



## Superintendents Annotated Model Employment Contract<sup>©</sup>

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# SUPERINTENDENTS ANNOTATED MODEL EMPLOYMENT CONTRACT<sup>®</sup>

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## INTRODUCTION

THE COUNCIL is pleased to provide this revised, annotated model contract. The *Superintendents Annotated Model Contract*© is the latest version of our most requested and utilized document, with the 2008 addendum. It is newer and more expanded than ever.

Since the original printing in 2000, the model contract has become a trusted, relied upon resource for superintendents throughout New York State, with good reason. A superintendent's employment agreement is the most important recitation of rights and benefits as a school district employee. It delineates parameters of the superintendent-board relationship and dictates terms applicable to current benefits and those flowing in retirement.

This newly minted version is revised and expanded from past iterations. Out-of-date provisions have been deleted and an entirely new feature added. Annotations provide comments, tips and best practice suggestions. These reflect years of experience as well as recommendations flowing from fiscal audits by the Office of the State Comptroller.

*The Superintendents Annotated Model Contract*© offers wording for a variety of contract benefits. They are not all applicable to every contract in every situation. Negotiations will require picking and choosing benefits. Geography, demography, experience and board willingness are all factors. Pay especially close attention to the duties and responsibilities clause and due process provisions. Protecting and preserving the role of chief school officer trumps any individual financial benefit.

We hope the revised model contract is valuable and informative. Of all the advice provided, the most important is take advantage of THE COUNCIL's free legal service. We are experienced and dedicated to superintendents. And, contracts are nuanced, regulated documents. Our expertise will ensure agreements pass the strictest scrutiny and fully protect interests throughout employment and retirement.

We look forward to working with and for you.

### Contact:

Michele V. Handzel, Esq.  
General Counsel  
Meghana Godambe, Esq.  
Legislative Associate & Assistant Counsel  
New York State Council of School Superintendents  
7 Elk Street, Third Floor  
Albany, NY 12207  
(518) 449-1063 . (518) 426-2229  
[michele@nyscoss.org](mailto:michele@nyscoss.org)  
[megha@nyscoss.org](mailto:megha@nyscoss.org)

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The information contained herein pertains to a binding legal agreement between a board of education and superintendent of schools. Neither this document nor its contents may be deemed legal advice or a substitute therefore. Anyone referring to this document should always seek formal legal counsel prior to entering any binding legal agreement or making a decision which could or may impact legal rights.

## TOP TEN CONTRACTING BEST PRACTICES

1. **DUTIES:** Delineate clear duties and responsibilities; don't rely just on statutory references.
2. **EVALUATIONS & COMPLAINTS:** Encourage the board to continuously inform you of concerns and a job well done. Ongoing dialogue fosters the leadership team. A singular year-end evaluation is less effective.
3. **SALARY vs. FRINGE BENEFITS:** It may be better to increase overall salary rather than set forth every fringe benefit individually. This adds transparency and can assist in final average salary calculations.
4. **ENUNCIATE BENEFITS:** Even providing a cell phone must have legal foundation. Set it forth clearly and precisely.
5. **CAVEAT EMPTOR:** It is a sellers market – there are more openings than those able to fill them. But, sellers and buyers must beware. A board will deny an offer when it feels a candidate is asking too much.
6. **GOAL SETTING:** Collaborative goal setting is essential. Do this mutually and annually.
7. **BE PRECISE:** All benefits should be understandable by the public, and never reference collective bargaining agreements.
8. **ACCRUAL OF DAYS:** Ensure any days - vacation, sick, personal - accrue on the first day of each year of the agreement. (i.e. July 1). Days are a form of compensation; be sure the business office tracks and records them.
9. **OBEY THE LIMIT:** Superintendent contracts must be for a term of at least three and not more than five years. Anything else violates the law.
10. **USE THE COUNCIL:** Engage Council attorneys for new contracts, renewals and questions, *before signing*.

## 3 COMMON 'DEAL BREAKERS'

1. **COMPENSATION:** A board may advertise a range but offer the low end. Experience and current salary are critical. Especially with internal hires, a board may look at the salary increase rather than what it would need to pay an outsider. Consult THE COUNCIL for salary data and methods to make this a win-win, not a deal breaker.
2. **RETIREE HEALTH INSURANCE:** If a board is unwilling to provide retiree health benefits immediately, compromise. Consider increasing amounts for each year of service (i.e. 20% a year for each of the next four years.)
3. **TERMINATION:** Insist on meaningful due process. A board unwilling to provide this may have short term plans it is not revealing.

## Annotations:

### Intent:

Set forth a clear statement of the parties' intent. If the board-superintendent relationship takes a turn, such statements evidence the board's intent to hire the superintendent to serve in that role, for the duration of the agreement.

### Term Limits:

Ensure contract term limits are adhered to – no less than three and no more than five years. Many also find it administratively beneficial for terms to coincide with the school year, July 1 – June 30.

## PREAMBLE EMPLOYMENT AGREEMENT BY AND BETWEEN \_\_\_\_\_ SCHOOL DISTRICT

AND \_\_\_\_\_

AGREEMENT, made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between THE BOARD OF EDUCATION OF THE \_\_\_\_\_ SCHOOL DISTRICT, \_\_\_\_\_ County, New York (hereinafter, the "Board") and \_\_\_\_\_, residing at \_\_\_\_\_, New York (hereinafter, the "Superintendent").

WHEREAS, the Board of Education of the District (hereinafter, "the Board") at a meeting duly held on \_\_\_\_\_ passed a resolution appointing \_\_\_\_\_ as Superintendent of Schools of the District for a period of \_\_\_\_\_ (\_\_\_\_) years from \_\_\_\_\_, \_\_\_\_\_ through June 30, \_\_\_\_\_ and the District wishes to employ the Superintendent in such capacity; and

WHEREAS, the Superintendent has accepted the Board's offer of employment upon the terms and conditions set forth herein; and

WHEREAS, it is the parties' belief that a written contract fully specifying the terms and conditions of the Superintendent's employment by the District will promote effective communication and true understanding between the parties; and

WHEREAS, the parties have mutually agreed upon the following terms and conditions relative to the Superintendent's employment by the District.

NOW, THEREFORE, in consideration of the agreements hereinafter set forth, and other good and valuable consideration, the parties agree as follows:

### ARTICLE I

#### TERM OF EMPLOYMENT AND WORK YEAR

1. The Superintendent's term of employment shall be for \_\_\_\_ (\_\_\_\_) years commencing on \_\_\_\_\_, \_\_\_\_\_ and terminating on June 30, \_\_\_\_\_, unless further extended or sooner terminated as hereinafter provided.
2. In city school districts, where the population is less than 250,000, the Superintendent's contract term cannot exceed five years. In the City of Rochester and cities with a population of more than 250,000, the term cannot exceed four years.
3. The Superintendent's work year shall be 12 months, from July 1 to June 30.

## Annotations:

### Duties:

It is good practice to set forth a detailed list of duties and responsibilities. Some school attorneys will advise referencing Education Law section 1711(2)(e). They will claim the board retains all rights to amend duties and responsibilities. This advice is understandable, however, The Council prefers enumerating duties so intent is clear. It is always helpful not to allow diminution of duties without consent. Doing so is often an invitation to micromanagement by the board.

#### BEST PRACTICES:

1. Negotiate clear duties and responsibilities.
2. Require written notice of complaints by the board and individual members.
3. Allow outside work that is not inconsistent with the role of the Superintendent.

## ARTICLE II DUTIES AND RESPONSIBILITIES OF SUPERINTENDENT AND BOARD

1. The Superintendent shall have charge of the schools of the District under the direction of the Board; (s)he shall be the chief administrative officer of the District and shall perform all the duties and possess all the powers and authority now or hereafter imposed upon or granted to a superintendent of schools under the provisions of the Education Law or other applicable statutes, laws, rules and/or regulations and those duties and/or responsibilities established by the Board pursuant to such statutes, laws, rules and regulations.
2. During the term of this agreement, the Superintendent shall faithfully, diligently and in accordance with accepted professional standards perform and discharge the duties and responsibilities of Superintendent of Schools of the District as the same are set forth in the Education Law and other applicable statutes, laws, rules and/or regulations and the duties and/or responsibilities established by the Board pursuant to such statutes, laws, rules, and/or regulations.
3. Without limiting the foregoing, the Superintendent shall have the specific and exclusive authority, right and responsibility to:
  - a. organize and reorganize the administrative and supervisory staff, including instructional and non-instructional personnel, in a manner which in the Superintendent's judgment best serves the District;
  - b. make recommendations to the Board of Education as a prerequisite to either the appointment or the termination of employment of both instructional and non-instructional personnel;
  - c. supervise, direct and evaluate associate, assistant and other Superintendents, directors, supervisors, principals, teachers and all other persons employed in either the business management or the instructional activities of the District;
  - d. transfer teachers and administrators from one school to another, or from one grade of a course of study to another grade in such course, subject to the terms of any relevant collective bargaining agreements;
  - e. with respect to their relationships to one another and the determination of their respective powers and duties, the parties acknowledge that they are both subject to the laws of the State of New York and applicable rules and regulations of the Board of Regents and the Commissioner of Education of the State of New York.
4. The Superintendent's duties are set forth on the job description annexed as Addendum "A". The Board may, from time to time, prescribe additional or different duties and responsibilities for the Superintendent, provided, however that the Board shall not, without the Superintendent's written consent, adopt a policy, by-law or regulation which impairs or reduces the duties and authority specified above; and, provided further, that all additional duties and

## Annotations:

### Distinguished Educators:

The enacted 2007-08 budget mandates new language in contracts for every superintendents, deputy superintendents, assistant superintendents, community superintendents (NYC), associate and other superintendents. The language must state the individual will work with distinguished educators appointed by the Commissioner. Distinguished educators work in low performing districts and are appointed as ex-officio members of the board of education.

