July 3, 2019

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Tim Porter, Superintendent

South Umpqua School District

558 Chadwick Lane

Myrtle Creek, OR 97457

Dear PARENT and Superintendent Porter,

This letter is the Final Order on the December 18, 2018, appeal filed by PARENT (Parent) alleging a violation of ORS 659.852 by South Umpqua School District. The objective of this order is to determine whether the district is in compliance with ORS 659.852 and, if necessary, specify corrective action to be completed by the district.

## PROCEDURAL BACKGROUND

This is an appeal of a final decision issued by South Umpqua School District on October 26, 2018. Parent filed her initial complaint with the district on October 2, 2018. In that complaint, Parent alleged that a volleyball coach was acting inappropriately toward her daughter’s volleyball team. Parent further suggested that the coach “should be relieved of her duties and not be allowed to coach at the . . . district again.”

Two days later, on October 4, 2018, Parent received a no trespass order from the district, stating that she may not enter the grounds of her daughter’s school.

Parent subsequently filed with the district an appeal to the October 2nd complaint, alleging that the district had retaliated against Student because she filed the complaint.

The district responded to Parent on October 26, 2018, issuing an order finding that the district had not retaliated against Student because she filed the complaint. Instead, the district found that it had issued the no trespass order because Parent had allegedly violated the district’s athletic participation contract. Under the contract, parents of student athletes agree to follow certain spectator guidelines, including to “not approach coaches during or after a game regarding a complaint.” According to the district, Parent allegedly approached the volleyball coach regarding a complaint immediately following a game that occurred on October 2, 2018.

Parent subsequently filed an appeal with the Oregon Department of Education. The department accepted Parent’s appeal on December 18, 2019, on grounds that 90 days had passed since Parent filed her initial complaint with the district.[[1]](#footnote-1)

Even though the department accepted Parent’s appeal on December 18, 2018, Parent continued to adjudicate her complaint through the district. On December 12, 2018, the district notified Parent that South Umpqua School District Board would hear her complaint on January 16, 2019. On January 16, 2019, the school board heard her complaint. On January 22, 2019, the school board issued a final order. In that order, the school board upheld the no trespass order.

## FINDINGS OF FACT

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

1. Before March 28, 2017, Parent worked for South Umpqua School District. The district fired Parent. Parent subsequently filed an unemployment claim. The district appealed the unemployment claim to the Employment Appeals Board.
2. On March 28, 2017, Parent and the district entered into a settlement agreement. Under the agreement, the district agreed to withdraw its appeal of Parent’s unemployment claim and Parent agreed, in part, to release the district from any claims, charges, or actions arising from Parent’s claim.
3. On October 2, 2018, Parent filed a complaint with the district. In her complaint, Parent alleged that the volleyball coach was acting inappropriately toward her daughter’s volleyball team.
4. Parent’s October 2nd complaint contained the following allegations:
	1. The volleyball coach shared inappropriate details about her personal life with students.
	2. The volleyball coach spoke inappropriately with Parent’s daughter (Student).
	3. The volleyball coach spoke inappropriately about Student with other students, including by denigrating Student.
	4. The principal initially refused to discuss the volleyball coach’s behavior with Parent.
	5. When the principal did discuss the volleyball’s coach’s behavior with Parent, the principal only proffered one solution: that Student may choose to not play volleyball.
	6. The volleyball coach favored certain students over Student. This favoritism affected Student’s playing time.

**APPEALS UNDER ORS 659.852**

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.[[2]](#footnote-2) If the Oregon Department of Education 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.[[3]](#footnote-3) If the Director of the Oregon Department of Education 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 director grants an extension.[[4]](#footnote-4) If the education program does not remedy the retaliatory act or complete the corrective action in a timely manner, the director may withhold moneys otherwise required to be distributed to the education program pursuant to statute.[[5]](#footnote-5)

### I. Arguments Presented

On appeal, Parent presents two theories for how South Umpqua School District retaliated against Student when it issued the no trespass order.

Under the first theory, Parent argues that the district issued the no trespass order in retaliation for her filing the October 2nd complaint. In support of her assertion, Parent makes three arguments.

