SAN LEANDRO UNIFIED SCHOOL DISTRICT

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MEMORANDUM

Date: February 2, 2016

To: Policy Committee

From: John Thompson, Ed.D., Assistant Superintendent

RE: Recommended Changes to Board Policy 4121

BACKGROUND:
In November 2014 the Healthy Workplaces/Healthy Families Act was passed (as added legislatively by AB 1522). This legislation requires districts to grant a minimum of one hour of paid sick leave for every 30 hours worked to their employees who work for 30 days within a year of their employment, including substitute employees. This law became effective on July 1, 2015. The district has two options to implement this: 1) employees can be allowed to accrue sick leave throughout the year, which can be carried over from year to year; or 2) employees can be granted 24 hours of paid sick leave at the beginning of each year which cannot be carried over from year to year.

ANALYSIS:
This law does not affect employees who already have sick leave allocations granted by the district such as those covered by collective bargaining agreements. In our district, this will affect approximately 200 substitute employees. In general, smaller districts or those with smaller staffs are selecting option #2 - the granting option. Option 2 is less burdensome for the staff required to track this sick leave. For the employee, there are advantages and disadvantages for each option. In option #1 employees must accrue sick leave before it can be used but up to 48 hours can be carried over from year to year. In option #1, employees can begin using the sick leave as soon as they are eligible, but cannot carry over unused sick leave from year to year.

RECOMMENDATION FROM STAFF:
Staff recommends option #2. Two people in the payroll department will be charged with tracking this sick leave for approximately 200 substitute employees in addition to all of their other responsibilities. Staff is concerned that the department does not have the capacity at current staffing levels to implement the accrual method (option #1) effectively.

CSBA Sample | BP 4121 Personnel New

Temporary/Substitute Personnel

The Governing Board recognizes that substitute and temporary personnel perform an essential role in promoting student achievement and desires to employ highly qualified, appropriately credentialed employees to fill such positions.

(cf. 4112.2 - Certification)

Hiring

The Superintendent or designee shall recommend candidates for substitute or temporary positions for Board approval, and shall ensure that all substitute and temporary employees are assigned in accordance with law and the authorizations specified in their credential.

(cf. 4113 - Assignment)

Substitute personnel may be employed on an on-call, day-to-day basis.

In addition, after September 1 of any school year, the Board may employ substitute personnel for the remainder of the school year for positions for which no regular employee is available. The district shall first demonstrate to the Commission on Teacher Credentialing the inability to acquire the services of a qualified regular employee. (Education Code 44917)

(cf. 4117.14/4317.14 - Postretirement Employment)

Note: Education Code 44956 and 44957 require that districts give employees who are laid off pursuant to Education Code 44955 priority for substitute service during the period of preferred right to reemployment. The period of preferred right to reemployment is 39 months for laid-off permanent employees and 24 months for probationary employees; see BP 4117.3 - Personnel Reduction.

Note: Pursuant to Education Code 44956, if a laid-off permanent employee serves as a substitute in any position requiring certification for any 21 days or more within a period of 60 school days, he/she is entitled to compensation not less than the amount the employee would receive if he/she were being reappointed and retroactive to the first day of the substitute service. Education Code 44957 does not contain similar provisions for probationary employees; such employees are paid according to the salary schedule for substitute employees adopted by the Governing Board, regardless of the number of days worked as a substitute.

Permanent or probationary certificated employees who were laid off pursuant to Education Code 44955 and who have a preferred right of reappointment shall be given priority for substitute service in the order of their original employment. (Education Code 44956, 44957)

(cf. 4117.3 - Personnel Reduction)

Classification

Note: A certificated employee's classification as a substitute, temporary, probationary, or

permanent employee governs the statutory job protections to which he/she is entitled and the procedures that apply if he/she is not reelected; see section below entitled "Release from Employment/Dismissal." Districts are encouraged to consult legal counsel when questions arise regarding such classification.

