September 4, 2018

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Matt Utterback, Superintendent

North Clackamas Schools

12400 SE Freeman Way

Milwaukie, OR 97222

Dear PARENT and Superintendent Utterback,

This letter is the Final Order on the February 21, 2018, appeal filed by PARENT (Parent) alleging that Ashland School District (District) violated the following administrative rules:

* OAR 581-022-1941[[1]](#footnote-1), which requires school districts to establish a process for the prompt resolution of a complaint by a person who resides in the district or by any parent or guardian of a student who attends school in the district;
* OAR 581-022-2345, which requires school districts providing transportation services to comply with all applicable state laws and rules;
* ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570, which prohibit the unlawful restraint or seclusion of a student by a public education program; and
* ORS 659.852, which prohibits retaliation against a student by an education program.

The objective of this order is to determine whether the District is in compliance with the applicable statutes and administrative rules and, if necessary, specify corrective action to be completed by the District.

## PROCEDURAL BACKGROUND

This is an appeal of the final decision issued by th District on September 1, 2017. Parent filed two complaints with the District on June 26, 2017. The first complaint used the District’s Discrimination Complaint Form and had been filled out by Parent on June 16, 2017. The second complaint used the District’s Public Complaint Form and had been filled out by Parent on June 18, 2017. In those two complaints, Parent alleged that the District committed 12 separate violations.

For procedural reasons, the District consolidated Parent’s complaints and investigated them under the District’s Public Complaint Procedure. Under that procedure, the superintendent of the District first investigates a complaint. Within 10 working days of the conclusion of the investigation, the superintendent issues a decision. If the complainant is dissatisfied with the decision, the complainant may file, within 10 working days of receiving the decision, a written request with the North Clackamas School Board to appeal the decision.

The superintendent hired an independent investigator to investigate Parent’s complaint. The investigator concluded the investigation on August 21, 2017. The superintendent issued his decision on September 1, 2017. In that decision, the superintendent found that the District was deficient with respect to three of Parent’s allegations. The superintendent found that the other nine allegations were unsubstantiated.

Parent choose to not file a request to appeal the superintendent’s decision with the North Clackamas School Board. Instead, she filed a request to appeal the decision with the Oregon Department of Education (Department). Under OAR 581-002-0040 (1), a complainant may appeal “a final decision by a school district.” The Department accepted Parent’s appeal under OAR 581-002-0040 (2)(a)(B), under which a decision by a school district is a final decision if “[i]n a multistep district complaint process, the district fails to render a written decision within 30 days of the submission of the complaint at each step.”

## FINDINGS OF FACT

**I. For purposes of determining whether the District violated OAR 581-022-1941, which requires school districts to establish a process for the prompt resolution of a complaint by a person who resides in the district or by any parent or guardian of a student who attends school in the district.**

1. During the summer of 2017, when Parent filed her complaint with the District, the District had a public complaint procedure for “resolving concerns voiced by employees, students, parents/guardians and the public in order to reduce potential areas of complaints, and to establish and maintain recognized channels of communication.”[[2]](#footnote-2)
2. The District’s complaint procedure is comprised of three steps. First, the school administrator responsible for investigating the complaint must conduct an investigation. Within 10 working days of concluding the investigation, the school administrator must issue a decision. If the complainant is dissatisfied with the school administrator’s decision, the complainant may appeal the decision to the superintendent of the District within 10 working days of the decision’s issuance. The superintendent must conduct another investigation. Within 10 working days of concluding the investigation, the superintendent must issue a decision. If the complainant is dissatisfied with the superintendent’s decision, the complainant may appeal the decision to the school board of the District within 10 working days of decision’s issuance.[[3]](#footnote-3)
3. The District’s complaint procedure specifies that (1) the school board’s decision is the District’s final determination, (2) the school board must issue its decision within 20 working days from the date on which the school board heard the complaint, and (3) the school board’s decision must be based on findings of fact and conclusions of law.
4. The District’s complaint procedure specifies that complaints may be appealed to the Department pursuant to OAR 581-022-1940.

**II. For purposes of determining whether the District violated OAR 581-022-2345, which requires school districts providing transportation services to comply with all applicable state laws and rules.**

1. The parties stipulate that during the 2016-2017 school year, the District contracted with an independent contractor to provide transportation services for Student to Arata Creek School. Documentation demonstrates that the District did not exclusively use the independent contractor.
2. The parties stipulate that Parent requested all vehicles transporting Student during the 2016-2017 school year to use a booster seat to transport Student. The District complied with Parent’s request when transporting Student with District vehicles.
3. The parities stipulate that on two occasions, the independent contractor providing transportation services for Student to Arata Creek School did not use the booster seat that Parent requested the District to use. These occasions occurred on March 6 and 13, 2017.
   1. The parties stipulate that Student weighed more than 80 pounds on the March 6 and 13, 2017.
   2. Communications between Parent and Student’s medical care provider substantiate that Student was 53 inches tall on March 6 and 13, 2017.
   3. Student was nine years of age on March 6 and 13, 2017.
4. The parties stipulate that on December 7, 2016, the District was late in transporting Student to Arata Creek School, where he was scheduled to be dropped off. The parties stipulate that an adult was present and accompanied Student into the school building. The parties disagree on who was present to accompany Student and why the person was there.
   1. In an interview conducted by the Department on June 9, 2018, the District stated that a staff person was specifically waiting for Student to be dropped off. The District stated that the staff person was a different person than the person who generally escorts students into the school building because the District was late in transporting Student to the school.
   2. In an interview conducted by the Department on May 25, 2018, Parent stated that a staff person was not specifically waiting for Student to be dropped off. Parent stated that a staff person was parking his or her car and entering the school building to go to work when Student was dropped off.
   3. In documents provided to the Department by the District, the District described the incident as follows: “[T]here was an adult outside that helped [Student] in and [the driver] watched him get inside.”
5. The parties stipulate that on January 5, 2017, the District transported Student from Arata Creek School to the Riverside Elementary daycare program instead of the Oak Grove Elementary School daycare program, where he was scheduled to be dropped off.
6. The parties stipulate that during the fall of 2017, beginning on August 29, 2017, the District contracted with an independent contractor to provide transportation services for Student to Knott Creek School.
7. The parties stipulate that on September 12, 2017, the driver who transported Student to Knott Creek School for the independent contractor inappropriately touched him.
   1. Communications between Parent and the District demonstrate that Student grabbed the driver’s cellular phone.
   2. Communications further demonstrate that the driver inappropriately placed his hand on Student to cause him to drop the phone.
   3. The District has a student discipline policy under which “[s]tudents are subject to discipline for conduct while traveling to and from school.”[[4]](#footnote-4)
   4. The District has a corporeal punishment policy under which school personnel may not use physical force to discipline or punish a student.[[5]](#footnote-5)

**III. For purposes of determining whether the District violated** **ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570, which prohibit the unlawful restraint or seclusion of a student by a public education program.**

