In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3339

DUPAGE REGIONAL OFFICE OF EDUCATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent.

Petition for Review of an Order of the Department of Education.
No. 21-36-CP

ARGUED SEPTEMBER 15, 2022 — DECIDED JANUARY 23, 2023

Before SYKES, *Chief Judge*, RIPPLE, and KIRSCH, *Circuit Judges*.

RIPPLE, *Circuit Judge.* In September 2020, Albert Sanchez filed a whistleblower complaint with the United States Department of Education's Office of the Inspector General ("OIG") against his former employer, DuPage Regional Office of Education ("DuPage"). Sanchez alleged that, after he made two protected disclosures to DuPage, he suffered five

reprisals in violation of § 828 of the National Defense Authorization Act of 2013, 41 U.S.C. § 4712.

The OIG investigated Sanchez's complaint, determined his claims to be unsubstantiated, and submitted a report to the Department for a final agency decision. On October 21, 2021, an administrative law judge ("ALJ") in the Department's Office of Hearings and Appeals determined, contrary to the findings of the OIG, that Sanchez was entitled to relief for all five alleged reprisals. The ALJ ordered DuPage to pay Sanchez compensatory damages in the amount of $210,000. DuPage filed a petition for review of the ALJ's order as authorized by 41 U.S.C. § 4712(c)(5). For the reasons set forth in this opinion, we now grant the petition for review and remand the case to the Department of Education for further proceedings consistent with this opinion.

BACKGROUND

A. Sanchez's Employment at DuPage

DuPage Regional Office of Education is a public education entity based in Wheaton, Illinois. Illinois's regional offices of education serve as intermediaries between the Illinois State Board of Education ("ISBE") and local school districts within their county or counties. School Code §§ 3-0.01, 3-14.2, 3-14.7.[1] They are "established by" the ISBE and subject to its "rules and regulations." *Id.* § 2-3.62. Each office is headed by a superintendent who is elected by the citizens of the area over which they have cognizance.[2]

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[1] The Illinois School Code is found at 105 ILCS 5/1-1 *et seq*.

[2] Cook County represents a special situation. It is divided into several Intermediate Service Centers—one serves the City of Chicago, and the

In September 2017, the Department of Education awarded DuPage two multi-year federal grants. DuPage received a $4 million Education Innovation and Research Grant ("EIR grant"). It also was a subgrantee of a separate $12 million Supporting Effective Educator Development Grant ("SEED grant") that was administered by Illinois State University ("ISU"). Both grants were designed to support local educators and leaders through research on professional development structures. Because of the grants' overlapping subject matter and purposes, DuPage and ISU collaborated closely in their work under the two grants. This collaboration made it necessary to monitor expense allocations between the grants to ensure compliance with federal rules and regulations.

DuPage hired Albert Sanchez in October 2017 to assist with grant management. Initially brought on as a contractor, Sanchez assumed a full-time position as a budget and data analyst several months later in January 2018. His role was to set up financial systems and budget tools for managing both the EIR and SEED grants. Although the precise details of the supervisory chain were unclear, Sanchez answered primarily to three officials at DuPage and ISU: Dr. Darlene Ruscitti, the elected Regional Superintendent of DuPage and Sanchez's top-line supervisor; Dr. Alicia Haller, DuPage's EIR grant director and Sanchez's primary supervisor; and Dr. Erika Hunt, ISU's SEED grant director who had no official supervisory role over Sanchez.

During his employment with DuPage, Sanchez made two protected whistleblower disclosures and experienced what he

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others serve the portions of Cook County that are outside the City of Chicago. Ill. Admin. Code tit. 23, §§ 525.30, 525.40; School Code § 2-3.62.

alleged were five reprisals in response. Under the relevant whistleblower statute, 41 U.S.C. § 4712(a)(1), a recipient of a federal grant is prohibited from retaliating against an employee who has disclosed "information that the employee reasonably believes is evidence of … a violation of law, rule, or regulation related to a Federal … grant." Employers who violate § 4712(a)(1) are subject to the administrative remedies specified in § 4712(c)(1).

Sanchez made his first disclosure around April 2018 when Hunt submitted an invoice to him for a roughly $10,000 breakfast expense, to be paid from the SEED grant. Sanchez told Hunt that the invoice was not an allowable expense under federal grant rules and refused to pay the invoice despite her insistence that he do so. Haller and Dr. Jeremy Dotson, the Assistant Regional Superintendent of Business at DuPage, later confirmed Sanchez's view that the breakfast expense was unallowable.

A few weeks after he had refused to pay the expense tendered by Hunt, Sanchez experienced what he claimed was his first reprisal. Haller informed him that, due to a change in policy at ISU, he was being removed from the invoice review process for the SEED grant. According to Sanchez, Haller told him that ISU officials had decided they did not want non-ISU employees approving SEED grant invoices. During the OIG investigation, Hunt stated that ISU's change in budget policy applied across the board and was not directed at DuPage or any of its staff.

Sanchez alleges that a second reprisal unfolded over a period from December 2018 to March 2019. In December 2018, Hunt told Haller and Ruscitti that she wanted to reduce

Sanchez's involvement with data infrastructure work[3] and to transition those duties to an outside contractor. Hunt and Haller were concerned that Sanchez lacked the technical competence and professional connections to undertake that work effectively. To make use of Sanchez's strengths, they decided to shift his duties from data infrastructure to grant development. Although Hunt indicated in a January 2019 email her concern that Sanchez might be "upset" to have data infrastructure work taken away from him, Haller understood Sanchez to be pleased with the shift toward grant development: Sanchez emailed Haller later that month, "I'm very excited about this strand of the work."[4] Sanchez's new job descriptions were finalized in March 2019. Although the OIG never identified any evidence that Sanchez objected to this change of duties, Sanchez now points to this development as an adverse employment action.

Sanchez made his second disclosure around January and February 2019. Haller submitted a contract for Sanchez's approval, asking that it be applied to the EIR grant, but Sanchez refused to do so. He told Haller that, because the work on that contract was to be performed for the SEED grant, it would

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[3] It appears from the record that this work was aimed at creating a statistical model of supply and demand for educators by region. As an initial matter, this effort required building relationships with different education actors in the state—including the ISBE, the Illinois Association of Regional School Superintendents, other regional offices of education, and the governor's office—to obtain relevant data. Beyond that, the work demanded facility with software development and technical statistical concepts. App. 110, 184–85, 196–97. Citations to "App." refer to DuPage's appendix containing the administrative record.

[4] App. 198, 201–04, 343.

violate federal grant rules to run the contract invoices through the EIR grant. Haller disagreed with Sanchez's view that her request would amount to a misallocation of grant funds because she believed the arrangement already had been approved by DuPage's program officer at the Department of Education. Nonetheless, on February 22, 2019, DuPage held a conference call with its program officer to clarify the issue, and the program officer cleared DuPage to continue with invoicing in the manner Haller had planned. It appears that, prior to the call, there were tensions among DuPage staff concerning whether Sanchez would be permitted to speak on the call. Ultimately, he did not speak.

The third alleged reprisal occurred on March 11, 2019, when DuPage placed Sanchez on an employee performance plan ("EPP"), to run from March 11 to September 30, 2019. Although the EPP was reportedly issued on March 11 during a meeting with Sanchez, there is some uncertainty as to when Sanchez received a copy of the EPP: His signature on the document is dated April 26, 2019, and he denied receiving a copy of it before that date. The stated purpose of the EPP was to "allow the employee the opportunity to demonstrate competency and commitment" to his work.[5] It listed areas of demonstrated strength and areas for further improvement, with sections addressing performance goals, resources, and expectations. The document noted in closing that "[f]ailure to meet or exceed these expectations, keep accurate records of work

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[5] *Id*. at 344.

completed, or violate [sic] any DuPage ROE policy, will result in disciplinary action—up to and including termination."[6]

The issuance of the EPP was preceded by serious discussions among DuPage and ISU staff concerning problems with Sanchez's performance. The record includes emails from December 2018, January 2019, and March 2019 detailing Haller's ongoing frustrations with Sanchez's communication skills, organization, work product, work hours, and accounting knowledge.[7] Haller began formally documenting her concerns with Sanchez's performance as early as March 3, 2019, including one instance in which she claimed Sanchez created expense tracking spreadsheets "that were off by hundreds of thousands of dollars."[8]

The EPP was more immediately precipitated by a March 4, 2019 meeting between Sanchez, Ruscitti, Haller, Hunt, and Dotson. Although the participants' impressions of the meeting varied somewhat, it appears that the meeting was aimed at providing clarity as to Sanchez's supervisory chain, his roles and responsibilities, and expectations surrounding communication and performance. The decision to place Sanchez on an EPP was apparently made after Sanchez had left this meeting.[9] It appears that Haller took the lead on drafting the EPP, with input from Hunt and Ruscitti and possibly Dr. Michael Robey, DuPage's Assistant Superintendent of

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6 *Id*. at 347.

7 *Id*. at 365–69, 371, 373, 375, 389, 390, 392, 403, 415–17.

8 *Id*. at 127.

9 *Id*. at 114, 218.

Operations.[10] Haller did not view the EPP as a disciplinary action, and Hunt shared in that understanding.[11] Sanchez, however, believed that Haller and Hunt did not want him to succeed in the EPP process and that the document was meant to justify his eventual termination.[12] In the months that followed, Haller continued to document communications with Sanchez and frustrations with his performance.[13]

The fourth alleged reprisal stemmed from an email to Hunt from an ISU employee, Emilie Shoop, on August 14, 2019. The email detailed three incidents. Shoop stated in her email that, shortly after Sanchez had joined DuPage, she was helping him with a Zoom conference call login when his username appeared on the screen as "Hot Sex Puma."[14] She also stated that, earlier that summer (2019), another ISU employee had told her that she experienced a similar incident with Sanchez, but that the Zoom username "was something like Sex Panther."[15] Finally, Shoop explained that a third incident that had occurred the previous day prompted her to send her email: She was assisting Sanchez with his laptop when she observed the phrase "Disturbing Men

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10 *Id*. at 114–15, 175, 187, 314.

11 *Id*. at 115, 187.

12 *Id*. at 74.

13 *Id*. at 114, 133–34, 137–40.

14 *Id*. at 163.

15 *Id*.

Masturbating" autofill on his browser.[16] Hunt promptly forwarded Shoop's email to Haller, who said DuPage would investigate. Haller referred the matter to Ruscitti and Dotson.

