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Memo

To Board of Education

From Shanti Gonzales, Board Member

Board Meeting Date January 22, 2020

Subject Board Policy – Personnel – BP 4144.5 Whistleblower Protection Policy (New)

Action and Recommendation Approval by the Board of Education of Oakland Unified School District Board Policy BP 4144.5 Whistleblower Protection Policy.

Background In response to the report by the Alameda County Civil Grand Jury, the Board agreed that it would adopt a Whistleblower Protection Policy.

Discussion The attached proposed policy, BP 4144.5 Whistleblower Protection Policy, is originally based on a similar policy from Los Angeles USD but modified to meet the specific context of Oakland. Review by General Counsel and others led to further modifications.

Fiscal Impact N/A

Attachment Board Policy 4144.5 Whistleblower Protection Policy

OAKLAND UNIFIED SCHOOL DISTRICT

BOARD POLICY

Personnel

BP 4144.5

Whistleblower Protection Policy

The Governing Board seeks to foster a culture of integrity and a climate of trust between the District, the public, and those who work with and for the District, and to inspire greater confidence in the integrity of District operations and decision-making.

Therefore, it is the expectation the Governing Board of the Oakland Unified School District (“OUSD”) that individuals disclose improper governmental activities and to submit written complaints that allege acts or attempted acts of interference, reprisal, retaliation, threats, coercion or intimidation against individuals who disclose improper governmental activities.

The Superintendent or designee shall prioritize the investigation and correction of any and all abuses resulting from improper governmental activities, and to protect those who come forward to report improper governmental activities.

To assure the reporting of any activity that threatens the efficient administration of the OUSD, complaints that allege improper governmental activities shall be kept confidential to the highest extent possible that allows for thorough investigation and compliance with all legally required disclosures.

If there is any conflict between the provisions of this policy, including definitions, or those used in the Education Code, including but not limited to Section 44110 *et seq.*, the statutory provisions shall control.

I. TITLE

This policy is adopted pursuant to Education Code Section 44110 *et seq.*, and shall be known as the “Oakland Unified School District’s Whistleblower Protection Policy.”

II. PURPOSE

It is the policy of the Oakland Unified School District (“OUSD”) to encourage individuals to disclose improper governmental activities and to submit written complaints that allege acts or attempted acts of interference, reprisal, retaliation, threats, coercion or intimidation against individuals who disclose improper governmental activities.

The Superintendent or designee shall seek out and correct any and all abuses resulting from improper governmental activities, and to protect those who come forward to report improper governmental activities.

To assure the reporting of any activity that threatens the efficient administration of the OUSD, complaints that allege improper governmental activities shall be kept confidential to the highest extent possible that allows for thorough investigation and compliance with all legally required disclosures.

If there is any conflict between the provisions of this policy, including definitions, or those used in California Education Code Section 44110 et seq., the statutory provisions shall control.

III. DEFINITIONS

To assist in the understanding of this policy, the following terms shall be defined as follows:

- A. "Any person" includes officials; classified, certificated, unrepresented, and confidential employees, and applicants for OUSD employment; as well as a contractor or individual employed by a contractor.
- B. "Board" means the Oakland Unified Board of Education.
- C. "Complaint" means the written complaint submitted under penalty of perjury alleging actual or attempted acts of reprisal, retaliation, threats, coercion, intimidation, interference, or similar improper acts directed at the complainant because of the complainant's protected disclosure.
- D. "Disciplinary action" means any tangible adverse employment action, including, without limitation, the termination of an employee.
- E. "Improper governmental activity" is defined as any activity by an OUSD department, or by an employee, official, or contractor that is undertaken in the performance of the employee, official, or contractor's duties, whether or not such action is within the scope of the employee, official, or contractor's duties, and which:
 - 1. violates any State or Federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of OUSD property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, discrimination, misuse of OUSD property and facilities, or willful omission to perform duty, or
 - 2. violates any OUSD policy, procedure, rule or regulation established by the Board, or
 - 3. is economically wasteful, or involves gross misconduct, incompetence, or inefficiency, or
 - 4. is a substantial and specific danger to public health or safety, or

5. misuses District resources, or

6. represents, intentionally and inaccurately, information related to the financial health of the District and that (i) is relied on by the Governing Board, the Superintendent, or other District or site administrators, (ii) does so with conscious and voluntary disregard of the need to use reasonable care, and (ii) is likely to cause foreseeable harm to the District including but not limited to financial harm or reputational harm.

F. "Official Agent" means the Ombudsperson, a school site administrator, a member of the Board, the Superintendent, or a licensed attorney within the Office of the General Counsel.

G. "Protected disclosure" means a good faith written communication that alleges or demonstrates an intention to disclose information that may evidence either of the following:

1. An improper governmental activity.

2. Any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition. A disclosure made in connection with an employee, official, or contractor's assigned normal duties is not protected.

H. "Superintendent" is defined as the Superintendent for the Oakland Unified School District.

I. "Use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, performance, evaluation, suspension, or other disciplinary action.

IV. REPORTING IMPROPER GOVERNMENTAL ACTIVITIES AND MAKING PROTECTED DISCLOSURES

A. Reporting Improper Governmental Activities

Any person may make a protected disclosure pursuant to this policy.

B. Where and How to Make a Protected Disclosure

1. Officials, classified, certificated, unrepresented, and confidential employees, and contractors must make a protected disclosure with the Ombudsperson, a school administrator, the Superintendent, a licensed attorney within the Office of the

General Counsel, a Board member, a member of the County Board of Education, County Superintendent of Schools, the Superintendent of Public Instruction, or the Attorney General Hotline (1-800-952-5665).

