June 15, 2021

 **BY EMAIL**

REDACTED

REDACTED

REDACTED

Superintendent Larry Didway

Oregon City School District

1417 12th St.

Oregon City, OR 97045

RE: Case #2020-MM-04

Dear REDACTED and Superintendent Didway:

This letter is the order on the April 19, 2021, appeal filed by REDACTED (Complainant) alleging that Oregon City School District violated ORS 659.852. To ensure compliance with ORS 659.852, the Oregon Department of Education reviews school district procedures and makes findings of fact to determine whether a violation occurred and what action, if any, should be taken.[[1]](#footnote-1)

**Appellate Procedures for Complaints Alleging Retaliation**

On appeal, Complainant alleges that Oregon City School District violated ORS 659.852. In pertinent part, complainant’s appeal reads as follows:

Due to the release of several new documents, we would like to ask that the scope of our current appeal [be] expanded to include a . . . retaliation complaint[.] . . . [W]e can show the district voted illegally in the board meeting concerning our case, reviewed an investigative report which we have discovered was falsified to determine the final outcome of the case, and then refused to release the documents which proved our case.

The retaliation in question pertains to case #2020-SG-08.

The Oregon Department of Education has jurisdiction to resolve this appeal under OAR 581-002-0003. When a person files with the department an appeal of a complaint alleging retaliation, the department will initiate an investigation to determine whether retaliation may have occurred.[[2]](#footnote-2)

If the department determines that retaliation did not occur, the department must issue a final order as described in OAR 581-002-0017.[[3]](#footnote-3) The Director of the Oregon Department of Education may for good cause extend the time by which the department must issue an order.[[4]](#footnote-4)

If the department determines that retaliation may have occurred, the department must issue a preliminary final order to the complainant and the school district.[[5]](#footnote-5) The preliminary order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s preliminary findings of fact, and the department’s preliminary conclusions.[[6]](#footnote-6)

If the department issues a preliminary final order, the complainant and school district must attempt to reach an agreement on how to resolve the matter through conciliation.[[7]](#footnote-7) If conciliation fails, the department will issue a final order as described in OAR 581-002-0017.[[8]](#footnote-8) The final order must include a reference to the district decision that is on appeal, the procedural history of the appeal, the department’s findings of fact, the department’s conclusions, and a short explanation of any corrective action required by the school district.[[9]](#footnote-9)

In this appeal, the department has completed its investigation. This letter constitutes the department’s order as to whether retaliation may have occurred.

**PROCEDURAL BACKGROUND**

On September 20, 2019, parents of students attending school in Oregon City School District met with a district administrator (Administrator 1) to discuss their concerns about a district coach (Coach). The parents were primarily concerned with whether Coach was coaching their child in a manner that caused emotional distress.

On October 8, 2019, the parents who had met with Administrator 1 on September 20 emailed the district, wanting information on whether the district had addressed their concerns. That same day, the district responded, writing that it would set up another meeting with the parents.

Subsequent to October 8, 2019, other parents met with Administrator 1 or filed complaints with the district, alleging that Coach was coaching their children in a manner that caused their children emotional distress. One of these complaints took the form of an email sent on October 10, 2019, to Administrator 1. The email stated that their child had been “emotionally hurt” by Coach.

On October 24, 2019, Complainant filed a complaint with the district. On the complaint form, Complainant did not specify the nature of their complaint. Instead, Complainant wrote on the district complaint form that Administrator 1 “had the details” and attached a copy of the email sent to Administrator 1 on October 10, which contained the allegation that a student had been “emotionally hurt” by Coach.

On November 4, 2019, Complainant received a letter from Administrator 1. That letter, in part, addressed whether Coach had failed to comply with injury protocols. Administrator 1 wrote, “There is no evidence that proper reporting procedures have been violated and actually there have been very few injuries with [Coach’s team].”

On November 8, 2019, Complaint filed an appeal with the district to Administrator 1’s written determination.