1. An incident report substantiates that on September 21, 2016, at Oak Grove Elementary School daycare program (Daycare Program), a member of daycare staff restrained Student. According to the incident report, the staff member “was holding [Student] to avoid being hurt — held him [with] one arm [and] then two [arms] as [Student] continued to bite, kick, spit, scratch, punch, and grabbed [staff member’s] tie and pulled as hard as he could. Released after 1-2 minutes.” In communications between Parent and the District, Parent claimed that after the incident, Student had bruises on his arm.
2. The September 21 incident report indicates that Parent was provided a copy of the incident report on September 22, 2016. The incident report indicates that Parent was notified of the incident “in person” on September 22, 2016.
3. The September 21 incident report does not contain information related to a debriefing meeting or to the training qualifications of the person performing the restraint.
4. The parities stipulate that on November 9, 2016, at the Daycare Program, one or more members of daycare staff restrained Student. During an interview conducted by the Department on June 9, 2018, the District admitted that the members of school staff who performed the restraint were not trained by the Oregon Intervention System.
5. The parties stipulate that the District failed to notify Parent that Student was restrained on November 9, failed to inform Parent that the District would be holding a debriefing meeting about the incident, and failed to notify Parent of any other pertinent information related to the incident.
6. On November 12, 2016, Parent called the Clackamas County Child Abuse Hotline and reported the November 9 incident. Parent reported that during the incident, a member of the Daycare Program staff held Student from behind with both arms, in a “bear hug like fashion,” then put her leg between his legs and pulled him off balance, causing him to fall to the floor and hit his head.
7. Photographic evidence provided by Parent demonstrates that on or about November 12, 2016, Student had a large sore on his head.
8. On November 12, 2016, two officers contacted the Daycare Program about the November 9 incident.
9. In February, 2017, the District hired a new administrator for the Daycare Program. During an interview with the Department, the administrator stated that even though daycare staff were well informed of the law at the time that she was hired, the Daycare Program did not have written procedures setting forth the notice requirements of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570.
10. After Student had been disenrolled from the Daycare Program, the administrator for the Daycare Program wrote and distributed to daycare staff procedures to follow when disciplining a student.
11. The Daycare Program’s procedures specify that in incidents requiring “administrative led intervention,” parents of the affected student “should be notified as soon as possible, but no later than [the] end of [the] day.”
12. The Daycare Program’s procedures specify that in some incidents requiring “administrative led intervention” (those classified as “Level 3” incidents) the parents of the affected student may be contacted “about further disciplinary action and follow up.”
13. On May 5, 2017, Parent filed with the District the complaint that is the subject of this appeal.
    1. In her complaint, Parent made 12 separate allegations, including allegations that the District unlawfully restrained Student on September 21, 2016, and November 9, 2016.
    2. The District communicated to Parent that it was not accepting those parts of Parent’s complaint alleging violations of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570. The District communicated to Parent that she could file an appeal with the Department to investigate those allegations. The District subsequently investigated some of those allegations; however, it did not investigate all of them.
    3. On September 1, 2017, the District issued its decision on Parent’s May 5 complaint. In that decision, the District found that the Daycare Program’s staff did not comply with ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 with respect to the events occurring on November 9, 2016, because they failed to notify Parent that Student was restrained, failed to inform Parent that the District would be holding a debriefing meeting about the incident, and failed to notify Parent of any other pertinent information related to the incident. The District specifically found that daycare staff “failed to provide timely notification and appropriate information to [Parent] about the circumstances in which [Student] was placed in hold on November 9, 2016.”

**IV. For purposes of determining whether the District violated ORS 659.852, which prohibits retaliation against a student by an education program.**

1. On May 23, 2014, Parent filed a complaint with the United States Department of Education Office for Civil Rights (OCR).
   1. In her complaint, Parent alleged that the District discriminated against Student based on disability when, on March 17, 2014, the District disallowed Student from attending daycare programs at Ardenwald Elementary School, View Acre Elementary School, and other elementary schools located within the District.
   2. OCR accepted Parent’s May 23 complaint on July 30, 2014. The OCR reference number for the complaint is 10141363.
   3. Parent and the District entered into complaint resolution proceedings. During the proceedings, Parent and the District entered into a complaint resolution agreement, under which:
      1. The District agreed to change its daycare enrollment processes to identify applicants and attendees with a disability.
      2. The District agreed to provide families with written information that daycare services were available to all students, including students with a disability, by January 16, 2015.
      3. The District agreed to meet with the parents of students with a disability to discuss how to accommodate them at daycare.
      4. The District agreed to meet annually with parents of students with a disability attending daycare to discuss how to better accommodate them.
      5. The District agreed that daycare staff, when disciplining a child, should consider whether the student has a disability.
      6. The District agreed to provide appropriate training to daycare staff on how to discipline a student with a disability.
      7. The District agreed to enroll Student in the Oak Grove Elementary School daycare program.
   4. Parent signed the complaint resolution agreement on December 3, 2014. The District signed the complaint resolution agreement on December 4, 2014. OCR closed the case on December 5, 2014.
   5. On February 22, 2015, Parent reported to OCR that the District had failed to fulfill the terms of the agreement. Parent specifically reported that the District had failed to provide families with written information that daycare services were available to all students, including students with a disability, by January 16, 2015.
2. During the 2016-2017 school year, the District provided transportation services to Student. Documents provided by the District substantiate that the District often changed Student’s transportation plan during the school year.
3. The parties stipulate that on August 31, 2016, an incident occurred at the Oak Grove Elementary School daycare program (Daycare Program) where Student was sent home early from the Daycare Program because he was accused by another student of choking the student. The parities stipulate that staff for the Daycare Program did not witness the incident and did not verify the other student’s accusations before sending Student home. The parities stipulate that staff interviewed the Student about the incident on September 7, 2016. Communications provided by Parent demonstrate that before September 7, 2016, she communicated to the District that staff did not verify the accusations before sending Student home.
4. Communications between Parent and the District demonstrate that Student was either sent home early from the Daycare Program or suspended from the program on September 21, 22, 23, 26, 29 and 30, 2016, October 3, 4, 5, 14, 17, 18, 19, 20, and 21, 2016, and November 2, 3, 4 and 9, 2016.
5. The parties stipulate that during the 2016-2017 school year, the District contracted with an independent contractor to provide transportation services for Student to Arata Creek School. Documentation demonstrates that the District first scheduled the use of the independent contractor on October 19, 2017, and that the independent contractor first transported Student on November 7, 2016. Documentation demonstrates that the District did not exclusively use the independent contractor.
6. The parties stipulate that on November 9, 2016, staff for the Daycare Program restrained Student. The parties stipulate that staff did not notify Parent about the restraint or inform Parent that they would be holding a debriefing meeting.
7. On November 12, 2016, Parent called the Clackamas County Child Abuse Hotline and reported the November 9 incident. Parent reported that during the incident, a staff member of the Daycare Program held Student from behind with both arms, in a “bear hug like fashion,” then put her leg between his legs and pulled him off balance, causing him to fall to the floor and hit his head.
8. Photographic evidence provided by Parent demonstrates that on or about November 12, 2016, Student had a large sore on his head.
9. On November 12, 2016, two officers contacted the Daycare Program about the November 9 incident.
10. On November 28, 2016, Parent reported to Department that the District had violated the federal Individuals with Disabilities Education Act (IDEA).
    1. Parent specifically alleged that the District:

* Did not provide Parent with access to Student’s files as required by IDEA;
* Failed to implement parts of Student’s Individualized Education Plan (IEP);
* Refused to review Student’s IEP as required by IDEA; and
* Placed Student in restrictive or otherwise inappropriate classrooms.
  1. The Department received and accepted Parent’s November 28 complaint on November 30, 2016. The Department’s case number for the complaint is 16-054-037.
  2. On January 26, 2017, the Department issued its Findings of Fact, Conclusions of Law, and Final Order for Parent’s November 28 complaint. In that order, the Department found that none of Parent’s allegations could be substantiated.

1. On December 31, 2016, Parent filed a second complaint with OCR. In her complaint, Parent alleged that the District discriminated against Student based on disability. On July 6, 2017, OCR requested Parent to provide additional information. Shortly thereafter, Parent provided the requested information. The OCR reference number for the complaint is 101710095.
2. During an interview conducted by the Department on June 6, 2018, the adminstrator of the Daycare Program stated that during the month of February 2017, Student was either sent home early from the program or suspended from the program five of his final six days attending the program. The administrator stated that Student was suspended for disciplinary reasons. On one occasion, Student used scissors to attack another student. On another occasion, Student wildly attacked a staff member of the Daycare Program, flailing his arms and kicking and biting the staff member.
3. On May 5, 2017, Parent filed with the District the complaint that is the subject of this appeal.

* 1. In her complaint, Parent made 12 separate allegations that invoked the following laws and rules:
* OAR 581-022-2345, which requires school districts providing transportation services to comply with all applicable state laws and rules;
* ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570, which prohibit the unlawful restraint or seclusion of a student by a public education program; and
* ORS 659.850 and OAR 581-021-0049 (1), which prohibits discriminating against a person on the basis of disability.
  1. The District accepted part of Parent’s May 5 complaint on June 26, 2017. The District accepted those parts of Parent’s complaint alleging violations of ORS 659.850 and OAR 581-021-0049 (1). The District also investigated those parts of Parent’s complaint alleging violations of OAR 581-022-2345, albeit with respect to whether the District discriminated against Student when providing transportation services.
  2. The District communicated to Parent that it was not accepting those parts of Parent’s complaint alleging violations of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570. The District communicated to Parent that she could file an appeal with the Department to investigate those allegations. The District subsequently investigated some of those allegations; however, it did not investigate all of them.
  3. On September 1, 2017, the District issued its decision on Parent’s May 5 complaint. In that decision, the District found that it was not deficient with respect to nine of Parent’s allegations. District found that it was deficient with respect to three of Parent’s allegations.