First, Parent argues that the date on which the district issued the order substantiates that its issuance was retaliatory. Parent filed her complaint with the district on October 2, 2018. The district issued the order on October 4, 2019. Parent argues that the timing of the order — the district issued the order a mere two days after she filed the complaint – substantiates that there is a corollary between two. Parent argues that had she not filed the complaint, the district would not have issued the order.

Second, Parent argues that the district’s use of the order substantiates that its issuance was retaliatory. Parent provided evidence that the principal called local law enforcement to report that Parent was on district property in violation of the order. Parent also provided evidence that she was not on district property, including evidence that the principal called her to apologize for making the report. In Parent’s view, the principal’s actions substantiate that she was using the order to retaliate against Parent. If the principal were using the order for its intended purpose, the principal would not have called local law enforcement without verifying that Parent was violating the order. By not verifying that Parent was violating the order, the principal demonstrated intent to use the order for abusive purposes.[[6]](#footnote-6)

Third, Parent argues that the district’s treatment of her as a complainant substantiates that the issuance of the order was retaliatory. Parent presented the following evidence related to the January 16th hearing where she appealed the issuance of the order:

* On December 12, 2018, the school board sent Parent notice of accepting her appeal. In the notice, South Umpqua School District Board informed Parent that the hearing would occur on January 16, 2019. Parent would be “afforded the opportunity to meet with the [school board] and to informally dispute” the no trespass order. Parent would have 10 minutes “to present [her] appeal.” Parent could have “an adult representative present for observation at [the] hearing.” However, the adult representative could not “speak on [her] behalf.” Parent could have “[n]o witnesses” testify on her behalf. Parent could “submit a written statement.” If Parent planned on submitting a written statement, she had to provide it to the school board no later than January 7, 2018, nine days before the date of the hearing.[[7]](#footnote-7)
* At the January 16th hearing, the district allowed multiple people to testify against Parent, on its behalf. District administration also presented the members of the school board with a document containing evidence supporting its decision to issue the no trespass order. The district did not provide Parent with a copy of the document before the hearing. The district also did not allow Parent to look at the document during the hearing. Parent requested a copy of the document and the district denied her request.[[8]](#footnote-8)
* On January 22, 2019, the school board issued a written order affirming the issuance of the no trespass order. The January 22nd order did not include a findings of fact or an explanation about why the school board was affirming the order. In its entirety, the January 22nd order read as follows:

This matter came before the South Umpqua School District Board on January 16, 2019, for a hearing requested by Parent, appealing the Superintendent’s decision to uphold a Trespass Order of the Parent . . . of Coffenberry Middle School Student. The [b]oard considered the presentations of Parent and District administration. Having fully considered the evidence,

IT IS THEREFORE ORDERED that the appeal is DENIED

The Trespass Order is AFFIRMED.[[9]](#footnote-9)

* On January 23, 2019, the district provided Parent with a copy of the document that district administration had presented to members of the school board at the January 16th hearing. That document included several allegations pertaining to Parent, including complaints made by the volleyball coach about Parent dating back to September 4, 2017. According to Parent, she learned about many of these allegations for the first time upon reading the document.[[10]](#footnote-10)

In Parent’s view, the district treated her unfairly during the complaint process. Whereas the district prohibited her from having witnesses testify on her behalf during the January 16th hearing, multiple people testified against her. Whereas the district required her to provide written materials to the school board nine days before the hearing, the district did not provide her with a copy of its written materials until after the school board issued the January 22nd order. Parent argues that for the district’s complaint process to be fair, the district should have allowed her to call witnesses, and it should have provided her with a copy of its written materials before the hearing. With respect to providing her with written materials, Parent notes that the document presented at the January 16th hearing contained several specific allegations, some of which she learned about for the first time upon receiving the document after the hearing.

Parent argues that the district’s treatment of her during the complaint process substantiates that the issuance of the no trespass order was retaliatory. In Parent’s view, the evidence demonstrates the district’s intent to affirm the no trespass order under all circumstances, no matter what evidence she presented or argument she made.

Under the second theory of the case, Parent argues that the district issued the no trespass order in retaliation to her filing an unemployment claim during the spring of 2017. Parent alleges that the district fired her, in part, because she refused to divulge medical information to the district concerning her pregnancy. Parent alleges that when she filed her unemployment claim, it created an adversarial relationship between her and the district that culminated in the issuance of the no trespass order.