At the time of initial employment and each July thereafter, the Board shall classify substitute and temporary employees as such. (Education Code 44915, 44916)

The Board may classify as substitute personnel a teacher hired to fill the position of a regularly employed person who is absent from service. (Education Code 44917)

Note: The following two paragraphs describe circumstances under which the Education Code expressly defines a position as temporary. In both Bakersfield Elementary Teachers Association v. Bakersfield City School District and California Teachers Association v. Vallejo City Unified School District, the courts determined that it was inappropriate to classify certificated employees as temporary on the basis of the provisional status of their credential (i.e., those serving under an intern credential, provisional internship permit, short-term staff permit, emergency teaching permit, or credential waiver). According to the courts, districts may classify as temporary employees only those persons who are specified to be temporary employees in the Education Code. All other certificated employees who cannot be properly classified as substitute or permanent employees must be classified as probationary employees.

Note: One circumstance under which a teacher may be classified as a temporary employee is when the district needs an additional teacher for a period of one semester to one year because of teacher absence due to leaves or long-term illness, as authorized in Education Code 44920. As provided below, Education Code 44920 requires the Board to determine the number of temporary employees that may be hired under these circumstances. In McIntyre v. Sonoma Valley Unified School District, the court clarified that a district's ability to classify an employee as temporary pursuant to Education Code 44920 is not dependent upon a one-to-one match of temporary employees to employees on leave. Rather, all that is required is that the number of temporary teachers not exceed the total number of employees on leave at any one time.

(take out old paragraph & insert new one)

To address the need for additional certificated employees when regular district employees are absent due to leaves or long-term illness, the Board may classify a teacher who is employed for at least one semester and up to one complete school year as a temporary employee. Any person whose service begins in the second semester and before March 15 may be classified as a temporary employee even if employed for less than a semester. The Board shall determine the number of persons who shall be so employed, which shall not exceed the identified need based on the absence of regular employees. (Education Code 44920)

#1

The Board also shall classify as temporary employees those certificated persons, other than substitute employees, who are employed to:

1. Serve from day to day during the first three months of any school term to teach temporary classes which shall not exist after that time, or perform any other duties which do not last longer than the first three months of any school term (Education Code 44919)

2. Teach in special day and evening classes for adults or in schools of migratory population for not more than four months of any school term (Education Code 44919)

(cf. 6175 - Migrant Education Program)

(cf. 6200 - Adult Education)

3. Serve in a limited assignment supervising student athletic activities provided such assignments have first been made available to teachers presently employed in the district (Education Code 44919)

(cf. 4127/4227/4327 - Temporary Athletic Team Coaches)

4. Serve in a position for a period not to exceed 20 working days in order to prevent the stoppage of district business during an emergency when persons are not immediately available for probationary classification (Education Code 44919)

Note: Item #5 below applies only to high school and unified districts.

5. Serve only for the first semester because the district expects a reduction in student enrollment during the second semester due to mid-year graduations (Education Code 44921)

For purposes of classifying employees pursuant to item #1 or #2 above, the school year shall not be divided into more than two school terms. (Education Code 44919)

Note: Education Code 44909 authorizes districts to employ certificated employees in programs and projects conducted under contract with public or private agencies or through categorically funded projects which are not required by federal or state statutes, and provides that such persons may be employed for periods less than a full school year. Pursuant to Education Code 44909, such persons may be terminated at the expiration of the contract or specially funded project without regard to termination procedures required for probationary or permanent employees. In Stockton Teachers Association v. Stockton Unified School District, the court of appeals clarified that "the expiration of the contract" refers to the contract between the district and the agency providing categorical funds, not a contract between the district and employee. Thus, the district may not hire a person for more or less than the term of the contract or project and treat such a person as a temporary employee. Districts should consult legal counsel as necessary regarding the classification or termination of employees hired pursuant to Education Code 44909. Also, it is recommended that districts use a separate employment agreement tailored to these employees.