1. On August 1, 2017, Parent filed a third complaint with OCR. In her complaint, Parent alleged that the District had discriminated against students with disabilities by removing from its website the written information that daycare services were available to all students, including students with a disability, as required by the complaint resolution agreement that the District signed on December 4, 2014.
2. The parties stipulate that Student was disenrolled from Knott Creek School during the month of November, 2017, and that Student was subsequently placed in Heron Creek School. Documents provided by the District substantiate that Student was scheduled to begin attending Heron Creek School on January 15, 2018. The parties stipulate that Student began attending Heron Creek School on January 4, 2018, one day after the first day of school following winter break. Communications between members of school staff provided by the District substantiate that Student’s intake information and IEP was hand-delivered to Heron Creek School on December 7, 2017, to expedite the enrollment process.
3. Documents provided by the District demonstrate that Parent and the District discussed Student’s IEP on November 17, 2017, at a meeting concerning his transition from Knott Creek School to Heron Creek School. The meeting was attended by members of Knott Creek School staff, members of Heron Creek School staff, representatives for the District, and Parent. The meeting participants discussed whether to continue to provide Student with one-on-one support services. According to the documents, the District agreed to provide Student with one-on-one support services for part of each school day, particularly with respect to academics.

## DIVISION 22 STANDARDS AND APPEALS

At the direction of the Legislative Assembly of the State of Oregon, the State Board of Education has established educational standards that every school district must implement. ORS 326.051. Those standards, known as Division 22 Standards, are set forth in OAR Chapter 581, Division 22.

School districts must comply with Division 22 Standards. If a parent or guardian of a student or a person who resides in the school district believes the district is not in compliance with a Division 22 Standard, the person may file a complaint with the school district. Following a final decision by the school district, the person may appeal the Division 22 complaint to the Department using the process set forth in OAR 581-002-0040.

If the Department conducts an investigation and determines that a school district is out of compliance with a Division 22 Standard, the school district must submit to the Department a plan for becoming compliant with the standard. ORS 327.103 (3). The Director of the Oregon Department of Education must approve the plan.

A noncompliant school district is required to be back in compliance before the beginning of the following school year. ORS 327.103 (2). If the director determines that a deficiency cannot be corrected before the beginning of the next school year, the director may allow an extension of time to demonstrate compliance, not to exceed 12 months. ORS 327.103(3)(a). If the district fails to show compliance within the required time, the director may withhold state school funds. ORS 327.103 (2).

### 1. Summary of Division 22 Standards on Appeal

This order concerns whether the District violated OAR 581-022-1941, as in effect as the time that Parent filed her initial complaint, and OAR 581-022-2345. OAR 581-022-1941, as in effect at the time that Parent filed her initial complaint, requires school districts to establish a process for the prompt resolution of a complaint by a person who resides in the district or by any parent or guardian of a student who attends school in the district. OAR 581-022-2345 requires school districts providing transportation services to comply with all applicable state transportation laws and rules.

### 2. Analysis of Whether the District Violated OAR 581-022-1941

Parent alleges that the District is in violation of OAR 581-022-1941 because the District:

* Did not accept Parent’s complaint in a timely fashion;
* Directed Parent to fill out a formal complaint form when Parent already had submitted the substance of her complaint to the District in writing;
* Refused to investigate certain aspects of her complaint, specifically those related to restraint and seclusion; and
* Relied on an independent investigator who, Parent alleges, did not “show” the evidence that she relied upon in making her findings.

The District answers that it followed its complaint procedure in investigating Parent’s complaint. The District admits that it limited the scope of its investigation to certain matters. The District directed Parent to appeal matters not investigated to the Department. However, the District otherwise contends that Parent’s allegations are unsubstantiated.

When investigating whether a school district’s complaint procedure is in violation of OAR 581-022-1941, the Department is limited to examining whether the written complaint procedure complies with the rule. If a school district developed a complaint procedure that met the requirements of OAR 581-022-1941, the Department’s investigation ends. The Department, acting under the authority of a Division 22 appeal, does not review the quality of the investigation conducted by the school district, the district’s adherence to timelines that are a part of the complaint procedure, or the school district’s responsiveness to and relationship with community members. Those issues fall under the oversight of the locally elected school board.

OAR 581-022-1941, as in effect at the time that Parent filed her initial complaint, requires school districts to “establish a process for the prompt resolution of a complaint by a person who resides in the district or by any parent or guardian of a student who attends school in the school district.” The rule requires the complaint procedure to “specify the time period during which the complaint will be addressed and final decision issued.” The rule requires the complaint procedure to include “[a] point at which the decision is final,” “a provision for the complainant [to] receive written notice that the district’s decision may be appealed to the [Department],” and “[a] written decision that clearly establishes the legal basis for the decision.”[[6]](#footnote-6)

The District has adopted a complaint procedure. The District’s complaint procedure specifies that the school board’s decision is a “final determination.” The complaint procedure clearly informs complainants that they may appeal a decision to the Department. The complaint procedure sets forth the standard that a “final determination will be in writing and will clearly establish the legal basis for the decision, findings of fact and conclusions of law.”

The District’s complaint procedure is a multi-step process. For each step, the District’s complaint procedure specifies the time during which a complainant may appeal the most recent decision and during which the District must issue a decision after conducting an investigation. The District’s complaint procedure does not specify the time during which an investigation must be conducted or the overall time period during which a complaint must be resolved.

OAR 581-022-1941 (2)(c) , as in effect at the time that Parent filed her initial complaint, clearly requires a school district to “specify the time period during which [a] complaint will be addressed and a final decision issued.” The role also clearly requires a school district with a multi-step complaint procedure to “establish the time period for each step as well as the overall time period for completing the complaint procedure.”

The District’s complaint procedure does not meet either standard. It does not specify the time period during which a complaint will be addressed and a final decision issued. It does not specify, for each step in the District’s complaint procedure, the “the time period for each step.” The District’s complaint procedure establishes timelines by which a complainant may appeal the most recent decision of the District and by which the District must issue a decision after conducting an investigation. As written, the District’s complaint procedure is an open-ended process with indefinite periods of time during which the District may conduct investigations.

The Department finds that the District is deficient under OAR 581-022-1941.

### 3. Analysis of whether the District violated OAR 581-022-2345

Under OAR 581-022-2345, “[p]upil transportation provided by [a] school district shall comply with all applicable Oregon Revised Statutes and Oregon Administrative Rules.” Under OAR 581-053-0004 (1), school districts “shall provide transportation in compliance with all applicable laws and administrative rules.” Under OAR 581-023-0004 (2), school districts “that contract out all or part of their pupil transportation services are required to ensure that their contractor complies with all applicable laws and administrative rules.” Under OAR 581-023-0004 (3), school districts may not “knowingly permit any person to operate a . . . school activity vehicle in violation of any applicable rules of the State Board of Education or Oregon laws.”

#### I. Arguments presented

Parent alleges that the District is in violation of OAR 581-022-2345 because the District:

* Did not use a booster seat to transport Student on two occasions;
* Dropped him off at school when the staff person who was designated as the person to escort students into the school building was not present;
* Transported him to the wrong daycare program; and
* Did not appropriately handle an incident when the driver transporting Student for the District inappropriately touched Student’s hand.

With respect to the first allegation, the District responds that it used an independent contractor to provide Student with transportation services on both occasions that he was transported without a booster seat. During the first incident, the independent contractor was using a new vehicle that was not equipped with a booster seat. During the second incident, the driver of the vehicle “was not aware” that Parent had requested the use of a booster seat.

The District claims that after these incidents occurred, it provided the school with a booster seat that could be used to transport Student in the event that the independent contractor arrived at the school without one. The District also claims that an administrator for the school purchased a booster seat for the same purpose.

The District also argues that law and rule did not require the District to use a booster seat when transporting Student. First, because Student weighed 94 pounds at the time that the incidents occurred. Second, because when the District used a booster seat to transport Student, Student was not properly secured. According to Parent, using the booster seat was necessary because without it, the shoulder belt was positioned across Student’s neck, not over the collarbone and away from the neck as required by law. *See* ORS 811.210 (2). According to the District, using the booster seat elevated Student so high that the top of his head nearly touched the ceiling of the vehicle. Although the District did not specifically state that using the booster seat caused the shoulder belt to be improperly positioned across Student’s body, the District’s statements imply that without the booster seat, the shoulder belt was positioned correctly across Student’s collarbone.

With respect to the second allegation, the District responds that a staff person was present at the time that Student was dropped off. According to the District, the staff person was a different person than the one designated to escort students into the school building because the District was late in transporting Student to the school. Parent contends that the staff person was not specifically waiting for Student, but was parking his or her car and entering the school building to go to work when Student was dropped off. According to Parent, the staff person was not specifically waiting for Student, but just happened to be present.

With respect to the third allegation, the District admits that it transported Student to the wrong daycare program. The District further admits that it did not respond to Parent’s initial complaint. The District claims that Student told the driver to transport him to the wrong daycare program. The District further claims that after Student was dropped off at the wrong daycare program, a person who works for the program transported Student to the correct daycare program.

