



New York State
Council of
School Superintendents

Contract Implementation in an Age of Scrutiny:

What ***EVERY***
Superintendent
Should Know[©]

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From the Executive Director:

NYSCOSS is pleased to provide a copy of *Contract Implementation in An Age of Scrutiny: What Every Superintendent Should Know*® offering sound advice on a range of topics related to your employment agreement.

The NYSCOSS legal service has flourished since its expansion in 1999. We have assisted more than 400 superintendents negotiating or reviewing their contracts, all free of charge. In several cases, we have helped enforce agreements, leading to favorable Commissioner's decisions and court cases. Because of our efforts, many superintendents have maximized NYSTRS benefits they may have otherwise lost. These efforts have also afforded you a margin of security in a visible and stressful position.

In any enterprise where hundreds of personal, individual employment agreements are created, there is an understandable range of complexity, sophistication, and accuracy. However, superintendent contracts can be jeopardized by inartful and sometimes prohibited clauses. We aim to minimize such jeopardy.

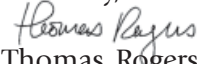
Contracts may also be compromised by poor practice. The superintendency is a difficult, public position. Compensation is negotiated in public and repeatedly disclosed. Community pressures or board conflicts can lead to temptations. But, these must be avoided.

Ethically, some practices may be questionable. Practically, the era of scrutiny in public education makes many enticements, however legal, inadvisable. Equally, superintendents set the tone at the top. Transparency in schools' financial dealings is paramount. This is particularly true with superintendent contracts. Practices once considered commonplace may now be inappropriate.

NYSCOSS can help. Our contract service offers a thorough review of your contract. We will also negotiate your agreement and any addenda. This will help NYSCOSS advocate on your behalf with TRS, SED, and the Comptroller's office. It also reinforces the impression of superintendents as scrupulously ethical educational leaders.

Please refer to this guide often. It is a working document applicable throughout your tenure as superintendent. The tips and suggestions will help avoid the potential pitfalls associated with poor practice and ensure your contract will stand up – whether tested by an auditor, a TRS representative, or a disenchanted board.

As always, I welcome your thoughts and comments.

Sincerely,

Thomas Rogers, Ed.D.
Executive Director



INTRODUCTION

It's never too soon to review your contract. Whether you're planning to retire immediately or in the distant future, and whether this is your first contract or your fifth, good contract practice now will save you huge headaches later. Recent developments make review worthwhile even for veteran superintendents. Several trends are dramatically reshaping employment agreements for chief school officers. These include:

Dramatic Turnover in the Superintendency

By 2008, two-thirds of New York State's chief school officers will be in the first five years of their first superintendency. Thus, two-thirds of superintendents will likely be negotiating a personal employment contract for the first time in their career.

Teachers Retirement System (TRS) Scrutiny

TRS is looking at contracts more closely in order to conform more precisely with applicable statutes. Collectively bargained contracts are rarely as complex as those for superintendents, leading to greater scrutiny of the latter.

Financial Scandals

The State Comptroller's office has been given the responsibility of auditing every school in the state by 2010. Informal agreements and reliance on past practices are now best reduced to writing. Audit committees and public disclosure will place an increasing premium on clarity and transparency.

These circumstances spotlight superintendent employment agreements. Contracts not only specify compensation, but delineate duties and responsibilities; outline terms of employment and due process; and form the basis of pension determinations. The greater scrutiny to which they are now being held – by the public and outside auditors – makes contract implementation as important as the terms.

Based on NYSCOSS's experience reviewing and negotiating more than 400 employment agreements, and our efforts working with TRS on behalf of superintendents, we have identified a broad range of best practices to be emulated and pitfalls to be avoided. The consequences of the pitfalls will only become more pronounced with the increased scrutiny, while the benefits of good practice will spare headaches long after retirement.

To ensure that all superintendent contracts reflect the latest developments and best practices, NYSCOSS offers members a Contract Service free of charge for contract review and renegotiation which will help maximize retirement benefits, ensure meaningful due process provisions, and avoid complications from ambiguous or inappropriate language.



CONTRACT MAINTENANCE

The NYSCOSS Model Contract was developed and honed over time by our attorneys at Girvin & Ferlazzo. It provides representative language on virtually all aspects of a superintendent contract. Many of the provisions have been upheld by the Commissioner and courts. Superintendents should refer to it as they negotiate a new contract or changes to an existing agreement. Although not all superintendents will want or need such

an encompassing document, it can serve as a starting point and reminder of potentially missing clauses.

Superintendents' successful employment relationships do not end with a well-structured contract. In fact, that is where they begin. From negotiation through review to renewal, the following practical recommendations ensure a long-lasting, mutually beneficial employment relationship.