Any employee hired to provide services in a categorically funded program or project may be employed for a period less than a full school year. He/she may be classified as a temporary employee if the period of employment will end at the expiration of that program or project. (Education Code 44909)

Salary and Benefits

The Board shall adopt and make public a salary schedule setting the daily or pay period rate(s) for substitute employees for all categories or classes of certificated employees of the district. (Education Code 44977, 45030)

Note: Pursuant to Government Code 3540.1, exclusive representatives of employees for purposes of negotiations may include representation of all public school employees other than management and confidential employees, as defined. Thus, substitute and temporary personnel may have the right to be represented. In cases where substitute and temporary employees are not represented, the Board may determine whether to include such employees in the district's health and welfare plan and other benefits. Although Options 1 and 2 below address temporary employees only, a district may modify either option as necessary to reflect its treatment of substitute employees. The district should consult legal counsel if it has any

questions about the provision of benefits to substitute and temporary employees.

OPTION 1: Temporary employees shall participate in the health and welfare plans or other fringe benefits of the district.

(cf. 4140/4240/4340 - Bargaining Units)

(cf. 4154/4254/4354 - Health and Welfare Benefits)

OPTION 2: Temporary employees shall not participate in the health and welfare plans or other fringe benefits of the district.

New section to be added

#2 Paid Sick Leave

Note: Labor Code 245-249 (the Healthy Workplaces, Healthy Families Act), as added by AB 1522 (Ch. 317, Statutes of 2014), require districts to grant a minimum of one hour of paid sick leave for every 30 hours worked to their employees who work for 30 days within a year of their employment, including temporary and substitute employees. In implementing this requirement, Labor Code 246, as amended by AB 304 (Ch. 67, Statutes of 2015), permits the district to use any of the options specified below. Option 1 provides for paid leave accrual based on one hour for every 30 hours worked. Option 2 allows an accrual method that provides for a regular accrual basis and ensures that the employee receives 24 hours of paid sick leave by the 120th day of his/her employment. Option 3 is for any district that credits employees with 24 hours of paid sick leave at the beginning of each year and does not allow unused sick leave to carry over to the next year. In addition, pursuant to Labor Code 245.5, as amended by AB 304, retired annuitants who have not reinstated to the applicable public retirement system are excluded from participation in these leave benefit provisions. The district should select the option below which corresponds to its approach under Labor Code 246.

Note: Additional requirements of Labor Code 245-249 include, but are not limited to, display of a poster containing specified information at every workplace, provision of each employee's sick leave balance on his/her wage statements, and maintenance of leave usage documentation for three years.

Note: The provisions of Labor Code 245-249 are very broad and only district employees covered by a valid collective bargaining agreement may be exempted from them, if the collective bargaining agreement expressly provides paid sick leave in an amount equal to or exceeding the amount of leave required pursuant to Labor Code 246, includes final and binding arbitration of disputes regarding the application of the paid sick days provisions, and provides premium wage rates for all overtime hours worked and a regular hourly rate of pay of not less than 30 percent more than the state minimum wage rate. Since many districts may not satisfy all the conditions for this exemption, the following optional section reflects the requirements of Labor Code 245-249. Any district whose collective bargaining agreement meets all the conditions for exemption may modify this section accordingly. For sick leave for full-time and part-time certificated employees and additional requirements of Labor Code 245-249, see AR 4161.1/4361.1 - Personal Illness/Injury Leave. For sick leave for classified employees, see AR 4261.1 - Personal Illness/Injury Leave.

OPTION 1: Except for a retired annuitant who is not reinstated to the retirement system, any temporary or substitute employee who works for 30 or more days within a year of his/her employment shall be entitled to one hour of paid sick leave for every 30 hours worked. Accrued paid sick days shall carry over to the

following year of employment, up to a maximum of 48 hours. (Labor Code 246)

OPTION 2: Except for a retired annuitant who is not reinstated to the retirement system, any temporary or substitute employee who works for 30 or more days within a year of his/her employment shall accrue, on a regular basis, paid sick leave of up to 24 hours by the 120th calendar day of his/her employment or each calendar year or 12-month period. Accrued paid sick days shall carry over to the following year of employment, up to a maximum of 48 hours. (Labor Code 246)

OPTION 3: Except for a retired annuitant who is not reinstated to the retirement system, any temporary or substitute employee who works for 30 or more days within a year of his/her employment shall be credited with 24 hours of paid sick leave for that year. Unused sick leave shall not carry over to the following year of employment. (Labor Code 246)

Note: The following paragraph applies to all the above options.

