August 8, 2019

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Dr. A. Katrise Perera, Superintendent

Gresham-Barlow School District

1331 NW Eastman Parkway

Gresham, OR 97030

Dear PARENT and Superintendent Perera,

This letter is the order on the May 4, 2019, appeal filed by PARENT (Parent) alleging a violation of ORS 659.852 by Gresham-Barlow School District. The objective of this order is to determine whether the district is in compliance with ORS 659.852. If the district is not in compliance with ORS 659.852, then Parent and the district must attempt to reach an agreement through conciliation as required by OAR 581-002-0011. If the district is in compliance with ORS 659.852, then this case is closed pursuant to OAR 581-002-0009 and 581-002-0017.

## PROCEDURAL BACKGROUND

This is an appeal alleging retaliation by Gresham-Barlow School District because Parent filed a complaint against the district. Parent received a final decision from the district for the complaint on October 16, 2018.

Parent’s complaint concerned the use of social media by a teacher. Parent alleged that the teacher had posted images of her son (Student) on social media without her consent.

After receiving Parent’s complaint, the district conducted an investigation. The district determined there was insufficient evidence to support Parent’s allegations.

Parent subsequently filed a complaint against the teacher with (1) the United States Department of Education on grounds that the post violated the Family Educational Rights and Privacy Act, (2) the Federal Trade Commission on grounds that the post violated the Children’s Online Privacy Protection Rule, and (3) the Teacher Standards and Practices Commission on grounds that the post violated Oregon state law. On April 9, 2019, the Teacher Standards and Practices Commission notified Parent that it was dismissing her complaint because it had determined there was insufficient evidence to support Parent’s allegations.

On appeal, Parent alleges that on October 30, 2018, the district did not allow Student to participate in a school activity. Parent alleges that during the fall of 2018, Student’s teacher called Student “ridiculous” and took away Student’s privileges. Parent finally alleges that on May 1, 2019, after an incident where Student was being bullied, the teacher sent him to the school counselor as punishment. Parent alleges that the district took those actions against Student in retaliation for the complaints she had filed with the district, the United States Department of Education, the Federal Trade Commission, and the Teacher Standards and Practices Commission.

The Oregon Department of Education accepted this appeal pursuant to OAR 581-002-0005, under which the department may accept an appeal alleging retaliation if the complainant alleges that retaliation occurred in response to a complaint for which the complainant received a final decision.

## FINDINGS OF FACT

After conducting its investigation, I am making the following findings of fact:

1. At the beginning of the 2018-2019 school year, a teacher employed by Gresham-Barlow School District notified parents that she would be using a social media application called Flipgrid to post pictures and video of students on a secure website that could only be accessed by the teacher and the parents.
2. On September 21, 2018, Parent responded to the notice by sending an email stating that the teacher could post pictures and video of Student as long as the teacher did not “share” the pictures and video.
3. On October 3, 2018, Parent sent the teacher an email stating that she was upset about the teacher posting a video of Student online. In Parent’s words, she “[c]ame home from work to discover a video of my child was posted to the [web]site.”
4. On October 15, 2018, the district opened an investigation.
5. On October 16, 2018, the district concluded its investigation. In its response, the district claims that the video did not contain images of Student. The district claims that the video only contained an off-camera recording of Student’s voice. The district dismissed Parent’s case on the basis that there was insufficient evidence to support Parent’s allegation.
6. Following the district’s investigation, it deleted the video from the secure website.
7. Parent filed complaints with (1) the United States Department of Education on grounds that the post violated the Family Educational Rights and Privacy Act, (2) the Federal Trade Commission on grounds that the post violated the Children’s Online Privacy Protection Rule, and (3) the Teacher Standards and Practices Commission on grounds that the post violated Oregon state law.
8. Parent alleges that on October 30, 2018, the teacher did not allow Student to participate in a school activity because the activity required students to post a picture of themselves on the secure website. Parent claims that she contacted the principal of the school to complain about the incident and that the teacher subsequently allowed Student to participate in the activity.
9. Parent alleges that during the fall of 2018, the teacher was “unable to control her anger” and called Student “ridiculous.” Parent alleges that the teacher also took away Student’s privileges. Parent specifically alleges that the teacher had “time taken away from [Student’s] recess, etc.”
10. On April 9, 2019, the Teacher Standards and Practices Commission notified Parent that it was dismissing her complaint because it had determined there was insufficient evidence to support Parent’s allegations.
11. On May 1, 2019, the teacher saw Student hitting himself and saying that he hated his life. The teacher sent Student to the school counselor.
12. On May 2, 2019, Parent sent an email to the district stating that the school counselor is not allowed to speak to Student.
13. In an email received by the Oregon Department of Education on May 9, 2019, Parent contends that the posted video did contain images of Student.