On December 16, 2019, Oregon City School Board held a meeting to consider the complaints filed against Coach, including the complaint and appeal filed by Complainant. Parents, students, and Coach all made statements to the school board.

On December 17, 2019, the board voted to uphold the findings of Administrator 1.

On May 22, 2020, Complainant wrote a letter to the Oregon Department of Education, requesting an investigation of Coach. In part, Complainant requested an investigation of “unreported/mishandling injuries, child endangerment.” Complainant alleged that certain students were injured during practice or competition and that Coach either did not report, underreported, or mishandled the injuries.

The department accepted Complainant’s appeal on June 22, 2020. Noting that Complainant had received a final decision from the district on December 17, 2019, the department accepted the appeal under OAR 581-002-0005(1)(a)(A), under which the department will accept a complaint on appeal if “[t]he complainant has exhausted the district’s complaint process.” The department assigned this appeal case #2020-SG-08.

During the spring of 2021, the Oregon Ethics Commission launched an investigation into whether the December 17, 2019, school board meeting violated state public meetings law. The commission also launched an investigation into whether Coach violated state ethics laws pertaining to public officials.

On March 30, 2021, the commission released a preliminary review as to whether an Oregon City School Board member violated state public meetings law. The review only pertained to one board member. In the review, the commission reasoned that the December 17, 2019, school board meeting violated the law. The commission also noted that the board member was not present at the meeting. Because the board member was not present at the meeting, the commission found that the board member had not violated the law.

On April 30, 2021, the commission entered into a stipulated order with Coach. In that order, the commission found that if a contested case hearing were held on whether Coach violated state ethics laws pertaining to public officials, a preponderance of evidence existed to find Coach violated the law.

On May 4, 2021, Complainant filed an appeal with the department, alleging retaliation. Complainant argued that the district, both in conducting an illegal vote on December 17, 2019, and in voting to retain Coach despite her having violated state ethics laws, was retaliating against them for filing with the district the October 24, 2019, complaint and subsequent appeal.

On April 19, 2021, the department accepted Complainant’s appeal pursuant to OAR 581-002-0005(1)(b). Under that provision, the department will accept an appeal if the alleged retaliation in question is in response to a complaint for which a complainant has received a final decision. Complainant was arguing that the district retaliated against them during the December 17, 2019, school board meeting for filing with the district the complaint and subsequent appeal.

**FINDINGS OF FACT**

After conducting its investigation, the Oregon Department of Education adopts the findings of fact set forth in the final order issued for case #2020-SG-08, issued on June 15, 2021. The department also makes the additional following findings of fact:

1. On December 16, 2019, the Oregon City School Board held a meeting to consider the complaints filed against Coach, including the October 24, 2019, complaint and subsequent appeal filed by Complainant.
2. On December 17, 2019, the school board met to vote on whether to uphold the findings of Administrator 1, who had issued a written determination finding that the complaints filed against Coach, including the October 24 complaint and subsequent appeal filed by Complainant, were unfounded. The school board voted to uphold the findings of Administrator 1. The school board conducted the vote during an executive session.
3. During the Spring of 2021, the Oregon Ethics Commission launched an investigation into whether the December 17, 2019, school board meeting violated state public meetings law. The commission specifically launched an investigation into whether the school board violated ORS 192.660(6), which prohibits a public body from taking a final action or making a final decision while in executive session.
4. During the spring of 2021, the commission launched an investigation into whether Coach violated state ethics laws pertaining to public officials. The commission specifically launched an investigation into whether Coach violated ORS 244.040(1), which prohibits a public official from using or attempting to use their official position to obtain a financial gain, and ORS 244.120(1)(c), which requires an appointed public official to notify their appointing authority of conflicts of interest.
5. On March 30, 2021, the commission released a preliminary review as to whether an Oregon City School Board member violated state public meetings law. The review only pertained to one board member. In the review, the commission reasoned that

