July 3, 2019

**BY EMAIL AND US MAIL**

PARENT

ADDRESS
ADDRESS

Cathy Hurowitz, Superintendent

Clatskanie School District

PO Box 678

Clatskanie, OR 97016

Dear PARENT and Superintendent Hurowitz,

This letter is the Final Order on the February 20, 2019, appeal filed by PARENT (Parent) alleging a violation of ORS 659.852 by Clatskanie 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 the Clatskanie School District on November 28, 2018. Parent filed her initial complaint with the district on October 10, 2018. In that complaint, Parent specifically stated that she had concerns with the principal of Clatskanie Elementary School.

On November 2, 2018, Parent received a report completed by an independent investigator hired by the district to investigate the October 10th complaint. Parent subsequently appealed the findings of the report to the Clatskanie School Board.

On November 28, 2018, Parent received a final decision from the school board on that complaint. The school board found that the complaint could not substantiated.

Parent filed an appeal with the Oregon Department of Education on February 20, 2019. The department accepted Parent’s appeal on grounds that it involves facts and circumstances related to a complaint for which Parent received a final decision.[[1]](#footnote-1)

## FINDINGS OF FACT

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

1. During the 2017-2018 school year, Parent’s son (Student) attended Clatskanie School District. The district had identified Student as a talented and gifted student.
2. During the 2017-2018 school year, Parent’s spouse (Parent II) was employed by Clatskanie School District as the superintendent for the district.
3. During the 2017-2018 school year, Parent II recommended to Clatskanie School Board that the board not renew the district’s contract with the principal of the school Student attended. Parent II made the recommendation for two reasons: first, because the principal had allegedly threatened a district administrator; second, because the principal had failed to provide accurate information necessary for the district to timely file Division 22 Assurances with the department.
4. Before the 2018-2019 school year, the principal entered into a new contract with the district and continued to serve as the principal of the school Student attended.
5. At the beginning of the 2018-2019 school year, Student attended Clatskanie School District.
6. At the beginning of the 2018-2019 school year, Parent II was no longer employed by the district.
7. Student disenrolled from the district on September 4, 2018. Student was not enrolled at the district on or after that date.
8. On September 4, 2018, Parent filed a complaint with the district. In her complaint, Parent alleged that the district’s math classes were not sufficient to meet her son’s academic needs as a talented and gifted student.
9. The district arranged for a committee to review the September 4th complaint.
10. On September 7, 2018, the committee reviewed the September 4th complaint and found that the district had sufficiently met Student’s academic needs as a talented and gifted student.
11. On October 10, 2018, Parent filed another complaint alleging that other students had bullied and harassed Student and that the principal had fostered an environment encouraging other students to bully and harass Student.
12. The district hired an independent investigator to investigate the October 10th complaint.
13. On November 2, 2018, the district issued the investigator’s written report. The report contained the following findings: (1) the allegation that other students bullied and harassed Student could not be substantiated; (2) the allegation that the principal had fostered an environment encouraging other students to bully and harass Student could not be substantiated.
14. Parent appealed the investigator’s written report to the school board.
15. The school board met in executive session on November 26, 2018, to hear Parent’s appeal.
16. On November 28, 2018, the school board issued a written order upholding the investigator’s findings.

## 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

In this appeal, Parent presents two theories for how Clatskanie School District retaliated against Student.

Under Parent’s first theory, she argues that the principal of the school attended by Student fostered an environment encouraging other students to bully and harass Student because Parent II recommended to Clatskanie School Board that the board not renew the principal’s contract.

According to Parent, when Parent II made the recommendation to not renew the principal’s contract, he created division in the district between parents and students who supported the principal and administrators and teachers who wanted his removal. According to Parent, students wore t-shirts in support of the principal. The community organized a march, to occur during school hours, supporting the principal. Parents participating in the march encouraged their students to skip school and participate in the march with them. The community subsequently petitioned to recall three school board members who had voted to not renew the principal’s contract. One of those school board members received a threatening letter and decided to resign. The other two were recalled. New school board members were appointed. After their appointment, the school board unanimously voted to renew the principal’s contract.

Parent claims that the division created in the district manifested itself at school as the bullying and harassment of Student. According to Parent:

I get [Student] up for the school at 6 a.m. as usual, and he goes to the couch. I bring in breakfast and he is sobbing, balled up in a fetal position and begging me not to send him back to school. I then find out he is . . . being mocked in the neighboring classroom which he goes to for math . . . and [on] the playground [and during] recess[,] as well. Same kids [had been bullying and harassing him for a long time]. Same taunts. It wasn’t name calling but making fun of him personally, mocking his brains or lack of intellect . . . laughing at his long hair, teasing him about liking pink and wearing it in his socks or shoes or apparel or artwork, as well as issues in general when playing on the playground (kids wouldn’t play by safe and expected soccer rules and would try to hurt him with the ball).