With respect to the fourth and final allegation, the District provided the Department with communications between Parent and the District demonstrating that the District acknowledged that the driver inappropriately touched Student’s hand. The communications further reflect that the driver worked for an independent contractor and that the District contacted the contractor about the incident. The District claims that it asked the independent contractor for information related to how the contractor trained its drivers. The District also claims that it directed the independent contractor to the contractor’s own policy, under which drivers may not touch students for any reason, including for the reason that a student had grabbed the personal property of a driver. The communication also reflects that the District asked Parent whether she wanted a different driver to transport Student. Documents provided by the District to the Department substantiate that a different driver transported Student after the incident.

#### II. Allegations over which the Department lacks subject matter jurisdiction

Of the allegations made by Parent, only the first allegation, concerning the use of a booster seat, raises the issue of violating a state law or rule related to transporting of students.

There is no state law or rule requiring an adult to be present when dropping off a student or other minor. There is no state law or rule prohibiting the transportation of a student or other minor to the wrong location. Finally, although there are laws and rules concerning the inappropriate touching of a minor, in consideration of the plain language of OAR 581-022-2345 and 581-053-0004 (each is written as an extension of the state’s policies regarding the transportation of students) the Department finds that to violate either rule, the specific “law” or “rule” at issue would have to prohibit the inappropriate touching of a minor *by a person providing transportation services*. In other words, in consideration of the plain language of OAR 581-022-2345 and 581-053-0004, a person does not violate either rule if the specific “law” or “rule” at issue is a law or rule of general applicability.

Under OAR 581-022-2345, “[p]upil transportation provided by [a] school district shall comply with all *applicable*” law and rules. The provisions of OAR 581-053-0004 specifically pertain to “transportation,” “transportation services,” and the operation of a “school activity vehicle.” Both rules require the law or rule at issue to concern the transportation of students or other minors. Neither of the rules are broad enough to apply to laws and rules of general applicability, where violations may occur while providing transportation services, but are not specifically about providing transportation services. As written, OAR 581-022-2345 and 581-053-0004 require the type of person who inappropriately touches a minor to be an element of a prohibition and the type of person to whom the prohibition applies to be a person providing transportation services. There is no law or rule that meets these criteria.

It should be noted that under OAR 581-053-0210, “[e]ach school board shall adopt and implement a written transportation policy regarding student conduct and discipline that conforms to ORS 339.250.” Under ORS 339.250 (8), a school district must adopt policies that “allow an individual who is a teacher, administrator, school employee or school volunteer to use reasonable physical force upon a student.” Under ORS 339.250 (9), the “authority to discipline a student does not authorize the infliction of corporeal punishment.” ORS 339.250 (9) defines corporeal punishment as “the willful infliction of, or willfully causing the infliction of, physical pain.” Exemptions to ORS 339.250 (9) include the use of physical force to the extent that it is necessary to maintain discipline or order and as permitted under the restraint and seclusion laws of this state. *See* ORS 161.205 (1) and (3) and 339.250 (9)(b)(B). In this instance, the parties agree that the driver transporting Student for the District inappropriately touched Student’s hand. By agreeing that it was inappropriate, the parties impliedly stipulate that the driver did not need to touch Student’s hand to maintain discipline or order. The parties also impliedly stipulate that the driver did not touch Student’s hand as permitted under the restraint and seclusion laws of this state. However, OAR 581-053-0210 does not provide a basis for the Department to regulate the actual disciplining of a student. The actual disciplining of a student is a local matter subject to the regulation of the locally elected schoolboard. Under the rule, the Department may ensure that a school district has a policy for disciplining a student that comports with ORS 339.250.

The District has a policy that comports with ORS 339.250. Under the District’s student discipline policy, “[s]tudents are subject to discipline for conduct while traveling to and from school.”[[7]](#footnote-7) Under the District’s corporeal punishment policy, school personnel may not use physical force to discipline or punish a student.[[8]](#footnote-8)

#### III. Failure to use a booster seat when transporting Student

For purposes of determining whether the District violated OAR 581-022-2345 by transporting Student without a booster seat, the most pertinent provision of law is ORS 811.210 (2). Under that statute, it is unlawful to transport a child without using a child safety system. Under ORS 811.210 (2)(c):

[A] person who weighs more than 40 pounds and who is four feet nine inches or shorter must be properly secured with a child safety system that elevates the person so that a safety belt or safety harness properly fits the person. As used in this paragraph, “properly fits” means the lap of the safety belt or safety harness is positioned low across the thighs and the shoulder belt is positioned over the collarbone and away from the neck.

For ORS 811.210 (2)(c) to apply, a person must weigh “more than 40 pounds” and must be “four feet nine inches or shorter.” When the District transported Student without using a booster seat, he was a “person who weigh[ed] more than 40 pounds and who [was] four feet nine inches or shorter.” The parties stipulate that Student weighed more than 80 pounds on the dates on which the District transported him without using a booster seat. Communications between Parent and Student’s medical care provider substantiate that Student was 53 inches tall on March 6, 2017.

The District argues that it was exempt from the requirements of ORS 811.210 (2) because Student weighed more than 80 pounds at the time that it transported Student without using a booster seat. However, there is no provision of law that exempts a minor from ORS 811.210 (c) on the basis that a Student has attained a specified weight. Rather, the pertinent exemption to ORS 811.210 (c) concerns a minor’s age.

Under ORS 811.210 (2)(e), even if a person who weighs more than 40 pounds is 57 inches or shorter, it is not unlawful to transport the person without using a child safety system if the person is “eight years of age or older.” It is sufficient to secure persons who are eight years of age or older with either a safety belt or a safety harness.[[9]](#footnote-9) *See* ORS 811.210 (2)(e). Student was eight years of age or older at the time that the District transported him without using a booster seat.

Under these circumstances, the District was not required to transport him using a child safety system. Under ORS 811.210 (2)(e), the District was required to secure Student with either a safety belt or a safety harness. The District did not violate ORS 811.210 (2) when it failed to transport Student without using a booster seat.

The Department finds that the District is not deficient under OAR 581-022-2345.

### 4. Conclusion

The Department finds that the District is (1) deficient under OAR 581-022-1941 and (2) not deficient under OAR 581-022-2345.

## Restraint and Seclusion

In this state, a child may not be restrained or secluded in a public education program except as provided by law. *See* ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570. For purposes of Oregon’s restraint and seclusion law, a public education program is an early childhood education program, elementary school, or secondary school that (1) is under the jurisdiction of a school district, education service district, or another educational institution or program and (2) receives support, either directly or indirectly, from funds appropriated by the Oregon legislature to the Department.

If the Department determines on appeal that a public education program has unlawfully restrained or secluded a student, the public education program has 30 days from the date on which the Department issues its final order to remedy the restraint or seclusion. 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).

### 1. Arguments Presented

Parent alleges that the District is in violation of ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 because the District:

* Unlawfully restrained Student on September 21, 2016, and November 9, 2016;
* Unlawfully restrained Student on September 21, 2016, and November 9, 2016, because untrained persons performed the restraints;
* Did not properly notify Parent of the restraint occurring on September 21 because the District failed to provide her with notice on the day that the restraint occurred; and
* Did not properly communicate with Parent with respect to the restraint occurring on November 9 because the District failed to notify Parent that Student was restrained, failed to inform Parent that the District would be holding a debriefing meeting about the incident, and failed to notify Parent of any other pertinent information related to the incident.

The District did not respond specifically to Parent’s allegations except to admit that it failed to notify her of the restraint occurring on November 9.

The District points out that since the September 21 and November 9 incidents, it wrote new procedures for daycare staff to follow when imposing discipline and trained daycare staff to follow those procedures.

### 2. Unlawful Restraint

State law and rule prohibit “the use of a mechanical restraint, chemical restraint or prone restraint on a student.” ORS 339.288 (1) and OAR 581-021-0553 (1). A mechanical restraint is “a device used to restrict the movement of a student or the movement or normal function of a portion of the body of a student.” ORS 339.288 (3)(b)(A) and OAR 581-021-0550 (2). A chemical restraint is “a drug or medication that is used on a student to control behavior or restrict freedom of movement” and that is not prescribed by a qualified health professional and administered as prescribed. ORS 339.288 (3)(a) and OAR 581-021-0550 (1). Prone restraint is “a restraint in which a student is held face down on the floor.” ORS 339.288 (3)(c) and OAR 581-021-0550 (4).

State law and rule also prohibits the use of any restraint for discipline, punishment, or convenience. ORS 339.291 (1)(b) and OAR 581-021-0553 (2)(b).

