June 1, 2018

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

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Don Grotting, Superintendent

Central Administration Center

16550 SW Merlo Rd.

Beaverton, OR 97003

don\_grotting@beaverton.k12.or.us

Dear PARENT and Mr. Grotting,

This letter is the Final Order on the April 5, 2018, appeal filed by PARENT alleging a violation of ORS 659.852 by Arco Iris Spanish Immersion Charter School (“Arco Iris”), for which Beaverton School District (“District”) is the sponsoring school district. The objective of this order is to determine whether Arco Iris and the District are in compliance with ORS 659.852 and, if necessary, specify corrective action to be completed by Arco Iris or the District.

## PROCEDUREAL BACKGROUND

This is an appeal of a final decision issued by the District on April 5, 2018. PARENT first filed her complaint with Arco Iris School Board on September 23, 2017. In that complaint, PARENT specifically stated that she had concerns with the principal of Arco Iris, Ms. Diaz. On September 26, 2017, for reasons related to the subject of this appeal, PARENT withdrew her son, A.K., from Arco Iris.

On September 28, 2017, PARENT contacted Arco Iris School Board to express her interest in meeting with the school board to discuss the complaint that she had filed on September 23.

On October 19, 2017, Arco Iris School Board closed the investigation related to PARENT’s complaint without issuing a final decision.

PARENT filed an appeal with the Oregon Department of Education (“Department”) on February 12, 2018. On March 13, 2018, the Department denied the appeal on grounds that the District had not yet issued a final decision as required by OAR 581-002-0040. As specified in the letter denying the appeal, the Department does not have the authority to consider a complaint alleging retaliation that has been heard only by a public charter school. Under current law, ORS 338.115 exempts public charter schools from ORS 327.102, the statue conferring complainants the right to file an appeal with the Superintendent of Public Instruction. Although a separate statutory basis exists for the adoption of a process by which ORS 659.852 may be enforced (*see* ORS 659.855 (4)), the rule governing the process by which a complainant may file an appeal with the department, OAR 581-002-0040, was adopted pursuant to ORS 327.102. Under OAR 581-002-0040, the Department cannot consider a complaint that originates in a public charter school—including a complaint alleging retaliation—without the sponsoring school district first hearing the complaint and issuing a final order.

On April 5, 2018, the District issued a final decision. In the final decision, the District explained to PARENT that Arco Iris had assumed all duties related to ORS 659.852 in the charter agreement between the District and Arco Iris. On April 5, 2018, PARENT refiled her appeal with the Department. On April 17, 2018, the Department accepted the appeal.

On May 17, 2017, the Department received a response to PARENT’s appeal from Arco Iris. On May 21, 2017, the Department received confirmation from the District that pursuant to the charter agreement between the District and Arco Iris, Arco Iris has assumed all duties related to “ensuring compliance with all applicable law, rules, regulations, policies, and procedures.”

## FINDINGS OF FACT

After conducting its investigation, the Department makes the following findings of fact:

1. On September 20, 2017, A.K. hit another student with a lunch box.
2. On September 20, 2017, after the incident where A.K. hit another student with a lunch box, A.K.’s teacher informed PARENT of the incident.
3. On September 23, 2017, PARENT sent an email to Arco Iris School Board. In the email, PARENT expressed that she had concerns with Ms. Diaz and requested a meeting between her, Ms. Diaz, and an Arco Iris School Board member.
4. On September 25, 2017, PARENT attended Arco Iris to observe A.K.
5. On September 25, 2017, at approximately 9:00 a.m., A.K. took a pencil from a second student and attempted to stab a third student with the pencil.
6. On September, 25, 2017, following the incident where A.K. attempted to stab another student, Ms. Diaz approached PARENT and asked to speak to her. PARENT alleges that when Ms. Diaz approached her, she said, “I understand [that] you have a problem with me,” purportedly in reference to the email PARENT sent to Arco Iris School Board on September 23.
7. During the meeting between Ms. Diaz and PARENT, Ms. Diaz produced two K-12 Student Discipline Referral Forms. The first, dated September 18, 2017, referenced the incident where A.K. hit another student with a lunch box. That form had the word “[i]nformal” written across the top of the form. In its response to this appeal, Arco Iris admits that this incident actually occurred on September 20, 2017. The second K-12 Student Discipline Referral Form, dated September 25, 2017, referenced the incident where A.K. attempted to stab another student.
8. On September 25, 2017, at 2:12 p.m., Ms. Diaz sent an email to Ms. McAleer, a consultant for Arco Iris, summarizing the recent behavior of A.K. and describing PARENT as “becom[ing] angry” during the meeting that had occurred earlier that day. In the email to Ms. McAleer, Ms. Diaz mentioned on two separate occasions that PARENT had reported her to Arco Iris School Board.