### Salary:

Compensation can be a deal breaker. Most often, a District advertises a salary range. A candidate often believes (s)he falls at the higher end while a board may look at other factors and decide the lower end is more appropriate. Internal candidates can have the toughest time. A board may 'low-ball' the offer in light of the increase in salary the candidate would receive. For example, the low end of the salary range could result in a \$25,000 pay increase for an assistant superintendent offered the superintendency. The Council can offer strategies to avoid these becoming deal breakers.

responsibilities prescribed by the Board are consistent with those normally associated with the position of Superintendent of Schools in the State of New York. This provision shall continue in full force and effect during any period of suspension.

5. During the term of this Agreement, the Superintendent shall devote his/her full time, skills, labor and attention to the performance and discharge of his/her duties and responsibilities; provided, however, that the Superintendent may undertake consultation work, speaking engagements, writing, lecturing or other professional duties, obligations and activities, with or without remuneration, so long as such activities do not materially affect the performance and/or discharge of the Superintendent's duties and/or responsibilities under this Agreement.

6. The Superintendent represents that (s)he will, throughout the term of this Agreement, hold a valid certificate to act as a Superintendent of Schools in the State of New York and that proof of such certification will be furnished to the District Clerk upon request. It is expressly understood that failure to hold and maintain such certification shall be cause for the immediate termination of this agreement and of the employment of the Superintendent.

7. The Superintendent shall be notified of and shall have the right to attend all meetings of the Board, including executive sessions of the Board, except that the Board may exclude the Superintendent from any portion of a meeting during which they are discussing his/her performance or salary.

8. The Board, individually and collectively, shall promptly and discretely refer to the Superintendent, in writing for his/her study and recommendation, any and all criticisms, complaints, suggestions, communications or comments regarding the administration of the District or the Superintendent's performance of his/her duties.

9. Consistent with and pursuant to Education Law §211-B (5)(a) the superintendent shall cooperate fully with any distinguished educator(s) appointed by the Commissioner of Education.

## ARTICLE III COMPENSATION

1. The Superintendent shall be paid, as salary, for the year July 1, \_\_\_\_\_, through June 30, \_\_\_\_\_, the sum of \_\_\_\_\_ Dollars (\$\_\_\_\_\_).

2. The Superintendent is also eligible for a merit increase which shall be determined and allocated by the Board of Education on or before June 30, \_\_\_\_\_, up to \_\_\_% of his/her annual base salary for the preceding school year. Said merit increase shall become a part of the Superintendent's base salary in the subsequent school year.

3. For each subsequent twelve month period of employment, the Superintendent's salary shall be determined by negotiations between the Board and the Superintendent based upon the Board's evaluation of the Superintendent's

## Annotations:

### Merit:

Merit pay is becoming more common. Those considering merit increases must bear in mind that any additional amount must be added to base salary to count for final average salary, pension purposes.

### Longevity:

Longevity payments are decreasing in popularity but worthy of consideration for longer term superintendents. (8.2% of superintendent contracts contain longevity payments (Snapshot VI, NYSCOSS 2007)).

### Ties to Budget Passage:

Recently, a few contracts have tied additional compensation to local budget passage. The Council recommends against this. It is well settled that school districts may not spend public money to encourage voters to vote in favor of a school budget. The Court of Appeals has specifically held that district funds may not be used to express "favoritism, partisanship, partiality, approval or disapproval" of any item put forward by the District for approval (Phillips v. Maurer, 67 N.Y.2d 672 (1986). Additional money for budget passage could be construed as violating this principle of law.

### Annuity:

IRS rules limit the amount that can be paid to deferred compensation plans.

In 2007:

- up to \$15,000 may be saved in a 401(k) or 403(b) plan
- up to \$4,000 in an IRA
- catch up provisions apply to those 50 and older
  - \$1,000 in an IRA
  - \$5,000 in a 401k/403b.

Check with a certified financial planner for complete rules.

performance during the prior school year. However, in no event shall the Superintendent's base salary for any twelve month period of employment be less than the amount of base salary received during the preceding twelve month period.

4. The Superintendent's compensation for each subsequent twelve month period of employment shall be determined by the Board no later than \_\_\_\_\_ in each year.
5. All compensation, less deductions required by law or authorized by the Superintendent, shall be paid in equal installments in the same manner as salary is paid to other certified employees of the District or as may be mutually agreed to by the parties.
6. Annuity - The Board shall deduct the annual sum of \_\_\_\_\_ Thousand Dollars (\$\_\_\_\_\_) or such other amount as may be designated by the Superintendent from the Superintendent's base salary as set forth above to pay the annual premium for the purchase of a tax deferred annuity for the Superintendent with a company designated by the Superintendent.

AND/OR

The Board shall establish a tax deferred annuity account for the benefit of the Superintendent and shall contribute \$\_\_\_\_\_ per year [amount is limited by law], on \_\_\_\_\_ of each year, to such account.

OR

The Board shall contribute to the Superintendent's tax deferred annuity account ([specify name of company, if desired]) for the benefit of the Superintendent, the amount of \$\_\_\_\_\_ per year [amount is limited by law], on or before [date, i.e. July 1, December 31] of each year, beginning on \_\_\_\_\_, \_\_\_\_\_.

7. Longevity - In addition to annual salary, upon the completion of \_\_\_\_\_ year(s) of employment with the District, the Superintendent shall be entitled to a longevity payment of \$\_\_\_\_\_.

Legal precedent has not yet determined permissibility of additional compensation if the budget passes. However, courts and the Commissioner have repeatedly ruled a board must not spend district funds, or appear to do so, to promote budget passage. If district funds pay a bonus when the budget passes, the inference drawn is the board supports budget passage and is overtly doing so through the payment of a bonus. Superintendents should avoid such provisions and even the appearance that compensation runs counter to established precedent.

## Annotations:

### Goal Setting:

Goal setting is critical. It defines expectations and can determine salary increases. It should take place early in the year. By law, the superintendent's evaluation instrument must be determined and filed with the district clerk by September 10 (8 NYCRR § 100.2(o)(2)(v)).

Timing can be an issue. Some prefer to evaluate prior to the budget (so budget passage is not a factor in the evaluation). Others prefer completion after the budget, when districts finances are known. There is no right answer. Mutual consent is most important.

Encourage evaluation on a continuing basis. Inform board members you wish to know right away if they are pleased (or not) with your performance and the direction the district is going.

Remember the only action a board may take is as a corporate body. Defamatory statements in a performance evaluation can be actionable (Kondo-Dresser v. Buffalo Public Schools, (NY Slip Op. 03479, (2005))

## IV ANNUAL GOALS, OBJECTIVES AND EVALUATION

1. The Board shall devote at least a portion of one meeting during the month of \_\_\_\_\_ in each year of the Superintendent's employment by the District to an evaluation in executive session of his/her performance and his/her working relationship with the Board.
2. The evaluation shall be based upon performance criteria as mutually established by the Board and the Superintendent by October 1 of each year which shall be reduced to writing in a form mutually agreed upon by the parties. A sample copy of the form shall be attached to this agreement. The Superintendent shall be provided with a copy of the written evaluation at least ten (10) days prior to the executive session of the Board scheduled to discuss such evaluation.
3. The Board also shall devote at least a portion of one meeting during the month of [mid way through year, i.e. November] \_\_\_\_\_ in each year during the Superintendent's employment by the District to a general discussion in executive session between the Board and the Superintendent with respect to his/her performance and his/her working relationship with the Board. A written memorandum summarizing that discussion shall be provided to the Board by the Superintendent subsequent to such discussion.
4. The performance evaluation prepared pursuant to this paragraph shall be confidential and shall be kept so by the Board and individual Board members.

OR

1. Within a reasonable time after the commencement of his/her employment and, thereafter, on or before September 1 of each subsequent school year of this Agreement, the Superintendent shall provide to the Board a written statement of the annual goals and objectives which the Superintendent intends to concentrate on during the upcoming school year. The Board shall review said goals and objectives and if the Board concurs with the Superintendent's written statement of goals and objectives, the Board's concurrence will be noted on said written statement via execution by the Board President. If the Board does not agree with the Superintendent's written statement of goals and objectives, it shall meet with the Superintendent to form mutually acceptable goals and objectives. If the Superintendent fails to provide such goals and objectives to the Board in accordance herewith, then the Board may determine such goals and objectives and shall provide same to the Superintendent by November 1.
2. Optional - The Board will conduct a mid year assessment of the Superintendent's progress towards achieving the goals and objectives on or before \_\_\_\_\_. The Superintendent will be notified, in writing, of any changes or modifications which the Board would like and the Superintendent shall concentrate on those areas.

## Annotations:

### Sick Leave:

There are many ways to achieve sick leave benefits. Statewide, 46.4% of superintendents have sick leave transferred from prior positions, (Snapshot VI, NYSCOSS 2007.) Accumulated days may be given cash value at retirement (or resignation) or form the basis for health insurance in retirement.