The district responds by making three arguments. The district first argues that the evidence does not support the idea that “a student reported in good faith information that the student believes is evidence of a violation of state or federal law, rule or regulation,” as required by law.[[11]](#footnote-11) The district argues that the language of ORS 659.852 requires a student to make the report. In the district’s view, because Parent made the report, not a student, ORS 659.852 does not apply.

The district also argues that the no trespass order did not substantially disadvantage a student as required by law.[[12]](#footnote-12) Again, the district argues that the language of ORS 659.852 requires a student to be substantially disadvantaged, not a parent. The district argues that because the order was issued to parent, ORS 659.852 does not apply.

Finally, the district argues that the evidence substantiates that the district issued the no trespass order because of Parent’s behavior, not because she filed the October 2nd complaint. In support of this argument, the district cites all of the allegations made against Parent in the document presented to the school board at the January 16th hearing.

### II. Legal Standard

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, the department finds 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 for the 2015 Legislative Assembly of the State of Oregon. 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.[[13]](#footnote-13) 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 education decision; and (3) there was a causal link between the protected activity and the adverse education decision.[[14]](#footnote-14)

### III. Analysis

The department does not reach the arguments on appeal because under both theories of the case – that South Umpqua School District issued the no trespass order in retaliation to her filing the October 2nd complaint, and that the district issued the order in retaliation to her filing an unemployment claim during the spring of 2017 – Parent fails to meet the statutory requirement that a student must be engaging in a protected activity for the protections ORS 659.852 to apply.

ORS 659.852 only protects the act of reporting, in good faith, information believed to be a violation of a state or federal law, rule, or regulation. With respect to Parent’s October 2nd complaint, she reported the following:

* + The volleyball coach shared inappropriate details about her personal life with students.
	+ The volleyball coach spoke inappropriately with Student.
	+ The volleyball coach spoke inappropriately about Student with other students, including by denigrating Student.
	+ The principal initially refused to discuss the volleyball coach’s behavior with Parent.
	+ When the principal did discuss the volleyball’s coach’s behavior with Parent, the principal only proffered one solution: that Student may choose to not play volleyball.
	+ The volleyball coach favored certain students over Student. This favoritism affected Student’s playing time.[[15]](#footnote-15)

The allegations listed above do not constitute a violation of a state or federal law, rule, or regulation. The allegations constitute grievances about the volleyball coach’s conduct and decision-making. None of the grievances, as stated, involves a violation of a law, rule, or regulation. Therefore, the October 2nd complaint falls outside the scope of the protections of ORS 659.852. Under this theory of the case, the student did not engage in a protected activity.

ORS 659.852 also only protects a student who reports, in good faith, information believed to be a violation of a state or federal law, rule, or regulation. With respect to Parent’s unemployment claim, Parent reported a violation of state or federal law, rule, or regulation, not Student. Under the plain meaning of the statute, ORS 659.852 only protects “[a] student [who] has in good faith reported information.” ORS 659.852 does not protect a student who is the son or daughter of a parent who has in good faith reported information. That said, the district’s argument that the language of ORS 659.852 requires a student to make the report is partly flawed. ORS 659.852 can apply to a situation where a parent files an official complaint with an education program on behalf of a student. As explained below, a student may make an informal report to a parent who then files an official complaint.

ORS 659.852 does not define “report.” Therefore, for purposes of ORS 659.852, determining the meaning of “report” requires discerning legislative intent. The Oregon Supreme Court prescribed the method for discerning legislative intent in *Portland General Electric, Co. v. Bureau of Labor and Industries[[16]](#footnote-16)* and *State v. Gaines*.[[17]](#footnote-17) 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.[[18]](#footnote-18)

To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*.[[19]](#footnote-19) That dictionary defines “report” to mean “to give an account of: NARRATE, RELATE, TELL.” Further, given that ORS 659.852 is intended to be applied in the same manner as a law protecting whistleblowers from employers, it is important to understand that employment law has the purpose of protecting “a report of information to either an external or internal authority.”[[20]](#footnote-20) Thus, ORS 659.852 applies when a student reports information to a parent (an internal authority) who then files an official complaint with an education program (an external authority).