## ORS 659.852 APPEALS

Education programs provided by school districts, public charter schools, education service districts, long term care and treatment facilities, the Youth Corrections Education Program, and the Oregon School of the Deaf are prohibited from retaliating against a student who reports in good faith information that the student believes is a violation of state or federal law, rule, or regulation. ORS 659.852. If the Department determines on appeal that an education program has retaliated against a student, the education program has 30 days from the date on which the Department issues its final order to remedy the retaliatory act. OAR 581-002-0040 (8)(b). If the Deputy Superintendent requires additional corrective action as part of the final order, the education program must complete the corrective action before the beginning of the following school year unless the Deputy Superintendent grants an extension. OAR 581-002-0040 (8)(b). If the education program does not remedy the retaliatory act or complete the corrective action in a timely manner, the Deputy Superintendent may withhold moneys otherwise required to be distributed to the education program pursuant to statute. OAR 581-002-0040 (9)(b).

I. Arguments Presented

PARENT filed her complaint with Arco Iris School Board on September 23. PARENT visited Arco Iris to observe her son on September 25. During that visit, Ms. Diaz requested to speak to PARENT. PARENT alleges that when Ms. Diaz made this request, she also made the following statement: “I understand [that] you have a problem with me.” During the meeting between PARENT and Ms. Diaz, Ms. Diaz produced two K-12 Student Discipline Referral Forms. The first, dated September 18, referenced the incident where A.K. hit another student with a lunch box. The second, dated September 25, referenced the incident where A.K. attempted to stab another student.

Noting the discrepancy between the date on which she was told that A.K. had hit another student with a lunch box—September 20—and the date of the form documenting the incident—September 18—PARENT alleges that Arco Iris fabricated the incident in response to her filing her complaint with Arco Iris School Board. PARENT further posits that Ms. Diaz’s comment “I understand [that] you have a problem with me,” supports this allegation.

Arco Iris disagrees with PARENT’s interpretation of the events occurring between September 20 and September 25. According to Arco Iris:

[W]e simply do not agree that the factual circumstances of this matter support a finding that Arco Iris or its staff engaged in retaliatory conduct toward A.K. or PARENT as contemplated by ORS 659.852. The incidents documented in the K-12 Student Disciplinary Referral Forms . . . indisputably occurred and the information recited therein, with the limited exception of the erroneous date, appear to be entirely accurate.

Arco Iris also argues that placing a disciplinary form in a student’s file does not constitute an “adverse action” for purposes of ORS 659.852: “Documenting behavioral issues and conduct by school administration simply cannot be held to be [an] ‘adverse action’ . . . where such documentation accurately reflects . . . student conduct.”

Correctly applying ORS 659.852 to these facts requires an understanding of the legal standard established by ORS 659.852. After reviewing the legislative history of ORS 659.852, we find that the legal standard established by the statute is the same as the legal standard under Oregon law for proving retaliation by an employer.

Legislative history suggests that ORS 659.852 should be interpreted in a manner that is consistent with ORS 659A.199 and other Oregon laws protecting whistleblowers. The genesis for ORS 659.852 was House Bill 3371 (2015). At both public hearings held for the bill—the first before the House Committee on Higher Education, Innovation, and Workforce Development on April 6, 2015, and the second before the Senate Committee on Judiciary on May 26, 2015—witnesses proffered testimony that the primary purpose of the bill was to extend the protections available to employees under ORS 659A.199 to students. The legislative history of ORS 659A.199 suggests that the primary purpose of that statute is to extend the protections available to public employee whistleblowers under Oregon law to other employee whistleblowers. *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 999-1000 (9th Cir. 2017). Thus, to make a complaint under ORS 659.852, a person must establish the elements required for establishing a *prima facie* case of retaliation under ORS 659A.199 and other Oregon laws protecting whistleblowers.

In consideration of these laws, a person must establish the following to prove retaliation under ORS 659.852: (1) the student was engaged in a protected activity; (2) the student suffered an adverse educational decision; and (3) there was a causal link between the protected activity and the adverse educational decision. *Huitt v. Optum Health Services*, 216 F.Supp. 3d 1179, 1190 (D. Or. 2016) (explaining requirements for establishing a *prima facie* case of retaliation under ORS 659A.199 and 659A.230); *see also Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986) (explaining requirements for establishing a *prima facie* case of retaliation under Title VII of the Civil Rights Act).

II. First Prong: Protected Activity

Under ORS 659.852, the only protected activity is the act of reporting in good faith information believed to be evidence of a violation of state or federal law, rule, or regulation. In this case, there is no evidence that A.K. made such a report. On September 23, PARENT sent the following email to Arco Iris School Board:

Dear Arcoiris School Board,

I have concerns about the treatment of my son, [A.K.], a 1st grader, by Principal Diaz. I would like to speak with a board member regarding my concerns.