3. The Board shall conduct an annual evaluation of the performance of the Superintendent during each year of this Agreement and shall provide the Superintendent with a written evaluation to be discussed in an executive session of the Board, no later than \_\_\_\_\_. The Board shall base its evaluation upon the Superintendent's performance and progress towards the goals and objectives established by the Superintendent and the Board as set forth above, as well as on the general performance of the Superintendent in carrying out his/her required duties and responsibilities. The form of the written evaluation shall be mutually agreed upon between the parties. A sample copy of the form shall be attached to this agreement. The Superintendent shall be provided with a copy of the written evaluation at least ten (10) days prior to the executive session of the Board scheduled to discuss such evaluation.

4. The Board may use [the mid-year assessment and] the end of the year evaluation to inform the Superintendent of any concerns it may have or any concerns it has received from others. The Board should inform the Superintendent of any complaints or concerns on an ongoing basis as they occur.

5. Any assessment or performance evaluation prepared pursuant to this paragraph shall be confidential and shall be kept so by the Board and individual Board members.

## ARTICLE V BENEFITS

### A. Sick Leave:

1. The Superintendent shall be credited with \_\_\_\_\_ days of sick leave upon the commencement of his/her employment with the District. Thereafter, the Superintendent shall be credited with \_\_\_\_\_ (\_\_\_\_) days of paid sick leave per school year, which shall be credited on July 1 of each school year. Sick leave may be used for illness or injury to the Superintendent or a member of his/her immediate family. "Immediate family" shall be defined as spouse, children, parents, grandparents or siblings.

2. Unused sick leave days may be accumulated by the Superintendent from year to year, if unused, without limit.

3. The Superintendent shall be paid for any sick leave days that are unused and accumulated at the time his/her employment with the District terminates at the rate of [1/220th of his/her then current annual salary or a set amount].

OR

3. When the Superintendent leaves the employment of the District (s)he will not be entitled to payment for any unused or accumulated sick leave days.

4. Up to \_\_\_\_\_ (\_\_\_\_) of these \_\_\_\_\_ (\_\_\_\_) days may be used for illness in the Superintendent's immediate family.

## Annotations:

### Leave Time:

The Office of the State Comptroller (OSC) analyzes superintendent contracts for precise language and accrual methods (when days accrue and the rate at which they are paid).

DO NOT reference collective bargaining agreements. Education Law section 1711 strictly prohibits references to any collective bargaining agreements in superintendent contracts.

### Vacation Leave:

Two thirds of superintendents receive at least 21 days vacation annually (Snapshot VI, NYSCOSS 2007.) Vacation leave should be credited at the beginning of each year (typically July 1). Absent such language, auditors will presume monthly accrual and prorate days over the course of the year.

### Conferences:

Two requirements must be in place for expenditures related to conferences (a) clear board authority (i.e. contract language or board policy; and, (b) board authorization through a resolution of some kind. These are also required for payment of any fringe benefits.

OR

4. In addition, the Superintendent shall be entitled to \_\_\_\_\_ ( ) days of leave for the purpose of illness in his/her immediate family. For purposes of this section, "immediate family" shall be defined as spouse, child, son- or daughter-in-law, parent, grandparent, parent-in-law or sibling of the Superintendent. Such days shall not accumulate if unused.

### **B. Bereavement Leave:**

1. The Superintendent shall be entitled to \_\_\_\_\_ ( ) days of paid leave due to a death in his/her immediate family. "Immediate family" is defined as spouse, children, parents, grandparents, brother, sister, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, or any relative or person living in the Superintendent's household.
2. If the death occurs while the Superintendent is on sick or vacation leave, the days used for the bereavement leave shall not be deducted from his/her accumulated sick leave. Unused bereavement leave days shall not be credited toward the Superintendent's accumulated sick leave days pursuant to paragraph \_\_\_\_\_ of this Article.
3. The District may grant additional bereavement leave days in circumstances where it determines that such additional leave is necessary and justified.

### **C. Personal Leave:**

1. The Superintendent shall be credited with \_\_\_\_\_ ( ) days of personal leave each year for the purpose of conducting business which cannot be conducted at any other time.
2. Any unused personal leave will be added to the Superintendent's accumulated sick leave.

### **D. Vacation Leave:**

The Superintendent shall be entitled to \_\_\_\_\_ ( ) days of paid vacation leave each school year, exclusive of holidays, credited on July 1st of each year. Unused vacation leave may be accumulated up to a maximum of \_\_\_\_\_ ( ) days. Accumulated vacation leave may be used during any subsequent year of employment. In the event the Superintendent has unused accumulated vacation leave at the time his/her employment with the District terminates, (s)he shall be paid at the rate of 1/220th for each such unused accumulated day.

### **E. Conferences and Other Expenses:**

The Superintendent shall be entitled to attend professional conferences at the local, state and national level, with the expenses of such conferences paid by the Board. The Superintendent is authorized to incur other reasonable and necessary expenses, up to the approved budgeted amount in the discharge of his/her duties. Any items requiring expenditures beyond the budgeted amount shall require prior Board approval.

# Annotations:

## BEST PRACTICE:

Ensure days are credited on July 1 of each year of the agreement.

## Retiree Health:

Retiree health insurance is common (78% statewide) (Snapshot VI, NYSCOSS 2007). What is less common is receiving it immediately upon being hired. Some boards ask superintendents to wait five (or more) years while others agree to scaling health in retirement – the district will pay 20% of premium costs in retirement for each year the superintendent works, up to a maximum of 80%. There are other ways to approach this issue. Don't let this be a deal breaker!

OR

The Superintendent shall be entitled to \_\_\_\_\_ ( ) days per year to be used for attendance at professional conferences. The Board may grant additional days in its discretion. The District shall reimburse the Superintendent for all reasonable expenses incurred by the Superintendent when attending said conferences, up to a maximum of \$\_\_\_\_\_ per year. The \$\_\_\_\_\_ conference reimbursement figure may be increased at the discretion of the Board.

## F. Holidays:

Provided that school is not in session, the Superintendent shall be entitled to paid holiday leave on the following days (examples follow):

Independence Day (July 4th)	New Year's Day
Labor Day	Martin Luther King Day
Columbus Day	President's Day
Veterans Day	Good Friday
Thanksgiving Day and the day after	Memorial Day
Christmas Day, Christmas Eve and the day after Christmas	

## G. Insurance:

1. Health Insurance - The Superintendent shall be entitled to coverage under the District's health insurance plan, with prescription drug and optical coverage, for the Superintendent and his/her dependents. The District shall pay 100% of the cost of such coverage.
2. Dental Insurance - The Superintendent shall be entitled to coverage under the District's dental insurance plan for the Superintendent and his/her dependents. The District shall pay 100% of the cost of such coverage.
3. Insurance in Retirement - Upon his/her retirement from the District, the Board will provide health and dental insurance coverage under either an individual or family health and dental insurance plan (based on individual/family status) for the Superintendent and his/her spouse, for the remainder of their lives; however, the Superintendent's spouse shall only be eligible for such coverage so long as they remain married and shall only be eligible for single coverage should (s)he survive him/her. The District will pay 100% of the premium cost of the appropriate insurance plans. This paragraph shall survive the term and be enforceable after the termination of this agreement.
4. Life Insurance #1 - The District will annually pay the premium for a whole/term life insurance policy for the Superintendent with a face value of \$\_\_\_\_\_, said policy to be effective \_\_\_\_\_.
5. The District shall reimburse the superintendent for Medicare premium payments for which (s)he becomes responsible for upon attaining age 65.

## Annotations:

### Split Dollar Life Insurance:

Split dollar life insurance policies are not very common and should be approached cautiously. The original version of the Model Contract contained language for split dollar policies. It is not included here.

Split dollar policies may be construed as a loan to the superintendent for premium amounts owed. Article VIII section 1 of the New York State Constitution prohibits gifts and loans by public entities, including school districts. Additionally, General Municipal Law section 11 does not authorize the purchase of life insurance as an investment. To ensure a life insurance policy does not violate GML section 11, it should not provide a cash value to the school district when/if the superintendent is terminated. That will avoid being deemed an unauthorized investment of district money.

### Life Insurance:

Almost 78.4% of superintendents receive term or whole life insurance, with the majority (53%) receiving term insurance (Snapshot VI, NYSCOSS 2007). Boards tend to prefer term insurance due to lower premiums and more limited tax consequences.

OR

4. Life Insurance #1 - The District will annually pay the premium for a whole/term life insurance policy for the Superintendent with a face value of \$\_\_\_\_\_, said policy to be effective \_\_\_\_\_. Should the Superintendent retire from the District, the Board shall continue to pay the premium on said policy for a period of \_\_\_ ( )years or until paid in full.

Should the Superintendent retire or resign from the District, (s)he shall have no obligation to repay the District for any amounts which the District pays or has paid as premiums on this policy. At such time, the District shall release any and all liens it may have on the policy and shall not seek recovery of premiums paid or benefits due thereunder, from either the Superintendent, his/her beneficiaries and/or his/her estate. Upon his/her retirement, the District shall execute any instrument necessary to permit the Superintendent to utilize the economic value of this policy and to gain full ownership interest in the policy. There shall be no collateral agreement and this Agreement shall supercede any previous collateral agreement between the parties, if any.