Finally, state law and rule specify that a member of a public education program’s staff may restrain a student only if the student’s behavior imposes a reasonable threat of imminent, serious bodily injury and another less restrictive intervention would not effectively stop the student’s behavior. ORS 339.291 (1)(a) and OAR 581-021-0553 (2)(a).

With respect to the incident occurring on September 21, 2016, Parent provided the Department with an incident report filled out by daycare staff. According to the incident report, a staff member “was holding [Student] to avoid being hurt — held him [with] one arm [and] then two [arms] as [Student] continued to bite, kick, spit, scratch, punch, and grabbed [staff member’s] tie and pulled as hard as he could. Released after 1-2 minutes.” According to this description of events, Student was not unlawfully restrained. Student was not mechanically or chemically restrained. Student was not subject to a prone restraint. Student was not restrained for discipline, punishment, or convenience. Rather, Student was restrained because he was biting, kicking, scratching, punching, spitting at, and grabbing and pulling the clothes of daycare staff. Finally, there is sufficient evidence that Student’s behavior imposed a reasonable threat of imminent, serious bodily injury to daycare staff and that less restrictive interventions would not have effectively stopped his behavior. Under the circumstances, it would have been reasonable to assume that Student may cause serious bodily injury to daycare staff because he was biting, kicking, scratching, and punching. Under the circumstances, it is hard to imagine a less restrictive intervention than holding Student’s arms for 1-2 minutes.

Parent contends that bruises on Student’s arm indicate that he was unlawfully restrained. However, as written, ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 do not prohibit a person from using a specified level of force when restraining a student. The laws and rules of this state prohibit using certain types of restraint and using restraint to achieve certain outcomes.

With respect to the incident occurring on November 9, 2016, Parent alleges that a member of daycare staff held Student from behind with both arms, in a “bear hug like fashion,” then put her leg between his legs and pulled him off balance, causing him to fall to the floor and hit his head. Parent provided the Department with photographic evidence that on or about November 12, 2016, Student had a large sore on his head.

In an interview conducted by the Department on June 6, 2018, the administrator of the Daycare Program refuted Parent’s version of events. The administrator, who was hired after the November 9 incident, stated that the previous administrator told her that Student had not been thrown to the floor during the incident. When asked why Student had a large sore on his head, the administrator did not provide an alternate explanation.

There is scant evidence to support either Parent’s version of events or the District’s claim that her version of events is inaccurate. In support of Parent’s version, the District admits that if failed to notify Parent of the November 9 incident. Further, it appears as if District did not make an incident report of the incident. The Department finds that by not adhering to statutorily prescribed procedures, the District damages its credibility with respect to its contention that Parent’s version of events is not accurate. That said, there is a plausible explanation for why the District did not properly notify Parent: the District did not have, at the time of the incident, written procedures for complying with ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570.

On the other hand, on November 12, 2016, Parent reported the incident to the Clackamas County Child Abuse Hotline. Two officers subsequently contacted the Daycare Program to determine whether Parent’s allegations were true. On that occasion, the officers determined that there was not enough evidence of abuse for them to file an official complaint, suggesting that Parent’s version of events may not be accurate.

However, even if there was evidence of abuse, abuse and unlawful restraint are not directly analogous. A person who unlawfully restrains a student is not necessarily abusing the student, and a person who abuses a student may do so through the use of a lawful restraint.

The Department finds that the evidence does not substantiate Parent’s allegation. There is no record of the events to support Parent’s allegation. There is no other person who can verify Parent’s allegation. Communications between Parent and the District demonstrate that the parties disagreed about what transpired from the beginning. Parent argues that the photographic evidence that she provided the Department of the sore on Student’s head supports her contention that Student was unlawfully restrained. However, the fact that Student was harmed on or about November 9, 2016, does not, by itself, corroborate Parent’s version of events. Even if the injury could be linked to the restraint, the injury would not necessarily verify that a member of daycare staff held Student from behind with both arms, in a “bear hug like fashion,” then put her leg between his legs and pulled him off balance, causing him to fall to the floor and hit his head. For instance, Student could have received the injury during a lawful restraint where daycare staff held Student in a supine position while Student banged his head against the floor.

The Department finds that the District did not commit an unlawful restraint under ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570.

### 3. Untrained Personnel

Parent argues that the District violated ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 because daycare staff who were not trained by the Oregon Intervention System restrained Student.

Under ORS 339.300, the Department is required to approve a training program for restraining students. OAR 581-021-0563 is the rule that sets forth the processes by which the Department will approve a training program for restraining student. However, state law and rule do not require a restraint to be performed by personnel who has been trained. Under ORS 339.291 (2), a restraint must be:

(b) Imposed by personnel . . . who are:

(A) Trained to use physical restraint or seclusion through programs described in ORS339.300; or

(B) Otherwise available in the case of an emergency circumstance when personnel described in subparagraph (A) of this paragraph are not immediately available due to the unforeseeable nature of the emergency circumstance[.]

OAR 581-021-0553 (2)(c)(B) imposes a similar requirement. Under the rule, restraints must be imposed by personnel who are:

(i) Trained to use physical restraint or seclusion through programs approved by the Department . . . under OAR 581-021-0563; or

(ii) Otherwise available in the case of an emergency circumstance when trained personnel are not immediately available due to the unforeseeable nature of the emergency circumstance.

Parent does not contend that the restraints occurring on September 21 and November 9 involved nonemergency circumstances or that the need for trained personnel was foreseeable. The evidence does not otherwise suggest that the restraints involved nonemergency circumstances or that the need for trained personnel was foreseeable.

The Department finds that the District did not commit an unlawful restraint under ORS 339.285 to 339.303 and OAR 581-021-0550 to 581-021-0570 because untrained personnel performed the restraints.

### 4. Notice Requirements

ORS 339.294 establishes the procedures by which a school district must provide notice to a parent following a restraint of the parent’s child. Under the statute, following a restraint, a school district must provide a parent with “verbal or electronic notification of the incident by the end of the school day when the incident occurred,” and “written documentation of the incident within 24 hours of the incident.” The written documentation must include:

(A) A description of the physical restraint or seclusion, including:

(i) The date of the physical restraint or seclusion;

(ii) The times when the physical restraint or seclusion began and ended; and

(iii) The location of the physical restraint or seclusion.

(B) A description of the student’s activity that prompted the use of physical restraint or seclusion.

(C) The efforts used to de-escalate the situation and the alternatives to physical restraint or seclusion that were attempted.

(D) The names of the personnel of the public education program who administered the physical restraint or seclusion.

(E) A description of the training status of the personnel of the public education program who administered the physical restraint or seclusion, including any information that may need to be provided to the parent or guardian [concerning the reason the physical restraint or seclusion was administered by a person without training]. ORS 339.294 (2)(b).

The statute also requires a school district to provide a parent with “[t]imely notification of a debriefing meeting to be held [by the school district] . . . and the parent’s right to attend the meeting.” ORS 339.294 (2)(c).

Finally, if the school personnel who administered a restraint were not trained by a program approved by the Department, the school district must provide the student’s parent with written notification of “[t]he lack of training” and “[t]he reason the physical restraint . . . was administered by a person without training.” ORS 339.294 (3).

OAR 581-021-0556 imposes requirements similar to those imposed under ORS 339.294. Under the rule, a parent must be verbally or electronically notified of a restraint of the parent’s child by the end of the school day on which the restraint occurred. OAR 581-021-0556 (2)(a). Under the rule, a parent must receive written notification of the incident within 24 hours of the incident occurring. OAR 581-021-0556 (2)(b). The rule sets forth the exact same requirements for the contents of the notice as ORS 339.294, except that the rule also requires the written notice to include “[t]imely notification of a debriefing meeting to be held [by the school district] and of the parent’s . . . right to attend the meeting.” Finally, the rule requires—in those circumstances where school personnel who administered a restraint were not trained by a program approved by the Department—a school district to provide the parent with written notification of “[t]he lack of training” and “[t]he reason the physical restraint . . . was administered by a person without training.” OAR 581-021-0556 (3).

With respect to the restraint of Student occurring on September 21, 2016, an incident report substantiates that a member of daycare staff restrained Student. According to the incident report, Student refused to attend class and was sent to an “office.” At the office, Student attacked a staff member. The staff member “was holding [Student] to avoid being hurt — held him [with] one arm [and] then two [arms] as [Student] continued to bite, kick, spit, scratch, punch, and grabbed [staff member’s] tie and pulled as hard as he could. Released after 1-2 minutes.” Student subsequently followed instructions, quieted down, and became “chatty.” The incident report indicates that Parent was provided a copy of the incident report on September 22, 2016. The incident report indicates that Parent was notified about the incident “in person” on September 22, 2016.