After learning of Shoop's email, Ruscitti, Dotson, and Robey exchanged emails discussing whether Sanchez had violated DuPage's harassment or acceptable use policies. Dotson and Robey arranged for a disciplinary meeting with Sanchez on August 20, 2019, with a follow-up meeting on August 29, 2019. They issued Sanchez a formal reprimand in the form of a personnel action report (PAR). The PAR identified the three incidents from Shoop's email as events that "violated [DuPage's] Acceptable Use Policy" and stated that these events made other employees "very uncomfortable and could be considered sexual harassment."[17] The PAR noted that Sanchez "acknowledged" the first incident, claiming that the sexually explicit username belonged to a friend who had borrowed his computer.[18] It then noted that Sanchez "did not recall" the second username incident.[19] The PAR did not say whether Sanchez admitted, denied, or did not recall the third incident, but it did state that this incident was witnessed by several individuals at a meeting at ISU. Robey later reported

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16 *Id*.

17 *Id*. at 318.

18 *Id*.

19 *Id*.

to the OIG that Sanchez had admitted to all three of the incidents.[20]

In late September 2019, Haller, Ruscitti, Robey, and Dotson exchanged emails in preparation for a performance appraisal meeting to close Sanchez's EPP period. In these emails, Haller compiled a large record of documents showing Sanchez's unsatisfactory performance. Ruscitti gave her approval for the meeting and for his termination on September 23, 2019. On September 30, 2019, Haller and Robey led Sanchez's performance appraisal meeting, informed him that his performance on the EPP was not satisfactory, and gave him the option of resigning or being terminated. He did not exercise the option of resigning. Sanchez was terminated on October 4, 2019, for the stated reason that he was "rated unsatisfactory with no defense given."[21] Sanchez points to his termination as the fifth act of reprisal.

B. Administrative Proceedings

1. The OIG Report

On September 23, 2020, Sanchez filed a whistleblower complaint against DuPage with the Department's Office of the Inspector General. The OIG conducted a year-long investigation in which it interviewed eight individuals and compiled roughly 1,000 pages of documentary evidence.[22]

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20 *Id*. at 313–14.

21 *Id*. at 1002.

22 Under 41 U.S.C. § 4712(b)(1), Sanchez filed a complaint with the OIG, which was in turn required to "investigate the complaint and, upon

The OIG framed its report in terms of the burden-shifting scheme employed under the whistleblower statute. 41 U.S.C. § 4712(c)(6) (directing adjudicators to apply the scheme in 5 U.S.C. § 1221(e)). Sanchez had the initial burden of showing that a disclosure was a "contributing factor" in a decision to take a personnel action. 5 U.S.C. § 1221(e)(1). He could meet that burden with circumstantial evidence, such as evidence that "the official taking the personnel action knew of the disclosure" and that "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." *Id.* § 1221(e)(1)(A)–(B). If Sanchez were to meet his burden, DuPage could avoid liability by showing "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Id.* § 1221(e)(2). Applying that framework, the OIG found that all of Sanchez's alleged reprisals were unsubstantiated.

a.

First Reprisal. As to the first alleged reprisal around April 2018, the OIG found that Sanchez's disclosure concerning unallowable catering expenses was a contributing factor in his removal from SEED grant financial oversight duties based on Hunt's knowledge of the disclosure and the temporal proximity of the action. But the OIG also determined that ISU's change in budget policy—a decision to limit SEED grant financial oversight to ISU employees—constituted "clear and

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completion of such investigation, submit a report of the findings" to the agency for a final determination.

convincing evidence that [DuPage] would have removed his financial duties regardless of this disclosure."[23]

b.

Second Reprisal. The OIG determined that Sanchez's disclosures were not a contributing factor in his change of duties between December 2018 and March 2019. The OIG found that none of the officials involved in this change—Haller, Hunt, or Ruscitti[24]—had any knowledge of the catering disclosure of April 2018. And because this personnel action "occurred or was initiated likely prior to his second protected disclosure" in January and February 2019, that disclosure "could not have been a contributing factor."[25] In any case, the OIG determined that the change of duties was simply a result of Sanchez's deficient performance on the data infrastructure work.

c.

Third Reprisal. Because of the temporal proximity to the second disclosure and the knowledge of the officials involved—Haller, Hunt, Ruscitti, and Dotson—the OIG determined that Sanchez's disclosure was a contributing factor to his placement on an EPP on March 11, 2019. The OIG further found, however, that "numerous e-mails and witness testimony" from DuPage personnel showed that Sanchez had "significant performance issues" and that DuPage had

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23 App. 33.

24 *Id*. at 34. The OIG report misstated its finding here. A page earlier, the OIG found that Hunt did have knowledge. *Id*. at 33. And Sanchez stated that he made the disclosure directly to Hunt. *Id*. at 69.

25 *Id*. at 34–35.

accordingly shown by clear and convincing evidence that it would have placed Sanchez on an EPP regardless of his disclosures.[26]

d.

Fourth Reprisal. The OIG did not clearly state whether it thought Sanchez had met his initial burden with respect to issuance of the PAR. But the OIG found, in any case, that DuPage had "clear and convincing evidence the PAR would have been issued based on the multiple, repeat incidents of inappropriate conduct."[27] The OIG further noted its finding that the PAR was issued in accordance with DuPage policy and shortly after the complaint was received.

e.

Fifth Reprisal. Finally, as to Sanchez's termination, the OIG determined that the disclosures were a contributing factor to the extent of Haller's and Ruscitti's involvement in the decision, but not as to Robey's involvement. Nonetheless, the OIG concluded that there was clear and convincing evidence that DuPage would have terminated Sanchez even without the disclosures. It noted DuPage's "documentation, including emails and memos, that demonstrated Sanchez's numerous performance issues throughout his employment."[28]

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26 *Id*. at 37.

27 *Id*. at 38.

28 *Id*. at 40.

2. ALJ Decision

After the OIG submitted its report, the case was referred to an ALJ within the Department's Office of Hearings and Appeals who had been delegated authority to render a final agency decision. DuPage and Sanchez waived a hearing with testimony before the ALJ and agreed to proceed on written submissions. Both parties submitted briefs, and Sanchez filed some additional documents. The ALJ also received an unredacted copy of the OIG's report.

On October 20, 2021, the ALJ issued a decision and order. She disagreed with the OIG's determinations, found that DuPage had retaliated against Sanchez on five occasions in violation of § 4712, and ordered DuPage to pay Sanchez compensatory damages in the amount of $210,000.

a.

First Reprisal. On the first alleged reprisal—the removal of Sanchez's SEED grant oversight duties—the ALJ agreed with the OIG in finding that Sanchez's disclosure of unallowable catering expenses was a contributing factor. The ALJ found that Haller "[c]learly" had knowledge of the disclosure "contemporaneously with the events" and that the reprisal "occurred nearly simultaneously with [the] disclosure."[29] But unlike the OIG, the ALJ did not think that DuPage met its shifted burden. Although she did not explain why, the ALJ apparently did not credit DuPage's defense that the removal of duties was the result of a change in policy at ISU that was applicable to all non-ISU employees. The ALJ also did not discuss

[29] *Id*. at 1127.

whether or how DuPage should be held responsible for a decision made by ISU officials.

b.

Second Reprisal. The ALJ also believed that at least one of Sanchez's disclosures was a contributing factor in the decision to transition him away from data infrastructure duties from December 2018 to March 2019. Contrary to the OIG's findings, the ALJ believed that Sanchez's second disclosure in January and February 2019 was a factor in this personnel action: Although the disclosure occurred "after [DuPage] began to consider a job change" in December 2018, it was "before [Sanchez's] new job description … was created and implemented" in March 2019.[30] In the ALJ's view, this timing was sufficient to show that the second disclosure was a contributing factor in the change of duties that was finalized in March 2019. It was not clear whether the ALJ also thought the first disclosure from April 2018 was a contributing factor.

The ALJ then found that DuPage had failed to carry its burden of showing that it would have implemented this change of duties even without Sanchez's disclosure(s). Although DuPage had argued that it took this action because Sanchez lacked the knowledge and professional connections necessary to perform the data infrastructure work effectively, the ALJ did not address this argument. Instead, the ALJ simply reiterated her view that the temporal sequence of events did not bar a finding that the second disclosure was a contributing factor in the change of duties.

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30 *Id*. at 1130.

c.

Third Reprisal. Like the OIG, the ALJ concluded that at least one of Sanchez's disclosures was a contributing factor to the issuance of an EPP on March 11, 2019. The ALJ appeared to base this finding on the temporal proximity between the EPP issuance and the second disclosure. Unlike the OIG, however, the ALJ found that DuPage failed to meet its shifted burden. The ALJ discussed extensively accounts of the March 4, 2019 meeting that precipitated the EPP, and she seemingly found it relevant that participants had varying impressions of the tone of the meeting. The ALJ also noted that, although the EPP period began on March 11, there was no documented evidence that Sanchez received a copy of the EPP document until April 26, 2019. Sanchez claimed that he did not receive a copy until that date. Ultimately, in the ALJ's view, the vagueness surrounding these events reduced the probative value of DuPage's assertions that the EPP was aimed at improving Sanchez's performance issues, so DuPage failed to carry its burden.

d.

Fourth Reprisal. The ALJ found that Sanchez's disclosures were a contributing factor in DuPage's formal reprimand of Sanchez for the three reported incidents of sexually explicit language appearing on his computer. According to the decision, the PAR's descriptions of the incidents were inconsistent with the descriptions in the Shoop email because the PAR exaggerated their significance, misidentified the timing of the events, and misreported that the events were witnessed by several individuals. Although the PAR noted Sanchez's acknowledgement of the first incident and his lack of recollection of the second, it did not state whether he acknowledged,

denied, or did not recall the third. Thus, despite the seven months' time between the second disclosure and the PAR, the ALJ found that there was "still reason to conclude" that Sanchez had met his initial burden.[31]

The ALJ did not think that DuPage met its shifted burden to show that it would have issued the PAR even without the disclosures. She found that Robey's description to the OIG of the PAR process was inconsistent with the document: Robey told the interviewer that Sanchez admitted to all three incidents, but the PAR only noted his acknowledgement of the first. And she reiterated her finding that the PAR exaggerated the seriousness of the reported incidents. Finally, the ALJ determined that the two officials involved, Robey and Dotson, were each downplaying their role in the action.

e.