2. Applicants for OUSD employment must make a protected disclosure directly to the Attorney General Hotline (1-800-952-5665).

V. PROTECTION

- ### A. Reprisal, Retaliation, Threats, Coercion, Intimidation or Interference with the Right to Report Information of Improper Governmental Activities Prohibited.

No OUSD official or employee may directly or indirectly use or attempt to use the official authority or influence of his or her position or office to interfere with the right of a person to make a protected disclosure. No OUSD official or employee may intentionally engage in acts of reprisal, retaliation, threats, coercion or similar acts against a person as a result of his or her providing, or attempting to provide, such information or refusing to obey an illegal order.

- ### B. Filing a Written Complaint of Retaliation

1. When a protected disclosure has been made under the procedures set forth in this policy and the complainant becomes the subject of acts of actual or attempted reprisal, retaliation, interference, intimidation, coercion or threats, a complaint may be filed with the Ombudsperson. Any complaint filed with the Ombudsperson must be filed within six (6) months of the alleged act or threat of interference or retaliation.

The complainant may also file a copy of the complaint with local law enforcement in accordance with Education Code section 44114. Such a complaint filed with local law enforcement shall be filed within twelve (12) months of the most recent act that is the subject of the complaint. Filing a complaint with local law enforcement by itself is not sufficient to put OUSD on notice of the complaint or the contents of the complaint.

2. In order for a complaint of actual or attempted acts of interference, intimidation, reprisal, retaliation, threats or coercion to be accepted by the Ombudsperson, the complainant must have made the protected disclosure with an official agent. An exception shall be made where the complainant presents a preponderance of evidence that the complainant was prevented from providing information by intimidation or interference. The General Counsel, in consultant with Ombudsperson, will determine if the evidence is sufficient in his or her sole discretion. If the complaint or the protected disclosure involves the General Counsel, the Superintendent will determine if the evidence is sufficient in his or her sole discretion.

C. Investigation

1. Upon receiving a written complaint alleging retaliation, the Ombudsperson shall refer it to the General Counsel for investigation. However, if the complaint alleges that the General Counsel interfered or took the retaliatory action, then the Ombudsperson shall request that the Superintendent appoint a designee to investigate.
2. The General Counsel or the General Counsel's designee shall determine issues of timeliness and where warranted, investigate complaints from any person alleging actual or attempted acts of reprisal, interference, intimidation, retaliation, threats, coercion or similar acts.
3. The investigation and findings shall be limited to the interference, reprisal or retaliation aspect of the complaint only.
4. Before final findings are made, the General Counsel or the General Counsel's designee will provide a copy of the complaint and any documents upon which the General Counsel or the General Counsel's designee intends to rely in reaching findings to the person accused of interference, intimidation, reprisal, retaliation, threats, or coercion. That person accused will be provided the opportunity to respond to the complaint and to file a written statement, which will become part of the record.
5. If, for any reason, the General Counsel or the General Counsel's designee's activities with respect to a complaint are terminated before findings are sent to the Superintendent or designee, the complaint will be sealed and will be released only to the Ombudsperson, Superintendent, or Board and as required by law.

D. Decision

1. The General Counsel or the General Counsel's designee shall present findings of the investigation to the Superintendent or designee, who shall reach a decision regarding the complaint and shall communicate that decision to the complainant and to the person or persons accused of violating this policy. The decision by the Superintendent or designee will include any appropriate relief for the complainant but will not describe any disciplinary action that may be taken against the person or persons accused of violating this policy.
2. For any complaint that alleges that the General Counsel interfered or took the retaliatory action, the Superintendent's designee identified in Section C.1 shall present the complaint to the Superintendent or designee, who shall reach a decision regarding the complaint and shall communicate that decision to the complainant and to the General Counsel. The decision by the Superintendent or designee will include any appropriate relief for the complainant but will not describe any disciplinary action that may be taken against the General Counsel.

3. If the complaint alleges that the Superintendent interfered or took the retaliatory action, the General Counsel shall present the complaint to the Board, who shall reach a decision regarding the complaint and shall direct the General Counsel to communicate that decision to the complainant and to Superintendent. The Board's decision will include any appropriate relief for the complainant but will not describe any disciplinary action that may be taken against the Superintendent.
4. The provisions of Education Code section 44114(e) shall govern any decision.

E. Discipline

Any official found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion, intimidation, interference, or similar improper acts directed at a complainant because of the complainant's protected disclosure resulting from a decision in response to a complaint may be subject to censure by the Governing Board.

Any OUSD employee found to have engaged in actual or attempted acts of reprisal, retaliation, threats, coercion, intimidation, interference, or similar improper acts directed at a complainant because of the complainant's protected disclosure resulting from a decision in response to a complaint shall be subject to discipline in accordance with existing and applicable OUSD personnel policies, collective bargaining agreements, and applicable laws.

F. Appeal of the Decision

A decision of the Superintendent or designee may only be appealed to the Board of Education if such an appeal is permitted pursuant to existing, applicable OUSD personnel policies and collective bargaining agreements and applicable laws. A decision of the Board may not be appealed.

G. Annual Report

The Superintendent shall submit an annual report of actions taken under this policy to the Budget and Finance Committee of the Board of Education. The report should include complaints received and acted on during the fiscal year (July 1 through June 30) and shall not include any details otherwise prohibited by applicable OUSD personnel policies and collective bargaining agreements and applicable laws.