The September 21 incident report substantiates that the District violated the provisions of ORS 339.294 and OAR 581-021-0556 in 3 different ways. First, the incident report indicates that Parent was notified about the incident “in person” on September 22, 2016. The incident report does not otherwise indicate that Parent was notified verbally or electronically by the end of the school day as required by law and rule. *See* ORS 339.294 (2)(a) and OAR 581-021-0556 (2)(a). Second, the incident report does not contain information related to a debriefing meeting, as required by OAR 581-021-0556 (2)(b)(H). Finally, the incident report does not contain information about the training qualifications of the school personnel who performed the restraint, as required by ORS 339.294 (2)(b)(E) and OAR 581-021-0556 (2)(b)(G).

The District admits that it was not compliant with any of the provisions of ORS 339.294 (2) and (3) or OAR 581-021-0556 (2) and (3) by admitting that it failed to (1) notify Parent that Student was restrained on November 9, (2) inform Parent that the District would be holding a debriefing meeting about the incident, and (3) notify Parent of any other pertinent information related to the incident.

The District points out that since the September 21 and November 9 incidents, it wrote new procedures for daycare staff to follow when imposing discipline and trained daycare staff to follow those procedures. The Department acknowledges that the District has attempted to correct its own deficiencies with respect to the procedures required by law and rule when a student is restrained. However, upon inspection, the District’s current procedures are not an accurate reflection of the notice requirements set forth in ORS 339.294 or OAR 581-021-0556.

The procedures specify that in incidents requiring “administrative led intervention,” parents of the affected student “should be notified as soon as possible, but no later than [the] end of [the] day.” However, the procedures do not specify that in all incidents requiring “administrative led intervention,” parents of the affected student should be timely notified of a debriefing meeting. The procedures specify that in some incidents requiring “administrative led intervention” (those classified as “Level 3” incidents) the parents of the affected student *may* be contacted “about further disciplinary action and follow up.” At best, the inclusion of this language is confusing. If “Level 3” incidents do not involve a restraint, by not distinguishing when daycare staff *must* notify parents of a debriefing meeting, the procedures may be misinterpreted by daycare staff. At worst, the inclusion of this language is in direct conflict with law and rule. If “Level 3” incidents do involve a restraint, the procedures indicate that daycare staff have the authority to determine whether to contact a parent.

The procedures also do not specify that when untrained daycare staff restrain a student, the parent must be notified of the lack of training and provided with an explanation for why an untrained person performed the restraint.

For purposes of this order, the Department gives weight to the fact that the incident report used by the District on September 21, 2016, did not contain some of components required by law. Specifically, it does not contain information related to debriefing meetings or to the training qualifications of the person performing the restraint.

### 5. Conclusion

The Department finds that the District is deficient under ORS 339.294 (2) and (3) and OAR 581-021-0556 (2) and (3).

## Prohibition Against Retaliation

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).

### 1. Arguments Presented

Parent alleges that the District is in violation of ORS 659.852 because the District:

* Retaliated against Student by suspending him from Oak Grove Elementary School daycare program (Daycare Program) without verifying accusations made by other students, and by continuing to use suspension to punish him without attempting to use other forms of discipline that Parent and the Daycare Program’s staff agreed to use at meetings related to Student’s IEP;
* Retaliated against Student by constantly changing his transportation plan, sometimes in a manner that required him to leave earlier than necessary, sometimes in a manner that caused him to leave for school so late that Parent had to either leave him unattended or miss part of her workday;
* Retaliated against Student by using an independent contractor with a “skanky” vehicle to transport him;
* Retaliated against Student by often transporting him alone;
* Retaliated against Student by unlawfully restraining him and not reporting the restraint;
* Retaliated against Student by referring him to Heron Creek School instead of allowing him to remain at Knott Creek School;
* Retaliated against Student by not enrolling him in Heron Creek School by January 3, 2018, the first of school following winter break;
* Retaliated against Student by not implementing his IEP; and
* Retaliated against student by not timely providing his IEP to Heron Creek School.

Parent alleges that the District committed the retaliatory acts described above because she (1) reported to law enforcement that a staff member at the Daycare Program abused Student and (2) filed various complaints against the District with OCR, the Department, and the District.

The District responds that in each instance, it was not retaliating against Parent, but was either disciplining Student or trying to accommodate Parent’s requests.

The District claims that it suspended Student only for disciplinary reasons. According to the District, on one occasion, Student used scissors to attack another student. On another occasion, Student wildly attacked a staff member of the Daycare Program, flailing his arms and kicking and biting the staff member.

The District admits that it did not report an incident in which a staff member of the Daycare Program restrained Student. However, the District contends that it did not unlawfully restrain Student. The District contends that Parent’s allegations related to the events occurring on November 9, 2016, are not accurate.

The District claims that it changed Student’s transportation plan for a variety of reasons. The District claims that it often changed Student’s transportation plan because he was often sent home early from school or suspended from school. The District also claims that Student posed disciplinary problems for drivers, sometimes necessitating the use of different drivers or transporting Student to school alone. The District also points out that logistics often necessitated changing Student’s transportation plan. Student was being transported from North Clackamas School District—which is located in the city of Milwaukie, Oregon—to Arata Creek School and Knott Creek School in Multnomah Education Service District—which are located in the northern part of Portland, Oregon, near the city of Gresham. Finally, the District claims that even though it occasionally used an independent contractor to transport Student, it prefers to use its own drivers and vehicles to transport students. The District provided the Department with evidence demonstrating its rationale with respect to its decisions regarding Student’s transportation.

With respect to referring Student to Heron Creek School, the District claims that he “was asked to leave Arata Creek [School]/Knott Creek [School] based on [his] escalating behavior, altercations [between him and staff,] and the parent’s distrust of the staff.”

With respect to not placing Student in Heron Creek School by January 3, 2018, the first day of school following winter break, the District provided documents to the Department substantiating that Student began attending school the next available school day, January 4, 2018. The District also provided evidence substantiating that Student was originally scheduled to begin school on January 15, 2018. Finally, the Department provided evidence substantiating that in order to allow Student to begin attending the school as early as possible, his intake information and IEP was hand-delivered to the school on December 7, 2017.

With respect to not implementing Student’s IEP, the District provided evidence to the Department that Parent and the District discussed his IEP on November 17, 2017, at a meeting concerning his transition from Knott Creek School to Heron Creek School. The meeting was attended by members of Knott Creek School staff, members of Heron Creek School staff, representatives for the District, and Parent. The meeting participants discussed whether to continue to provide Student with one-on-one support services. According to the documents, the District agreed to provide Student with one-on-one support services for part of each school day, particularly with respect to academics.

Finally, with respect to not timely providing Student’s IEP to Heron Creek School, the District provided evidence to the Department that Student’s IEP was hand-delivered to Heron Creek School on December 7, 2016.

### 2. Legal Standard for ORS 659.852

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).

### 3. 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 substantial evidence that Parent made several reports of this kind.

On May 23, 2014, Parent filed a complaint with the United States Department of Education Office for Civil Rights (OCR). In her complaint, Parent alleged that the District discriminated against Student on the basis of disability when, on March 17, 2014, the District disallowed Student from attending daycare programs at Ardenwald Elementary School, View Acre Elementary School, and other elementary schools located within the District.

On February 22, 2015, Parent reported to OCR that the District had failed to fulfill the terms of the agreement. Parent specifically reported that the District had failed to provide families with written information that daycare services were available to all students, including students with a disability, by January 16, 2015.

On November 12, 2016, Parent called the Clackamas County Child Abuse Hotline and reported that on November 9, 2016, a staff member of the Daycare Program held Student from behind with both arms, in a “bear hug like fashion,” then put her leg between his legs and pulled him off balance, causing him to fall to the floor and hit his head.

On November 28, 2016, Parent reported to Department that the District had violated the federal Individuals with Disabilities Education Act (IDEA). Parent specifically alleged that the District did not provide Parent with access to Student’s files as required by IDEA, failed to implement parts of Student’s IEP, refused to review Student’s IEP as required by IDEA, and placed Student in restrictive or otherwise inappropriate classrooms.

On December 31, 2016, Parent filed a second complaint with OCR. In her complaint, Parent alleged that the District discriminated against Student on the basis of disability.

On May 5, 2017, Parent filed with the District the complaint that is the subject of this appeal. In her complaint, Parent made 12 separate allegations. The District found that evidence substantiated three of the allegations.

On August 1, 2017, Parent filed a third complaint with OCR. In her complaint, Parent alleged that the District had discriminated against students with disabilities by removing from its website the written information that daycare services were available to all students, including students with a disability, as required by the complaint resolution agreement that the District had signed on December 4, 2014.