Fifth Reprisal. Once again, the ALJ disagreed with the OIG's finding and instead concluded that Sanchez's termination was retaliatory. The ALJ's reasoning rested on how closely tied the termination was to the EPP, which she had already concluded was a reprisal: Sanchez was terminated based on his unsatisfactory rating at the end of the EPP period, on September 30, 2019, and so the EPP formed the basis for his termination. Thus, in the ALJ's view, Sanchez's contributing factor showing on the EPP essentially extended transitively to the termination as well.

The ALJ then found that DuPage failed to carry its shifted burden. She reviewed documentation that DuPage had provided which, she found, discussed Sanchez's performance

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31 *Id*. at 1135.

failures "in excruciating detail," but she concluded that, in developing all of its documentation, DuPage was simply "micromanaging" Sanchez rather than supporting his performance.[32] And, in the ALJ's view, DuPage's defense that the termination was based on deficient performance was undercut by her findings that DuPage had failed to provide Sanchez regular performance assessments, as required by policy, and that there was significant uncertainty as to Sanchez's proper supervisory chain throughout his employment.

f.

Damages Order. The ALJ determined that Sanchez should be compensated for "lost wages due to the acts of reprisals."[33] Finding that Sanchez would have been compensated in the amount of $105,000 per year for the period of October 5, 2019, through the date of her order, October 20, 2021, she ordered DuPage to pay Sanchez damages in the amount of $210,000. The ALJ noted that, although § 4712 permitted awarding costs and attorney's fees, she did not find it reasonable to do so.

DuPage petitioned for review as authorized by § 4712(c)(5).

DISCUSSION

DuPage raises two arguments in its petition for review. As an initial matter, it submits that it enjoys sovereign immunity as an arm of the State of Illinois, that its immunity has not been abrogated or waived, and that the Department's order was therefore barred by sovereign immunity. *See Fed. Mar.*

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32 *Id*. at 1136.

33 *Id*. at 1138.

Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 747, 760 (2002). Alternatively, DuPage contends that even if sovereign immunity does not bar a federal proceeding against it, the Department's decision should be vacated as arbitrary and capricious and unsupported by substantial evidence. We address each argument in turn.

Eleventh Amendment Immunity

A.

Under the Eleventh Amendment, the states, including those entities that can be considered "arms of the state," are generally immune from suit in federal court. This immunity does not extend, however, to other political or municipal entities created by states. *Alden v. Maine*, 527 U.S. 706, 756 (1999). The Supreme Court recognized this exception for local entities in *Lincoln County v. Luning*, 133 U.S. 529 (1890), a case dealing with whether a local county enjoyed immunity. The Court wrote:

> [W]hile the county is territorially a part of the state, yet politically it is also a corporation created by, and with such powers as are given to it by, the state. In this respect, it is a part of the state only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the state.

Id. at 530; *see also Moor v. Alameda Cnty.*, 411 U.S. 693, 717–21 (1973).

A line of case law has developed to identify entities which bear a closer relationship to the state and therefore operate as "arms of the state." The anchor Supreme Court case in this jurisprudence is *Mt. Healthy City School District Board of*

Education v. Doyle, 429 U.S. 274 (1977). In evaluating a school district's invocation of Eleventh Amendment immunity, the Supreme Court explained that the issue was "whether the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id*. at 280. "The answer depends," the Court held, "at least in part, upon the nature of the entity created by state law." *Id*. Looking to Ohio law, the Court noted that the "many local school boards" within the state were "subject to some guidance from the State Board of Education" and "receive[d] a significant amount of money from the State." *Id*. At the same time, the school boards had "extensive powers to issue bonds" and "to levy taxes within certain restrictions of state law." *Id*. Consequently, "[o]n balance," the local school board was "more like a county or city than … like an arm of the State." *Id*. It was not entitled to immunity.

We first applied *Mt. Healthy*'s arm-of-the-state analysis in *Mackey v. Stanton*, 586 F.2d 1126 (7th Cir. 1978). There we addressed the immunity of the Elkhart County Department of Public Welfare. Noting *Mt. Healthy*'s statement that the immunity issue "depends, at least in part, upon the nature of the entity created by state law," we also noted that, "[a]lthough the Court did not express its reasons for reaching this result," it was "inferable … that the Court was impressed with the statutory power of the local school district to raise its own funds when the need arose." *Id*. at 1130. Moreover, we inferred, the Court "may have found" it "particularly significant" that the school district was authorized "to collect money to pay judgments against it, indicating that the state treasury would not have to pay such judgments." *Id*.

Turning to the Indiana statutes, we decided that the county's Department of Public Welfare was like the *Mt. Healthy* school board "[i]n all respects that the Supreme Court seemed to consider significant." *Id*. at 1131. We explained:

> Although both are subject to state supervision and depend heavily on state funds, they perform their duties on a local level. More important, both have the power to raise their own funds by tax levy and by bond issuance. Significantly, [the Indiana statute] is analogous to [the statute in *Mt. Healthy*], providing a manner for payment of judgments without resort to the state treasury.

Id.

We returned to this issue in *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987). In considering whether Purdue University was an arm of the State of Indiana, we divided our analysis into two parts. First, "[t]he most important factor [was] the extent of the entity's financial autonomy from the state." *Id*. at 845. Evaluation of this factor required that we examine "the extent of state funding, the state's oversight and control of the university's fiscal affairs, the university's ability independently to raise funds, whether the state taxes the university, and whether a judgment against the university would result in the state increasing its appropriations to the university." *Id*. Second, we considered "the general legal status of the university." *Id*. at 846–47 (citing *Mt. Healthy*, 429 U.S. at 280). This "general legal status" inquiry "cannot be resolved by simple reference to Indiana statutory definitions"; instead, we "must look to substance rather than form." *Id*. Here, we found it significant that the Governor of Indiana appointed

the university's governing council. *Id*. We held that, in view of these two considerations, Purdue University was an arm of the State of Indiana.

In 2008, we read *Kashani* as presenting a two-factor test: "To determine if a particular entity is an arm of the state, courts look primarily at two factors: (1) the extent of the entity's financial autonomy from the state; and (2) the 'general legal status' of the entity." *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 420 (7th Cir. 2008) (citing *Kashani*, 813 F.2d at 845–47). The financial autonomy inquiry is the "most important factor," and, among the subfactors identified in *Kashani*, the most probative evidence of financial autonomy is whether judgments against the entity would be paid by the entity itself or by the state treasury. *Id*. (quoting *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007)).

Because we have encountered the arm-of-the-state issue on relatively few occasions, we have examined the decisions of our sister circuits to ensure that our approach is within the heartland of the national approach. *Cf. Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (noting with approval that the courts of appeals "have recognized the vulnerability of the State's purse as the most salient factor" in arm-of-the-state analysis). The Third Circuit has articulated "three major criteria" for assessment: "(1) whether the payment of the judgment would come from the state, (2) what status the entity has under state law, and (3) what degree of autonomy the entity has." *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006). The Fifth Circuit examines six factors:

> (1) whether the state statutes and caselaw view the agency as an arm of the state; (2) the source

> of the entity's funding; (3) the entity's degree of local autonomy; (4) whether the entity is concerned primarily with local, as opposed to statewide, problems; (5) whether the entity has the authority to sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

Black v. N. Panola Sch. Dist., 461 F.3d 584, 596 (5th Cir. 2006) (quoting *United States ex rel. Barron v. Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440 (5th Cir. 2004)). That court "give[s] the most weight" to the source of funding, with special attention first to "whether the state would be liable for a judgment against the defendant and then to whether the state would be liable for the defendant's general debts and obligations." *Id*. (quoting *Barron*, 381 F.3d at 440). Our neighbor to the east, the Sixth Circuit, considers four factors:

> (1) the State's potential liability for a judgment against the entity; (2) the language by which state statutes and state courts refer to the entity and the degree of state control and veto power over the entity's actions; (3) whether state or local officials appoint the board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government.

Ernst v. Rising, 427 F.3d 351, 359 (6th Cir. 2005) (citations omitted). It identifies "the state treasury's *potential* legal liability for the judgment" as "the foremost factor." *Id*. The Ninth Circuit considers five factors:

> (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the state; and (5) the corporate status of the entity.

Holz v. Nenana City Pub. Sch. Dist., 347 F.3d 1176, 1180 (9th Cir. 2003) (cleaned up). These factors are to be analyzed "in light of the way [state] law treats the governmental agency." *Id*. at 1181 (quoting *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992)). The Tenth Circuit employs a two-step process. *Hennessey v. Univ. of Kan. Hosp. Auth.*, 53 F.4th 516, 528 (10th Cir. 2022). First, it evaluates four primary factors: (1) "the character ascribed to the entity under state law," (2) "the degree of control the state exercises over the entity," (3) "the amount of state funding the entity receives" and "whether the entity has the ability to issue bonds or levy taxes on its own behalf," and (4) "whether the entity in question is concerned primarily with local or state affairs." *Id*. (quoting *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007)). "If these factors are in conflict and point in different directions," it then "proceed[s] to the second step and consider[s] the 'twin reasons' underlying the Eleventh Amendment—avoiding an afront to the dignity of the state and the impact of a judgment on the state treasury." *Id*. (citations omitted). "Of these twin reasons, the foremost reason for sovereign immunity is avoiding state liability for any judgment against the entity." *Id*. (citations and internal quotation marks omitted). The Eleventh Circuit evaluates four factors: "(1) how state law defines the entity; (2) what degree of

control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Lightfoot v. Henry Cnty. Sch. Dist.*, 771 F.3d 764, 768 (11th Cir. 2014) (quoting *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003)).

Notably, most circuits identify legal liability for money judgments as the most significant factor or subfactor in the analysis. *See, e.g., Burrus*, 546 F.3d at 420; *Holley v. Lavine*, 605 F.2d 638, 644 (2d Cir. 1979); *Belanger*, 963 F.2d at 251 (describing legal liability as the "most important factor"); *Thomas v. St. Louis Bd. of Police Comm'rs*, 447 F.3d 1082, 1084 (8th Cir. 2006) ("[C]ourts assess the agency's degree of autonomy and control over its own affairs and, more importantly, whether a money judgment against the agency will be paid with state funds."). The significance of the legal liability factor seems to stem from the principle articulated in *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *See, e.g., Unified Sch. Dist. No. 480 v. Epperson*, 583 F.2d 1118, 1122 (10th Cir. 1978) (citing *Edelman*, 415 U.S. 651) ("[I]t is agreed that if the money judgment sought to be entered against a board or agency will be satisfied out of the state treasury, then the board is immune from suit under the Eleventh Amendment."); *Ronwin v. Shapiro*, 657 F.2d 1071, 1073 (9th Cir. 1981) (citing *Edelman*, 415 U.S. at 664) ("[A] crucial question … is whether the named defendant has such independent status that a judgment against the defendant would not impact the state treasury.").