## 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.[[1]](#footnote-1)

If the Oregon Department of Education determines on appeal that an education program has not retaliated against a student, the department will issue a final order to the complainant and the program and close the appeal.[[2]](#footnote-2)

If the Oregon Department of Education determines on appeal that an education program has retaliated against a student, the department will issue a preliminary order to the complainant and the program.[[3]](#footnote-3) As part of that preliminary order, the department will order the complainant and the program to attempt to reach an agreement through conciliation.[[4]](#footnote-4) If the complainant and program fail to reach an agreement, the department will issue a final order.[[5]](#footnote-5) If the department determines in the final order that the program has retaliated against the student, the final order will include notice that the program must complete a corrective action plan.[[6]](#footnote-6) A program must complete corrective action by the beginning of the school year next following the date of the final order.[[7]](#footnote-7) If a program does not complete corrective action by the beginning of the school year, the department may order appropriate remedies, including an order withholding distributions otherwise required under the laws of this state to be made from the State School Fund.[[8]](#footnote-8)

### I. Arguments Presented

In this appeal, Parent alleges that Gresham-Barlow School District retaliated against Student because she had filed complaints with the district, the United States Department of Education, the Federal Trade Commission, and the Teacher Standards and Practices Commission.

Parent presents three theories for how the district retaliated against Student.

Parent first alleges that on October 30, 2018, the teacher did not allow Student to participate in a school activity because the activity required students to post a picture of themselves on the secure website. Parent claims that she contacted the principal of the school to complain about the incident and that the teacher subsequently allowed Student to participate in the activity.

Parent also alleges that during the fall of 2018, the teacher was “unable to control her anger” and called Student “ridiculous.” Parent alleges that the teacher also took away Student’s privileges. Parent specifically alleges that the teacher had “time taken away from his recess, etc.”

Parent finally alleges that on May 1, 2019, after an incident where Student was being bullied, the teacher sent Student to the school counselor as punishment.

The district responds by providing the department with documents related to its initial investigation on whether the teacher unlawfully posted pictures or video of Student online and documents related to the events that occurred on May 1, 2019. The first set of documents indicate that the online post only contained a recording of Student’s voice. The second set of documents indicate that on May 1, the teacher saw Student hitting himself and saying that he hated his life and sent him to the counselor on the basis of those observations, not as punishment.

### 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.[[9]](#footnote-9) 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.[[10]](#footnote-10)

### III. Legal Analysis

As will be explained in greater detail below, the department does not reach the arguments on appeal because 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 a student who reports, in good faith, information believed to be a violation of a state or federal law, rule, or regulation. Parent argues that the district retaliated against Student because she filed complaints with the district, the United States Department of Education, the Federal Trade Commission, and the Teacher Standards and Practices Commission. However, the language of ORS 659.852 only protects “[a] student [who] has in good faith reported information that the student believes is evidence of a violation of a state or federal law, rule, or regulation.” It does not protect a student when a parent in good faith reported information that the parent believes is evidence of a violation of a state or federal law, rule, or regulation.

In this case, Parent observed the video online and then filed her complaints. In Parent’s own words, she “[c]ame home from work to discover a video of my child was posted to the [web]site.” Parent believed that the district was in violation of the law. However, Parent believed that the district was in violation of the law because of her observations. She did not believe that the district was in violation of the law because of something Student told her. 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.

This is not to say that ORS 659.852 does not apply to any 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 with the education program.

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[[11]](#footnote-11)* and *State v. Gaines*.[[12]](#footnote-12) 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.[[13]](#footnote-13)

To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*.[[14]](#footnote-14) 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.”[[15]](#footnote-15) 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 instance, Parent filed her complaints because of something that she observed online, not because of something that Student told her. In Parent’s words, she “[c]ame home from work to discover a video of my child was posted to the [web]site.” Thus, the protections of ORS 659.852 do not apply.

## CONCLUSION

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

If you have any questions, please contact me.

Sincerely,

Mark Mayer, Complaint and Appeals Coordinator

Office of the Director

Mark.Mayer@state.or.us

1. ORS 659.852. [↑](#footnote-ref-1)
2. OAR 581-002-0009(3)(a)(B) and 581-002-0017(1)(a). [↑](#footnote-ref-2)
3. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-3)
4. OAR 581-002-0011. [↑](#footnote-ref-4)
5. OAR 581-002-0017(1)(b). [↑](#footnote-ref-5)
6. OAR 581-002-0017(1)(e). [↑](#footnote-ref-6)
7. OAR 581-002-0019(1). [↑](#footnote-ref-7)
8. OAR 581-002-0019(2). [↑](#footnote-ref-8)
9. *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 999-1000 (9th Cir. 2017). [↑](#footnote-ref-9)
10. *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-10)
11. 317 Or. 606 (1993). [↑](#footnote-ref-11)
12. 346 Or. 160 (2009). [↑](#footnote-ref-12)
13. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172. [↑](#footnote-ref-13)
14. *Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014). [↑](#footnote-ref-14)
15. *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-15)