In each of these incidents, Parent reported in good faith information that she believed to be evidence of a violation of state or federal law, rule, or regulation. The Department finds that the facts substantiate that Parent engaged in an activity protected under ORS 659.852.

### 4. Second Prong: Adverse Educational Decision

Under ORS 659.852 (1)(b), adverse educational 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.

For the protections of ORS 659.852 to apply to Student’s situations, each action taken by the District that Parent claims is retaliatory in nature must be one of the adverse educational decisions listed above. Parent is not alleging that Student’s grades were reduced, that he was denied academic or employment opportunities, that he was excluded from academic or extracurricular activities, or that he was denied access to his transcripts. Parent is alleging that the District retaliated against Student by suspending him, disenrolling him, threatening him, harassing him, and taking other adverse actions against him that substantially disadvantage him.

#### I. Application of ORS 659.852 (1)(b) in consideration of its plain meaning

Under the plain meaning of ORS 659.852 (1)(b), the District made several adverse educational decisions against Student. The District either sent Student home early from the Daycare Program or suspended him from the program on the following dates: August 31, 2016, September 21, 22, 23, 26, 29 and 30, 2016, October 3, 4, 5, 14, 17, 18, 19, 20, and 21, 2016, November 2, 3, 4 and 9, 2016, and, during the month of February, 2017, for five of his final six days attending the program. The District also disenrolled Student from Knott Creek School during the fall of 2017.

#### II. Application of ORS 659.852 (1)(b) in consideration of its legislative history

Parent contends that the following constitute adverse educational decisions for purposes of ORS 659.852 (1)(b):

* The District constantly changed Student’s transportation plan, sometimes in a manner that required him to leave earlier than necessary, sometimes in a manner that caused him to leave for school so late that Parent had to either leave him unattended or miss part of her workday;
* The District used an independent contractor with a “skanky” vehicle to transport Student;
* The District often transported Student alone;
* The District unlawfully restrained Student and did not report the restraint; and
* The District did not enroll Student in Heron Creek School by January 3, 2018, the first of school following winter break.

None of the above allegations, if true, would constitute suspension, expulsion, disenrollment, grade reduction, denial of academic or employment opportunities, exclusion from academic or extracurricular activities, or denial of access to transcripts. Determining whether these allegations constitute an adverse educational decision for purposes of ORS 659.852 (1)(b) requires discerning legislative intent, specifically with respect to the terms “threat” and “harassment” and the phrase “adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.”

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.”

The dictionary defines “adverse” to mean “acting against” and “action” to mean “the bringing about of an alteration by force.” The dictionary further defines “substantially” to mean “in a substantial manner.” “Substantial,” in turn, means “something having good substance or actual value.” “Disadvantage” means “to affect unfavorably.” Thus, for purposes of ORS 659.852 (1)(b), an adverse educational decision includes any alteration to an academic, employment or extracurricular activity that (1) acts against a student, (2) is brought about by a school district by force, and (3) affects the student unfavorably in a substantive way or in a way that reduces the value associated with the activity.

Context and legislative history do not provide any alternate reading of the terms “threat” and “harassment” or the phrase “adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.”

The Department finds that constantly changing a student’s transportation plan in a manner that requires the student to leave for school earlier than necessary constitutes “harassment” because constantly changing a transportation plan in such a manner would be vexing and annoying to the student. Importantly, the evidence substantiates that Student’s transportation plan changed in this manner multiple times. If a school district changed a student’s transportation plan in this manner a single time, the Department may find that the evidence is insufficient to substantiate an act of vexation or annoyance.

The Department finds that changing a student’s transportation plan in a manner that requires a student to leave for school so late that the student’s parent would have to either leave him unattended or miss part of the parent’s workday constitutes an “adverse action that substantially disadvantages the student in academic, employment or extracurricular activities.” Because changing the student’s transportation plan directly affects the student’s school day, it is an alteration to an academic activity. Changing the plan in a manner that causes the student to leave for school so late that the student’s parent would have to either leave the student unattended or miss part of a workday “acts against” the student. Changing the transportation plan requires force. Changing the transportation plan affects the student unfavorably in a substantive way. Either the student would be left unattended or the parent of the student would be in danger of being disciplined at work.

The Department finds that under certain circumstances, not reporting a restraint *may* constitute an “adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.” Because the failure to report the restraint violates the education laws of this state, it is an alteration to an academic activity prescribed by law. The failure to report the restraint “acts against” the student. The failure to report the restraint *may* be made by force if the failure to report the restraint is a deliberate act against the student. Finally, the failure to report the restraint affects the student unfavorably in a substantive way because the student would not benefit from his or her parents discussing with the school district how to address the student’s behavior more effectively.

In this proceeding, the facts do not substantiate that the District failed to report the restraint by force. The facts do not substantiate that the District failed to report the restraint deliberately. The District may have been negligent, not intentional, with respect to its failure to report the incident occurring on November 9, 2016. The District may have failed to report the restraint because of inaction rather than action.

The Department finds that enrolling a student after the beginning of a term also *may* constitute an “adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.” Enrolling the student after the beginning of the term alters an academic activity. Enrolling the student after the beginning of the term “acts against” the student. Enrolling the student after the beginning of the term *may* be made by force. As with not reporting a restraint, evidence would have to substantiate that the school district deliberately enrolled the student after the beginning of the term. Finally, enrolling the student after the beginning of the term *may* affect the student unfavorably in a substantive way or in a way that reduces the value associated with an academic activity, provided that the late enrollment affected the student’s ability to learn or otherwise devalued the student’s education.

In this proceeding, the facts do not substantiate that District enrolled Student in Heron Creek School after January 3, 2018, the first day of school following winter break, by force. In fact, the facts substantiate the opposite. Student began attending school the next available school day, January 4, 2018. Student was originally scheduled to begin school on January 15, 2018. Finally, in order to allow Student to begin attending the school as early as possible, his intake information and IEP was hand-delivered to the school on December 7, 2017.

The facts also do not substantiate that the late enrollment affected Student in a substantive way or in a way that reduces the value associated with an academic activity. Student began attending school the next available school day, January 4, 2018. The evidence does not substantiate that Student was affected unfavorably by missing one day of school.

The Department finds that transporting a student in a “skanky” vehicle and transporting a student alone do not, absent other factors, constitute a “threat,” “harassment,” or an “adverse action that substantially disadvantages a student in academic, employment or extracurricular activities.” Neither necessarily indicates something impending and usually undesirable or unpleasant. Neither is an act that has the purpose of vexing or annoying a student. Neither necessarily alters an academic, employment or extracurricular activity. Neither necessarily affects a student unfavorably in a substantive way or in a way that reduces the value associated with an academic activity.

#### III. Unsubstantiated allegations

As for Parent’s remaining allegations—that the District retaliated against Student by unlawfully restraining him, by not implementing his IEP, and by not timely providing his IEP to Heron Creek School—each also presents the Department with a question of legislative intent. However, the Department finds that the facts do not substantiate Parent’s underlying claims that these incidents occurred.

With respect to Parent’s allegation that the District retaliated against Student by unlawfully restraining him, as discussed previously in this order, the evidence does not substantiate that Student was unlawfully restrained.

With respect to Parent’s allegation that the District retaliated against Student by not implementing his IEP, the District provided evidence to the Department that Parent and the District discussed his IEP on November 17, 2017, at a meeting concerning his transition from Knott Creek School to Heron Creek School. The meeting was attended by members of Knott Creek School staff, members of Heron Creek School staff, representatives for the District, and Parent. The meeting participants discussed whether to continue to provide Student with one-on-one support services. According to the documents, the District agreed to provide Student with one-on-one support services for part of each school day, particularly with respect to academics.

With respect to Parent’s allegation that the District retaliated against Student by not timely providing his IEP to Heron Creek School, the District provided evidence to the Department that Student’s IEP was hand-delivered to Heron Creek School on December 7, 2016.

#### IV. Summary of Department’s Findings Related to Adverse Educational Decisions

In summary, the Department finds that the District made an adverse educational decision when it sent Student home early from the Daycare Program or suspended him from the program, when it disenrolled him from Knott Creek School, and when it constantly changed Student’s transportation plan, sometimes in a manner that required him to leave earlier than necessary, sometimes in a manner that caused him to leave for school so late that Parent had to either leave him unattended or miss part of her workday.

The District finds that the District’s other actions do not constitute an adverse educational decision for purposes of ORS ORS 659.852 (1)(b).