As the courts of appeals have developed this well-trod path, the Supreme Court has confirmed the primacy of legal

liability in the analysis, observing that "prevention of federal-court judgments that must be paid out of a State's treasury" was the "impetus for the Eleventh Amendment." *Hess*, 513 U.S. at 48.[34] Therefore, the Court has instructed that "[w]hen indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being"—protecting States' dignity and financial solvency—"remain our prime guide." *Id*. at 39–40, 47.

B.

We now focus our lens on public school entities. In line with our general approach, which is certainly well within the heartland of the national approach, we have held that a "local school district ordinarily is not a 'State' and hence may be sued in federal court." *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986). In *Gary A.*, the plaintiffs brought an action against an Illinois school district, its board, and the State Board of Education. Although we determined that the State Board was entitled to Eleventh Amendment immunity, we rejected the local defendants' claim to immunity. *Id.* at 944, 946. The local defendants rested their argument on two financial realities: first, the school district received a "significant amount of money from the state," and second, the state had decided to reimburse the local defendants if judgment were to be entered against them in the suit. *Id*. at 944–45 (quoting *Mt. Healthy*, 429 U.S. at 280). In our view, neither rationale was persuasive. As to the first, we noted that in *Mt. Healthy* it was "irrelevant" that the state provided funds to the

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34 The Court also demonstrates in *Hess* that this conclusion was compatible with the original intent of the Amendment. *See also Petty v. Tenn.–Mo. Bridge Comm'n*, 359 U.S. 275, 276 n.1 (1959).

local entity, some of which could be used to pay judgments. *Id*. at 945. Rather, what was important was that the school boards had "extensive powers to issue bonds and levy taxes" and that they "usually pa[id] their own judgments." *Id*. As in *Mt. Healthy*, the Illinois school board in *Gary A.* had such powers. *Id*. As to the second—the state's decision to reimburse the school board—we determined this argument was fundamentally mistaken: "A state's decision to indemnify a state employee or subdivision does not grant that employee or subdivision constitutional immunity" because a state "may not, by state law, expand a limited constitutional immunity." *Id*. Of course, if the state had created an entity that had the "nature" of an arm of the state—such as "a single state agency to control all public education"—then it might have been entitled to immunity. *Id*. at 945 n.9. However, because the school board was local in nature, the judgment would "run against the local defendants only," regardless of what decisions the state then made regarding reimbursement. *Id*. at 945.

More recently, in *Parker v. Franklin County Community School Corp.*, 667 F.3d 910 (7th Cir. 2012), the plaintiffs brought suit under 42 U.S.C. § 1983 against fourteen Indiana public school corporations. The school corporations there argued that they were arms of the state and, as such, not "persons" within the meaning of § 1983. *Id*. at 926. We read *Mt. Healthy* as laying out four factors for analysis: "(1) the characterization of the district under state law; (2) the guidance and control exercised by the state over the local school board; (3) the degree of state funding received by the district; and (4) the local board's ability to issue bonds and levy taxes on its own behalf." *Id*. at 927 (citing *Mt. Healthy*, 429 U.S. at 280). We further noted the Supreme Court's instruction to look to "legal liability" to determine whether "the state is the real, substantial

party in interest." *Id*. (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 431 (1997)).

Beginning with the "most salient factor," legal liability, we observed that it was the local defendants, not the State of Indiana, who would be obligated to pay a judgment in the instant case. *Id*. Although Indiana funded "a significant portion of the schools' budget, school corporations still ha[d] the power to levy taxes and issue bonds under certain circumstances for non-operating funds." *Id*. at 928. Additionally, the state guaranteed school corporations' debts, but "*only* to the extent of the amounts appropriated for the school" by the General Assembly. *Id*. We also noted that "the general legal status of school corporations" was "political subdivisions with locally elected school board members and superintendents (not gubernatorial appointments) who serve local communities (not the State of Indiana as a whole)." *Id*. They were "independent corporate bodies" with the ability to "sue and be sued and enter into contracts." *Id*. In sum, despite the state's provision of substantial funding to the school corporations, their "political" and "operational" independence and their "ability to raise their own funds for purposes of paying judgments" led us to characterize them as "persons" under § 1983 rather than as arms of the state. *Id*. at 929.

Helpfully, decisions in other circuits shed light on the characterization of educational bodies under different states' statutory structures. In *Febres v. Camden Board of Education*, 445 F.3d 227, 229 (3d Cir. 2006), the Third Circuit evaluated a board of education's classification employing three criteria—legal liability for judgments, the entity's status under state law, and the degree of autonomy the entity possessed. It decided that the board's "status" clearly "militate[d] against

immunity": The board could sue or be sued, was separately incorporated, and was not immune from state taxation. *Id*. at 230. The "autonomy" factor, on the other hand, "weigh[ed] only slightly in favor" of immunity: The board was required to deliver its meeting minutes to the governor, who had limited veto powers over its actions, and the governor had limited powers to appoint members to the board. *Id*. at 231. Because those two factors pointed in different directions, the legal liability factor was "particularly significant." *Id*. at 232. The district court had ruled for the board on this issue on the ground that, because of the "magnitude of the state's funding" to the board, any judgment against it would inevitably be paid with state funds. *Id*. at 232–33. But the Third Circuit found this reasoning misguided: The real issue was not whether state funds would be used, but rather "the nature of the state's financial contributions" to the board. *Id*. at 233. It was not relevant whether the board satisfied a judgment with funds "which had initially been provided by the state" because there was no suggestion that the state "retain[ed] ownership or control of the funds appropriated" to the board. *Id*. at 234. And the record indicated that the board received some funds from some non-state sources and had the ability to "raise revenues through taxes." *Id*. at 233–34. Finally, as we had reasoned in *Gary A.*, the Third Circuit found it irrelevant that the state would likely increase appropriations to the board to offset the cost of a court judgment against it. *Id*. at 234. Such a "discretionary subsidy" was not indicative of a "legal obligation" on the part of the state to satisfy the board's

judgments. *Id*. On balance, the court concluded, the board was not an arm of the state. *Id*. at 237.[35]

The Eleventh Circuit addressed the issue in *Lightfoot v. Henry County School District*, 771 F.3d 764 (11th Cir. 2014). The court identified four factors for consideration: (1) state law's definition of the entity; (2) the state's degree of control; (3) the source of the entity's funds; and (4) legal liability for judgments against the entity. *Id*. at 768 (citing *Manders*, 338 F.3d at 1309). At the outset of the discussion, it observed that "the Supreme Court and the vast majority of appellate courts that have considered the issue have found that school districts and school boards are not entitled to Eleventh Amendment immunity." *Id*. at 768–69. Although the court found that all four factors weighed against immunity, its analysis of the second factor is particularly noteworthy for its exacting standard on state control.

On the first factor, the court noted that Georgia courts had described county boards of education—which governed each county's school district—as agencies through which the counties, as subdivisions of the state, act in school matters. *Id*. at

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35 In 2017, the Third Circuit again had occasion to consider the status of Camden's school district. *See Denkins v. State Operated Sch. Dist. of City of Camden*, 715 F. App'x 121, 124 (3d Cir. 2017). In *Denkins*, the court explained that because of "factual changes since *Febres*—specifically, the full state takeover and the relocation of responsibilities from the Board to the state-appointed Superintendent"—it was necessary to reassess arm-of-the-state status. *Id*. In view of this assertion of state control, the court concluded that the analysis now favored treating Camden's school district as an arm of the state. *Id*. at 124-26. However, *Denkins* did not disturb the reasoning of *Febres* as applied to the facts of that case and indeed relied on *Febres* in its own analysis. *See id*.

769. Additionally, the court observed that Georgia's constitution and code grouped school districts together with counties, municipalities, and other political subdivisions. *Id.* at 770. On the second factor, the court found that Georgia school districts were "largely under local control" because they were subject to the management of locally elected county boards of education. *Id.* at 771–72. Moreover, districts had "substantial autonomy over their affairs," could "sue and be sued," and could "purchase property, borrow money, enter contracts, and issue bonds." *Id*. at 772. And, in the Eleventh Circuit's view, the state's significant control over education policy and regulation—including the establishment of basic education requirements, teaching standards, and budget reviews—did not amount to "the requisite control for Eleventh Amendment purposes." *Id*. at 772–73. On the third factor, the school district had strictly limited powers to tax, issue bonds, and borrow money; it relied "heavily" on state funding for the remaining 65% of its budget. *Id*. at 775. Nonetheless, the Eleventh Circuit deemed the school district's "local fundraising capabilities similar to the school board in *Mt. Healthy*." *Id*. at 777. On the final factor, the court observed that the school board's "fiscal autonomy means that it cannot be said that a judgment against [it] will come from state funds." *Id*. at 778 (cleaned up). Thus, all four factors weighed against classifying the school district as an arm of the state.

In *Woods v. Rondout Valley Central School District Board of Education*, 466 F.3d 232, 239–40 (2d Cir. 2006), the Second Circuit pointed out the need to distinguish between a school district and a school district's board of education, which had "separate corporate existences" under New York law. With that distinction in mind, the court laid out its six-factor test:

> (1) how the entity is referred to in the documents that created it; (2) how the governing members of the entity are appointed; (3) how the entity is funded; (4) whether the entity's function is traditionally one of local or state government; (5) whether the state has a veto power over the entity's actions; and (6) whether the entity's obligations are binding upon the state.