5. Disability Insurance - The District will provide and annually pay the premium for a disability insurance policy with a maximum waiting period of sixty (60) days, and a benefit of 60% monthly salary, with a maximum of \$\_\_\_\_\_ per month. Recently, the OSC has raised additional concerns about split dollar insurance. Deferred savings element could be construed as a retirement plan, prohibited by the General Municipal Law. OSC strictly scrutinizes all split dollar plans.

## Annotations:

### Moving Expenses:

With mobility on the rise, moving expenses are important. Board attorneys and The Council suggest obtaining a few quotes and asking for specific dollar reimbursement for costs. If residence is required, seek a reasonable amount of time to establish it.

### **H. Moving Expenses:**

The Superintendent shall be entitled to reimbursement for all costs associated with relocation, including but not limited to, payment for travel prior to commencement of employment, temporary housing and moving expenses, in an amount not to exceed \$\_\_\_\_\_.

It is understood that the Superintendent will establish and maintain his/her residence within the boundaries of the \_\_\_\_\_ School District. Residency shall occur as soon as reasonable and possible, but no later than \_\_\_\_\_ ( ) months from the commencement of his/her employment with the District.

### **I. Physical Exams:**

The Superintendent agrees to have a comprehensive medical examination performed once during each twelve month/two year period of his/her employment by a duly licensed physician of his/her choice and to file a statement from the examining physician certifying his/her physical competency to perform his/her duties with the Clerk of the Board. Such statement will be treated as confidential information and shall not be discussed or released by any member of the Board of Education. Any cost for such annual medical examination not covered by the District sponsored health insurance plan shall be paid by the Board.

### **J. Mileage Reimbursement/Car Allowance:**

The District shall reimburse the Superintendent for mileage at the IRS rates when (s)he is required to use his/her personal car in the performance of his/her official duties as Superintendent.

OR

The District will provide a monthly travel allowance of \$\_\_\_\_\_.

OR

The District will provide a recent model year automobile for use by the Superintendent for school business.

### **K. Association Dues:**

The District shall pay 100% of the Superintendent's annual membership fee for the Superintendent's membership in the New York State Council of School Superintendents, the American Association of School Administrators and (local organization.).

### **L. Continuing Education:**

The District will pay for all costs associated with the Superintendent's enrollment in a doctoral program, including but not limited to tuition, books, fees, printing and copying costs.

#### PRACTICAL TIP

Residency does NOT necessarily mean permanent, legal domicile. You can maintain two residences.

## Annotations:

### Medical Expenses:

It is common to require certification of medical fitness to perform the duties of the superintendent as a condition of initial employment. The Americans with Disabilities Act prohibits periodic required medical examinations after employment begins – reasonable cause to direct such examinations is required by law.

### Expenses:

There may be no other issue that caused greater consternation in OSC audits than this one. Most superintendents receive district provided electronic resources such as cell phones, pagers, computers. Ensure clear contract provisions as well as district policies. Contracts should specifically indicate the items are for business and personal use but remain the property of the school district.

#### BEST PRACTICE:

Rely on the IRS rate for mileage reimbursement. A car allowance is permissible but must be reported as income.

#### PRACTICAL TIP

Including the value of the car allowance into salary decreases confusion and increases clarity (as well as FAS).

OR

The District will reimburse the Superintendent for successful completion of \_\_\_\_\_ graduate level course(s) each semester/school year.

### M. Other Expenses:

The District shall make available to the Superintendent \$ \_\_\_\_\_ annually for the purpose of other expenses such as (examples: cell phone, home fax, computer, etc.). Reimbursement shall occur upon submission of receipts for such costs.

OR

The District shall provide the Superintendent with a cell phone, home fax machine, home computer, etc. for his/her use. Such items shall be the property of the District and shall be returned to the District at the time the Superintendent leaves the employment of the District.

## ARTICLE VI AGREEMENT RENEWALS

1. The Board shall notify the Superintendent, on or before \_\_\_\_\_, [one to two years before expiration of agreement], whether it intends to extend his/her employment for an additional year commencing on July 1, \_\_\_\_\_ or whether the Superintendent's term will expire on June 30, \_\_\_\_\_. By June 30 of each school year thereafter the Board shall likewise act to notify the Superintendent whether it intends to extend his/her employment for an additional year commencing on July 1 of the year set for termination of the then current contract. At such time, a motion to extend the term of this Agreement and the Superintendent's employment for an additional one (1) year period will be moved, seconded and voted upon by the Board. The failure of the Board to act in accordance herewith shall not cause this Agreement or the employment of the Superintendent to be extended beyond the then current expiration date.
2. Should the Board fail to meet or act in regard to the Superintendent's employment prior to \_\_\_\_\_, as required herein the Superintendent may, at any time subsequent to \_\_\_\_\_, request in writing that the Board inform him/her whether or not it intends to extend his/her appointment for an additional one (1) year term. The Board shall, in writing, respond to this request in either the affirmative or the negative within thirty (30) days of its receipt of the request.
3. Any extension of the term of the Superintendent's employment shall be evidenced by an amendment to this Agreement; and shall be upon the same terms and conditions as herein set forth unless otherwise agreed in writing by the parties. In no event shall the benefits provided to the Superintendent under this agreement and subsequent contract extensions be decreased or eliminated during the term of his/her employment, without his/her consent.

## Annotations:

### Renewals:

Contracts must be for at least three and no more than five years. In regard to all extensions or renewals the time from the date the Board acts until expiration cannot exceed 5 years. Contracts will be deemed to begin on date the board acts (except for new contracts).

Be extremely careful when an extension is considered. The Boyle decision insists one or more contracts read together cannot exceed five years.

### PRACTICAL TIP

Evergreen clauses provide a constant term for years.

4. In the event that the Board notifies the Superintendent of its intention to extend his/her appointment as Superintendent of Schools, then within sixty (60) days of such notice, the Superintendent shall advise the Board in writing as to whether (s)he intends to accept the extended appointment.

OR

### Evergreen Language:

1. No later than June 30th in each year of this Agreement, or in any extension hereof, the Board shall meet to consider extending the term of the Superintendent's employment for an additional one year period. At such time, a motion to extend the term of this Agreement for an additional one year period will be moved, seconded and voted upon by the Board. If the Board fails to so act by June 30, the Superintendent may require that it do so at its next regularly scheduled Board meeting. It is the parties' expectation that the Superintendent's term of employment will be renewed at the time of such Board consideration, provided the Superintendent has previously rendered competent and efficient service and faithfully discharged the duties of his/her position as described herein.

2. The requirements of Article V(1) may be waived upon written notice to the Board signed by the Superintendent.

3. Any extension of the term of the Superintendent's employment shall be in the form of an amendment to this Agreement; and shall be upon the same terms and conditions as herein set forth unless otherwise agreed in writing by the parties.

OR

No later than \_\_\_\_\_ in each year of this Agreement, or any extension hereof, the Board shall meet to consider extending the term of the Superintendent's employment for an additional (1) year period. Upon the Board's failure or refusal to so move, second consider and vote upon such an extension with the time provided herein, the then unexpired term of this Agreement shall be automatically extended by an additional one (1) year period.

OR

The parties agree that the term hereof and the Superintendent's employment shall be extended automatically for (1) additional year if the Superintendent provides the Board written notice of the terms of this paragraph during the month of February, \_\_\_\_\_ and each February thereafter, and the Board fails to inform the Superintendent in writing on or before April 1, of its intent not to extend the term. Such automatic extension shall be upon the terms and conditions of this Agreement, unless otherwise negotiated.

The Commissioner frowns upon districts being committed without board action such as would occur in the second to last scenario above.

## Annotations:

### Due Process:

The model represents the optimal protection. Some boards may demand advisory arbitration which offers less protection. If your board insists on advisory arbitration, contact The Council.

Beware of “no-fault” termination clauses where the board can terminate for no reason, upon the payment of certain salary and/or benefits for a limited period of time. These may create problems for future employment. No fault clauses may also limit negotiated benefits.

### BEST PRACTICE:

Ensure at least one year notice of non-renewal or renewal.

## ARTICLE VII AGREEMENT TERMINATION

1. This Agreement may be terminated at any time, without cause, by mutual agreement, in writing, between the Superintendent and the Board; or by the Superintendent’s written resignation on sixty (60) days notice to the President of the Board.
2. The Superintendent’s employment during the term of this Agreement may only be terminated for just cause, in accordance with the procedures set forth below.
3. Hearing Procedures:
  - (a) Charges against the Superintendent may only be brought by the Board and all such charges shall be in writing. The Superintendent shall be entitled to a fair hearing on said charges, upon at least thirty (30) days notice, before an independent hearing officer who shall be an attorney at law. The hearing shall be in executive or public session, at the option of the Superintendent. The hearing officer may be selected by mutual agreement between the Superintendent and the Board or, in the event no such agreement is reached within fifteen (15) days after the Superintendent’s receipt of the written charges, a request shall be made to the American Arbitration Association, by either party for a list of Arbitrators.
  - (b) The Superintendent shall be entitled to due process protection at such hearing, including but not limited to the right to elect a public private hearing; to be represented by counsel, to present, cross-examine and subpoena witnesses, to subpoena documents, papers, letters or other tangible evidence, to have all testimony given under oath, to receive without cost an accurate written transcript of the proceedings; and to receive written findings of fact and conclusions of law. The hearing officer’s decision shall be final and binding upon the parties, subject to their respective rights to appeal in accordance with law. The District, at its expense, shall provide a certified shorthand or court reporter who will transcribe all proceedings.
  - (c) Any criticisms or complaints which have not been previously forwarded to the Superintendent in accordance with the provisions of Article \_\_, paragraph “\_” of this Agreement or charges based upon any allegation which was made known in writing to the Superintendent by the Board more than one (1) year before the charge is filed, shall not be admissible at such a hearing against the Superintendent. The hearing officer shall strike from the written charge or charges any such charge made against the Superintendent.
  - (d) The hearing officer shall, upon the conclusion of the hearing, prepare and submit a written decision, which decision shall include findings of fact and a disposition of each charge. Both the Board and Superintendent shall be bound by the decision of the hearing officer. Both

## Annotations:

### BEST PRACTICE:

Avoid hearings conducted by the board and giving it final decision. Insist on an independent hearing officer and a binding decision.