### 5. Third Prong: Causal Link

As a preliminary matter, it is important to understand that any adverse educational decision made by the District necessarily must have occurred on or after the date on which Parent reported a violation of state or federal law, rule, or regulation. Any adverse educational decision made by the District occurring before the date on which Parent reported a violation, no matter how much it disadvantaged Student, cannot be used as proof of retaliation because an act of retaliation only exists if engaging in a protected activity *causes* an adverse educational decision.

For purposes of the adverse educational decisions occurring before November 12, 2016, the date on which Parent called the Clackamas County Child Abuse Hotline, the only pertinent reports are the ones made by Parent to OCR on May 23, 2014, and February 22, 2015. These adverse educational decisions include sending Student home early from the Daycare Program or suspended him from the program on the following dates: August 31, 2016, September 21, 22, 23, 26, 29 and 30, 2016, October 3, 4, 5, 14, 17, 18, 19, 20, and 21, 2016, and November 2, 3, 4 and 9, 2016.

For purposes of the adverse educational decisions occurring before May 5, 2017, the date on which Parent filed the complaint with the District that is the subject of this appeal, the only pertinent reports are the reports made by Parent to OCR on May 23, 2104, February 22, 2015, and December 31, 2016, to the Clackamas County Child Abuse Hotline on November 12, 2016, and to the Department on November 28, 2016. These adverse educational decisions include suspending Student during the month of February, 2017, for five of his final six days attending the Daycare Program and constantly changing Student’s transportation plan.

All of Parent’s reports are pertinent with respect to the final adverse educational decision at issue in this order, Student’s disenrollment from Knott Creek School.

#### I. Adverse educational decisions occurring before November 12, 2016

With respect to adverse educational decisions occurring before November 12, 2016, the evidence does not substantiate that reports made by Parent to OCR on May 23, 2014, and February 22, 2015, were a substantial factor in sending Student home early or suspending him from the Daycare Program. Instead, the evidence suggests that Student was sent home early and suspended for disciplinary reasons.

To substantiate a causal link between the reports and the suspensions, there would have to be either evidence of direct causation (such as a school district making statements that a student or parent reporting a violation of state or federal law, rule, or regulation is the cause of the adverse educational decision) or evidence of a strong corollary between the reporting of the information and an adverse educational decision (such as a school district making the adverse educational decision for no discernable reason immediately after a student or parent reports a violation of state or federal law, rule, or regulation). In this case, there is no evidence of direct causation. Further, a year and six months transpired between Parent’s February 22, 2015, report and Student’s first suspension on August 31, 2016. There is no evidence of a corollary between the two.

#### II. Adverse educational decisions occurring before May 5, 2017

With respect to adverse educational decisions occurring before May 5, 2017, the evidence does not substantiate that reports made by Parent to OCR on May 23, 2014, February 22, 2015, and December 31, 2016, by Parent to the Clackamas County Child Abuse Hotline on November 12, 2016, and by Parent to the Department on November 28, 2016, were a substantial factor in the adverse educational decisions made after that date.

Again, there is no evidence that the reports directly caused the District to change Student’s transportation plan or suspend him for five of his final six days attending the Daycare Program.

Also, there is very little evidence of a corollary between the reports and the adverse educational decisions. Parent argues that the evidence substantiates retaliation because there is a correlation between her reporting additional violations of state or federal law, rule, or regulation, and an increase in the number of adverse educational decisions made against Student. Although the Department finds the number of adverse educational decisions made against student disquieting, the Department does not find that a corollary between reporting additional violations and an increase in adverse educational decisions, alone, proves that the former caused the latter. The adverse educational decisions could be the product of ineffective educational policies or the actions of a student with significant behavioral issues.

Furthermore, there is evidence that the District made the adverse educational decisions for reasons other than disadvantaging Student. With respect to constantly changing Student’s transportation plan, the District claims that it often changed Student’s transportation plan because he was often sent home early from school or suspended from school. The District also claims that Student posed disciplinary problems for drivers, sometimes necessitating the use of different drivers. The District also points out that logistics often necessitated changing Student’s transportation plan. Student was being transported from the city of Milwaukie, Oregon, to the northern part of Portland, Oregon, near the city of Gresham. Finally, the District claims that even though it occasionally used an independent contractor to transport Student, it prefers to use its own drivers and vehicles to transport students. The District provided the Department with evidence demonstrating its rationale with respect to its decisions regarding Student’s transportation.

With respect to suspending Student for five of his final six days attending the Daycare Program, the District argues that it suspended Student for disciplinary reasons. The District claims that during these final days in the program, Student used scissors to attack another student on one occasion and wildly attacked a staff member of the program on another occasion.

#### III. Other adverse educational decisions

With respect to the remaining adverse educational decision, that the District disenrolled Student from Knott Creek School, the evidence does not suggest that reports made by the Parent that the District violated state or federal law, rule, or regulation caused the disenrollment.

There is no evidence that the reports directly caused the disenrollment. There is little evidence of a corollary between the two. Parent argues that the accumulation of reports caused the District to make the decision; however, there is no other evidence that the former caused the latter.

District argues that Student was disenrolled from leave Knott Creek School because his behavior at the school was escalating, altercations between him and school staff were increasing, and the parent distrusted school staff. The District argues that under the circumstances, it had no choice other than to disenroll Student.

### 6. Conclusion

The Department finds that the District is not deficient under ORS 659.852.

## CONCLUSIONS AND CORRECTIVE ACTION

The Department finds that the District is deficient under OAR 581-022-1941[[10]](#footnote-10), ORS 339.294 (2) and (3), and OAR 581-021-0556 (2) and (3). The Department finds that all other allegations made by Parent are unsubstantiated.

The District must submit to the Department a plan for becoming compliant with those statutes and rules.

For purposes of developing a plan for becoming compliant with OAR 581-022-1941, the District must contact Mark Mayer, Office of Government and Legal Affairs, Oregon Department of Education. The Department will provide contact information for Mr. Mayer upon request.

For purposes of developing a plan for becoming compliant with ORS 339.294 (2) and (3), and OAR 581-021-0556 (2) and (3), the District must contact Lisa Bateman, Office of Student Services, Oregon Department of Education. The Department will provide contact information for Ms. Bateman upon request.

The District must be back in compliance before the beginning of the 2019-2020 school year. If the Director of the Oregon Department of Education determines that the District is not compliant by the beginning of the 2019-2020 school year, the director may allow an extension of time to demonstrate compliance, not to exceed 12 months. If the District fails to show compliance within the required time, the director may withhold state school funds.

Sincerely,

Mark Mayer

Government and Legal Affairs

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503-947-0464

1. The rule governing district complaint processes, OAR 581-022-1941, was recently revised by the State Board of Educationand renumbered as OAR 581-022-2370. However, the revisions are applicable to compalints filed on or after January 1, 2018. For purpose of this appeal, therefore, the applicable administrative rule is OAR 581-022-1941. [↑](#footnote-ref-1)
2. The District’s complaint policy is available at <http://policy.osba.org/nclack/KL/KL%20D1.PDF>. [↑](#footnote-ref-2)
3. The District’s complaint procedure is available at <http://policy.osba.org/nclack/KL/KL%20R%201%20D1.PDF>. [↑](#footnote-ref-3)
4. The District’s discipline policy is available at <http://www.nclack.k12.or.us/schoolboard/page/district-policies-0>. [↑](#footnote-ref-4)
5. The District’s punishment policy is available at <http://www.nclack.k12.or.us/schoolboard/page/district-policies-0>. [↑](#footnote-ref-5)
6. OAR 581-022-2370, the rule that currently governs the district complaint process, sets forth the same requirements. [↑](#footnote-ref-6)
7. *See* s*upra* note 4. [↑](#footnote-ref-7)
8. *See* s*upra* note 5. [↑](#footnote-ref-8)
9. ORS 811.250 (2)(e) specifically requires a person who is eight years of age or older to “be properly secured with a safety belt or safety harness that meets requirements under ORS 815.055.” Under ORS 815.055:

   (1) The Department of Transportation shall adopt and enforce rules establishing minimum standards and specifications for the construction and installation of safety belts, safety harnesses or child safety systems and anchors or other devices to which safety belts, safety harnesses or child safety systems may be attached and secured.

   ORS 815.055 (1)(a) further requires the rules adopted by the Department of Transportation to “conform to the standards for child safety systems established by the federal government.” Pursuant to ORS 815.055, the Department of Transportation has adopted OAR 735-102-0010, through which the Department of Transportation adopts by reference 49 C.F.R. 571.213. [↑](#footnote-ref-9)
10. OAR 581-022-2370, the rule that currently governs the district complaint process, sets forth the same requirements. [↑](#footnote-ref-10)