Id. at 240 (quoting *Mancuso v. N.Y. State Thruway Auth.*, 86 F.3d 289, 293 (2d Cir. 1996)). If the six factors all pointed in one direction, the court's inquiry was "complete." *Id*. If they pointed in different directions, the court would then focus "on the twin reasons for the Eleventh Amendment" as identified in *Hess*—protecting the state's dignity and fiscal integrity. *Id*.; *see Hess*, 513 U.S. at 39–40. "If the outcome still remains in doubt, then whether a judgment against the governmental entity would be paid out of the state treasury generally determines the application of Eleventh Amendment immunity." *Woods*, 466 F.3d at 241. The Second Circuit found that its six factors weighed against immunity. First, New York law identified boards of education as "bod[ies] corporate," and it defined school districts as "public corporation[s]." *Id*. at 243–44 (quoting N.Y. Educ. Law § 1701; N.Y. Const. art. X, § 5). It was thus "reasonable to infer that a board of education, like the district it governs, is a municipal corporation." *Id*. at 244. Second, board members were elected locally. *Id*. Third, the school district's funds—which were administered and expended by the board—were drawn both from state appropriations and from local property taxes. *Id.* at 245. This was sufficient to weigh against arm-of-the-state status. *Id.* Fourth, although "New York views public education as a state rather than local function," it remained the case that "many of the functions

performed by boards of education" were "generally regarded as connected with local government," so this factor could not support the claim to be an arm of the state. *Id*. at 245–46 (quoting *Lanza v. Wagner*, 183 N.E.2d 670, 675 (N.Y. 1962)). Fifth, the state did not possess veto power over the board's actions. Although the state education commissioner possessed "undoubtedly broad" powers over boards—including the power "to remove for cause any school officer, including a member of a board of education, and to withhold funds from a school district under certain circumstances"; "to review various official acts by a board of education"; and "to institute proceedings … to enforce any law pertaining to the school system"—these powers did not "unequivocally equate to veto authority." *Id*. at 248. Sixth, New York law required the board to maintain a reserve fund to cover property loss and liability claims, and it further provided that if such fund proved insufficient to satisfy a judgment, the board would have to obtain additional funds by levying a tax within the district. *Id*. at 249–50. Thus, a judgment against the board was not binding on the state. The board was not an arm of the state.

We have found two federal appellate decisions concluding that a local education entity was an arm of the state. In *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992), the Ninth Circuit evaluated the status of a California school district. Although the court found that parts of its five-factor test were a close call, the first and most important factor—legal liability—clearly favored classification as an arm of the state. *Id*. at 251. The court observed that, "[u]nlike most states, California school districts have budgets that are controlled and funded by the state government rather than the local districts." *Id*. California's "centralized control of school funding" resulted in a system in which "state and local

revenue is commingled in a single fund under state control, and local tax revenue lost to a judgment must be supplanted by the interchangeable state funds already in the district budget." *Id*. at 251–52. Thus, any judgment against a school district would, in fact, be directly covered by state funds. Under this unique funding scheme, California's school districts were arms of the state. In *Perez v. Region 20 Education Service Center*, 307 F.3d 318 (5th Cir. 2002), the Fifth Circuit found that a Texas education service center was an arm of the state. Applying its six-factor test, the court considered it significant that Texas case law treated the centers as arms of the state and that, although locally selected, the centers' boards of directors were subject to supervision and removal by the state education commissioner. *Id*. at 328, 330. The state education commissioner also approved the appointment of each center's executive director and could remove an executive director for poor performance. *Id*. at 330. Despite circuit case law to the contrary, the court did not closely scrutinize whether Texas had a legal *obligation* to pay judgments or debts of a center and instead was satisfied that it was "likely that a judgment" against a center "would be paid in large portion by the state." *Id*. at 328–29; *cf. Vogt v. Bd. of Comm'rs of Orleans Levee Dist.*, 294 F.3d 684, 693 (5th Cir. 2002) (emphasizing that the proper inquiry is whether the state has an *obligation* to pay a judgment).

Despite the various formulations found in the case law of the circuits, the basic approach is very similar, looking to factors such as control, state-law characterizations, and funding sources. Most importantly, these cases make clear that legal liability is the primary factor in considering the status of local education entities. These cases also clarify that it is not the ultimate *source* of the funds paid to a judgment that is significant

but rather whether the state has an *obligation* to satisfy the judgment.

C.

To ascertain the role that the regional offices of education play in public education, we begin by examining the content of Illinois law. Illinois law divides the state into thirty-five regional offices of education, each of which encompasses one or more counties and serves the school districts within its geographical area. Ill. Admin. Code tit. 23, §§ 525.10, 525.20; School Code § 2-3.62.[36]

Illinois's regional offices of education occupy an intermediate position within the State's public education system, between school districts on the one hand and the Illinois State Board of Education (ISBE) on the other.[37] The ISBE is created by the state constitution and is vested with powers to "establish goals, determine policies, provide for planning and evaluating education programs and recommend financing." Ill. Const. art. X, § 2. The regional offices are authorized by the

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[36] As noted earlier, Cook County and the City of Chicago are subject to a special organizational arrangement. *See supra* note 2.

[37] *See* Ill. Ass'n of Reg'l Superintendents of Schs., *Directory, July 1, 2020 – June 30, 2021*, at 5, https://iarss.org/wp-content/uploads/2020/10/IARSS-Directory_2020_2021_web-1.pdf ("As an intermediate agency between the Illinois State Board of Education and local school districts, the office of the Regional Superintendent performs regulatory functions as directed by the Illinois School Code.").

School Code, §§ 2-3.62, 3A-4, and the regions are defined administratively by the ISBE, Ill. Admin. Code tit. 23, § 525.20.[38]

The purpose of the regional offices of education[39] is generally to coordinate and provide state-sponsored services to

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[38] The regional offices of education are to be distinguished from school boards—which govern most school districts—and from regional boards of school trustees—which generally have jurisdiction over territory coextensive with the regional offices of education but which exercise separate powers.

The regional board of school trustees is "a body politic and corporate" with "perpetual existence" and the "power to sue and be sued." School Code § 6-2. The regional superintendent is ex-officio secretary of the regional board. *Id*. § 6-17; *see also id*. § 7-6(a). The basic purpose of the regional board is to "hear[] and determine[] whether school district annexation petitions should be granted or denied." 32A Ill. L. & Prac. Schools § 83; School Code § 7-1; *see generally Bd. of Educ. of Bloomington v. Cnty. Bd. of Sch. Trs. of McLean Cnty.*, 222 N.E.2d 343 (Ill. App. Ct. 1966). In 1979, the Illinois Attorney General issued an opinion concluding that members of a regional board were not county officials, in part because the regional board had a "separate corporate identity" and was "distinct and separate from other bodies." 1979 Ill. Att'y Gen. Op. No. 56, 1979 WL 21193; *see also* 1982 Ill. Att'y Gen. Op. No. 18, 1982 WL 42766 (A regional board "is a local governmental entity distinct from the county or counties comprising it.").

A school board, for its part, is "a body politic and corporate created to perform governmental functions relating to education of children in its district." *Evans v. Benjamin Sch. Dist. No. 25*, 480 N.E.2d 1380, 1384–85 (Ill. App. Ct. 1985); *see also* 32A Ill. L. & Prac. Schools § 87; School Code § 1-3. It has broad powers, including to "appoint all teachers and fix the amount of their salaries," School Code § 10-20.7, to make contracts, *id*. § 10-20.21, and to levy taxes and borrow money, within limits, *e.g., id*. §§ 11E-85, 17-2, 19-1, 19-3.

[39] The School Code frequently uses the term "educational service center" or "educational service region." *See, e.g.*, School Code § 2-3.62. These are synonymous with "regional office of education." Section 3-0.01 states that a "regional superintendent" shall be the "chief administrative officer" of

schools within their regions, including by assisting with "planning, implementation and evaluation of … computer technology education [and] mathematics, science and reading resources for teachers"; providing "continuing education, in-service training and staff development"; and providing "training, technical assistance, coordination and planning in other program areas such as school improvement, school accountability, financial planning," health programming, and alternative and special education. School Code § 2-3.62. In carrying out their functions, the regional offices are subject to the "rules and regulations" promulgated by the ISBE "delineat[ing] the scope and specific content" of their programs "as well as the specific planning, implementation and evaluation services to be provided by" the regional offices. *Id*.; *see also* Ill. Admin. Code tit. 23, § 525.60 (providing for annual evaluations by the ISBE).

Each regional office of education has as its chief administrative officer a regional superintendent. School Code § 3-0.01.[40] The regional superintendent is elected by voters within the region and takes an oath prescribed by the state

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each "educational service region" and that his or her office is to be referred to as the "regional office of education." *See also* Ill. Admin. Code tit. 23, § 525.10(a) (referring to the entities described in § 2-3.62 of the School Code as "Regional Offices of Education").

[40] The School Code refers to this position variously as "regional superintendent" and "county superintendent." Section 3-0.01 provides that any reference to "county superintendent" means the "regional superintendent." *See also* Ill. Att'y Gen. File No. 92-007 (1992), 1992 WL 469746 ("The title of the office was changed from 'county superintendent of schools' to 'regional superintendent' by Public Act 79–1057, effective October 1, 1975.").

constitution. *Id.* §§ 3-1, 3-2. In addition to carrying out the purposes of the regional office as elaborated in the School Code and the Administrative Code, *see id.* § 2-3.62; Ill. Admin. Code tit. 23, § 525.10, the regional superintendent has broad supervisory powers over the school districts in the region to ensure compliance with the ISBE's requirements. School Code § 3-14.2 ("supervision and control"). These powers include: giving teachers and school officers direction in teaching methods, *id*. § 3-14.6; acting as "official adviser and assistant of the school officers and teachers," in performance of which duty he or she "shall carry out the advice of [the ISBE]," *id*. § 3-14.7; notifying school districts of the amount of money he or she has distributed to them, *id*. § 3-14.17; inspecting school buildings for health and safety compliance, *id*. § 3-14.21; recommending that the ISBE impose or remit a withholding-of-funds penalty, *id*. §§ 3-15.2, 2-3.24; directing "in what manner school treasurers shall keep their books and accounts," *id*. § 3-15.3; and removing "any member of a school board from office for willful failure to perform his official duties," *id*. § 3-15.5.

The regional superintendent also has certain duties both to the State and to the county. With respect to the State, the superintendent is required: to present "all financial statements, books, vouchers and other records required" to the Illinois Auditor General pursuant to that office's rules, *id*. § 3-6.1; to collect financial reports from school districts and provide those reports to the ISBE, *id*. § 3-15.1; and to present annually to the ISBE "such information relating to schools in his region as [the ISBE] may require," *id*. § 3-15.8. With respect to the county, the regional superintendent must: quarterly present to the county board a report of all official acts, including a list of schools visited, *id*. § 3-5; report annually to the

county board financial books, which include balance on hand, receipts, amounts distributed to each school treasurer, and books and vouchers for expenditures, *id*. § 3-6; apportion and distribute as directed all moneys he or she receives that are due to local school districts, *id*. § 3-9; and provide an "opinion and advice" in "all controversies arising under the school law," certifying a "written statement of facts" if an appeal is taken to the ISBE, *id*. § 3-10. If the regional superintendent fails or refuses to make required reports to the county board or otherwise engages in "any palpable violation of law or omission of duty," the county board may remove him or her from office. *Id*. § 4-10. Additionally, the county board is required to examine the regional superintendent's financial statements. *Id*. § 4-7. Board members are liable "individually to the fund injured and to the sureties" of the regional superintendent "for all damages occasioned by neglect" of this examination duty. *Id*.

