

Office of Superintendent of Schools
Board Meeting of May 18, 2005

May 4, 2005

Office of School Board Attorney
Johnny Brown, Board Attorney

**SUBJECT: PROPOSED ENACTMENT OF SCHOOL BOARD RULE: INITIAL
READING 6Gx13- 4A-1.33, PROCEDURES FOR EMPLOYEES FILING
COMPLAINTS, COVERED BY FLORIDA WHISTLE-BLOWER ACT**

COMMITTEE: SCHOOL SUPPORT ACCOUNTABILITY

At its April 13, 2005 School Board meeting, the School Board passed agenda Item B-3, directing the School Board Attorney to initiate rulemaking to enact a Board Rule that would provide guidelines to school district personnel for the filing of complaints covered by Florida's Whistle-Blower Act, §112.3187-112.31895, Fla. Stat. (2004).

The proposed Rule establishes uniform procedures for employees of Miami-Dade County Public Schools (M-DCPS) who file complaints covered by Florida's Whistle-Blower Act and sets forth a process for the investigation of these complaints. In addition, the proposed Rule codifies the school district's adherence to a non-retaliation policy to protect employees who file legitimate Whistle-Blower Act complaints.

Attached are the Notice of Intended Action and the proposed Board Rule.

Authorization of the Board is requested for the Superintendent to initiate rulemaking proceedings in accordance with the Administrative Procedure Act for the promulgation of new School Board Rule 6Gx13-4A-1.33, *Procedures for Employees Filing Complaints Covered by Florida's Whistle-Blower's Act*.

RECOMMENDED: That The School Board of Miami-Dade County, Florida, authorize the Superintendent to initiate rulemaking proceedings in accordance with the Administrative Act to promulgate new School Board Rule 6Gx13-4A-1.33, *Procedures for Employees Filing Complaints Covered by Florida's Whistle-Blower's Act*.

LMG/dlp

G-3

NOTICE OF INTENDED ACTION

THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA, announced on May 18, 2005, its intention to promulgate new Board Rule 6Gx13- 4A-1.33, Procedures for Employees Filing Complaints Covered by Florida's Whistle-blower's Act, at its meeting of July 13, 2005.

PURPOSE AND EFFECT: The new Board Rule establishes procedures for employees of Miami-Dade County Public Schools (M-DCPS) who file complaints in accordance with Florida's Whistle-blower's Act, § 112.3187-112.31895 Florida Statute (2004), and delineates a process for the investigation of these complaints.

SUMMARY: To establish a uniform procedure for M-DCPS employees who file complaints covered by Florida's Whistle-blower's Act, to delineate a process for the investigation of these complaints, and to codify the non-retaliation policies adhered to and prescribed by the School Board to protect employees filing legitimate Whistle-blower's Act complaints.

SPECIFIC LEGAL AUTHORITY UNDER WHICH RULEMAKING IS AUTHORIZED: 1001.41(1)(2); 1001.42(22); 1001.43(10) F.S.

LAW IMPLEMENTED, INTERPRETED, OR MADE SPECIFIC: § 112.3187-112.31895; 216.011; 447.203(9); 1012.23; 1012.27(6) F.S.

IF REQUESTED, A HEARING WILL BE HELD DURING THE BOARD MEETING OF July 13, 2005, which begins at 1:00 p.m., in the School Board Auditorium, 1450 N.E. Second Avenue, Miami, Florida 33132. Persons requesting such a hearing or who wish to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by Section 120.541(1), F.S., must do so in writing by June 14, 2005, to the Superintendent of Schools, Room 912, at the same address.

ANY PERSON WHO DECIDES TO APPEAL THE DECISION made by The School Board of Miami-Dade County, Florida, with respect to this action will need to ensure the preparation of a verbatim record of the proceedings, including the testimony and evidence upon which the appeal is to be based. (Section 286.0105, Florida Statutes)

A COPY OF THE PROPOSED NEW RULE is available to the public for inspection and copying at cost in the Citizen Information Center, Room 158, 1450 N.E. Second Avenue, Miami, Florida 33132.