RECOMMENDATIONS

DO Compare & Contrast

Contracts should be evaluated against the NYSCOSS Model Contract. The Model Contract can serve as a starting point when looking for language during renegotiation. As a model, it does not offer the only way to address an issue, just a recommended one.

DO Use NYSCOSS

Periodically have NYSCOSS examine your agreement. Even if NYSCOSS negotiated your original contract, reviewing addenda or changes ensures your contract maximizes retirement benefits and minimizes risk. Contracts not reviewed by NYSCOSS sometimes contain inappropriate language (i.e. reference to benefits received by other employees) or ambiguous/sloppy language (which complicates matters with TRS and auditors whose interpretation will naturally be the most conservative). NYSCOSS is at a disadvantage when trying to support agreements it has not had an opportunity to review or negotiate. Many superintendents are negotiating contracts or extensions in the spring, so for quickest service, schedule an elective review during the fall or winter.

DO Apprise Board Members

The entire board should be familiar with the provisions of your contract. When new board members are elected, it is good practice for the board president to offer a short overview of the superintendent contract, especially unique provisions. Such personnel matters should only take place in executive session.

DO Maintain Final Copies with the Board Clerk

The final signed agreement and any addenda should be filed with the Clerk of the Board of Education. The superintendent should also maintain a signed original. Electronic copies may be kept by both parties. However, any prior drafts and any proposed changes should be separately housed and clearly labeled, and if possible, destroyed at the conclusion of negotiations. It should *NEVER* appear as though more than one final contract exists.

DO Take an Oath Of Office

New York State Public Officer's Law (Section 10) requires "officers" to take and file an oath of office within 30 days of their appointment. This provision applies to superintendents. You should take an oath of office when you are appointed and every time you are reappointed or your contract is extended.

CONTRACT MAINTENANCE Cont.

DON'T Rely on Verbal Agreements or Past Practices

Any addendum or contract modification must be set forth in writing and approved by the Board of Education in public session. Verbal agreements are invalid. An 'understanding' with the board president or even the board as a whole is not legally binding on the board or TRS. Similarly, a superintendent *cannot* rely on a 'past practice' as justification for paying a benefit. For example, the fact that other employees (or even the previous superintendent) received payment for unused sick days at retirement or received post-retirement health insurance, does not justify such a benefit for the current superintendent if it isn't explicitly in writing. Under a 'worst case scenario', receiving a benefit not incorporated into the written contract could be construed as an illegal gift of public funds.

DON'T Negotiate Personally

Contract negotiation should involve the superintendent and his/her representative (i.e. NYSCOSS attorney) and the board of education and its legal representative. Every other contract the district enters passes through the board's attorney, yours should too. Common pitfalls include negotiations between the superintendent and a single board member, even the President, that result in contract revisions that are not adopted in the same manner as the underlying contract and thus don't stand up well during audits or at retirement time.

DON'T Unilaterally Interpret Your Contract:

Contracts are a two-way street. They set forth mutual legal obligations between the board *and* superintendent. Unilateral changes are unenforceable. Just as a board member cannot, on his/her own, direct a superintendent to take a particular action, the superintendent does not unilaterally dictate the interpretation of the terms of his/her agreement. In areas where a contract is silent or ambiguous (often regarding how sick and vacation days are accumulated or compensated), there are legal precedents which govern interpretation. No superintendent should rely on instinct or intuition – doing so may unintentionally violate the law.

Top Five Implementation Musts

1. **Use NYSCOSS:** Whether negotiating your first agreement or your twelfth amendment, consult NYSCOSS attorneys *before* signing.
2. **Reduce it all to Writing:** Verbal agreements and past practices are *not* legally enforceable. Reduce all elements of the contract to written form.
3. **Don't Keep Drafts:** Once the contract is signed, destroy prior drafts. It should never appear as though more than one agreement exists.
4. **Don't Gimmick Salary Increases:** Remuneration should be clear and understandable. This assists in working with TRS and the public.
5. **Consult NYSTRS:** Consulting with TRS prior to retirement will provide a better understanding of how your pension will be calculated.

CONTRACT RENEWAL/EXTENSION

Stable leadership breeds academic success. Recognizing this, and the fact that applicant pools are shrinking, more boards of education are offering contracts for longer periods and are renewing contracts for their current superintendents.

If an agreement is not based on the Model Contract or the NYSCOSS Legal Service was not used to negotiate the initial agreement, using NYSCOSS prior to any renewal or extension affords the opportunity to identify outdated or inappropriate provisions and to revise and improve them.

Recommendations

DO Use NYSCOSS

The fact that NYSCOSS negotiated your original agreement (or it was based on the Model Contract) does not make it sacrosanct. Each time a superintendent negotiates an amendment or addenda, (s)he should contact the Council. As trivial as a change may seem, failure to seek expert advice could jeopardize the entire contract.