The funding sources for the regional offices are mixed. Each regional superintendent, along with any assistant regional superintendents he or she is authorized to appoint, receives a salary set by the School Code and payable monthly by the ISBE out of the state education budget. *Id.* § 3-2.5. The Illinois Appellate Court, however, has suggested that the source of an officer's salary has little probative value on his or her categorization as a state officer or a county officer. *See Suburban Cook Cnty. Reg'l Off. of Educ. v. Cook Cnty. Bd.*, 667 N.E.2d 1064, 1068–70 (Ill. App. Ct. 1996).

Notably, county boards are permitted to "provide for additional compensation" for regional superintendents if they wish. School Code § 3-2.5. The regional superintendent also may employ additional persons as needed to discharge the

office's duties, but these employees are paid by the county and are subject to the approval of the county board. *Id*. §§ 3-15.6, 4-6. The county has a duty to provide the regional superintendent with "a suitable office with necessary furniture and office supplies," *id*. § 4-2, and it may cover "reasonable traveling expenses" for the office as it deems appropriate, *id*. § 4-4. Beyond these sources, the regional offices must seek grants from the ISBE for funding of their programs and work. *Id*. § 2-3.62(d). For legal representation, the regional superintendent is entitled to rely on the services of the state's attorney for the county where the regional office is located. *Id*. § 3A-15.

We find helpful insight on the very important question of liability in a 1992 opinion of the Illinois Attorney General. *See Status of Regional Superintendent of Schools*, Ill. Att'y Gen. File No. 92-007 (1992), 1992 WL 469746.[41] That opinion addressed the question of "whether a regional superintendent of schools is considered a State employee, for purposes of indemnification and representation" under the State Employee Indemnification Act, "or, alternatively, whether a regional superintendent is considered a county employee, whom the county is responsible for indemnifying or insuring against liability." *Id*. Reviewing both the State Employee Indemnification Act and the Local Governmental and Governmental Employees Tort Immunity Act, the Attorney General concluded that a

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41 The statutory provisions discussed in that letter and in this paragraph have been recodified. The relevant provisions are now found at 745 ILCS 10/1-206 (defining "local public entity" to include an "educational service region") and 5 ILCS 350/1 ("The term 'State' means the State of Illinois … or any other agency or instrumentality of the State," but it "does not mean any local public entity as that term is defined in [745 ILCS 10/1-206].").

regional superintendent was neither a state nor a county employee. *Id*. The latter statute defined an "educational service region" (synonymous with a regional office of education)[42] as a "local public entity." Thus, on the one hand, "because the regional superintendent is the chief administrative officer of a local public entity, rather than an agency or instrumentality of the State," he or she was not a state employee. *Id*. But, on the other hand, even though "the regional superintendent performs certain duties with respect to the county board" and "the county board also performs certain duties with respect to the regional superintendent," the Local Governmental and Governmental Employees Tort Immunity Act "clearly differentiates between educational service regions and counties." *Id*. And under the statute, "an educational service region is empowered to protect itself and its employees and officers against liability." *Id*. In sum, the Attorney General's opinion suggests that Illinois law treats a regional office as a local entity that is neither an "instrumentality" of the State nor an extension of a county.[43]

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42 *See supra* note 39.

43 The School Code has an express provision treating enforcement of judgments against school boards and regional boards of school trustees. Section 22-3 of the School Code provides that a court enforcing such judgments "shall enter an order commanding the directors, trustees and school treasurer to cause" the appropriate amount "to be paid … out of any moneys of the township or district unappropriated, or if there are no such moneys, out of the first moneys applicable to the payment of the kind of services or indebtedness for which the judgment is entered which shall be received for the use of the township or district." Moreover, the enforcing court may "requir[e] such board to levy a tax for the payment of the

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A study of the Illinois School Code gives us a basic idea of the role of the regional office of education, but it hardly provides sufficient information to establish that, as a matter of federal law, such an entity is an "arm of the state." There is a pronounced ambiguity on the key question of whether the State would incur the *legal* liability to pay any monetary judgment against the regional office. Indeed, DuPage admits in its brief that, although it does not have the authority to raise taxes to pay an adverse judgment, any damages would likely be paid using local registration fees and "evidence-based funding dollars" from the State.[44]

The weight of authority—including this court's decisions—views the State's *legal liability* as the most important factor. Courts do not look to the source of funds that will be used to pay a judgment but instead to whether the State bears some obligation to satisfy judgments against the entity. *E.g.*, *Gary A.*, 796 F.2d at 944–45; *Parker*, 667 F.3d at 927–28; *Febres*, 445 F.3d at 235–37; *cf. Belanger*, 963 F.2d at 252.[45] Additionally,

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judgment." *Id*. There appears to be no similar provision applicable to the regional offices of education.

44 Pet'r's Br. 8–9.

45 We note that, in *Perez*, the Fifth Circuit evaluated a Texas entity with a similar legal status to that of an Illinois regional office and found it to be an arm of the state. 307 F.3d at 331. *Perez*, however, did not apply an exacting standard of legal liability; rather, it found that it was sufficient to show that a judgment against the education entity there "likely … would be paid in large portion by the state." *Id*. at 329. Consistent with our and most circuits' precedents, we expect an entity asserting arm-of-the-state

when an entity facially appears to be local or regional rather than statewide, the entity will need to make a stronger showing to establish itself as an arm of the state. For instance, in *Lightfoot*, 771 F.3d at 771–73, the court held that Georgia's extensive regulation of education policy in local school districts did not amount to sufficient state control to turn the school districts into arms of the state. Similarly, *Woods*, 466 F.3d at 248, found that the New York State education commissioner's broad powers to remove local education officials and review school boards' actions did not amount to a veto power under that court's precedent. By contrast, in *Sturdevant*, 218 F.3d at 1167–71, the Tenth Circuit conceded that the State Board for Community Colleges had a significant degree of autonomy, but it relied heavily on the fact that it served the State as a whole to conclude that it was an arm of the state.

DuPage's inability to establish that the State of Illinois would be liable for any monetary judgment, combined with its inability to demonstrate that a regional office of education is anything other than an important but local administrator of

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status to show that the State bears a legal obligation to satisfy a judgment or debt against it.

Further, we note that the education service centers in *Perez* are distinguishable from Illinois regional offices in other important respects. Whereas an executive director of an education service center is subject to approval and removal by the state education commissioner, *id*. at 330, an Illinois regional superintendent is elected solely by local voters and removable by *county* officials. Moreover, the Illinois Attorney General has opined that a regional superintendent is not a state officer, and Illinois statutes treat regional offices as local entities for purposes of employee indemnification. By contrast, *Perez* observed that Texas case law treated a lawsuit against an education service center as a lawsuit against the state. *Id*. at 328.

the local school systems, makes clear that it has not shouldered its burden of establishing that it is an "arm of the state." *See Woods*, 466 F.3d at 237–38 ("[T]he governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity."). Because DuPage has not shown that it was entitled to immunity from the Department's adjudication of Sanchez's whistleblower complaint, we turn to the merits of the ALJ's decision.[46]

The Merits

A.

We begin our consideration of the merits of this case by setting forth the statutory landscape.

To protect public funds from waste, fraud, and abuse, Congress established certain requirements, applicable to all federal contractors and grantees, to encourage the reporting of misuse of federal funds. The case before us today requires that we review the Department of Education's application of a key provision of that congressional effort, Section 4712 of Title 41. This section prohibits federal contractors and grantees from discharging, demoting, or otherwise discriminating against an employee for making a "disclosure." The statute defines a protected disclosure as "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

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[46] Because DuPage has not met its burden of showing that it is an arm of the state, we need not reach the issue of whether there was a waiver of sovereign immunity.

grant, … or a violation of law, rule, or regulation related to a Federal contract … or grant." 41 U.S.C. § 4712(a)(1). The disclosure must be made to an individual or a body specified in the statute, including an Inspector General or a management official. *See id.* § 4712(a)(2).

To obtain relief under this provision, an employee must (1) make a protected disclosure (2) to a person specified in the statute, and (3) suffer a reprisal for making the protected disclosure. After establishing these three elements, the employee must further demonstrate that the protected disclosure was a "contributing factor" in the personnel action that was taken against the employee. The employer must then demonstrate by clear and convincing evidence that it would have taken the same action even if the disclosure had not occurred. In this respect, the statute adopts the legal burdens of proof set forth in the Whistleblower Protection Act. *See id.* § 4712(c)(6) (adopting the burdens of proof of 5 U.S.C. § 1221(e)).

The statute also sets forth the administrative and judicial framework in which the employee must seek relief. An employee may submit a complaint to the Inspector General of the agency. *Id*. § 4712(b)(1). That officer will then undertake an investigation and submit a report to the head of the agency. *Id*. The agency head must either issue an order denying relief or take action to remedy the injury. *Id*. § 4712(c)(1). A remedial order may include a direction to abate the reprisal, to grant reinstatement with back pay and benefits, and to restore other terms and conditions of employment that would have applied if the reprisal had not been taken. *Id*. Costs and expenses incurred by the employee, including attorneys' fees, also may be granted. *Id*.

An employee denied relief by the agency may bring a de novo action for relief in the appropriate district court. *Id*. § 4712(c)(2). Alternatively, any person adversely affected by the agency order may seek relief in the court of appeals. Proceedings in the court of appeals are governed by the provisions of the Administrative Procedure Act. *Id*. § 4712(c)(5) (adopting the review provisions of Chapter 7 of Title 5).

In evaluating Sanchez's claims, the ALJ employed the burden-shifting scheme required by the whistleblower statute. *See id*. § 4712(c)(6) (directing adjudicators to apply the scheme in 5 U.S.C. § 1221(e)). Sanchez therefore had the initial burden of showing by a preponderance of the evidence that a disclosure was a "contributing factor" in a decision to take a personnel action. 5 U.S.C. § 1221(e)(1). He could meet that burden with circumstantial evidence, such as evidence that "the official taking the personnel action knew of the disclosure" and that "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." *Id.* § 1221(e)(1)(A)–(B). If Sanchez were to meet his burden, DuPage could avoid liability by showing "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Id.* § 1221(e)(2).

