which, on its face, is a legitimate, nondiscriminatory reason for the action. The question is how strong is Cardinal's evidence in support of its decision to not renew S's employment, and whether the evidence of record establishes by clear and convincing evidence that Schmitz was not renewed for budget reasons.

Weighing the strength of Cardinal's evidence must be done considering the facts surrounding the budget reason, and whether those facts support or undercut Cardinal's budget reason.

Goff identified 15 instructors who were not renewed, including 7 which she said were for budgetary reasons. The non-renewal of S for budget reasons occurred on June 10, 2022. Despite that, on July 21, 2022, slightly more than one month later, Cardinal's school board met and stated that it needed to add more staff due to increased enrollment numbers. Eleven days after that, on August 1, 2022, Goff stated that she had 9 instructor positions to fill.

Although Cardinal stated that Schmitz was not rehired due to budgetary issues, as noted above, Cardinal gave three other contradictory reasons for the decision not to rehire Schmitz, including (1) unsatisfactory work performance (despite her years of positive annual reviews, her positive feedback, and her lack of any disciplinary actions), (2) that Schmitz's employment had simply "expired" and (3) that Goff wanted to rebuild "culture and trust" (no elaboration was provided on what was meant by "culture and trust").

As noted in the findings above, during the time Schmitz' complaints were pending, despite Schmitz having had positive annual performance reviews and having been complimented on her interaction with parents, Goff made several unsupported, undetailed and gratuitous criticisms of S including that Goff had received complaints from parents that S's "tone" was

rude, disrespectful and demanding, and that S' colleagues complained about her "combativeness." *OES Docket # 4*, Ex. 12, p.3.

Goff also took issue with S's "tone", without providing any details, corroboration or context. Inexplicably, Goff also stated that S colleagues were "laughing" when they knew S's employment would not be renewed. The criticisms of S are undetailed, and uncorroborated. Cardinal indicates at one point that S employment had simply expired without providing any real support for why her employment expired and other staff members' employment had not. This series of inconsistent and unsupported reasons undermine any strong legitimate reason to justify support for Cardinal's personnel action.

For the first *Carr* factor, the above facts sharply reduce the strength of Cardinal's evidence in support of its personnel action. Cardinal's budgetary justification, or any other legitimate reason, for ending Schmitz's employment is not clearly or convincingly demonstrated.

2. Second Carr Factor: Strength of Cardinal's Motives to Retaliate

The second *Carr* factor is the existence and strength of any motive to retaliate on the part of Goff, who played a central role in the decision to not rehire S.

Goff was confronted with allegations stretching over 10 months, from September of 2021 through June of 2022. S had raised 3 separate complaints on the matter, with no substantial addressing of those complaints during that time by Cardinal. Those complaints were found to be valid, and culminated in the North Carolina Department of Public Instruction confirming broad and systemic violations at Cardinal. North Carolina ordered multiple corrective actions, which required significant expenditure for Cardinal to accomplish. Those expenditures would reduce the annual profits of Cardinal's parent corporation.

Analyzing the second *Carr* factor, because of the long-standing nature of S's complaints, the affirmation of those complaints by the state of North Carolina, and the additional cost to Cardinal affecting its available funds, Cardinal had a strong reason to retaliate.

3. Third Carr Factor: Treatment of Other Similarly Situated Employees

The third factor is the treatment of other similarly situated employees who were subject to not having their employment at Cardinal continued.

As set out in the above findings of fact, among the forty teaching staff who did not sign the letter, three were not rehired for budgetary reasons, only three people, or 7.5%, were terminated. Among the seven staff who did sign the complaint, four people, or 57 %, were terminated. Two staff members, Schmitz and Minotti, drafted the letter and attended all meetings about the letter. Both of those staff members were not retained.

After meeting with Goff, for whatever reason, some of the complaint signers issued

written apologies. Among those people, none were terminated.

In summary, for Cardinal staff that were similarly situated but didn't sign the complaint, only 7.5 % were terminated, while for Cardinal staff who did sign the complaint, 57 % were terminated. Further, for similarly situated complaint signers who later issued a written apology, none were terminated.

Analyzing the third *Carr* factor, because of the dramatically higher termination rates for instructors who signed the complaint, and also because of the fact that no complaint signers who later apologized were terminated, there is a strong showing of a difference in similarly situated employees who did not sign the complaint.

Applying all three *Carr* factors, Cardinal has failed to meet its burden of showing by clear and convincing evidence that it would have taken this same action in the absence of Complainant's disclosures.

C. Damages S has Established as Authorized under the NDAA.

The prehearing conference and the Order Governing Proceedings issued at the start of this hearing addressed damages, and specifically invited the parties to address damages, with the Order stating:

Although liability has not been established, if it is established the statute provides for different remedies including an award of damages and fees. See 41 U.S.C. § 4712(c)(1). The parties are, therefore, invited to address what damages they believe are warranted if Triangle Charter Education Association, Inc. and Charter Schools USA is found to be liable for violating the statute. *OES Docket # 7, p. 4.*

Because it has been determined that S has been subjected to a prohibited reprisal, this decision now must consider what authorized damages S has proven under the NDAA. 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
- (4) “[c]onsider disciplinary or corrective action against any official of the executive agency, if appropriate.” See 41 U.S.C. § 4712.