I have made alternate arrangements for my son for Monday 9/25/17 so that he does not have to be at Arcoiris on that day. I would be willing to meet with Principal Diaz on 9/25/17 but only in the presence of a school board member, preferably one with experience educating young children. I have a meeting nearby from 11:30 to 12:30am on that day but am otherwise available.

I look forward to hearing from you.

Thank you,

PARENT

Concerned Arcoiris parent

In this email, PARENT did not report in good faith information that she believed to be evidence of a violation of state or federal law, rule, or regulation. She reported “concerns about the treatment of my son.” PARENT’s concerns may have been legitimate. They may have been serious. They may even have concerned a violation of state or federal law, rule, or regulation. However, the email does not describe or allege a violation of state or federal law, rule, or regulation. The email merely mentions “concerns.”

We find that the facts do not support the contention that A.K. reported in good faith information that he believed to be evidence of a violation of state or federal law, rule, or regulation.

III. Second Prong: Adverse Educational Decision

Under ORS 659.852 (1)(b), adverse education decisions are limited to the following:

[S]uspension, expulsion, disenrollment, grade reduction, denial of academic or employment opportunities, exclusion from academic or extracurricular activities, denial of access to transcripts, threats, harassment or other adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.

Placing a disciplinary form in a student’s file does not constitute suspension, expulsion, disenrollment, grade reduction, denial of academic or employment opportunities, exclusion from academic or extracurricular activities, or denial of access to transcripts.

Whether placing a disciplinary form in a student’s file constitutes a “threat” or “harassment” requires discerning legislative intent. The Oregon Supreme Court prescribed the method for discerning legislative intent in *Portland General Electric, Co. v. Bureau of Labor and Industries*, 317 Or. 606 (1993),and *State v. Gaines*, 346 Or. 160 (2009). Under this methodology, a person must analyze the text, context, and legislative history of a law and, if legislative intent remains unclear after analyzing the text, context, and legislative history of the law, employ general maxims of statutory construction to resolve the ambiguity. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172.

To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*. *See Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014). That dictionary defines “threat” to mean “an indication of something impending and usually undesirable or unpleasant” and “harassment” to mean “the act or an instance of harassing: VEXATION, ANNOYANCE.” Context and legislative history do not provide any alternate reading of these two terms.

Both terms could potentially apply to placing a disciplinary form in a student’s file. However, in this case, placing the form in A.K.’s student file does not constitute either a “threat” or “harassment.” Ms. Diaz, upon producing the form, did not indicate that “something impending and undesirable or unpleasant” would follow. Nor did Ms. Diaz intentionally “vex” or “annoy” PARENT. This is not to say that PARENT did not feel vexed or annoyed; however, the facts do not substantiate that Ms. Diaz had the intent of creating within PARENT those feelings.

Finally, because Arco Iris never used the form to impose a punishment on A.K., placing the form in A.K.’s file also does not “substantially disadvantage” him.

We find that the facts do not support the contention that placing the disciplinary file in A.K.’s file was an adverse educational decision.

IV. Third Prong: Causal Link

Three facts support the contention that there is a causal link between PARENT sending the September 23 email to Arco Iris School Board and the placement of the K-12 Student Discipline Referral Form dated September 18 in A.K.’s file. First, Ms. Diaz indicated her displeasure with PARENT when she approached her on September 25 and said, “I understand [that] you have a problem with me.” Second, Ms. Diaz indicated an awareness of the potential effect of PARENT’s having reported her to the school board in her September 25 email to Ms. McAleer. In that email, she specifically mentioned on two separate occasions that PARENT had reported her. Finally, producing the disciplinary form on the first school day following the day on which PARENT sent the email to Arco Iris School Board (PARENT sent the email on a Saturday) suggests that there is a corollary between the two.

The Department acknowledges that the actions of Ms. Diaz substantiate that she had an issue with PARENT’s actions. The Department further acknowledges that the actions of Ms. Diaz have properly been proffered as evidence of causation. However, the Department declines to determine whether the evidence is sufficient to support the requisite finding of causation necessary to prove retaliation under ORS 659.852 because the facts do not support a finding that PARENT engaged in a protected activity or that Arco Iris made an adverse educational decision.

## CONCLUSION

In conclusion, we find that Arco Iris and the District did not commit a retaliatory act under ORS 659.852.

Sincerely,

Mark Mayer

Government and Legal Affairs

Mark.Mayer@state.or.us

503-947-0464

Cc: Matthew D. Lowe, Jordan Ramis PC