Any temporary or substitute employee may begin to use accrued paid sick days on the 90th day of his/her employment, after which he/she may use the sick days as they are accrued. (Labor Code 246)

Note: The following paragraph applies to all of the above options and reflects the intent of the Healthy Workplaces, Healthy Families Act to enable California workers to address their own and their family's health needs and to provide them with economic security when they need to take time off work for reasons of domestic violence, sexual assault, or stalking. The following paragraph may be revised to include additional reasons for which temporary or substitute employees may use sick leave, pursuant to district policy or practice. Pursuant to Labor Code 247.5, as amended by AB 304 (Ch. 67, Statutes of 2015), a district is not required to inquire into the purposes for which an employee uses paid leave.

A temporary or substitute employee may use accrued sick leave for absences due to: (Labor Code 246.5)

1. His/her own need or the need of a family member, as defined in Labor Code 245.5, for the diagnosis, care, or treatment of an existing health condition or for preventive care

2. Need of the employee to obtain or seek any relief or medical attention specified in Labor Code 230(c) and 230.1(a) for the health, safety, or welfare of the employee, or his/her child, when the employee has been a victim of domestic violence, sexual assault, or stalking

(cf. 4161.1/4361.1 - Personal Illness/Injury Leave)

(cf. 4261.1 - Personal Illness/Injury Leave)

No employee shall be denied the right to use accrued sick days and the district shall not in any manner discriminate or retaliate against an employee for using or attempting to use sick leave, filing a complaint with the Labor Commissioner, or alleging district violation of Labor Code 245-249. The Superintendent or designee shall display a poster containing required information, provide notice to eligible employees of their sick leave rights, keep records of employees' use of sick leave for three years, and comply with other requirements specified in Labor Code 245-249 and in AR 4161.1/4361.1 - Personal Illness/Injury Leave.

Release from Employment/Dismissal

The Board may dismiss a substitute employee at any time at its discretion. (Education Code 44953)

Note: Pursuant to Education Code 44954, if a district decides not to reelect for the following

year a temporary employee who has served at least 75 percent of the days in the school year, the district must so notify that employee by the end of the school year. In Neily v. Manhattan Beach Unified School District, the court held that Education Code 37200, which defines a school year as ending June 30, is applicable for determining the deadline for this notification, not the last day that students and teachers are in their classrooms.

The Board may release a temporary employee at its discretion if the employee has served less than 75 percent of the number of days the regular schools of the district are maintained during one school year. After serving 75 percent of the number of days that district schools are maintained during one school year, a temporary employee may be released as long as he/she is notified, before the last day of June, of the district's decision not to reelect him/her for the following school year. (Education Code 37200, 44954)

(cf. 4112.9/4212.9/4312.9 - Employee Notifications)

Reemployment as a Probationary Employee

Note: Education Code 44917, 44918, and 44920 provide that a substitute or temporary employee who performs the duties of a certificated employee for a complete school year, or for at least 75 percent of the days in the school year, shall be given credit for a complete year as a probationary employee if he/she is then employed as a probationary employee the following school year, as provided below. However, in McIntyre v. Sonoma Valley Unified School District, the court clarified that a district is not required to grant probationary status to an employee based solely on the fact that he/she served as a temporary employee for more than one year if the employee is released and reemployed as a temporary employee for the following year to fill the position of a regularly employed person absent from service.

Note: Reemployment provisions contained in Education Code 44918 do not apply to districts with average daily attendance of over 400,000; such districts should modify the following section accordingly.