Some school attorneys like a list of hearing officers to select from. The Council can offer insight into hearing officers and even suggest others. Do not agree with a pre-set list of hearing officers without consulting The Council.

parties shall, however, retain their right to appeal the decision of the hearing officer to any forum with jurisdiction.

- (e) If the charges against the Superintendent are not sustained at such hearing or after any appeal therefrom, the Board shall reimburse the Superintendent for his/her costs and attorney's fees incurred in defense of the hearing or appeal therefore.

### ARTICLE VIII DISABILITY

1. The Board reserves the right, during the Superintendent's term, in the event of his/her absence, illness, injury or other disability, to appoint an Acting Superintendent of Schools who shall temporarily perform the duties of Superintendent at the pleasure of the Board. In the event of such illness, injury or disability, the Superintendent shall cause his/her physician(s) to make a written report to the Board of his/her condition, and shall, at the Board's expense, submit to an examination by the Board's physician(s) designated for that purpose, at such reasonable time or times as the Board shall request.
2. In the event that by reasons of illness, accident or other cause beyond his/her control, the Superintendent shall be incapacitated from rendering the services required for a period of six (6) months beyond the expiration of his/her accumulated and unused leave entitlements, the Board may at its option and upon written notice to the Superintendent, terminate this contract. In such event the compensation provided for herein shall be paid to the Superintendent for a period of three (3) months beyond the month in which this contract shall have been so terminated.

### ARTICLE IX INDEMNIFICATION

The District agrees, as a further condition of this employment contract, that it shall defend, hold harmless, and indemnify the Superintendent from any and all demands, claims, suits, actions, and legal proceedings brought against the Superintendent in his/her individual capacity, or in his/her official capacity as agent and employee of the District, provided the incident arose while the Superintendent was acting within the scope of his/her employment or under the direction of the Board, including but not limited to all uninsured financial loss arising out of any proceeding, claim, demand, suit or judgment by reason of alleged negligence or other conduct resulting in bodily or other injury to any person or damage to the property of any person.

OR

1. The Board agrees to provide legal counsel and to indemnify the Superintendent against all uninsured financial loss arising out of any proceeding, claim, demand, suit or judgment by reason of alleged negligence or other conduct resulting in bodily or other injury to any person or damage to the

## Annotations:

### Indemnity:

If a conflict exists (rare) between the school's interest and the superintendent's, The Council advises the superintendent be able to choose his/her own attorney. This is preferable to leaving the decision up to the board or an outside entity (i.e., insurance company).

### Indemnity and Survival:

Though mergers are rare, survival clauses protect your rights. Some attorneys will advise boards to allow greater flexibility in the case of a merger. This is not in the superintendents best interest.

property of any person committed while the Superintendent is acting within the scope of this employment or under the direction of the Board.

2. The District agrees, as a further condition of this employment contract, that it shall defend, hold harmless, and indemnify the Superintendent from any and all demands, claims, suits, actions, and legal proceedings brought against the Superintendent in his/her individual capacity, or in his/her official capacity as agent and employee of the District, provided the incident arose while the Superintendent was acting within the scope of his/her employment or under the direction of the Board.

3. As a condition of receiving such indemnification, the Superintendent shall, within ten days of the time (s)he is served with any summons, complaint, process, notice, demand or pleading, deliver a copy of the same to the Board.

4. If in the good faith opinion of the Superintendent, a conflict exists as regards the defense to such claim between the legal position of the Superintendent and the legal position of the District, the Superintendent may engage counsel in which event the District shall indemnify the Superintendent for the costs of legal defense.

## ARTICLE X SURVIVAL

1. If the District is dissolved, annexed to, merged or consolidated with one or more school districts, the Board agrees to make every reasonable effort to ensure that the Superintendent is appointed to the position of Superintendent of the merged district. If this is not possible, then the Board shall make every reasonable effort to ensure that the Superintendent is appointed to a position in the merged district which is consistent with the Superintendent's education, background, experience, certification and former status and acceptable to the Superintendent. In either case, the Superintendent shall be entitled to receive salary, benefits and rights provided for under this Agreement for the balance of the unexpired term hereof.

2. If the Superintendent is not appointed to the position of Superintendent or a comparable position in the merged district, or if the Superintendent declines to accept such appointment, then the Board shall continue to pay the Superintendent all salary and benefits provided for under this Agreement, until the end of the term of this Agreement. If the merged district fails to pay said salary and benefits, such cost shall be a debt of the District, and the District shall continue in existence as provided by law for the purpose of paying such debt. Alternative severance arrangements may be entered into upon written agreement of the Superintendent and the Board.

# Annotations:

## Ratification Issues:

Once negotiations are complete, be sure to follow a clear process for ratification. Steps include:

1. Board (designated representative) and superintendent sign the agreement.
2. Notarization is not required but is good practice.
3. The board must formally, through a resolution, adopt the agreement.
4. File the final, approved agreement with the district clerk.
5. The superintendent should keep a final copy of the agreement as well.

Keep only the final copy of the agreement. Ensure every page is initialed or identifies it as the final agreement.

If either party wishes to maintain prior working drafts, label them clearly, on written copies and electronically. A Comptroller's audit revealed a board and superintendent maintained different drafts of what each thought was the final contract. This created a myriad of serious legal issues when benefits were paid at the end of the contract term.

## ARTICLE XI MISCELLANEOUS

1. The validity or enforceability of any particular provision of this Agreement shall not affect its other provisions and this Agreement shall be construed in all respects as if such invalid or unenforceable provision has been omitted.
2. This Agreement shall be construed and enforced in accordance with the laws of the State of New York.
3. The failure of either party at any time to require the performance by the other of any of the terms, provisions or agreement hereof shall in no way affect the right thereafter to enforce same and shall not constitute the waiver of either party hereto of any breach of any of the terms, provisions or agreement or be construed as a waiver of any succeeding breach.
4. The original of this Agreement shall be filed with the Clerk of the Board of Education.
5. This Agreement constitutes the entire contract between the parties and contains all the agreements between them with respect to the subject matter hereof. This shall supersede all prior agreements and/or resolutions in regard to the employment of the Superintendent.

IN WITNESS WHEREOF, the parties have caused this Agreement to be subscribed on the day and year first above written.

\_\_\_\_\_ SCHOOL DISTRICT

By: \_\_\_\_\_  
President, Board of Education

By: \_\_\_\_\_  
Superintendent of Schools

\_\_\_\_\_

# 2008 Addendum

September 2008

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Legal Notice & Disclaimer: Nothing herein is or should be construed as offering legal advice. It is informational only. This document should be used as a reference only and not in any way substitute for professional legal advice. Superintendents in need of legal assistance related to their contract or employment rights should contact THE COUNCIL'S legal staff.

## PREAMBLE

Set forth a clear and particularized statement on the party's intent when entering the agreement. Rarely will this provision be the subject of debate or scrutiny but if the board-superintendent relationship takes a turn for the worse, such statements clearly evidence that the board intends to hire the superintendent to serve in that role and that anything less would be a violation of the agreement.

## TERM AND WORK YEAR

THE COUNCIL reiterates the imperative of ensuring contract terms conform to statutory requirements – no less than three and no more than five years. The minimum term does not apply to City school districts. We routinely see contracts for longer terms, especially when contracts commence mid-year. Have THE COUNCIL review your agreement to ensure compliance.

Recently, a superintendent approached THE COUNCIL because her board sought to enter a two year agreement – this, after serving six years as superintendent. When COUNCIL attorneys advised the school attorney this was not permissible, the board responded by seeking to not enter an agreement but simply appoint the superintendent. Terms would, presumably be set forth in a board resolution. The board was acting on the advice that Education Law §1711 states a board “may” enter an agreement with a superintendent and if it does, that term shall be for at least three and no more than five years.

THE COUNCIL disagrees and believes this is too narrow a reading of the statute.

Statutorily, a board of education must have legal authority to provide salary and benefits paid to an employee, including the superintendent. Superintendent employment agreements serve this purpose. Providing benefits through a resolution which heretofore were set forth in an agreement effectively creates a new agreement – the resolution becomes the contract. They are

legally indistinguishable. As with a contract, the term must be for at least three years.

Contractually, virtually every superintendent contract sets forth due process rights. Were a board to, in any manner, diminish any contract rights (including benefits) the action would be construed as discipline. The due process rights would attach. Failure to adhere to those rights would be a direct contract breach.

Analyzed holistically, a board cannot enter a less than three year or more than five year term. This would violate statute and to the extent there is an existing contract, the action would violate the contract as well. Further, if a superintendent is working under an existing agreement which includes a due process clause, that too must be adhered to.