In Respondent's Exhibit 3, S identifies her requested damages. S acknowledges she does not seek to be restored to her teaching position at Cardinal. S requests the following: (1) compensatory damages, (2) emotional distress damages, (3) emotional distress damages, and (4) punitive damages. Each request is discussed below. *OES Docket # 30*.

(1) Compensatory Damages

S seeks what she describes as compensatory damages of \$18,000 for three months pay after being terminated, for pay and costs associated with having to find a new position, and for “attorney fees my husband and I accrued for hiring a special education attorney (at the time) for items related to this matter.”

One of the stipulated facts in this case is that S has worked as a Math Interventionist at the Swift Creek Elementary School since the beginning of the 2022-23 school year. *OES Docket #20*. Even if her contract had been renewed, S would not have been earning pay during the two summer months, since the ten-month employment contract would not extend into the summer. And since S began employment at the beginning of the 2022-2023 school year at Swift Creek Elementary School, she has not suffered any loss of pay due to the reprisal and, thus, cannot

recover the sought three month's pay. Concerning S's request for pay and costs associated with having to find a new position, such costs are allowable compensatory damages. Unfortunately, S has not submitted any evidence to establish or quantify the amount of such damages, and therefore cannot recover for costs of finding a new position.

The final damages sought under S' first category of compensatory damages is for attorney fees. While the statute allows for attorney's fees reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as with the previous request, S has provided no evidence which can form the basis for an award, and therefore cannot recover the sought attorney's fees.

Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indust. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). The United States Court of Appeals for the Fourth Circuit, the circuit that includes North Carolina, has stated that compensatory damages should be "sufficient in amount to indemnify the injured person for the loss suffered." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 357 (4th Cir. 2011). North Carolina's highest court has said that "The objective of compensatory damages is to restore the plaintiff to his original condition or to make the plaintiff whole." *Watson v. Dixon*, 352 N.C. 343, 347 (2000). Here, there is no evidence of a concrete loss or an amount needed to indemnify S for a loss suffered or make her whole.

(2) Emotional Distress Damages

S second request is for emotional distress damages, which are another category of authorized compensatory damages under the NDAA. S seeks \$300,000 in emotional distress damages, based on the stress brought on by Cardinal's retaliation. Here as well, S provides no figures or quantification of emotional distress damages. In the absence of specific proof, S cannot recover damages for emotional distress.

(3) Reputational Damages

S third request is for reputational damages, which are also authorized compensatory damages under the NDAA. Sc seeks \$300,000 in reputational damages, based on the stress brought on by Cardinal's retaliation. Here as well, S provides no figures or quantification of such damages. She does describe troubling actions, such peers knowing beforehand that she would be terminated, with other employees outside laughing and waiting to see S' response. In light of her commendable whistleblower activities, S's reputation is in all likelihood stellar. However, even if that were not the case, once again, in the absence of specific evidence and quantification, S cannot recover reputational damages.

(4) Punitive Damages

S final request is for punitive damages, to deter Cardinal personnel from similar conduct in the future and because of the egregious nature of their conduct during the 2021-2022 school year. While punitive damages can serve such a function, the NDAA statutes do not provided for punitive damages to be assessed, and therefore S is precluded from recovering punitive damages.

(5) Nominal Damages

While S has not proven any of her requested actual damages, this decision finds that S is entitled to nominal damages. In the absence of proof of actual injury, the law recognizes the importance to organized society that rights such as those of a whistleblower be scrupulously observed, while at the same time it remains true to the principle that substantial damages should be awarded only to compensate an actual injury. *Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 1054, 55 L. Ed. 2d 252 (1978).

Accordingly, S is entitled to recover nominal damages not to exceed one dollar from Cardinal as vindication of her rights under the NDAA.

VI. CONCLUSIONS OF LAW

1. Complainant has met her burden of showing that she was an employee of a federal grantee.
2. Complainant has met her burden of showing that she made protected disclosures about IDEA violations at Cardinal to Cardinal's principal, the board chair, and other personnel at Cardinal.
3. Complainant has demonstrated that her protected disclosures were contributing factors to Cardinal's decision to terminate her employment.
4. Cardinal has failed to demonstrate clearly and convincingly that it would have terminated S' employment even if she had not made protected disclosures.

VII. ORDER

Having found that Cardinal has subjected S to a prohibited reprisal, S is **ORDERED** to be awarded nominal damages not to exceed \$1 from Cardinal.

VIII. APPEAL RIGHTS

This order constitutes an order granting 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.

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. *See* 41 U.S.C. § 4712(c)(5).

DATE OF DECISION: September 15, 2023

Robert G. Layton
Administrative Law Judge