July 2, 2018

**BY EMAIL AND US MAIL**

PARENT

ADDRESS

ADDRESS

Linda Florence, Superintendent

Reynolds School District

1204 NE 201st Ave

Fairview, OR 97204-3402

Dear PARENT and Ms. Florence,

This letter is the Final Order on the June 27, 2018, appeal filed by PARENT alleging a violation of ORS 659.852 by Reynolds School District (“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 District on April 3, 2018. PARENT simultaneously filed two complaints with the District on March 13. She filed one complaint with the principal of Woodland Elementary School and she filed the other complaint with the superintendent of the District. In both complaints, she alleged that Woodland Elementary School staff discriminated against her and her child on several grounds, including national origin and marital status.

On April 3, 2018, the District responded to PARENT’s complaint. In its response, the District stated that it “was unable to substantiate [her] allegations of discriminatory treatment.”

On June 25, 2018, PARENT filed an appeal with the Oregon Department of Education (“Department”). As part of that appeal, PARENT alleged that the District retaliated against her in violation of ORS 659.852. The Department launched two separate investigations: one pertaining to PARENT’s allegations related discrimination and one pertaining to PARENT’s allegations related to retaliation. This order concerns only the second investigation, the one pertaining to PARENT’s allegations related to retaliation.

On June 27, 2018, the Department issued notice to both PARENT and the District that it was accepting her appeal. The Department accepted PARENT’s appeal under OAR 581-002-0040, under which the decision of a school district is final if the school district “fails to resolve a complaint within 90 days of the initial filing of a complaint.”

## FINDINGS OF FACT

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

1. On March 13, 2018, PARENT simultaneously filed two complaints with the District. She filed one complaint with the principal of Woodland Elementary School and she filed the other complaint with the superintendent of the District. In both complaints, she alleged that Woodland Elementary School staff discriminated against her and her child.
2. Attendance records demonstrate that PARENT’s child did not attend school on March 13.
3. The Reynolds School District 2017-2018 Elementary Certified Staff Calendar demonstrates that Woodland Elementary School did not have classes on March 14, 15, or 16.
4. March 17 was a Saturday and March 18 was a Sunday.
5. On June 28, the Department received an email from PARENT in which she stated that she withdrew her child from Woodland Elementary School shortly after she filed her complaint. On June 29, the Department received documentation from the District that PARENT withdrew her child from the school on March 19.

## ORS 659.852 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. 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 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. 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 director may withhold moneys otherwise required to be distributed to the education program pursuant to statute. OAR 581-002-0040 (9)(b).

### 1. Legal Standard

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). With this legislative history in mind, the Department finds that 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 ORS 659A.199 and other Oregon laws protecting whistleblowers, 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).

### 2. Analysis of Facts

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, PARENT made two reports on March 13, 2018, one to Woodland Elementary School and one to the District. In both complaints, she alleged that staff members at Woodland Elementary School discriminated against her and her child.

For purposes of this appeal, any adverse educational decision made by the District necessarily must have occurred on or after March 13, the date on which PARENT made her report. Any adverse educational decision made by the District occurring before March 13, no matter how much it disadvantaged the child, 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.

In this case, the evidence demonstrates that PARENT reported that the District violated the law on May 13. The evidence further demonstrates that PARENT withrew her child from school on May 19. Finally, the evidence demonstrates that PARENT’s child did not attend the school between the day that PARENT reported the violation and the day that she withdrew her child from school. In short, the evidence demonstrates that the District did not make an adverse educational decision after the date on which PARENT reported the violation. Under these circumstances, a protected activity could not have caused an adverse educational decision and the District could not have retaliated against PARENT.

## CONCLUSION

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

Sincerely,

Mark Mayer

Government and Legal Affairs

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