## CONTRACTUAL DUTIES

### Distinguished Educator

Chapter 57 of the laws of 2007 mandates all superintendent agreements (including BOCES DS agreements) entered, amended, or extended on or after April 4, 2007 include language related to distinguished educators. The following language has been deemed to meet the requirement:

“Consistent with and pursuant to Education Law §211-B (5)(a) the superintendent shall cooperate fully with any distinguished educators appointed by the Commissioner of Education.”

Distinguished educator language is required in all contracts even though a district may not be in a situation where distinguished educators will be placed in the district.

### Board Meeting

Contracts should include a provision authorizing (though not requiring) the

superintendent to be present at all board meetings, including executive sessions, unless the superintendent's salary or performance is being discussed. THE COUNCIL argues that even without such a contractual provision, Superintendents have statutory authority under Section 1711(3) of the Education Law to participate in all board meetings. The statute provides that superintendents have the right to speak on all matters before the board. THE COUNCIL maintains that superintendents cannot execute their right to speak on all matters unless they are able to be present at all board meetings.

While it does not happen frequently, superintendents are increasingly reporting situations where the board has attempted to prevent the superintendent from attending an executive session. The board may or may not cite a reason for the exclusion. The board, for example, may want to discuss a personnel matter with a district employee without the superintendent present. On at least one occasion, a board refused to include a provision in the superintendent's contract authorizing his presence at all board meetings.

Earlier this year, the Committee on Open Government issued an *advisory* opinion providing that a superintendent does not have the right to attend an executive session unless authorized to do so by the board. Even with this interpretation, it follows that the board can authorize a superintendent's presence at all meetings with an explicit statement in contract.

THE COUNCIL cautions superintendents renewing contracts that asking for this provision may lead the board to question why the issue is suddenly being raised, particularly if board meeting participation has never been an issue.

## SALARY

### General Comment

**I**ncreasingly, superintendent contracts establish salaries or salary increases for each year of the agreement. Knowing salary for each year is beneficial to the superintendent. It also

helps the board focus on goal attainment. A better provision would require the Board to compensate the Superintendent with "no less than" the agreed upon salary increase for each year. This assures the Superintendent a set increase but leaves the door open for more.

Some boards prefer to set salary annually. In either case, a clear set of evaluation guidelines and rubrics should be mutually established by the board and superintendent.

### Merit Pay

**W**e continue to see some but not many contracts include a form of merit pay. When including merit pay provisions keep in mind any increase not added to base salary is not includable in a final average salary calculation.

Further, even when it is included, NYSTRS takes a hard look at whether the payment is such as to be included as regular pay. In many cases, the lump sum aspect of the payment results in NYSTRS excluding the money from final average salary.

### §3109 TSA Payments

**E**ducation Law §3109 permits moneys to be deducted from salary for placement into a tax sheltered annuity.

Education Law §3109 permits school districts to establish tax sheltered annuities and have salary payments deposited into such accounts.

Superintendent contracts must ensure such provisions are correctly drafted. TSA moneys should *not be* segregated in contract language. Rather, the full salary should be set forth. A portion thereof is then deducted by the business office for deposit in the §3109 account.

THE COUNCIL has been involved in cases where §3109 moneys were separately listed in their own contract provision. The moneys, while intended to be part of salary were not includable in a final average salary. NYSTRS deemed the moneys non-regular compensation.

Even an amendment after the fact could not correct the issue.

Be clear about TSA moneys and contact THE COUNCIL for advice on wording.

## ANNUAL GOALS & EVALUATION

**I**ssues here arise more as a case of deeds, not words.

Rarely does a contract fail to set forth a process for goal setting and evaluations. Failure to abide by the contract term creates the issue.

Strictly speaking, if a board fails to adhere to a contract term, including one pertaining to evaluations, the remedy could be a court proceeding. However, from a long term view, rarely is it advisable to sue your employer. Lawsuits tend not to generate good feelings – only winners and losers.

When a board procrastinates, or worse, negligently fails to perform evaluations, superintendents have a few options.

Initially, the board should be reminded in writing of its duty to evaluate. If this fails, the superintendent should engage in his/her own self evaluation. The final self evaluation should be presented to the board with a cover letter indicating that this shall serve as the superintendent's final evaluation for the applicable school year.

While not ideal, minimally, the superintendent has provided a contemporaneous document demonstrating accomplishments and areas to work on (if any) for the coming year.

## BENEFITS

### Paid Time Off

**W**hether dealing with vacation, sick, personal or other leaves, THE COUNCIL reminds superintendents that any form of paid time off (PT), be it vacation, sick or personal time should be clearly set forth in contracts.

Ideally, credit for such days should be provided effective July 1 of each year of the agreement. Contracts must also set forth any days for which pay may be had upon separation or end of year. Again, the rate of pay is critical – 1/240<sup>th</sup> of salary or some other amount. Absent such clear language, the Board and superintendent run the risk of negative audits by the Comptroller or others.

### Retirement Reminder

**N**ew York and New Jersey superintendents have been in the news lately for the exorbitant payments for sick and vacation time. THE COUNCIL offers caution in this regard.

What is perfectly legal may not be perfectly prudent. A plethora of recent action by the Attorney General as well as news accounts have foisted the issue of sick and vacation to the forefront.

Beyond large payouts, which always garner strict scrutiny, audits reveal imprecise language and questionable accumulations of time. Language should be clear whenever a superintendent is receiving payments.

### Vacation Days

**B**e sure to note any restrictions on use of vacation days, such as limitations on when vacation days may be taken, the number of consecutive vacations days allowable, and whether prior board approval is needed. Often, a restrictive vacation day provision is the consequence of the board's prior negative experience with the superintendent's predecessor. Confer with COUNCIL attorneys to work out a possible compromise with the Board.

### Sick Days for Family Members

**F**or some superintendents, most commonly those with young children or with responsibilities for the care of a parent, the ability to use sick days for immediate family members is important.

A board may interpret the contract's silence on the matter to mean there is no restriction on the use of sick days to care for immediate family. However, to avoid possible future confusion or disagreement, THE COUNCIL recommends clearly stating in the contract that sick days can be used for immediate family and to then, define "immediate family".

## CONFERENCES

In an effort to curb costs, some boards have been interested in capping the total allowance for conference attendance. THE COUNCIL believes such caps, though seemingly a cost protector, are unnecessary. Boards must approve conference attendance prior to the attendance occurring. If there are costs concerns, denial of the conference is always an option. A hard cap in contract language is not needed.

Superintendents facing this issue may wish to roughly calculate conference costs annually. This number can be provided to 'meet the board halfway.'

## INSURANCE

### Health Insurance

A trend started a few years ago is continuing; boards are seeking to have superintendents pay more out of pocket for health insurance. The general feeling is this sets the tone for negotiations with teachers, administrators and other district employees, and saves the district some money, albeit negligible.

It is more common than in the past to see a board request a 15 percent contribution from the superintendent.

To defray some of these costs, THE COUNCIL has successfully negotiated corollary coverage through health savings accounts. The accounts enable the school district to deposit a set amount annually to reimburse non-covered health insurance costs. **Appendix A** fully describes these types of accounts.

A health savings account must be negotiated

and properly set up by the district. But, it offers an alternative to simply paying more for health costs while also fixing the precise contribution by a district.

A small number of superintendents have language in their contract continuing health insurance coverage for their surviving spouse for a set period should the superintendent pass away during the term of the contract. As districts continue efforts to reduce health insurance costs, this benefit is not likely to become commonplace.

### Insurance in Retirement

Retiree health insurance continues to be common in superintendent contracts but it is harder and harder to get immediately. Increasingly, boards seek longer commitments before providing health coverage in retirement. In some cases, boards will ask for five or seven years of continuous service as a district employee before providing health in retirement.

A negotiation alternative may be to agree to an increasing percent contribution over the life of the contract – 20 percent coverage per year with 90 percent total coverage after year five.

Superintendents coming to a new district from one which provides health in retirement can have a more difficult time. Not every board is willing to simply provide what was given in the prior district – not making you worse off is not always palatable to a board. Ultimately, the above suggestion and others can help smooth the road to secure health in retirement. But, this benefit has been a deal breaker.

In addition, THE COUNCIL has been receiving an increasing number of inquiries regarding Medicare reimbursement. Contract language dictates whether Medicare costs are covered by the district. **Appendix B** distinguishes health insurance language inclusive of Medicare costs from language that covers health insurance only.

#### AVOID THE DEAL BREAKER

Don't let retiree health insurance be a deal breaker issue. Work with Council attorneys on creative ways to gain this benefit, especially if you come from a position where you would have otherwise received it.

### Other Insurances

**L**ife, disability and to a lesser extent long term care insurance continue to be parts of superintendent agreements.

82.7 percent of superintendents receive term or whole life insurance, with a majority (65.5%)<sup>1</sup> receiving term insurance. Boards prefer term insurance due to lower premiums and more limited tax consequences.

A very low percentage receive split dollar life insurance. Board attorneys often caution against split dollar as it could require tracking the superintendent until death.

The State Comptroller's office has also raised concerns about split dollar insurance. The deferred savings element endemic to it could be construed as a retirement plan, prohibited by the General Municipal Law. OSC strictly scrutinizes all split dollar plans.

THE COUNCIL recommends superintendents not negotiate split dollar insurance. Rather, we suggest establishing a set amount the district will pay annually for insurance and then allow the superintendent to decide which type is suitable. Generally, boards are willing to do this.

Bear in mind, this is a cost to the district. A request for insurance to be paid may cut into the ultimate salary amount.

## MOVING & RESIDENCY

### Moving Expenses

**W**ith the mobility of superintendents on the rise, payment for moving expenses is increasingly important. When a board is willing to pay these costs, good practice dictates obtaining a few quotes and requesting reimbursement for these – versus simply paying money outright.

#### PRACTICE TIP

Go for expense reimbursement for moving, not a flat payment. A few thousand dollars is not going to make much difference and will not be included in final average salary in any case.

### Residency

**B**oards of education are insisting, more than ever before, for the superintendent to establish residency. In more affluent areas, the request for residency is close proximity to the district. Upstate and elsewhere residency is specific to the district where the superintendent works.

This issue must be taken very seriously. A recent Commissioner's decision made clear a board has the authority to demand residency and when the facts warrant, determine it.

In *Matter of Connor* (Commissioner's Decision No 15809, August 6, 2008), the Commissioner upheld the board's action. It analyzed the parties' intended meaning of the phrase "permanent residency." Since this term was not defined in the agreement, yet critical to it, the Commissioner looked at outside evidence.

The Commissioner was persuaded by the board's clear indication that it did not want a "commuter superintendent" and the superintendent's representation that his family would move to Suffolk County. He also noted, "Because [the superintendent] essentially only lived in an apartment in Suffolk County

1 Snapshot of the Superintendency 2007©

during the traditional work week and then returned to his house and family [upstate] most weekends ... it was not arbitrary or capricious for the board to conclude he did not satisfy the qualification of employment contained in the contract.”

The Commissioner did not consider whether “permanent resident” was susceptible to different interpretations – only whether the school board’s interpretation was reasonable (or at least not arbitrary.) He concluded it was not.

*Matter of Connor* stands as the most recent and somewhat discouraging decision on superintendent residency. If this issue arises, superintendents should call THE COUNCIL in advance. Superintendents should also be mindful of the practice tips noted herein.

#### Practical Aspects of Residency

- Residency does not need to mean permanent domicile.
- If you own another home, be clear you need not give it up to be deemed a resident.
- Have THE COUNCIL draft language on residency to ensure you articulate your responsibilities.
- Seek a reasonable time to establish residency.
- Do not agree to language that allows the Board to nullify a contract if residency is not established.

Never would one guess such a seemingly benign issue would raise so many questions. Superintendents are invariably offered a car allowance or mileage reimbursement in lieu thereof. Which is better is a personal choice.

Many superintendents do not wish to track mileage and thus seek a car allowance. If this is done, appropriate tax treatment must be part of the equation. Additionally, car allowances are *not* made part of final average salary except for those in Tier 1A – a group whose size continues to diminish each year.

#### Recommended Practice

**R**ely on the IRS rate for mileage reimbursement. This is better than a district established rate which could be less than the IRS rate.

#### PROFESSIONAL DEVELOPMENT

**S**ome board attorneys will advise avoiding paying for continued learning. Continuing education improves school leaders’ ability and will have a direct positive impact on student achievement. This is rarely a major negotiation issue but is one that should be insisted upon.

#### CELL PHONE AND RELATED

**E**arly Comptroller audits focused on cell phone use a great deal. This has waned in more recent audits as best practices have become more known and accepted.

A point many superintendents are mindful of is, when a cell phone is purchased and provided by a district, the record of use is record of the district. This does not mean it can be publicly disclosed. However, it does mean the district will have it as a formal record. If you wish to retain privacy, consider simply purchasing and maintaining your own phone.

The same can be said for computers and related devices.

If the contract provides for a cell phone, clearly indicate it is for business and incidental personal use. The latter ensures the superintendent is permitted to use the phone as needed, not just for work. This also avoids having to carry two phones and looking like you are wearing the *Batbelt*.

#### Practical Advice

**P**urchase the items yourself, eliminate any specific provisions in the contract and have salary reflected accordingly.

## CONTRACT RENEWALS

When renewing contracts, superintendents are advised to be careful to heed the restrictions regarding duration of superintendent contracts which are set forth in statute and emphasized in Commissioner's decisions. In particular, the Commissioner's decision, *Appeal of Boyle* (No 13,501, November 2, 1995) is held as the landmark decision serving as a guidepost for superintendents renewing their contracts.

As emphasized in *Boyle*, Superintendents should be mindful that New York courts frown on public bodies, which includes school boards, binding their successors to long-term contractual agreements. Superintendent contracts must not exceed five years pursuant to Section 1711(3) of the Education Law. (*Boyle* preceded the enactment of legislation requiring superintendent contracts be a minimum of three years in duration.)

The Commissioner has viewed a contract extension as effectively creating two contracts, an initial (prior) contract and a subsequent contract. Under *Boyle*, a contract extension is permissible as long as the initial contract is not more than five years in length and the subsequent contract, separately, is also not more than five years in length.

In other words, a board may not enter into a contract extension with its superintendent which would, if combined with the remaining term of the existing contract, exceed five years.

COUNCIL attorneys can assist superintendents in ensuring compliance with the statutory term limit when extending a contract.

## DUE PROCESS

### No-Fault Termination Clause

Superintendents should be wary of No-Fault Termination Clauses, which are increasingly popular with boards. A No-Fault Clause permits a board to terminate the employment of a superintendent without due process whether for cause or for any arbitrary reason. It provides superintendents with very little protection from rogue boards.

If a board insists on a No-Fault Clause, a superintendent must carefully weigh the risks and benefits. Surprisingly, there are benefits to such a clause for the superintendent. Few people would remain in a negative employment relationship without compelling reasons. A superintendent may prefer to opt out of the contract if relations with the board have deteriorated to such an extent that district business cannot be conducted. Further, the process to arrive at a settlement agreement can be long and arduous, and often does not lead to satisfactory compensation for the superintendent.

Superintendents are encouraged to contact COUNCIL attorneys when a board adamantly insists on a No-Fault Clause. The parties may be able to agree to a version of the No-Fault Clause that offers the superintendent more protection. For instance, the provision could require the Board to pay the superintendent salary and benefits for a predetermined period of time.

## CONCLUSION

Superintendent contracts are fluid, living documents. We encourage superintendents not only be familiar with them but ensure boards are as well. The agreement is as much theirs as it is yours. Review salient provisions of the agreement with the board annually. Highlight issues which may come up – payment for vacation days at the end of the year, termination payments and so on.

As you negotiate a new agreement, consider the big picture and all angles – how it will be perceived locally, at the state level and even whether it will pass the muster of a scrutinizing audit.

THE COUNCIL can assist in all superintendent contact needs. We urge contacting us and allowing us to provide counsel and guidance on the issues contained here and related.

### CONTACT

MICHELE V. HANDZEL, ESQ.  
General Counsel

MEGHA GODAMBE, ESQ.  
Legislative Associate and Assistant Counsel  
THE COUNCIL of School Superintendents  
7 Elk Street, Third Floor  
Albany, New York 12207  
(518) 449-1063  
[michele@nyscoss.org](mailto:michele@nyscoss.org)  
[megha@nyscoss.org](mailto:megha@nyscoss.org)  
[www.nyscoss.org](http://www.nyscoss.org)

# Appendix A

## From The Bench vol. 7 Issue 4

### Residency Requirements in Superintendent Contracts

Superintendent residency is increasingly being required by school boards. Some are demanding “permanent” residency not wanting a ‘commuter superintendent.’ This is occurring upstate *and* downstate. A recent commissioner’s decision was unfavorable to the superintendent involved, offering caution to school leaders looking to relocate. If residency is required, take it seriously!

MATTER OF CONNOR (Commissioner’s Decision No 15809, August 6, 2008)

In June 2007, the Eastport-South Manor Central School District entered a three year agreement with a new superintendent. The Board, insisted on the following, very strict, residency provision:

*“The Superintendent must permanently reside at his primary residence in Suffolk County. In the event that the Superintendent does not reside in Suffolk County at any time, the entire contract will be deemed null and void.”*

The new superintendent indicated a willingness to relocate with his family to Suffolk County. He agreed to the contract with the above provision and was represented by counsel.

Upon signing the agreement, the superintendent entered a one-year lease in Suffolk County. Around the same time, he sold one upstate home but purchased another. Family circumstances changed thus keeping them upstate.

Six months into the agreement (November 2007), the board notified the superintendent it was terminating the contract for violation of the residency clause. The board offered a short time (one week) to demonstrate residency. Through his attorney, he provided evidence of residency including change in voter registration and amended driver’s license.

After considering this information, the Board terminated the employment relationship effective December 13, 2007. No due process hearing was held. (Lack of due process was contested in the appeal but the Commissioner held the strict wording of the residency clause did not require it.)

The Commissioner denied a request for a stay of the board decision. This left the superintendent without a job, without remuneration but with a one year lease away from his family – pending the final decision.

#### RESIDENCY NOT FOUND

The Commissioner’s August 6, 2008 decision upheld the board’s action. It analyzed the parties’ intended meaning of the phrase “permanent residency.” Since this term was not defined in the agreement, yet critical to it, the Commissioner looked at outside evidence.