**Originator: Dr. Marta Pérez
Date: May 9, 2005**

PERSONNEL**PROCEDURES FOR EMPLOYEES FILING COMPLAINTS COVERED BY FLORIDA'S WHISTLE-BLOWER'S ACT; FOR THE INVESTIGATION OF THESE COMPLAINTS; AND DECLARATION OF THE DISTRICT'S NON-RETALIATION POLICY FOR EMPLOYEES INITIATING SUCH COMPLAINTS****Purpose of the Rule**

The purpose of this rule is to establish, in accordance with Florida's Whistle-blower's Act ("WBA"), a uniform procedure for employees of the Miami-Dade County Public Schools (MDCPS) who wish to file a complaint that is covered by the WBA, § 112.3187-112.3189(1), Fla.Stat.(2004), and to delineate a process for the investigation of these complaints. In addition, this Rule codifies the non-retaliation policies adhered to and prescribed by the School Board to protect employees filing legitimate WBA Complaints.

I. Florida's Whistle-Blower's Act

Florida's Whistle-blower's Act, sections 112.3187-112.31895, Fla.Stat. (2004), was enacted in order to prevent agencies, or independent contractors of agencies from taking retaliatory action against an employee who reports violations of state, federal, or local laws on the part of a public employer or an independent contractor. See § 112.3187(2), Fla.Stat. (2004). Certain provisions of the WBA apply to school districts. See § 112.3187(3)(a) and (6)(a), Fla.Stat. (2004). In particular, school districts must comply with the non-retaliatory action provisions (§112.3187) and the confidentiality provisions (§112.3188) of the WBA. This Board Rule incorporates and codifies herein those provisions of the WBA that apply to school districts.

The intent of the WBA is "to prevent agencies or independent contractors from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer or independent contractor that "create a substantial and specific danger to the public's health, safety, or welfare." Another purpose of the WBA is "to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee." Section 112.3187, Fla.Stat. (2004).

A. Definitions:

1. "Employee" means a person who performs services for, and under the control and direction of, or contracts with, the School Board or independent contractor for wages or other remuneration.
2. "Adverse personnel action" means the discharge, suspension, transfer, or demotion of any employee or the withholding of bonuses, the reduction in salary or benefits, or any other adverse action taken against an employee within the terms and conditions of employment by MDCPS or independent contractor.
3. "Independent contractor" means a person, other than an agency, engaged in any business and who enters into a contract, including a provider agreement, with the School Board.
4. "Gross mismanagement" means a continuous pattern of managerial abuses, wrongful or arbitrary and capricious actions, or fraudulent or criminal conduct which may have a substantial adverse economic impact.

B. Prohibited Acts/Non-Retaliatory Policy

1. MDCPS or an independent contractor shall not dismiss, discipline, or take any other adverse personnel action against an employee for disclosing information pursuant to the provisions of this Rule.
2. MDCPS or an independent contractor shall not take any adverse action that affects the rights or interests of a person in retaliation for the person's disclosure of information covered by this Rule.
3. The provisions of this Rule shall not be applicable when an employee or person discloses information known by the employee or person to be false.

C. Nature And Type Of Information Covered By WBA

In order for the provisions of this Rule to be applicable, the information disclosed pursuant to this Rule must include:

1. Any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of MDCPS or an independent contractor thereof which creates and presents a substantial and specific danger to the public's health, safety, or welfare.

2. Any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of MDCPS or an independent contractor thereof.

D. Filing WBA Complaints

1. **Person To Whom WBA Information Must Be Disclosed**

Any information disclosed under this Rule must be submitted to the Inspector General for the MDCPS or in the case where no Inspector General has been contracted by the School Board, any information disclosed which is of the type covered by the WBA must be submitted to the Superintendent of Schools as the "chief executive officer" or the individual designated as the "agency inspector general" by the Superintendent pursuant to section 112.3189(1) of the Florida Statutes.

2. **Employee Protections**

This section protects MDCPS employees who disclose information on their own initiative in a written and signed complaint; who are requested to participate in an investigation, hearing, or other inquiry conducted by MDCPS, any agency or federal government entity; who refuse to participate in any adverse action prohibited by this section; or who initiate a complaint through the whistle-blower's hotline maintained by the Office of the Inspector General; or employees who file any written complaint to the employee designated as agency inspector general under § 112.3189(1), or to the Florida Commission on Human Relations. No remedy or other protection under [ss. 112.3187-112.31895] applies to any person who has committed or intentionally participated in committing the violation or suspected violation for which protection under this Rule is being sought.