In this case, Student did not report a violation to Parent (functioning as the internal authority) prompting Parent to file the unemployment claim with the state (functioning as the external authority). Rather, Parent filed the claim on her own. Thus, the unemployment complaint falls outside the scope of the protections of ORS 659.852.

Furthermore, under the terms of the settlement agreement between Parent and the district, the district agreed to withdraw its appeal of the unemployment claim and Parent agreed to release the district from any claims, charges, or actions arising from the claim. Because this appeal is an “action” arising from the claim – at least with respect to the theory that the district issued the no trespass order in retaliation to the filing of the claim – the department must dismiss Parent’s appeal insofar as she is arguing them on those grounds. Insofar as Parent’s allegations rely on the theory that the district retaliated against her because she filed the unemployment claim, the settlement agreement prevents Parent from pursuing her appeal.

Before concluding this order, the department necessarily explain why the district’s argument the language of ORS 659.852 requires a student to be substantially disadvantaged, not a parent, is flawed. *Webster’s Third New International Dictionary* defines “substantially” to mean “in a substantial manner” and “substantial” to mean “being that specified to a large degree or in the main.” The dictionary further defines “disadvantage” to mean “to place at a disadvantage,” “affect unfavorably,” or “harm.” Thus, the plain meaning of ORS 659.852 requires an education program to place a student at a disadvantage, affect a student unfavorably, or harm a student in a manner that affects the student to a large degree. Not permitting a student’s parent to enter the grounds of the school attended by the student *could* substantially disadvantage the student under the right circumstances. The department declines to determine whether the right circumstances are present in this case because the appeal can be resolved on other, dispositive grounds.

## CONCLUSION

In conclusion, the Oregon Department of Education finds that South Umpqua School District did not commit a retaliatory act under ORS 659.852.

Sincerely,

Mark Mayer, Complaint and Appeals Coordinator

Office of the Director

Mark.Mayer@state.or.us

503-947-0464

1. OAR 581-002-0040. Under this rule, the department may accept an appeal when a complainant receives a final decision from a district. The rule also specifies that a final decision includes a district not resolving a complaint within 90 days of the complainant filing initially filing the complaint. The State School Board repealed OAR 581-002-0040 on March 21, 2019. However, the rule still applies to appeals that the department accepted before March 21, 2019. Because the department accepted Parent’s appeal on December 18, 2018, the rule applies to her appeal. [↑](#footnote-ref-1)
2. ORS 659.852. [↑](#footnote-ref-2)
3. OAR 581-002-0040(8)(b). *See* note 1 for an explanation of the applicability of OAR 581-002-0040. [↑](#footnote-ref-3)
4. OAR 581-002-0040(8)(b). *See* note 1 for an explanation of the applicability of OAR 581-002-0040. [↑](#footnote-ref-4)
5. OAR 581-002-0040(9)(b). *See* note 1 for an explanation of the applicability of OAR 581-002-0040. [↑](#footnote-ref-5)
6. The department declines to make findings with respect to evidence presented by Parent supporting these allegations because the department is resolving the matter on separate, legal grounds. [↑](#footnote-ref-6)
7. *See* comment undernote 6. [↑](#footnote-ref-7)
8. *See* comment under note 6. [↑](#footnote-ref-8)
9. *See* comment under note 6. [↑](#footnote-ref-9)
10. *See* comment under note 6. [↑](#footnote-ref-10)
11. ORS 659.852. [↑](#footnote-ref-11)
12. *Id.* [↑](#footnote-ref-12)
13. *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 999-1000 (9th Cir. 2017). [↑](#footnote-ref-13)
14. *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). [↑](#footnote-ref-14)
15. This favoritism was not based on any student’s protected class status and, thus, was not discriminatory for purposes of ORS 659.850. [↑](#footnote-ref-15)
16. 317 Or. 606 (1993). [↑](#footnote-ref-16)
17. 346 Or. 160 (2009). [↑](#footnote-ref-17)
18. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172. [↑](#footnote-ref-18)
19. *Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014). [↑](#footnote-ref-19)
20. *Brunozzi*, 851 F.3d at 1000 (interpreting the meaning of “report” in ORS 659A.199 in a manner that is consistent with the type of activity that is protected by other Oregon laws pertaining to whistleblowing). [↑](#footnote-ref-20)