DO Strictly Follow Term Limits (Boyle)

Contracts can be no less than three and no more than five years (Ed. Law §1711). In *Boyle v. Madrid Waddington Central School District* (35 Educ. Dept. Rep 162 1995), the Commissioner of Education prohibited boards of education from entering into contract extensions with superintendents which would, if combined with the remaining term of the existing contract, exceed five years.

DO Be 'Centsible'

A board may agree to additional new fringe benefits, but these may not be in a superintendent's best interest. For example allowing a board to pay the costs of home internet use and being provided a cell phone are appropriate. However, these relatively small annual costs might better be put into a salary versus separate contract provisions. This makes the contract a cleaner, clearer document and avoids undue scrutiny when none is warranted.

***DON'T* Risk Using Personal/Family Attorneys**

The superintendent contract has become a highly specialized document. Statutory laws govern its terms and provisions; TRS precedents and regulations govern its interpretation at retirement; and case law around its enforcement changes every year. No attorney not immersed in the practice of education law can give you the same level of service and accuracy as NYSCOSS.

EVALUATIONS & JOB DESCRIPTION

By law, school boards must annually evaluate superintendents. Good practice would dictate the same mandate. Evaluations are opportunities to reflect upon

district goals and the extent to which they have been achieved. You should work with your board to ensure your evaluation instrument achieves these goals.

RECOMMENDATIONS

DO Collaborate on Development

You and your board should determine the nature and scope of issues on which you will be evaluated. Make sure they are measurable and relate back to district goals, short and long term. Articulated directives from the board to the superintendent lead to micromanagement.

DO Time the Evaluation Appropriately

The Model Contract offers an evaluation process which takes place in the spring, allowing your school board to look back on almost a full year of work to make a determination. A post-budget process offers the opportunity to cap a good year with successful budget passage. Of course, negative vote results could bring similar consequences. A pre-budget evaluation avoids this but brings uncertainty about budget passage and whether a justified raise is affordable.

DO Maintain Confidentiality

Personnel matters should be discussed in executive session. A job description is a public document, but discussions over whether you are fulfilling every duty is not. Similarly, the narrative component of an evaluation is not subject to Freedom of Information Law (FOIL). But, most statistical aspects (i.e. scoring on a range from 1-5) are.

DO Enable Continuous Evaluation

Your evaluation should be an ongoing process. A singular event (i.e. one executive session in the spring) should not be the only opportunity to offer feedback. A board should bring issues to the superintendent as they arise, fostering communication and good working relationships.

DO Create the Evaluation with the Board

If your board chooses to develop an evaluation instrument without your initial input, it must permit your review and feedback before it is finalized. Collaborate.

DO Establish a Job Description

Although the superintendent is ultimately responsible for all components of the school, a job description is a worthwhile endeavor. It delineates responsibilities and expectations. This proves especially useful to new superintendents and new boards of education.

DON'T Create a Lengthy Job Description

Two pages is adequate. Job descriptions should be tailored to your district (small, large, urban, rural) and the duties for which you are directly responsible (versus delegated). Keep in mind, as with any job description for a chief executive, it serves as a guidepost, not an absolute.

RETIREMENT CONSIDERATIONS

NYSCOSS can assist superintendents interested in reviewing contracts with an eye toward retirement. Final pension determinations from TRS can take 12 to 15 months to resolve, often longer.

NYSCOSS will help ensure agreements are structured so that legitimate benefits are not disallowed and your final determination is

expedited. We do not engage in efforts to increase salary solely for purposes of artificially increasing final average salary (FAS) for retirement purposes. Such efforts socialize a single school district's superintendent compensation over the entire system and are unethical.

RECOMMENDATIONS

DO Maintain Copies of Previous Contracts

Substantial changes to salary or contract benefits which could impact FAS are closely scrutinized by the TRS. Typically, TRS looks at contract changes over the final five years, but sometimes goes back much further to determine whether increases are rational or designed simply to increase FAS. TRS has some numerical guidelines, but also has broad discretionary authority to determine whether salary increases appear atypical or designed to substitute for payments which would otherwise be excluded from FAS.

Examples of excluded payments are:

- Salary replacing health insurance benefits;
- Increases in accumulated sick leave days and/or the per diem paid for such days which occur prior to retirement;
- Salary increases in the last three years of the agreement which are unusually high relative to prior precedents.

