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Policy, Procedures and Legal Framework Regarding Discrimination

I. INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (ADA) (as amended by the Americans with Disabilities Act Amendments of 2008), Title VI of the Civil Rights Act of 1964 (Title VI), Title IX of the Education Amendments of 1972 (Title IX), the Age Discrimination Act of 1975, and their respective implementing regulations (the federal anti-discrimination laws) prohibit retaliation by the San Carlos Unified School District (District) because an individual has engaged in protected activity related to: disability; race, color, or national origin; sex or gender; or age.

As discussed herein, retaliation against those engaging in protected activities is unlawful, prohibited by District policy and employees who engage in such retaliation are subject to discipline which may include sanctions. As set forth in San Carlos School District Board Policies 410 and 1312 et seq, San Carlos School District encourages the reporting of complaints and to resolve such complaints through an established, objective process. District Board Policy 1312.1 specifically states that it is the Governing Board of San Carlos School District's responsibility to address and resolve any complaints concerning district employees. In addition, pursuant to this same policy the Board prohibits retaliation against complainants. Please see http://www.sancarlos.k12.ca.us/all_pdf/board_pdf_file/boardlink/BP0000PHILGOALSOBJ.pdf and http://www.sancarlos.k12.ca.us/wp-content/uploads/1000-San-Carlos.Revised1.pdf for the current District policies and procedures prohibiting, among other things, discrimination, including the Uniform Complaint Procedures. Please be advised that these procedures will be updated on or before March 14, 2014.

Protected activity consists of: (1) opposing a practice made unlawful by one of the federal anti-discrimination laws (the "opposition" clause); or (2) filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under one of the federal anti-discrimination laws (the "participation" clause).

This memorandum reaffirms the District's policy of ensuring that individuals who oppose unlawful discrimination, participate in discrimination proceedings, or otherwise assert their rights or the rights of others under the federal anti-discrimination laws are protected against retaliation. Voluntary compliance with and effective enforcement of the federal anti-discrimination laws depend in large part on the initiative of individuals to oppose practices that they reasonably believe to be unlawful and to file charges of discrimination. If retaliation for such activities were permitted, it would have a chilling effect upon the willingness of individuals to speak out against discrimination or to participate in the administrative process or other discrimination proceedings. Individuals who allege retaliation under the federal anti-discrimination laws need not also allege that they were treated differently because of disability, race, color, or national origin, sex or gender, or age.

Individuals who allege retaliation in violation of Section 504 or the ADA need not be qualified individuals with a disability. Similarly, individuals who allege retaliation for protesting discrimination against persons in one of the protected groups covered by the federal anti-discrimination laws need not be in the protected

group in order to assert a retaliation claim. Individuals can challenge retaliation by the District even if the retaliation occurred after their relationship with the District has ended (e.g., former student, former parent of a student, former employee). They can also challenge retaliation by the District based on their protected activity involving a different school district or based on protected activity by someone closely related to or associated with them.

II. PROTECTED ACTIVITY: OPPOSITION

The anti-retaliation provisions make it unlawful to discriminate against individuals because they have opposed any practice made unlawful under the federal anti-discrimination laws. This protection applies if individuals explicitly or implicitly communicate to the District a belief that its activity constitutes a form of discrimination that is covered by any of the federal anti-discrimination laws.

Examples of protected opposition include:

- Threatening to file a charge or other formal complaint alleging discrimination

Threatening to file a complaint with the U.S. Department of Education's Office for Civil Rights (OCR), the California Department of Education (CDE), the District, union, court, or any other entity that receives complaints relating to discrimination is a form of opposition.

Example – A parent informs her child's teacher that if her child's Section 504 plan or Individualized Education Program (IEP) is not properly or fully implemented then she will file a complaint with the District, OCR, the CDE, or request a due process hearing from the California Office of Administrative Hearings (OAH). This statement constitutes "opposition."

- Complaining to anyone about alleged discrimination against oneself or others

A complaint or protest about alleged discrimination to a District teacher, manager, administrator, union official, co-worker, attorney, newspaper reporter, Congressperson, or anyone else constitutes opposition. A complaint on behalf of another, or by parents' or employees' representatives, rather than by the parents or employees themselves, constitutes protected opposition by both the person who makes the complaint and the person on behalf of whom the complaint is made.

A complaint about a practice constitutes protected opposition only if the individuals explicitly or implicitly communicate a belief that the practice constitutes unlawful discrimination. Because individuals often may not know the specific requirements of the federal anti-discrimination laws, they may make broad or ambiguous complaints of discrimination. Such a protest is protected opposition if the complaint would reasonably have been interpreted as opposition to employment discrimination.

Example 1 – A teacher or parent calls a District administrator to protest racial discrimination by the District. The protest constitutes "opposition."

Example 2 – A teacher complains to co-workers about harassment of a disabled employee or student. This complaint constitutes "opposition."

Example 3 – A parent or teacher complains or reports about a student being called names by other students that are derogatory because of the student's disability, sex or gender, or race, color, or national origin. Although the parent or teacher does not specify that either believes the name calling creates a hostile educational environment based on disability, sex or gender, or race, color, or national origin, their complaint reasonably would have been interpreted as opposition to discrimination, due to the content of the name-calling. Their complaint, therefore, constitutes "opposition."