Unless released from employment pursuant to Education Code 44954, any person employed for one complete school year as a temporary employee shall, if reemployed for the following school year in a vacant position requiring certification qualifications, be classified as a probationary employee. With the exception of on-call, day-to-day substitutes, if a temporary or substitute employee performs the duties normally required of certificated employees for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and is then employed as a probationary employee for the following school year, his/her previous employment as a temporary or substitute employee shall be credited as one year's employment as a probationary employee for purposes of acquiring permanent status. (Education Code 44917, 44918, 44920)

(cf. 4116 - Probationary/Permanent Status)

Vacant position means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave. (Education Code 44920, 44921)

A temporary employee hired pursuant to item #1 or #2 in the section "Classification" above shall be classified as a probationary employee if the duties continue beyond the time limits of the assignment. (Education Code 44919)

Note: Districts that do not maintain high schools should delete the following paragraph.

A person employed pursuant to item #5 in the section "Classification" above who is then continued in employment beyond the first semester shall be classified as a probationary employee for the entire school year and shall be reemployed to fill any vacant position in the district for which he/she is certified. Preference for available positions shall be determined by the Board as prescribed by Education Code 44845 and 44846. (Education Code 44921)

With the exception of on-call, day-to-day substitutes, any temporary or substitute employee who was released pursuant to Education Code 44954 but who has nevertheless served in a certificated position in the district for at least 75 percent of each of two consecutive school years shall receive first priority if the district fills a vacant position for the subsequent school year at the grade level at which the employee served during either year. In the case of a departmentalized program, the employee shall have taught the subject matter in which the vacant position occurs. (Education Code 44918)

Legal Reference:

EDUCATION CODE

22455.5 Provision of retirement plan information to potential members

22515 Irrevocable election to join retirement plan

37200 School calendar

44252.5 State basic skills assessment required for certificated personnel

44300 Emergency teaching or specialist permits

44830 Employment of certificated persons; requirements of proficiency in basic skills

44839.5 Employment of retirant

44845 Date of employment

44846 Criteria for reemployment preferences

44909 Employees providing services through categorically funded programs

44914 Substitute and probationary employment computation for classification as permanent employee

44915 Classification of probationary employees

44916 Time of classification; statement of employment status

44917 Classification of substitute employees

44918 Substitute or temporary employee deemed probationary employee; reemployment rights

44919 Classification of temporary employees

44920 Employment of certain temporary employees; classifications

44921 Employment of temporary employees; reemployment rights (unified and high school districts)

44953 Dismissal of substitute employees

44954 Release of temporary employees

44955 Layoff of permanent and probationary employees

44956 Rights of laid-off permanent employees to substitute positions

44957 Rights of laid-off probationary employees to substitute positions

44977 Salary schedule for substitute employees

45030 Substitutes

45041 Computation of salary

45042 Alternative method of computation for less than one school year

45043 Compensation for employment beginning in the second semester

56060-56063 Substitute teachers in special education

GOVERNMENT CODE

3540.1 Educational Employment Relations Act, definitions

LABOR CODE

220 Sections inapplicable to public employees

230 Jury duty; legal actions by domestic violence, sexual assault and stalking victims, right to time off

230.1 Employers with 25 or more employees; domestic violence, sexual assault and stalking victims, right to time off

233 Illness of child, parent, spouse or domestic partner

234 Absence control policy

245-249 Healthy Workplaces, Healthy Families Act of 2014

CODE OF REGULATIONS, TITLE 5

5502 Filing of notice of physical examination for employment of retired person

5503 Physical examination for employment of retired persons

5590 Temporary athletic team coach

80025-80025.5 Emergency substitute teaching permits

COURT DECISIONS

McIntyre v. Sonoma Valley Unified School District (2012) 206 Cal.App.4th 170

Stockton Teachers Association CTA/NEA v. Stockton Unified School District (2012) 204 Cal.App.4th 446

Neily v. Manhattan Beach Unified School District, (2011) 192 Cal.App.4th 187

California Teachers Association v. Vallejo City Unified School District, (2007) 149 Cal.App.4th 135

Bakersfield Elementary Teachers Assn. v. Bakersfield City School District, (2006) 145 Cal.App.4th 1260, 1277

Kavanaugh v. West Sonoma Union High School District, (2003) 29 Cal.4th 911

Management Resources:

WEB SITES

CSBA: http://www.csba.org

Commission on Teacher Credentialing: http://www.ctc.ca.gov

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