DO Provide Contemporaneous Rationale

The five year rule does not automatically prevent the incorporation into FAS of significant salary or benefit increases in the years leading up to retirement. However, the board must offer a contemporaneous rationale which clarifies why the salary

increase is justified and not an attempt to increase the pension. For example, a board might provide a substantial salary increase to keep a superintendent from retiring or taking a job in another district, or change salary policy to be calculated relative to a county average. The reasons for such increases should be set forth in detail in board minutes or a memorandum of agreement at the time the increase is made. TRS ignores after-the-fact rationales (a position upheld in court.)

DO Ensure Health Insurance Accuracy

You may receive health insurance benefits in retirement as part of your contract. This may accrue immediately or after serving a certain number of years in the district. Your contract should be specific and consider Medicare implications. Unless otherwise stated, Medicare will automatically become a retiree's primary insurance at age 65; district provided insurance becomes secondary. Your contract should address Medicare costs. A specific contract provision providing 'the district shall pay 100 percent of the costs of health insurance in retirement' would likely include Medicare costs in the district's obligation.

RETIREMENT CONSIDERATION CONT.

DON'T Gimmick Salary Increases

TRS is taking ever greater care in their review of superintendent agreements. Mistakenly assuming that a benefit counts toward FAS regardless of how it is structured could be unfortunate; intentionally attempting to convert an ineligible benefit into salary is unethical. Furthermore, doing so undermines our efforts to solve legitimate issues on all superintendents' behalf.

DON'T Assume Past Practice Binds TRS

Not only is your district not bound by its past practices where unstated contractual benefits are concerned, TRS is not bound to

interpret your contract as it did with your predecessor or a neighbor – case law may have changed, or TRS may have adopted a new policy. The only way to be sure your contract stands up to current standards is through periodic NYSCOSS review.

DON'T Wait Until Retirement is Imminent

Given the importance of contemporaneous rationale, delay only serves to limit your options for dealing with TRS. Do not wait until retirement is imminent to have your contract reviewed.

SCOPE OF NYSCOSS CONTRACT SERVICES

The Contract Service is designed to provide counsel in personal contract negotiations with school districts and to support enforcement of these agreements once negotiated. We also negotiate contracts for any chief school officer whether or not they have joined the Council as even one adverse precedent could affect all subsequent superintendents.

However, NYSCOSS's services are not unlimited. Superintendents using the NYSCOSS Contract Service agree to be bound by its terms and follow the direction of the Executive Director and Counsel. NYSCOSS reserves the right to:

- Suspend representation during contract negotiations if it believes the superintendent's demands are unreasonable; if, in its judgment, the superintendent and board are too far apart to have any reasonable expectation of agreement; or, if the superintendent reopens a finalized agreement;
- Suspend representation during a termination action where NYSCOSS concludes the superintendent has acted unethically or illegally;

- Underwrite only those negotiation strategies which it believes will be successful;
- Limit representation to following through on an immediate circumstance;
- Make use of the service contingent on the superintendent availing him or herself of NYSCOSS's confidential Professional Assistance Program.

The NYSCOSS Contract Service is also not meant to (and cannot) supplement or supplant the district's legal representation. Specifically, NYSCOSS cannot provide legal advice concerning district matters; provide collective bargaining representation; defend criminal actions (however, after acquittal, NYSCOSS may seek to ensure enforcement of the superintendent's preexisting contract); defend management decisions of the superintendent; or, defend the superintendent against actions of the community or district staff.

The NYSCOSS Mission

Founded in 1886, the New York State Council of School Superintendents (NYSCOSS) has provided over 120 years of educational leadership. Presently, the organization serves over 800 active superintendents, deputies and assistant superintendents.

Vision

To be the pre-eminent professional organization in New York State influencing the development of education policy and asserting the leadership role of the superintendency.

Mission

- To promote the interest of education and children in New York State.
- To influence local, state and national policy affecting education.
- To uphold the integrity of the office.
- To enhance the superintendency as a profession.
- To provide leadership and membership services through a professional organization of school superintendents.
- To foster support and collegiality among its members.

Priorities

Advocacy:

Expand the advocacy role of the NYSCOSS in support of public education in meeting the diverse needs of New York State children by influencing the development of policy, regulation, legislation and practice. Participate in the development of legislation, SED regulations and guidance documents, with focus on their impact on schools.

Professional Development:

Provide opportunities and structure for a continuum of professional development activity enhancing leadership in New York State schools.

Leadership:

Provide for the membership of the Council services, support and opportunities of leadership at local, state and national levels.

The Next Generation of School Leaders:

Attract and nurture exceptional leaders, including the under-represented, into the superintendency.

Communication:

Improve linkages with and between Council membership, leadership and the field to better understand and address issues.

*Accomplish the above priorities while remaining cognizant and sensitive to the diverse elements and needs of the state, its many school districts, and the varying priorities and concerns of its educational leaders.



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