Example 4 – A parent or teacher raises concerns or issues with the adequacy or implementation of a student's Section 504 plan or IEP. A parent or teacher states a belief that a girls' sports team is not receiving the same level or support as the equivalent boys' team or the boys' teams are permitted to use the main gymnasium or play on weekend nights while the girls' teams are not. These statements constitute "opposition."

Example 5 – A parent of a racial minority student states that the student deserves to be promoted to the next grade. The parent does not state or suggest a belief that the student is being subjected to discrimination based on race. There also is no basis to conclude that the District would reasonably have interpreted the complaint as opposition to race discrimination because the challenged unfairness could have been based on any of several reasons. The parent's complaint therefore does not constitute protected "opposition."

- Refusing to obey a directive because of a reasonable belief that it is discriminatory

Refusal to obey a directive constitutes protected opposition if the individual reasonably believes that the directive requires him or her to carry out unlawful discrimination.

Example - A teacher is instructed to limit the hours of services to which a student with a disability is entitled to receive. The teacher refuses to comply with the directive and provides the student with all of the hours. The teacher's action constitutes "opposition."

Refusal to obey a directive also constitutes protected opposition if the individual reasonably believes that the directive makes discrimination a term or condition of employment. For example, a teacher's refusal to cooperate with a practice of allowing boys but not girls to shower after physical education or athletic practices constitutes protected "opposition." The teacher's participation in the practice made sex or gender discrimination a term or condition of employment. Thus, the refusal to comply with the practice constitutes "opposition."

- Requesting reasonable accommodation

A request for reasonable accommodation of a disability constitutes protected activity under Section 504 and the ADA. Although a person making such a request might not literally "oppose" discrimination or "participate" in the administrative or judicial complaint process, he or she is protected against retaliation for making the request.

Individuals are protected against retaliation for opposing perceived discrimination if they had a reasonable and good faith belief that the opposed practices were unlawful. Thus, it is well settled that a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful.

III.PROTECTED ACTIVITY: PARTICIPATION

The anti-retaliation provisions make it unlawful to discriminate against individuals because they have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, hearing, or litigation under the federal anti-discrimination laws. This protection applies to individuals challenging disability discrimination under the statutes enforced by OCR in its proceedings, in state administrative or court proceedings (e.g., CDE or OAH), as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings. Protection under the participation clause extends to those who file untimely charges. The federal anti-discrimination laws do not limit or condition in any way the protection against retaliation for participating in the charge process. While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the statutory complaint process. Thus, courts have consistently held that an entity covered by the laws is liable for retaliating against an individual for filing a charge regardless of the validity or reasonableness of the charge. To permit an entity to retaliate against a charging party based on its unilateral determination that the charge was unreasonable or otherwise unjustified would chill the rights of all individuals protected by the federal anti-discrimination laws.

The retaliation provisions of the federal anti-discrimination laws prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights. For example, it would be unlawful to retaliate against an employee because his or her spouse, who is also an employee, filed a charge or against a student because his or her parent filed a charge.

An individual is protected against retaliation for participation in discrimination proceedings even if those proceedings involved a different entity. For example, a violation would be found if a school district retaliated against a parent or the parent's child because it found out that the parent had previously complained of racial discrimination at a prior school district.

IV.ADVERSE ACTION

The vast majority of adverse actions taken in retaliation for protected activity will be against parents, teachers, or both. However, retaliatory adverse actions can and do take place against students as well.

The anti-retaliation provisions of the federal anti-discrimination laws are given broad coverage and include acts that are not considered adverse under the traditional discrimination provisions of the laws. For instance, in the employment context, generally a negative performance evaluation or written warning is sufficiently adverse for retaliation purposes but not sufficiently adverse for discrimination purposes. This broad view of coverage accords with the primary purpose of the anti-retaliation provisions, which is to "[maintain] unfettered access to statutory remedial mechanisms." Regardless of the degree or quality of harm to the particular complainant, retaliation harms the public interest by deterring others from filing a charge. An interpretation of the anti-retaliation provisions that permits some forms of retaliation to go unpunished would undermine the effectiveness of the federal anti-discrimination laws and conflict with the language and purpose of them.

For retaliation purposes, an action is considered adverse if it is reasonably likely to deter the charging party or others from engaging in protected activity. Of course, petty slights and trivial annoyances are not sufficient, as they are not likely to deter protected activity. More significant retaliatory treatment, however, can be considered adverse regardless of the level of harm and whether the action was successful or not in deterring the individual from further protected activity.

Retaliatory actions against parents oftentimes take the form of refusing to respond to e-mail messages or return phone calls, not allowing parents to view records, or continually canceling school meetings and conferences. However innocuous those actions may seem, by far the most common significant retaliatory actions taken against parents for protected activity are the making of a false complaint to Child Protective Services (CPS), the imposition of unwarranted truancy charges, and obtaining protective orders against them.