It appears in this case that [Oregon City School Board] never voted or took action on [whether to uphold Administrator 1’s written determination] in any of its public sessions. Instead, the board voted wile in executive session. It also appears that the board’s vote was a final decision. “Decision” is defined in ORS 192.610(1) as “any determination, action, vote or final disposition upon a motion, proposal, resolution, order, ordinance or measure on which a vote of a governing body is required, at any meeting at which a quorum is present.” The board’s vote constitutes a decision . . . and would be categorized as a final decision because that decision constituted the ultimate resolution of the matter concerning discipline of [Coach].[[10]](#footnote-10)

The commission also noted that the board member was not present at the meeting. Because the board member was not present at the meeting, the commission found that the board member had not violated the law.

1. On April 30, 2021, the commission entered into a stipulated order with Coach. In that order, the commission found that if a contested case hearing were held about whether Coach violated ORS 244.040(1) or ORS 244.120(1)(c), a preponderance of evidence existed to find Coach violated each provision twice.[[11]](#footnote-11)
2. As of June 10, 2021, the commission had not yet issued a preliminary review or order pertaining to any other school board member.

**ANALYSIS**

Under ORS 659.852, school districts and certain other education programs 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.

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 Oregon Department of Education 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.

Case law further establishes that the legislative history of ORS 659A.199 suggests that the primary purpose of the statute is to extend the protections available to public employee whistleblowers under Oregon law to other employee whistleblowers.[[12]](#footnote-12) 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, the department finds that 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.[[13]](#footnote-13)

**A. Procedural Matters**

Oregon City School District argues that the department should dismiss this case pursuant to the rule of limitations. Under that rule, an appeal must be received by the department no later than “one year after the date of the decision by the district resolving the complaint” or “if the district fails to resolve the complaint . . . two years after the date on which the complainant first filed the complaint.”[[14]](#footnote-14)

The department agrees with the district. Under the department’s rule of limitations, the department necessarily must dismiss Complainant’s appeal for procedural reasons. The district issued its final decision pertaining to Coach on December 17, 2019. Complainant first contacted the department to file the appeal on May 4, 2021. Because Complainant filed this appeal more than two years after the district issued its final decision, Complainant’s appeal is procedurally defective.

In consideration of the facts, the department dismisses Complainant’s appeal.

**B. Protected Activity**

Oregon City School District raises several other arguments as to why the department should find the district not deficient in this case. In order to provide departmental guidance with respect to these arguments, the department will respond to them, though they have no bearing on this appeal.

The district first argues that it is not deficient because ORS 659.8952 only applies to a *student* who files a complaint, not a parent or other person.[[15]](#footnote-15) The department agrees with the district, but necessarily must point out that under ORS 659.852, a student is not required to report the violation to an education entity. In consideration of the legislative history of ORS 659.852, a student may report the violation to a parent or other person who subsequently reports the violation to the education entity.

ORS 659.852 does not define “report.” 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) Reporting information to an external authority is similar to a student who reports information to a parent, who *then* files a complaint with the education program.

That said, in this case, there is no evidence that Complainant’s child reported to Complainant the information that constituted the basis of the October 24, 2019, complaint and subsequent appeal. The only evidence on the record is that Coach documented in an email that the student fell during practice, that the student appeared to be unharmed by the fall, and that despite the fall, the student immediately returned to practice. The evidence on the record also indicates that the student told Complainant that Coach followed the law rather than violating it. The student told Complainant that they did not suffer a concussion and that Coach examined them for a concussion.

**C. Adverse Education Decision and Causal Link**

Oregon City School District finally argues that it is not deficient because Complainant’s child did not suffer an adverse education decision and there is no causal link between the October 24, 2019, complaint and subsequent appeal filed by Complainant with the district.