It is important to note, at the outset, two characteristics of the whistleblower provisions that we have just set out. First, with respect to the first prong of the statutorily mandated analysis, Congress has made very clear that this "contributing factor" element may be met with circumstantial evidence, such as evidence that the retaliating official "knew of the disclosure … and … the personnel action occurred within a

period of time such that a reasonable person could conclude" that the disclosure was a contributing factor in it. *Id*. § 1221(e)(1)(A)–(B); *see Kewley v. Dep't of Health & Hum. Servs.*, 153 F.3d 1357, 1361–62 (Fed. Cir. 1998) (describing Congress's explicit correction of an earlier misapprehension of the necessary quantum of evidence in *Clark v. Dep't of the Army*, 997 F.2d 1466 (Fed. Cir. 1993)). We have described this "contributing factor" standard as requiring "something less than a substantial or motivating" factor standard. *Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009). This element therefore does not impose upon the complainant a high hurdle: "[T]he circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, *prima facie*, that the disclosure was a contributing factor to the personnel action." *Horton v. Dep't of the Navy*, 66 F.3d 279, 284 (Fed. Cir. 1995). As the court in *Kewley* noted, Congress has suggested that "an action taken within the same performance evaluation period w[ill] normally be considered within a 'reasonable time.'" *Kewley*, 153 F.3d at 1363 (quoting S. Rep. No. 100-413, at 15 (1988)). Thus, Congress has given clear guidance that the adjudicators within the agency are to "use this reasonable time standard liberally." *Id.*

The second notable characteristic of this statutory language is that, in affording the employer the opportunity to rebut the prima facie showing, the statute requires explicitly that the employer must meet the "clear and convincing" standard, not the simple preponderance standard. Congress employed this standard because the rebuttal case only comes into play once the prima facie case has been established and because the employer usually holds all the evidentiary cards. *See Whitmore v. Dep't of Lab.*, 680 F.3d 1353, 1367 (Fed. Cir.

2012) (quoting 135 Cong. Rec. H747–48 (daily ed. Mar. 21, 1989)). As the court in *Kewley* noted, Congress, in employing this standard, sought to accommodate two competing considerations: It wanted to ensure that an employer would not be able to rely on "any possible flaw in an employee's work record as an excuse for retaliation"; at the same time, it did not intend that "employees who are poor performers escape sanction by manufacturing a claim of whistleblowing." *Kewley*, 153 F.3d at 1363 (quoting S. Rep. No. 100-413, at 15 (1988)).

In determining whether the employer has met its shifted burden, the factors articulated in *Carr v. Social Security Administration* seem to have garnered wide approval. Thus, courts look to

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

185 F.3d 1318, 1323 (Fed. Cir. 1999). In evaluating each of these factors, the decision-maker must consider all of the record evidence. "Evidence only clearly and convincingly supports a conclusion when it does so in the aggregate considering all the pertinent evidence in the record, and despite the evidence that fairly detracts from that conclusion." *Whitmore*, 680 F.3d at 1368.

The standards governing our own review are also clearly set forth in the statute. Section 4712(c)(5) incorporates the

judicial review provisions of the Administrative Procedure Act. Therefore, we will not disturb the agency's legal determinations "as long as they are not arbitrary or capricious, and are in accordance with the law." *Israel v. U.S. Dep't of Agric.*, 282 F.3d 521, 526 (7th Cir. 2002). Under that deferential standard, "we must uphold the action if the agency considered all of the relevant factors and we can discern a rational basis for the agency's choice." *Id.* The agency's factual findings are reviewed for substantial evidence, meaning "such relevant evidence as a reasonable mind might accept as adequate to support the conclusion" it reached. *Huck Store Fixture Co. v. NLRB*, 327 F.3d 528, 533 (7th Cir. 2003). While this standard is obviously a deferential one, we are unable to fulfill our responsibility when the agency adjudicator "fails to provide an in depth review and full discussion of the facts to explain its reasoning." *Whitmore*, 680 F.3d at 1368. "If considerable countervailing evidence is manifestly ignored," the decision must be vacated and remanded. *Id*.

B.

With this statutory landscape in mind, we now turn to the justifications offered by the Department of Education for its determination.

1.

First Reprisal.

As we noted earlier, Sanchez made his first disclosure around April 2018 when Hunt submitted an invoice to him for a roughly $10,000 breakfast expense, to be paid from the SEED grant. Sanchez told Hunt that the invoice was not an allowable expense under federal grant rules and, despite Hunt's insistence, refused to pay the invoice.

The OIG found that Sanchez's disclosure concerning unallowable catering expenses was a contributing factor in his removal from SEED grant financial oversight duties based on Hunt's knowledge of the disclosure and the temporal proximity of the action. Although the OIG did not accept that Ruscitti or Haller had knowledge of Sanchez's disclosure at the time, Hunt did have knowledge, and "Hunt removed these duties only one month" after the disclosure.[47] The OIG also took the view, however, that ISU's change in budget policy—a decision to limit SEED grant financial oversight to ISU employees—constituted "clear and convincing evidence that [DuPage] would have removed his financial duties regardless of this disclosure."[48] Thus, the removal was not retaliatory.

Like the OIG, the ALJ found that Sanchez's disclosure about catering expenses was a contributing factor to his removal of SEED grant duties. The ALJ first noted that the alleged reprisal "occurred nearly simultaneously with [the] disclosure."[49] The ALJ also found that "[c]learly" Haller had knowledge of the disclosure "contemporaneously with the events": Haller said she only learned of the events "after they occurred," but the ALJ apparently did not credit that because Haller's interview notes failed to provide an estimate of when she knew of them.[50] In the ALJ's view, DuPage's claim that it

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47 App. 33.

48 *Id*. at 33–34.

49 *Id*. at 1127.

50 *Id*.

lacked knowledge of the disclosure was "completely contradicted by" Dotson's interview.[51]

The ALJ did not address directly whether DuPage had met its burden of establishing by clear and convincing evidence that the same decision about Sanchez's continued participation in the SEED program would have been reached if he had not made the disclosure. Although the issue was squarely before her, the opinion contains no substantive discussion of the issue. In its submission to the ALJ, DuPage had pointed out that ISU was a separate entity from DuPage, that the SEED grant was administered by ISU, that Sanchez made his disclosure to Hunt (an ISU employee), and that ISU chose to remove Sanchez (and all non-ISU employees) from grant oversight positions. DuPage contended that these facts precluded a determination that Sanchez's disclosure was a contributing factor in any action *by DuPage*.

DuPage did not control ISU. ISU's decision to remove all DuPage personnel from financial oversight of the grant administered by ISU would have resulted in Sanchez's removal from these duties regardless of any disclosure to DuPage. The ALJ's failure to consider, in any meaningful way, the significance of ISU being a separate entity from DuPage—which calls into question how DuPage could be responsible for ISU's decision to remove Sanchez from those duties—is a major flaw in its analysis. To put it mildly, the question whether DuPage could even be liable for ISU's decision was an exceedingly "relevant factor." *Israel*, 282 F.3d at 526. The ALJ's failure to grapple with it prevents us from discerning "a rational basis for the agency's choice." *Id.* If the ALJ had applied

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51 *Id*. at 1128.

carefully the *Carr* factors, she would have assessed not only the strength of the evidence supporting a personnel decision and the existence of any retaliatory motive but also, as a threshold matter, whether the decision was even attributable to DuPage. *Carr*, 185 F.3d at 1323. We therefore cannot sustain the determination.

2.

Second Reprisal.

The OIG determined that Sanchez's disclosures were not a contributing factor in his change of duties between December 2018 and March 2019. The OIG found that none of the officials involved in this change—"to include Haller, Hunt or Ruscitti"—had any knowledge of the catering disclosure from April 2018.[52] And because this personnel action "occurred or was initiated likely prior to his second protected disclosure" in January and February 2019, that disclosure "could not have been a contributing factor."[53] The OIG concluded that, in any case, the change of duties was simply a result of Sanchez's deficient performance on the data infrastructure work.

The ALJ disagreed. She noted that the change of duties occurred over a period of months: Hunt decided in December 2018 that she intended to bring in a data infrastructure consultant; the planned change of duties was communicated to Sanchez in December 2018 or January 2019; and Sanchez's new job description was finalized in March 2019. The ALJ

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52 *Id*. at 34. As noted earlier, the OIG misstated its finding here. Hunt plainly knew of the April 2018 catering disclosure, as the OIG found in its discussion of the first alleged reprisal. *See id*. at 33.

53 *Id*. at 34–35.

therefore found the temporal proximity between the second disclosure (January 2019) and the change of duties to be dispositive. Although the disclosure occurred "after [DuPage] began to consider a job change," it was "before the new job description … was created and implemented. This timing is sufficient to establish the second disclosure is a contributing factor for this personal [sic] action."[54]

In the ALJ's view, DuPage also did not carry its burden of showing that it would have changed Sanchez's duties even absent the disclosure(s). DuPage had argued that (a) the change of duties was the "direct and sole result" of Sanchez's lack of skills and professional connections necessary to perform the work and (b) the OIG's finding that the second disclosure occurred after the change in duties meant it could not possibly be a contributing factor.[55] The ALJ did not address the first claim but rejected the second claim because Sanchez's new duties were not finalized until March 2019, after the second disclosure. "That alone" was enough to show that DuPage did not meet its burden.[56]

Even if we accept that the ALJ addressed adequately DuPage's second argument (regarding the change of duties), we cannot say the same with respect to the first (regarding Sanchez's competence). The ALJ simply noted the first argument and disposed of it by repeating her reasoning for accepting the *second* argument. Even under the deferential standard of review that we employ in these cases, this oversight simply

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54 *Id*. at 1130.

55 *Id*.

56 *Id*.

cannot pass muster. DuPage's view of Sanchez's abilities, if credited, would have been a satisfactory defense. But the ALJ did not explain whether she credited those claims or, if not, why she did not. Instead, the ALJ stated that her rejection of the timeline argument "alone" was "enough" to find that DuPage had not met its burden.[57] Had the ALJ adhered to the well-established *Carr* factors, she would have explored vigorously the "strength of [DuPage's] evidence in support of its personnel action." *Carr*, 185 F.3d at 1323. Instead, the ALJ failed to grapple with record evidence demonstrating DuPage's serious concerns that Sanchez lacked the skills and professionalism to perform these duties competently.[58] This approach constitutes a failure to consider a relevant factor and rendered the ALJ's decision on this point arbitrary and capricious.

3.

Third Reprisal.