For teachers and other District staff, the most obvious types of retaliation are denial of promotion, refusal to hire, denial of job benefits, demotion, suspension, and discharge. Other types of adverse actions include threats, reprimands, negative evaluations, harassment, or other adverse treatment. Retaliatory actions against students can run the entire spectrum of the educational program from unfair or undeserved grading or criticism to unwarranted discipline. Denial of or exclusion from services, activities, or benefits is another means of retaliation.

V. CAUSAL CONNECTION

Not all adverse actions that might be taken against individuals who have engaged in protected activity are necessarily retaliatory. In order for the adverse action to be retaliatory, there must be a nexus or causal connection between the protected activity and the adverse action. Individuals who have engaged in protected activity are not afforded blanket immunity from adverse action as a result. They are only entitled to be free from adverse actions taken against them that are in response to their protected activity. Adverse actions that are legitimate and non-retaliatory may still be imposed on these individuals to the same extent as individuals who have not engaged in protected activity.

In order to establish unlawful retaliation, there must be proof that the entity took an adverse action because an individual engaged in protected activity. Proof of this retaliatory motive can be through direct or circumstantial evidence.

Direct evidence of a retaliatory motive is any written or verbal statement by a respondent official that he or she undertook the challenged action because the charging party engaged in protected activity. Such evidence also includes a written or oral statement by a respondent official that on its face demonstrates a bias toward the charging party based on his or her protected activity, along with evidence linking that bias to the adverse action. Such a link could be shown if the statement was made by the decision-maker at the time of the adverse action. Direct evidence of retaliation is rare.

The most common method of proving that retaliation was the reason for an adverse action is through circumstantial evidence. A violation is established if there is circumstantial evidence raising an inference of retaliation and if the respondent fails to produce evidence of a legitimate, non-retaliatory reason for the challenged action, or if the reason advanced by the respondent is a pretext to hide the retaliatory motive.

An initial inference of retaliation arises where there is proof that the protected activity and the adverse action were related. Typically, the link is demonstrated by evidence that: (1) the adverse action occurred shortly

after the protected activity, and (2) the person who undertook the adverse action was aware of the complainant's protected activity before taking the action.

An inference of retaliation may arise even if the time period between the protected activity and the adverse action was long, if there is other evidence that raises an inference of retaliation. For example, a 14-month interval between the parent's filing of a discrimination complaint and the initiation of truancy charges against her did not conclusively disprove retaliation where the director of special education mentioned the discrimination complaint at least twice a week during the interim and initiation of the truancy charges occurred just two months after the resolution of her discrimination complaint.

Even if an entity produces evidence of a legitimate, nondiscriminatory reason for the challenged action, a violation will still be found if this explanation is a pretext designed to hide the true retaliatory motive. Typically, pretext is proven through evidence that the entity treated the complainant differently from similarly situated individuals or that the entity's explanation for the adverse action is not believable. Pretext can also be shown if the entity subjected the individual to heightened scrutiny after she engaged in protected activity.

VI. SOME RECENT COURT DETERMINATIONS OF RETALIATION IN THE EDUCATIONAL FIELD

In A.C. v. Shelby County Board of Ed., 711 F.3d 687 (6th Cir. 2013), the court determined that temporal proximity between parents' initial requests for classroom glucose testing of their diabetic child at beginning of the school year and the principal's first report to Tennessee's Department of Children's Services of parental medical abuse of child in late October, and evidence calling into question the truthfulness of principal's reports themselves, was sufficient to meet parents' minimal burden for establishing causation element of prima facie case of retaliation in violation of either Section 504 or the ADA.

The court further determined that genuine issues of material fact existed as to whether school board's articulated legitimate non-retaliatory reasons for principal's reports to DCS of parental medical abuse of their diabetic child, that such reports were motivated by concern for avoiding tort liability under state law and concerns for child's health, were a pretext for retaliating against parents for requesting accommodations, precluding summary judgment in favor of school board. A reasonable jury could find that the reports of abuse were both false and suspiciously timed, that, based on her training, the principal knew or should have known that sending the child to school with sweets was not per se child abuse, that the principal could have reasonably informed herself about whether there was any basis for alleging that child was not monitored at home, and that the DCS reports were actually motivated by the school's well-established displeasure with the parents and their accommodation requests.

Finally, the court stated that with respect to retaliation claims under either Section 504 or the ADA, where the defendant made an error too obvious to be unintentional, a fact-finder may infer that it had an unlawful motive for doing so.

In Polonsky-Britt v. Yuba City USD, 2012 WL 5828513 (E.D.Cal. 11/15/12), the court addressed retaliation claims brought by a special education teacher against the school district in which she was employed. The court denied the school district's motion for summary judgment concluding that: the coverage of Section 504's anti-retaliation provision included special education teachers advocating on behalf of students with disabilities; the teacher engaged in protected activity by stating her objection to obtaining illegal post hoc parental consent for modified student assessments and by informing her superiors that not all students were receiving the educational services required by law; her forced transfer was an adverse action; and, the

proximity in time between the protected activity and the adverse action was sufficiently close to provide a causal connection. The court further found that the teacher presented enough evidence of pretext to address the school district's proffered legitimate non-discriminatory justification for the forced transfer.

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