Parent further claims that the principal actively fostered an environment encouraging other students to bully and harass Student. According to Parent, the principal refused to appropriately discipline students who were bullying and harassing Student and intimidated staff in order to discourage them from reporting his retaliatory actions.

Under Parent’s second theory of the case, she argues that the school board did not properly consider her appeal at the November 26th executive session because Parent II recommended to the board that it not renew the principal’s contract *and* because she had filed the October 10th complaint. According to Parent, the school board affirmed the November 2nd report “[as] a way of getting back at our family for my husband calling out [the principal].”

The district responds by asserting that it hired an independent investigator to investigate the October 10th complaint and that it otherwise adhered to its complaint process in hearing Parent’s complaint.

### 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.[[6]](#footnote-6) 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.[[7]](#footnote-7)

### III. Legal Analysis

As will be explained in greater detail below, the department does not reach the arguments on appeal for the following reasons: first, under Parent’s first theory of the case – that the principal fostered an environment encouraging other students to bully and harass Student because Parent II recommended to the school board that the board not renew the principal’s contract – 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; second, under Parent’s second theory of the case – that the school board did not properly consider Parent’s appeal at the November 26th executive session both because of Parent II’s recommendation to the board *and* because Parent had filed the October 10th complaint – Parent fails to meet the statutory requirement that a student must suffer an adverse education decision.

With respect to Parent’s first theory of the case, 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 principal fostered an environment encouraging other students to bully and harass Student. Parent further argues that the principal fostered this environment because Parent II recommended to the school board that the board not renew the principal’s contract. However, the language of ORS 659.852 clearly 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.” In this case, Parent II made a recommendation to the school board that the board not renew the principal’s contract for two reasons. First, because the principal allegedly threatened a district admininstrator. Second, because the principal failed to provide accurate information necessary for the district to timely file Division 22 Assurances with the department. Parent II reasonably believed the first to be a violation of both state and federal employment law. Parent II reasonably believed the second to be a violation of state education law. However, the fact remains that it was Parent II, not Student, who reported the information to the school board. 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[[8]](#footnote-8)* and *State v. Gaines*.[[9]](#footnote-9) 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.[[10]](#footnote-10)

To discern the plain meaning of a term in statute, Oregon appellate courts consult *Webster’s Third New International Dictionary*.[[11]](#footnote-11) 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.”[[12]](#footnote-12) 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).

With respect to Parent’s second theory of the case, ORS 659.852 only protects a student who suffers an adverse education decision. Parent argues that the school board did not properly consider her appeal at the November 26th executive session because of Parent II’s recommendation to the board *and* because Parent had filed the October 10th complaint.

As explained above, ORS 659.852 only protects “[a] student [who] has in good faith reported information,” not a student who is the son or daughter of a parent who has in good faith reported information. Thus, the protections of ORS 659.852 do not apply to the school board’s handling of Parent’s appeal insofar as that handling was in retaliation to Parent II’s recommendation to the board.

ORS 659.852 also only protects a student from an adverse education decision. Under ORS 659.852, an adverse education decision is an act of “retaliation,” which the statute defines to mean:

suspension, 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.

Student disenrolled from the district on September 4, 2018, and was not enrolled at the district on or after that date. Parent filed the complaint alleging that the principal had fostered an environment encouraging other students to bully and harass Student on October 10, 2018. The school board met in executive session to hear Parent’s appeal of the investigator’s findings on November 26th, 2018. Thus, Student was not enrolled in the district during the entirety of the district’s complaint process. Under those circumstances, it would be virtually impossible for the district to disadvantage Student in an “academic, employment or extracurricular” activity. With the exception of denying access to transcripts, denying reenrollment, or refusing to perform a duty otherwise owed students who do not attend an education program, ORS 659.852 protects students who actually attend the education program. In this instance, the school board ruled on whether the principal had fostered an environment encouraging other students to bully and harass Student. Because Student was no longer enrolled at the district, the school board’s decision to affirm the investigator’s findings could not have disadvantaged Student.[[13]](#footnote-13)

## CONCLUSION

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

Sincerely,

Mark Mayer, Complaint and Appeals Coordinator

Office of the Director

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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 complainant exhausting a district’s complaint process. 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. *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 999-1000 (9th Cir. 2017). [↑](#footnote-ref-6)
7. *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-7)
8. 317 Or. 606 (1993). [↑](#footnote-ref-8)
9. 346 Or. 160 (2009). [↑](#footnote-ref-9)
10. *Portland General Electric*, 346 Or. at 610-611; *Gaines*, 317 Or. at 171-172. [↑](#footnote-ref-10)
11. *Comcast Corp. v. Dept. of Revenue*, 356 Or. 282 (2014). [↑](#footnote-ref-11)
12. *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-12)
13. If Parent had presented evidence that Student wanted to reenroll at the district, and evidence that his reenrollment was contingent on the school board’s decision, then the department may have reached a different conclusion. However, in this case, no such evidence was presented. [↑](#footnote-ref-13)