- a. Any employee of MDCPS or applicant for employment with MDCPS, who is discharged, disciplined, or subjected to other adverse personnel action, or denied employment, because he or she engaged in an activity protected by this Rule may file a complaint, which complaint must be made in manner prescribed in § 112.31895, Fla.Stat. (2004).
- b. Within 60 days after the action prohibited by this section, any MDCPS employee protected by this Rule may file a

complaint with the Inspector General or with the appropriate individual as specified in section D(1) above.

E. Confidentiality Of WBA Information

In accordance with § 1112.3188, the name or identity of any individual who discloses in good faith to the Inspector General information that alleges that an employee or agent of an agency or independent contractor:

- (a) Has violated or is suspected of having violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare; or
- (b) Has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty

may not be disclosed to anyone other than a member of the Inspector General's staff, internal auditor's, without the written consent of the individual, unless the Inspector General, internal auditor, determines that: the disclosure of the individual's identity is necessary to prevent a substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime; or the disclosure is unavoidable and absolutely necessary during the course of the audit, evaluation, or investigation.

Except as specifically authorized by s. 112.3189, all information received by the Inspector General or information produced or derived from fact-finding or other investigations conducted by the Florida Commission on Human Relations or the Department of Law Enforcement is confidential and exempt from s. 119.07(1) if the information is being received or derived from allegations as set forth in Sections E(a) or E(b) above, and an investigation is active.

All information received or information produced or derived from fact-finding or investigations conducted pursuant to this Rule and as authorized by s. 112.3187(8)(b) is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution, if the information is being received or derived from allegations as set forth in Sections E(a) or E(b) above and an investigation is active.

Information deemed confidential under this section may be disclosed by the Inspector General receiving the information if the recipient determines that the disclosure of the information is absolutely necessary to prevent a

substantial and specific danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime. Information disclosed under this subsection may be disclosed only to persons who are in a position to prevent the danger to the public's health, safety, or welfare or to prevent the imminent commission of a crime based on the disclosed information.

F. Investigations That Are Considered "Active"

An investigation is active under this Rule if: (a) It is an ongoing investigation or inquiry or collection of information and evidence and is continuing with a reasonable, good faith anticipation of resolution in the foreseeable future; or (b) all or a portion of the matters under investigation or inquiry are active criminal intelligence information or active criminal investigative information as defined in s. 119.011, Florida Statutes.

Notwithstanding the latter, an investigation ceases to be active when: (a) the written report required under s. 112.3189(9) has been sent by the Inspector General to the recipients named in s. 112.3189(9); (b) it is determined that an investigation is not necessary under s. 112.3189(5); or (c) a final decision has been rendered by the local government [or by the Division of Administrative Hearings pursuant to s. 112.3187(8)(b).]

Information or records received or produced under this section which are otherwise confidential under law or exempt from disclosure under chapter 119 retain their confidentiality or exemption.

Any person who willfully and knowingly discloses information or records made confidential under this subsection commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083 of the Florida Statutes.

G. Investigative Procedures

1. Information Disclosed By Certain Employees

This section only applies to the disclosure of information as described in s. 112.3187(5) by an employee or former employee of, or an applicant for employment with the School Board.

To facilitate the receipt of complaints or information described herein, the Inspector General shall maintain an in-state toll-free whistle-blower's hotline and shall circulate among school district an advisory for all employees which indicates the existence of the

toll-free number and its purpose and provides an address to which written whistle-blower information may be forwarded.

2. Inspector General To Determine Validity Of Complaint

When a person alleges information described in s. 112.3187(5), the Inspector General actually receiving such information shall within 20 days of receiving such information determine:

(a) Whether the information disclosed is the type of information described in s. 112.3187(5).

(b) Whether the source of the information is a person who is an employee or former employee of, or an applicant for employment with, a state agency, as defined in s. 216.011.

(c) Whether the information actually disclosed demonstrates reasonable cause to suspect that an employee or agent of an agency or independent contractor has violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare, or has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty.

For any time period set forth herein, such time period may be extended in writing by the Inspector General, for good cause shown.

3. Closing Complaints That Are Not Covered By The WBA

If the Inspector General determines that the information disclosed is not the type of information described in s. 112.3187(5), or that the source of the information is not a person who is an employee or former employee of, or an applicant for employment with the School Board, or that the information disclosed does not demonstrate reasonable cause to suspect that an employee or agent of the School Board or independent contractor has violated any federal, state, or local law, rule, or regulation, thereby creating and presenting a substantial and specific danger to the public's health, safety, or welfare, or has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty, the Inspector General shall notify

the complainant of such fact and copy and return, upon request of the complainant, any documents and other materials that were provided by the complainant.