The Commissioner was persuaded by the board’s clear indication it did not want a “commuter superintendent” and the superintendent’s representation that his family would move to Suffolk County. He also noted, “Because [the superintendent] essentially only lived in an apartment in Suffolk County during the traditional work week and then returned to his house and family [upstate] most weekends ... it was not arbitrary or capricious for the board to conclude he did not satisfy the qualification of employment contained in the contract.”

The Commissioner did not consider whether “permanent resident” was susceptible to different interpretations – only whether the school board’s interpretation was reasonable (or at least not arbitrary.) He concluded it was not.

#### INTERPRETING THE DECISION

The decision is troubling. The board's interpretation of permanence is disputable. The board did not demand the superintendent relinquish other property to demonstrate permanent residency in Suffolk County. It also did not require purchase of property. A one year lease also suggests a level of permanence, especially in an expensive area of the State.

Additionally, only the superintendent, not his family or spouse were parties to the contract. *Their* residency should not have been determinative of the superintendent's. Familial proximity could be a factor in determining permanent residency, but, it is not dispositive. For example, if the superintendent purchased real estate and received a STAR exemption on it, but his family remained upstate, he would have been deemed a permanent resident (or, it would seem, have a much stronger case.)

The latter point is noteworthy. In April, the Commissioner denied a resident of Fire Island the right to cast a budget vote. The Commissioner reasoned the individual could not have been a resident of Fire Island because he received a STAR exemption on property in Westchester County since 1999. Permanent residency is a pre-requisite for receiving a STAR exemption<sup>2</sup>. *Appeal of Klein* is not mentioned in *Matter of Connor*.

As cogent as these points may be, the Commissioner's decision stands. The ruling appears to provide boards' broad authority to ascertain 'permanent residency' when that phrase remains undefined in the agreement. So long as a board interprets the phrase reasonably, the decision is likely to stand.

#### MOVING AHEAD

Council attorneys have considerable experience working on residency issues. We caution superintendents on how boards apply these clauses and also work to negotiate clear understanding of the terms. The latter is most important.

THE COUNCIL often will suggest qualifying language when residency is required. This might include:

- (a) 'The board recognizes the superintendent owns a second home [elsewhere] and this shall not be deemed inconsistent with the residency requirement';
- (b) 'Purchase of a home is not required to satisfy the residency requirement set forth herein';
- (c) 'The board would prefer but does not insist the superintendent's family also reside with him in the district.' Or,
- (d) 'Should the superintendent move while serving in the capacity as superintendent, (s)he shall move closer to the district.'

Residency requirements can also raise corollary issues. If a board insists on residency, insist on moving expenses or assistance paying transitional expenses such as a rental. It is equally reasonable to request time to relocate (six months to a year).

Ultimately, residency may not be a money issue per se, but failure to comply can be costly. Let us help negotiate to ensure your interests are protected and intent is clear.

(Originally published August 2008).

# Appendix B

## From The Bench vol. 7 Issue 3

### Health Insurance: Options & Considerations

School districts provide health insurance to employees, including superintendents. That's easy. Understanding whether current and retirement needs are sufficiently covered is not. Superintendents should analyze options which may be available to round out current coverage and ensure benefits in retirement.

Disclaimer Note: *Health insurance is VERY nuanced. What may be applicable to one person may not work for another. The following possible options differ district to district. The list is not comprehensive. When exploring options consult counsel, business office personnel and insurers. THE COUNCIL may also assist.*

#### Cafeteria/§125 Plans

Cafeteria Plans or §125 plans (referring to the Internal Revenue Code section allowing their establishment) are popular. These plans allow pre-tax employee contributions into designated accounts. Funds are used to reimburse qualified medical costs incurred throughout each calendar year. Employees elect the amount to be deposited prior to the beginning of each calendar year. Unexpended funds do *not* roll-over to subsequent years. Cafeteria plans are funded pre-tax so contributions and distributions are not taxed. Most school districts establish §125 plans. Specific contact language or board policy would authorize Superintendents' eligibility to use §125 plans.

#### Health Reimbursement Arrangement (HRA)

Health Reimbursement Arrangements (HRAs) are *employer* funded flexible spending arrangements. Employers establish *and* fund plans. Contributions are not subject to federal tax and there is no limit on the amount an employer may contribute. HRA distributions reimburse employee incurred qualified medical expenses<sup>3</sup>. These are largely the same expenses as under a §125 plan. HRA plans cannot have a cash option – HRA moneys may not be paid as cash to employees.

In contrast to §125 plans, HRAs are not 'use it or lose it'. Unexpended moneys *may* rollover for use in subsequent years.

#### Health Savings Accounts (HSA)

Health savings accounts (HSAs) are analogous to IRAs for health expenses. HSAs are commonly established in conjunction with high deductible health insurance plans (HDHP)<sup>4</sup>. Pre-tax *employee* contributions are placed in a trust-like account to pay costs associated with qualified medical expenses. IRS rules define qualified expenses - typically dental, vision and other types of benefits. HSA contributions may be deducted from gross income. HDHPs are key to HSA eligibility and not always common in school districts.

### Non-Discriminatory Rules

Section 125 plans, HRAs and HSAs must comply with non-discriminatory rules. Non-discrimination rules are enforced by the IRS to prevent highly-compensated and/or key employees from using reimbursement plans as tax-shelters. These rules prohibit discrimination *in favor of* highly compensated employees with regard to eligibility and participation in the plan. Failure to follow non-discrimination rules will result in the disqualification of all highly compensated employees and taxing funds dispersed to them<sup>5</sup>.

<sup>3</sup> Qualified medical expenses include: amounts paid for health insurance premiums; long-term care coverage; and, costs not covered under another health plan. (IRC §213(d). Also, <http://www.irs.gov/publications/p969/aro2.html#doe2262>).

<sup>4</sup> Min. annual deductible: \$1,100 individual and \$2,200 family (<http://www.irs.gov/publications/p969/aro2.html#doe174>).

<sup>5</sup> Source: [http://www.mycafeteriaplan.com/hra\\_testing.htm](http://www.mycafeteriaplan.com/hra_testing.htm)

## Retirement Considerations

THE COUNCIL is receiving an increasing number of inquiries about health insurance coverage in retirement. Many questions relate to Medicare.

Upon attaining age 65, most people begin receiving coverage under Medicare Part B (Medical insurance; Part A is hospitalization). Medicare premiums are deducted from social security payments<sup>6</sup>.

Superintendent employment agreements often provide retirement health insurance coverage. Contract language dictates whether Medicare costs are covered. Consider the options:

**SAMPLE LANGUAGE - OPTION A:** *“The District shall pay the superintendent’s health insurance costs in retirement for the superintendent’s life” (or words to this effect).*

**SAMPLE LANGUAGE - OPTION B:** *“The district shall pay 90% of the cost of the district’s health insurance for the superintendent in retirement.”*

Option A likely covers health insurance *and* Medicare costs. The language contemplates paying costs of health insurance coverage, whatever they are – district plan or Medicare. Medicare is not specifically cited in Option A but *costs* could be read to include Medicare. Specific wording stating Medicare costs are covered would be clearer.

Option B would likely not include Medicare costs. It cites a percentage of the *district’s* health insurance costs. A person retiring with Option B-like language would likely not have a claim to district reimbursement of Medicare costs.

THE COUNCIL advises reviewing retirement health insurance language in advance. Many districts DO NOT cover Medicare costs, understanding the precise nature of coverage, in advance, is beneficial. Council attorneys can assist superintendents seeking to modify these provisions.

### Medigap Coverage

Medigap insurance relates to Medicare. Not all out-of-pocket health costs are covered Medicare (i.e. coinsurance, copayments and deductibles). Medigap, sold by private insurance companies, fills the ‘gaps’<sup>7</sup>. Generally, you must have Medicare Part A and Part B to purchase a Medigap policy. Medigap may be negotiated. However, THE COUNCIL does not see a great deal of this. By receiving district health insurance benefits, the need for Medigap may not be as great.

## Conclusion

Health insurance costs continue to rise – few know this better than superintendents. Superintendents should bear this in mind for themselves as well as for their districts. The above snapshot offers a glimpse of tools which may help manage costs. Feel free to contact THE COUNCIL to explore the scope and applicability of these options.

(Originally published March 2008)

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<sup>6</sup> Effective January 2008, monthly Medicare Part B premiums are \$96.40. Monthly premiums increase based on income (over \$82,000 for individuals.)

<sup>7</sup> Source: <http://www.medicare.gov/Publications/Pubs/pdf/02110.pdf>

# Annotations:

Oath of Office:  
Don't forget - each time the employment is renewed or extended, you must take the oath of office. A sample is provided.

## BOARD RESOLUTION

BE IT RESOLVED that the Board of Education hereby appoints and employs \_\_\_\_\_ as Superintendent of Schools, for the period \_\_\_\_\_ to \_\_\_\_\_ and further approves the Employment Agreement dated \_\_\_\_\_ setting forth the terms and conditions of such appointment and employment.

## OATH OF OFFICE

\_\_\_\_\_ SCHOOL DISTRICT  
\_\_\_\_\_, NEW YORK \_\_\_\_\_

STATE OF NEW YORK

COUNTY OF \_\_\_\_\_

I do solemnly swear that I will support the Constitution of the United States of America and the Constitution of the State of New York, and that I will faithfully discharge the duties of the office of Superintendent of Schools, according to the best of my ability.

\_\_\_\_\_  
(Signature) (Address)

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_

\_\_\_\_\_  
Name and Title of Subscribing Officer

\_\_\_\_\_  
(School District) (County)