As noted earlier, the third alleged reprisal occurred on March 11, 2019, when DuPage placed Sanchez on an EPP that ran from March 11 to September 30.[59] The stated purpose of

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57 *Id*.

58 *E.g.*, *id*. at 104, 185.

59 Although the EPP was reportedly issued on March 11 during a meeting with Sanchez, there is some uncertainty as to when Sanchez received a copy of the EPP. His signature on the document is dated April 26, 2019, and he denied receiving a copy of it before that date. *Id*. at 114–15, 144, 1094.

the EPP was to "allow the employee the opportunity to demonstrate competency and commitment" to his work.[60]

The OIG concluded that the temporal proximity of the EPP to the second disclosure and the knowledge of the officials involved—Haller, Hunt, Ruscitti, and Dotson—demonstrated that Sanchez's disclosure was a contributing factor to his placement on an EPP on March 11, 2019. The OIG further found, however, that "numerous e-mails and witness testimony" from DuPage personnel showed that Sanchez had "significant performance issues" and that DuPage had accordingly shown by clear and convincing evidence that it would have placed Sanchez on an EPP regardless of his disclosures.[61]

The ALJ had little difficulty with the first prong on the statutory analysis. She found that Sanchez's disclosures were contributing factors to his placement on an EPP. That determination is supported by the record. We will pretermit extensive discussion of this conclusion; given the lenient standard of proof mandated by the statutory language, there was sufficient circumstantial evidence of DuPage's knowledge of the disclosures and sufficient temporal proximity between the second disclosure and the start of the EPP to justify the Department's determination.

The second prong of the statutory analysis, dealing with DuPage's burden to establish by clear and convincing evidence that it would have implemented the EPP even in the absence of the disclosure, gives us significant pause. The ALJ

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60 *Id*. at 344.

61 *Id*. at 37.

declined to credit DuPage's justifications. She pointed to what she deemed to be inconsistencies in the record concerning the lead-up to the EPP, "vagueness regarding key details of when the EPP was created," and a suspicious delay in Sanchez's signing the EPP.[62] The ALJ concluded that these inconsistencies and ambiguities "reduce[d] the probative value of the evidence" DuPage offered to support its defense that the EPP "was only to help improve [Sanchez's] work performance."[63]

As we have noted earlier, it is well established that, in making its determination, the agency must take into consideration all the evidence of record. *Whitmore*, 680 F.3d at 1368. Here, the ALJ's analysis fails to establish that it paid adequate consideration to the detailed evidence that, prior to his being placed on the EPP, Sanchez's overall job performance had raised serious concerns. Haller, who certainly acted as his *de facto* supervisor, detailed those concerns in her statement to the OIG. She noted that, with respect to a funded project that included other regional offices of education, he had responsibility for "supporting development efforts in the other [regional offices] and the data infrastructure work that will support the entire project."[64] Yet, despite her asking him several times to contact the coordinators in these organizations and to get baseline information on what data they collected, he had not contacted those coordinators and, indeed, had not even identified them, much less visited them.

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62 *Id*. at 1132–33.

63 *Id*. at 1133.

64 *Id*. at 127.

Haller also expressed concern about Sanchez's lack of organization and his failure to adopt work habits that permitted smooth communication with other staff members.[65] After accepting assignments or making commitments to others, he would fail to follow through on those obligations and cause lapses in the organization's reliability and productivity.[66] He failed to fix a spreadsheet even after he realized that it was producing outdated and inaccurate data that had to be corrected by others.[67] One of the consequences of his failure to work in an organized manner was the production of "[e]xpense tracking spreadsheets that were off by hundreds of thousands of dollars."[68] His communications with individuals outside the organization often lacked professionalism. Attempts to improve his accountability within the organization faltered because of his lack of cooperation.[69]

Haller attributed this poor performance to a lack of knowledge and capacity with technology and a lack of understanding of basic accounting principles.[70] She recognized that there was a need to improve the definition of his role within the organization, but also noted that efforts toward

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65 *E.g.*, *id*. at 375–76, 389–90, 392–93, 399, 403, 449–52.

66 *E.g.*, *id*. at 365–66, 377, 395–97, 415–17.

67 *Id*. at 415.

68 *Id*. at 127.

69 *E.g.*, *id*. at 365.

70 *Id*. at 110, 112.

clarification had been thwarted by Sanchez's refusal to acknowledge the leadership role of the project directors.

The ALJ's focus on the procedure employed at the March 2019 meeting where the leadership decided to place Sanchez on an EPP and the subjective impression of the meeting's participants fails to grapple in any significant way with the hard evidence that DuPage had solid, and to a great degree unrebutted, reasons to seek a *substantial* improvement in Sanchez's performance. The ALJ's failure to confront that evidence renders her decision arbitrary and capricious and unsustainable as a matter of law.

4.

Fourth Reprisal.

As we noted earlier, the fourth alleged reprisal stemmed from a complaint by an ISU employee. That employee detailed three incidents when Sanchez's computer displayed inappropriate sexual material to a coworker in a work-related situation. When this matter came to the attention of DuPage officials, the Assistant Regional Superintendent for Business and the Assistant Superintendent for Operations issued a PAR stating Sanchez's deviations from DuPage policies and setting forth remedial action that Sanchez had to take to avoid similar deviations in the future.

The ALJ's reasoning in finding Sanchez's disclosures a contributing factor in the issuance of the PAR is problematic. The ALJ first laid out her factual findings about the content of the PAR, including her view that the PAR "misreport[ed]" one of the incidents described in Shoop's email.[71] But when

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71 *Id*. at 1135.

determining whether the disclosures were a contributing factor in the issuance of the PAR, she merely stated that the PAR was issued during the EPP period and that, "[a]though [it] occurred about seven months after [DuPage] had knowledge of the second disclosure, there [wa]s still reason to conclude" that it was a contributing factor.[72] Despite her view that the PAR misreported one of the incidents (an assertion for which she gave little elucidation), the ALJ did not say whether this factor informed her conclusion that the disclosures were a contributing factor in its issuance. Apart from a conclusory view that the PAR was "directly tied" to the EPP,[73] we are given no basis for her conclusion that the disclosures were in any way tied to Sanchez's failure to conform to the computer policies of DuPage.

The ALJ's determination that DuPage did not carry its shifted burden is especially problematic. She pointed out, correctly, discrepancies in the record concerning Assistant Superintendent Robey's claim that Sanchez admitted to all the incidents. However, the ALJ also mischaracterized Robey's interview notes while evaluating the PAR meeting, suggesting that Robey and Dotson each tried to pin responsibility for the PAR on the other. While the ALJ accurately noted that Dotson pointed to Robey as the main actor in this process,[74] Robey did not similarly point to Dotson. The ALJ quoted Robey as saying that *Dotson* "sat down with [Sanchez] … and

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72 *Id*.

73 *Id.*

74 *Compare id*. (ALJ decision) *with id*. at 218 (Dotson's interview notes).

ultimately issued a written remand [sic]."[75] In fact, the interview notes for Robey say Robey "recalled that *he and* Dotson sat down with Sanchez … and ultimately issued a written reprimand."[76] Both accounts indicate that Robey and Dotson were present, and Robey's account does not contradict Dotson's statement that Robey took the lead.

The reasoning of the ALJ cannot support the conclusion that the PAR was retaliatory.

5.

Fifth Reprisal.

This reprisal is predicated on Sanchez's final termination. The ALJ determined that Sanchez had met his burden of showing one or both of his disclosures contributed to his termination because the termination was "closely tied" to the EPP, itself an act of reprisal: His termination was "purportedly implemented based on the unsatisfactory rating" at the end of the EPP period, on September 30, 2019, and so the EPP formed the basis for his termination.[77] Thus, Sanchez's showing on the EPP essentially extended transitively to the termination as well.

The ALJ also determined that DuPage failed to carry its shifted burden. After reviewing documentation DuPage provided that discussed Sanchez's performance failures "in excruciating detail," the ALJ concluded "that by developing all

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75 *Id*. at 1135.

76 *Id*. at 313 (emphasis added).

77 *Id*. at 1136.

these notes, [DuPage] was micromanaging [Sanchez's] work activities more than they were supporting his performance while he was subject to the EPP."[78] The ALJ also found that DuPage did not follow all its policies related to performance assessments—specifically, there was no evidence that DuPage conducted formal performance assessments as required by policy until the end of the EPP period on September 30, 2019, at which point the decision was made to terminate Sanchez's employment. Finally, the ALJ found it troubling that there was significant uncertainty concerning Sanchez's chain of supervision throughout his employment. This uncertainty "undercut[]" DuPage's assertion that it followed its policies requiring an employee's supervisor to participate in EPPs and performance appraisals.[79]

Because we have determined that the record will not support the ALJ's determination that issuance of the EPP was an act of retaliation, we cannot accept the ALJ's conclusion that the termination was retaliatory because it was based on the EPP. For this reason alone, that determination cannot stand. We note, however, several additional problems with the ALJ's reasoning that preclude our accepting, even under a deferential standard of review, her conclusion. First, the ALJ notes that Sanchez was never afforded the initial review sessions required by DuPage policy. But the ALJ never points to any evidence supporting why these sessions are relevant to the problems that precipitated later discontent with Sanchez's performance, many of which involved a lack of basic

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78 *Id*.

79 *Id*. at 1137–38.

professional skills. The ALJ also relies on what she considers a lack of clarity about Sanchez's chain of supervision but does not explore how that supposed lack contributed to the particular deficiencies that troubled DuPage management. Indeed, she criticizes, again in conclusory fashion, management for "micromanaging" Sanchez during the EPP period but does not explain why "micromanaging" a struggling employee is problematic.

But the fundamental flaw in the ALJ's treatment of this alleged reprisal is the failure to come to grips, in any meaningful way, with the very significant record evidence of Sanchez's performance failures both before the EPP and during the EPP period. This evidence is central to the case but received scant attention by the ALJ. The ALJ's failure to deal in a meaningful way with this core issue renders the decision arbitrary and capricious.

CONCLUSION

The petition for review is granted. The decision of the Department of Education is vacated and the case is remanded to the Department for further proceedings consistent with this opinion.[80]

The decision as to whether to assign this matter to another ALJ rests, at least initially, with the Department. We respectfully suggest that the Department follow that course. *See Delgado v. U.S. Dep't of Just.*, 979 F.3d 550, 562 (7th Cir. 2020).

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[80] Because we must remand this case to the Department for further proceedings, we will pretermit any discussion of the Department's decision on the matter of remedy.

Petition for Review Granted; Decision Vacated; Case Remanded.