As argued by the district,

The district’s procedural voting error was in no way retaliatory. It had no adverse impact on [Complainant]. [Complainant was an active participant] in the district decision-making process. [Complainant was]: (1) present during the December 16, 2019, [meeting,] (2) aware that the district board would be voting on their complaint, and (3) notified in writing of the district’s final decision the following day. The December 17, 2019, correspondence from the district to [Complainant] states unequivocally that the “board voted to sustain the investigative findings and resolutions of [Administrator 1] and will retain [Coach] as coach.

On appeal, Complainant argues that the district – first by conducting the illegal vote, second by retaining Coach – was retaliating against them for filing the October 24, 2019, complaint.

For purposes of ORS 659.852, an adverse education decision is “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.” In this case, Complainant’s child was not suspended, expelled, or unenrolled. They did not suffer a grade reduction. They were not not denied an opportunity or access to their transcripts. They were not excluded from an activity. The only question is whether Complainant’s child suffered an adverse action that substantially disadvantaged them in an extracurricular activity.

As the district points out, Complainant’s child could not have suffered an adverse action because the school board took an illegal vote. The school board allowed Complainant to participate in the decision-making process and informed Complainant of the outcome of the vote.

However, Complainant’s child could have suffered an adverse education decision because the school board *retained* Coach, particularly given that Complainant had alleged, in part, that Coach underreported and mishandled student athlete injuries and that Coach, presumably, would continue to coach Complainant’s child.

If the department were ruling on this issue, it would not need to make a determination as to whether retaining Coach adversely affected Complainant’s child because Complainant’s theory of the case fails on other grounds. To find that retaliation occurred under ORS 659.852, the department would have to find that the district retained Coach *because* Complainant filed with the district the complaint and subsequent appeal. But there is no evidence of a causal link, and assuming a causal link flies in the face of logic. Rather, the most logical description of the district voting to retain Coach is not that it did so *because* Complainant filed the complaint and subsequent appeal, but *despite* Complainant filing the complaint and appeal.

**CONCLUSION**

In conclusion, the Oregon Department of Education dismisses this appeal on procedural grounds. This is the department’s final order for Case #2021-MM-04. The department is closing the appeal.

If you have any questions, please contact me.

Sincerely,



Mark Mayer, Complaint and Appeals Specialist

Office of the Director

Oregon Department of Education

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1. The administrative rules governing the Oregon Department of Education’s appeals process are OAR 581-002-0001 to 581-002-0023. [↑](#footnote-ref-1)
2. OAR 581-002-0009. [↑](#footnote-ref-2)
3. OAR 581-002-0009(3)(a)(B). [↑](#footnote-ref-3)
4. OAR 581-002-0009(3)(b). [↑](#footnote-ref-4)
5. OAR 581-002-0009(3)(a)(A). [↑](#footnote-ref-5)
6. *Id*. [↑](#footnote-ref-6)
7. OAR 581-002-0011. [↑](#footnote-ref-7)
8. OAR 581-002-0011(8). [↑](#footnote-ref-8)
9. OAR 581-002-0017(2). [↑](#footnote-ref-9)
10. Oregon Government Ethics Commission, Preliminary Review for Case #21-032XSM (internal quotations omitted), *available at* <https://apps.oregon.gov/OGEC/CMS/FinalDispositions>. [↑](#footnote-ref-10)
11. Oregon Government Ethics Commission, Stipulated Final Order for Case #20-137ESM, *available at* <https://apps.oregon.gov/OGEC/CMS/FinalDispositions>. [↑](#footnote-ref-11)
12. *Brunozzi v. Cable Communications, Inc.*, 851 F.3d 990, 999-1000 (9th Cir. 2017). [↑](#footnote-ref-12)
13. *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-13)
14. OAR 581-002-0005(2). [↑](#footnote-ref-14)
15. ORS 659.852(2) (“A student of an education program may not be subjected to retaliation by an education program for the reason that the student has in good faith reported information that the student believes is evidence of a violation of a state or federal law, rule, or regulation.”) [↑](#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)