H. Determining The Necessity Of An Investigation

If the Inspector General determines that the information disclosed is the type of information described in s. 112.3187(5), that the source of the information is from a person who is an employee or former employee of, or an applicant for employment with the School Board, and that the information disclosed demonstrates reasonable cause to suspect that an employee or agent of the School Board or independent contractor has violated any federal, state, or local law, rule, or regulation, thereby creating a substantial and specific danger to the public's health, safety, or welfare, or has committed an act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, or gross neglect of duty, the Inspector General making such determination shall then conduct an investigation, unless the Inspector General determines, within 30 days after receiving the allegations from the complainant, that such investigation is unnecessary. The time period set forth herein may be extended in writing by the Inspector General, for good cause shown.

I. Factors To Be Considered By Inspector General In Determining Whether An Investigation Is Necessary

For purposes of this Rule, the Inspector General shall consider the following factors, but is not limited to only the following factors, when deciding whether the investigation is not necessary:

1. The gravity of the disclosed information compared to the time and expense of an investigation.
2. The potential for an investigation to yield recommendations that will make MDCPS more efficient and effective.
3. The benefit to the School Board to have a final report on the disclosed information.
4. Whether the alleged whistle-blower information primarily concerns personnel practices that may be investigated under chapter 1012 or in accordance with the pertinent collective bargaining agreement.
5. Whether another agency may be conducting an investigation and whether any investigation under this section could be duplicative.

6. The time that has elapsed between the alleged event and the disclosure of the information.

J. Procedure To Be Followed When It Is Determined That An Investigation Is Not Necessary

If the Inspector General determines under Section I above that an investigation is not necessary, the Inspector General making such determination shall:

1. Copy and return, upon request of the complainant, any documents and other materials provided by the individual who made the disclosure.
2. Inform in writing to the School Board that the investigation is not necessary and to the individual who made the disclosure of the specific reasons why an investigation is not necessary and why the disclosure will not be further acted on under this section.

II. Applicability Of Procedures To District Employees

The Inspector General may conduct an investigation pursuant to this Rule only if the person transmitting information to the inspector general is an employee or former employee of, or an applicant for employment with, the School Board, or an employee of, former employee of, or applicant for employment with a vendor who has a contract with the School Board.

III. Submission Of Investigation Report By Inspector General

Once an investigation has begun, the Inspector General shall (1) conduct an investigation with respect to the WBA information described herein and any related matters; (2) submit to the complainant and the School Board, within 60 days after the date on which a determination to conduct an investigation is made in accordance with this Rule, a final written report that sets forth the Inspector General's findings, conclusions, and recommendations, except in cases where there is evidence of a criminal violation as specified below. The complainant shall be advised in writing by the agency head that the complainant may submit to the Inspector General comments on the final report within 20 days of the date of the report and that such comments will be attached to the final report. The time periods set forth herein may be extended in writing by the Inspector General, for good cause shown.

The final report required under this Rule must be reviewed and signed by the person responsible for conducting the investigation and must include:

1. A summary of the information with respect to which the investigation was initiated.
2. A description of the conduct of the investigation.
3. A summary of any evidence obtained from the investigation.
4. A listing of any violation or apparent violation of any law, rule, or regulation.
5. A description of any action taken or planned as a result of the investigation, such as:
 - a. A change in an agency rule, regulation, or practice.
 - b. The restoration of an aggrieved employee.
 - c. A disciplinary action against an employee.
 - d. The referral to the appropriate law enforcement agency of any evidence of a criminal violation.

If an investigation under this section produces evidence of a criminal violation, the report shall not be transmitted to the complainant, and the Inspector General shall notify the State Attorney's Office or the appropriate law enforcement agency.

Specific Authority: 1001.41; 1001.42; 1001.43; 1012, F.S.

Law Implemented, Interpreted, or Made Specific: 112.3187-112.31895; 216.011; 447.203(9); 1012.23; 1012.27(6), F.S.

History THE SCHOOL BOARD OF MIAMI-DADE COUNTY, FLORIDA
New: 5-18-05
Amended: