

Critical Choices in Superintendents' Contracts

By Ann McColl

Imagine a local board of education in North Carolina that is searching for a new superintendent. It wants to hire the best person possible for the school system, and it knows that its offer will have to be competitive in order to attract the chosen candidate. On the other hand, it may be accustomed to spending within a certain range and may have used the same contract for years. The board is not sure how much it will need to change and what alternatives exist to the way it has always crafted its relationship with the superintendent.

Imagine a candidate for a superintendency. She wants to get the best possible offer—one that will give her the authority she needs to lead the schools and an attractive benefits package. Yet she does not want to seem pushy or be unrealistic about what this particular board can do. The candidate knows only the contracts she already has had and is not familiar with options that might be better.

Imagine a board and a superintendent that are planning to meet to discuss extension of the superintendent's contract. Both parties know that this is a chance to revisit the terms of the contract and refine their relationship. The board chair has suggested that the superintendent approach the board with any recommended changes to the contract. The board is pleased with the superintendent's performance and wants him to stay.

This article is written to help in all these circumstances, which play out many times every year in North Carolina. To familiarize both parties to the contract with options, the article describes many critical choices that should be

reflected in the contract. Because of the wide diversity of local boards and their communities, as well as the varied interests of superintendents, there is no model contract. Rather, the article aims to help parties come together by identifying approaches that may work for their particular relationship.

The article is organized according to a list of critical choices about the negotiable items shown below. If a board and a superintendent candidate are developing a contract, reviewing all the choices may be helpful. For contract amendments, boards and superintendents can use the list to identify the negotiable items of interest to them. The discussion of each critical choice begins with a descriptive summary, followed by an examination of negotiation issues and legal standards. Then sample provisions are provided to show the range of approaches. The sample provisions are from actual North Carolina contracts unless otherwise noted. Some are better crafted than others.

Negotiable Items Discussed in This Article

1. Superintendent Duties and Authority
2. Staff Organization
3. Referral of Complaints
4. Attendance at Board and Committee Meetings
5. Salary Increases
6. Tax-Deferred Annuities
7. Employee Contributions
8. Salary Incentive to Stay
9. Options for Further Compensation for Time
10. Other Benefits Related to Salary
11. Performance Payments
12. Performance Evaluation
13. Transportation Expenses
14. Technology Expenses
15. Unique Position
16. Contract Term, Resignation, and Renewal
17. Interim-Superintendents' Contracts
18. No-Cause Terminations and Severance-Pay Agreements
19. Attorney Fees

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Editor's Note: Most of the actual contracts from which the sample provisions are taken refer to the superintendent in gender-specific terms (*he, his*). This article reproduces that language with the understanding that a contract employing these provisions will reflect the gender of the individual superintendent.

The provisions are applicable to superintendent candidates as well as to incumbents seeking amendments. The article simply refers to superintendents rather than making this distinction.

Items Related to Board–Superintendent Relations

Summary

The provisions that establish the working relationship between the board and the superintendent may be the most critical elements of a superintendent's contract. The contract can set the stage for effective governance and a healthy relationship between the board and the superintendent. It can establish the authority of the superintendent over school district operations, the process for resolving complaints received by board members, and the degree of the superintendent's autonomy in pursuing professional development and professional relationships outside the school district.

Negotiation Issues

The board and the superintendent may each want to enlist an attorney to draft provisions related to board–superintendent relations. However, even when attorneys are involved, the board and the superintendent should openly discuss their expectations for their working relationship. The parties also should share their understanding of how all board members, including members elected after the contract is in effect, will be informed about the contract's provisions and their impact on board operations.

The board and the superintendent should be familiar with the district's policy manual to understand the full working relationship established by the board. The manual may include policies that describe the superintendent's authority to take personnel actions, to establish administrative procedures, to act in the absence of an expressed policy, to enter into contracts, or to approve change orders.

1. SUPERINTENDENT DUTIES AND AUTHORITY

Legal Standards

Boards have specific statutory authority to establish duties for the superintendent. Section 115C-47(15) of the North Carolina General Statutes (hereinafter G.S.) provides that the "local boards of education shall prescribe the duties of the superintendent as subject to the provisions of G.S. 115C-276(a)." Under that section, "[a]ll acts of local boards of education, not in conflict with State law, shall be binding on the superintendent, and it shall be his duty to carry out all rules and regulations of the board." The contract presents an opportunity for the board and the superintendent to work together to define the superintendent's duties in a way that is consistent with effective board–superintendent relations.

Sample Provisions

Sample Provision 1 establishes standards for board members.

1. *The Board members shall, as individuals, do no act that will prevent the Superintendent or his subordinates from properly performing the work of the Schools. In their dealings with the Superintendent, the board members shall deal through Board action.*

Sample Provision 2 limits a board's broad statutory authority to prescribe superintendent duties and is consistent with effective governance and contractual expectations.

2. *The Board may, from time to time, prescribe additional duties and responsibilities for the Superintendent; provided, however, that*
 - (i) *the Board shall not without the Superintendent's written consent, adopt any policy or by-law which impairs the duties and authority specified above; and*
 - (ii) *all additional duties and responsibilities prescribed by the Board shall be consistent with those normally associated with the position of Chief Executive Officer of a school. This provision shall remain in full force and effect during any period of suspension.*¹

2. STAFF ORGANIZATION

Legal Standards

With respect to staff organization, hiring, and firing, several statutory provisions apply. The law succinctly states the superintendent's and the board's roles in hiring school personnel:

It shall be the duty of the superintendent to recommend and the board of education to elect all principals, teachers, and other school personnel in the administrative unit.²

The contract, board policy, or practice will need to expand on this standard to clarify the process used by that school district for hiring employees.

By contrast, the law is much more specific and detailed in regard to the superintendent's and the board's roles in the dismissal or demotion of employees covered by the career-status law (tenured teachers), probationary teachers, and school administrators during the term of their contract:

The superintendent . . . shall participate in the firing and demoting of staff, as provided in G.S. 115C-325.³

1. Association for the Advancement of International Education, *Model Employment Contract for Heads of American/International Schools* (New Wilmington, Pa.: Thompson House, Westminster College, July 1993).

2. N.C. GEN. STAT. 115C-276(j) (hereinafter G.S.).

3. G.S. 115C-276(l).

Because the law spells out responsibilities, there is less need to address this relationship in the contract.

The law does not require board action for dismissal of other employees or for most other employment actions. It does, however, provide for a right of appeal to the board of final administrative decisions in the following employment context:

Appeals to Board of Education and to Superior Court.
– An appeal shall lie to the local board of education from any final administrative decision in the following matters: . . . (3) The terms or conditions of employment or employment status of a school employee; . . .⁴

In addition to this general requirement, the law more specifically addresses assignment of principals.

Subject to local board policy, the superintendent shall have the authority to assign principals to school buildings.⁵

This last provision is unusual. In most instances, the statutes delegate authority to the board, and the board can then decide whether to delegate that authority to the superintendent. In this provision, however, the statute confers on the superintendent the authority to assign principals unless the board determines otherwise.

Sample Provisions

There are critical choices to be made in the areas in which the law allows options in the superintendent's authority in personnel decisions. Because this authority is a defining element of the board–superintendent relationship, addressing it in the contract is appropriate. Board policy could set out more details of the relationship. For the superintendent to be able to operate as chief executive officer, he or she should have complete discretion to organize staff. For many superintendents, this may be the most important authority to have in order to effect change. Sometimes boards want to be more involved in employment decisions or want to know in advance about actions to be taken. The contract provides the opportunity for the board and the superintendent to define and understand this relationship.

Sample Provision 3 gives full authority to the superintendent.

3. *He shall be the chief executive officer of the Board; shall direct and assign teachers and other employees of the schools under his supervision; shall organize, reorganize and arrange the administrative and supervisory staff, including instruction and business affairs, as best serves*

the _____ School System; shall select all personnel subject to the approval of the Board.

Sample Provisions 4, 5, and 6 restrict this authority in various ways.

4. *The Employee shall have freedom to organize, reorganize and arrange the administrative and supervisory staff, including instruction and business affairs, principal and assistant principals in any manner or fashion, which in the Employee's judgment best serves the _____ School System; provided such action is not inconsistent with the policies of the Employer and/or inconsistent with law. It is agreed that such policies shall include the Employer's approval of the organization chart of the administrative and supervisory staff and the creation or elimination of any subsequent positions for which certification is required. . . . It is understood and agreed by the Employer that individual board members have no authority to make any commitment or take any action regarding personnel except to make such referrals to the Employee and in their capacity as a member of the Board while in session.*
5. *The Superintendent shall have complete authority to organize the administrative, supervisory, and clerical staff in any manner or fashion, which in his judgment best serves the _____ School System. The Superintendent shall also have complete authority to assign all currently employed principals and assistant principals. The responsibility for selection, placement, and transfer of other classified or certificated personnel shall be vested in the Superintendent subject to approval by the Board. The Superintendent shall have authority to immediately accept, on behalf of the Board, resignations of personnel upon receipt of notice of resignation.*
6. *The Superintendent shall direct and assign teachers and other employees of the school system under his supervision; he shall organize, reorganize, and arrange the administrative staff, including program services and operations, as best serves the school system, subject to the approval of the Board; he shall recommend the employment and discharge of all personnel subject to the approval of the Board . . .*

3. REFERRAL OF COMPLAINTS

Summary

Board members often receive complaints from the public, parents, or school employees regarding some element of the school district's operation. Maintaining proper roles in the handling of these complaints is an important dynamic in the board–superintendent relationship. The superintendent's contract is an opportunity to clarify this

4. G.S. 115C-45(c).

5. G.S. 115C-276(q).

relationship and process. All board members, including any who join the board after the contract is implemented, should be aware of the contractual requirements.

Negotiation Issues

Referral of complaints does not have to be addressed in a contract: it can be a part of board policies. However, the process will be easier for the superintendent to enforce if the issue is included in the contract. A superintendent should review board policies to identify any processes required specifically for referral of complaints and generally for appeal of administrative decisions. These policies should not conflict with the contract, but may provide more detail on the required processes.

Legal Standards

Students and employees have a right to appeal certain kinds of administrative decisions.⁶ Other decisions may be appealed at the discretion of the local board. It is important for board members not to get involved in trying to resolve an issue that may come before the board through a formal appeals process. The handling of other kinds of complaints, such as those from members of the community, is not specifically covered by law, although public records laws would apply to any written communication in regard to the complaint. Written complaints are public records unless they fit within a specific exemption for confidential information, such as a complaint that discloses information in a student's official record or personnel information recognized by statute as being exempt.⁷

Sample Provision

Sample Provision 7 establishes the basic expectation of how board members will address complaints they receive.

7. *The Board, individually and collectively, shall promptly refer all criticisms, complaints, and suggestions called to its attention to the Superintendent for study and recommendation and shall refrain from individual interference with the administration of school policies except through Board action.*

4. ATTENDANCE AT BOARD AND COMMITTEE MEETINGS

Summary

Superintendents typically attend meetings of the board as a whole and meetings of board committees. This issue should be addressed in the contract to ensure that the superintendent is properly involved.

Negotiation Issues

The issue of attendance does not have to be addressed in the contract; however, addressing it will allow the board and the superintendent to clarify expectations regarding this important matter. It is reasonable for a board to exclude the superintendent from a meeting to discuss his or her evaluation. Other exclusions should be identified to make sure that all parties understand the implications of the provision.

Legal Standards

By law, the superintendent serves as ex officio secretary to the board of education. Specific duties also are established: "As secretary to the board of education, the superintendent shall record all proceedings of the board, issue all notices and orders that may be made by the board, and otherwise be executive officer of the board of education."⁸ The question sometimes arises whether implicit in this responsibility is the right of the superintendent to attend all board meetings or whether the board could choose someone else to serve as secretary. There is no specific statutory language on the issue, and the courts have not addressed it. However, it seems clear that the board can exclude the superintendent from a closed session in which the board's evaluation of the superintendent is discussed. In regard to other matters, the state attorney general has provided an opinion that the superintendent's presence at all board meetings is implicitly required by virtue of the superintendent's being ex officio secretary.⁹ By contrast, in a well-reasoned letter, Robert P. Joyce, a School of Government faculty member, has written that the board could bar the superintendent from attending a closed session.¹⁰ Given the uncertainty of the law, it is especially helpful to clarify in the contract how the board and the superintendent intend to address attendance.

Sample Provision

Sample Provision 8 brings clarity to the issue of the superintendent's right to attend board meetings.

8. *The Superintendent shall have the right to attend all Board meetings and all Board committee meetings, except a meeting called to discuss the Superintendent's evaluation, and he shall have the right to provide administration recommendations on each item of business considered by the Board and its committees.*

6. G.S. 115C-45(c).

7. G.S. 132-1, 115C-402 (student records), 115C-319, -320 (personnel records).

8. G.S. 115C-276(b).

9. Op. Att'y Gen., Letter to J. White, president, Jones County Voters' League (July 17, 1991).

10. Letter to A. Locklear (June 22, 1992).

Items Related to Salary and Other Income-Related Provisions

Summary

Boards face few legal obstacles in providing a compensation package designed to attract and retain a high-quality superintendent. The obstacles tend instead to be fiscal or political. Even fiscally constrained boards can, however, consider what assurances they can give to superintendents regarding salary. Boards and superintendents also have options in considering benefits that supplement the salary base.

Negotiation Issues

A board's ability and willingness to use local funds varies significantly across the state. Superintendents should review the contracts of prior superintendents in the district to learn how the board has addressed salary in the past. Although a board may choose to do more, such a review will at least give the superintendent a sense of the board's—and the community's—history on the issue.

In many school districts, amendments to contracts establishing salary increases also are available. A review of these amendments provides helpful historical information on the board's willingness to provide salary increases over the term of the contract.

Superintendents' contracts are available as public records and are maintained both by the school system and the State Department of Public Instruction.

To understand more fully a community's ability and willingness to pay for education, other databases can be used, including comparisons of local salary supplements, rankings of districts by per pupil expenditures, county manager salary, tax rate, and other budget information (see sidebar). These databases are regularly updated. All these resources help the board and the superintendent compare their system with other school systems that may be similar in size, geography, or wealth.

Once an overall amount that the superintendent should receive has been established, the board and the superintendent can determine the means of compensation. Any amount above the state salary level for the position can be paid through a local supplement, or some of the value of the compensation package can be placed in other kinds of benefits (see Items 6–11 below). These choices should be made carefully, for they may be treated differently for tax purposes or for compensation counted by the state retirement system. Also, these additional benefits often do not increase in proportion to increases in salary, so the total compensation package may grow more slowly. Further, many separation agreements do not include payment of additional benefits in case of a unilateral termination. Still, these additional benefits can be important in attracting qualified candidates.

Resources on a Community's Ability to Pay

- **Local Salary Supplements**
www.ncpublicschools.org/docs/fbs/finance/salary/supplements/2006-07supplements.pdf
- **Rankings of Districts by Per Pupil Expenditures and Other Expenditure Data**
www.ncpublicschools.org/docs/fbs/resources/data/financialdata/2006-07data.pdf
- **County Manager Salary**
<http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/cosal2007/mgr.pdf>
- **Tax Rate**
www.ncacc.org/research/07tax.xls
- **Tax and Budget Survey**
www.ncacc.org/research/survey07.xls

Legal Standards

Legal standards establish some minimum requirements for the use of state funds but do not hinder a board in using local funds to supplement salary or offer other benefits. Local boards have discretion in using state funds for the superintendent's salary within the salary range given for each size category of school (based on the number of students). They then may use local funds for additional salary. The following statute establishes the legal parameters for the superintendent's state salary:

The salary of the superintendent shall be in accordance with a State standard salary schedule, fixed and determined by the State Board of Education as provided by law; and such salary schedule for superintendents shall be determined on the same basis for both county and city superintendents and shall take into consideration the amount of work inherent to the office of both county and city superintendents; and such schedule shall be published in the same way and manner as the schedules for teacher and principal salaries are now published.¹¹

5. SALARY INCREASES

Sample Provisions

Although boards have the right under the law to increase the superintendent's salary by using local funds, many contracts explicitly express this right, as in Sample Provision 9. The assurance not to reduce aggregate annual salary is the more significant element in this provision.

9. *The Board retains the right to increase annual salary paid to the Superintendent from local funds as a supplement at any time during the term of the contract and*

11. G.S. 115C-272.

agrees not to reduce the aggregate annual salary as stipulated in this section.

Sample Provision 10 provides for automatic increases.

10. *In addition, Superintendent shall receive a guaranteed 5% increase each and every year after the first year for the term of this contract, which would include all salary increases enacted during the term of this Contract by the General Assembly of North Carolina for state public school employees. Should the General Assembly grant in excess of 5% Superintendent would receive this.*

Another approach is to link the superintendent's salary to that of other administrators or to that of teachers. This may be one way for superintendents to benefit from legislatively mandated salary increases for other administrators. Sample Provisions 11 and 12 show different approaches to making this connection. Boards or superintendents that want to pursue these options should work with their attorneys and finance officers to make sure that the options are considered and understood.

11. *The annual compensation (salary and any bonuses) for the Superintendent shall at no time during the term hereof be less than \$10,000.00 greater than that of the next highest paid administrator in the _____ School System.*
12. *Annually, the Superintendent's state salary and local salary supplement shall be adjusted to reflect the highest percentage increase paid annually to any classification of certified school employees by the General Assembly of the State of North Carolina. At a minimum, _____ shall receive a 3 percent raise annually, beginning July 1, 2008.*

6. TAX-DEFERRED ANNUITIES

Sample Provisions

Sample Provision 13 is found in many contracts but is not necessary for superintendents to be able to direct salary to an annuity.

13. *The Board, at the request of the Superintendent and in accordance with State law, shall withhold and transfer an amount of salary annually or semi-annually or monthly, said amount to be determined by the Superintendent, permitting the Superintendent to participate, if he so desires, in a tax-deferred annuity program of his choosing.*

Sample Provisions 14 through 17 show different approaches for contracts to take in providing this benefit to superintendents.

14. *In addition to the aggregate annual salary specified above, the Board shall establish for Superintendent a*

Supplemental Retirement Pay Agreement in conformity with the provisions and requirements of Section 457 of the Internal Revenue Code and shall make contributions monthly during the term of this contract to the Superintendent's deferred compensation account in the amount of \$250.00. At Superintendent's election, up to \$3,563.00 of his aggregate annual salary may be placed into this Retirement Account.

15. *The Board, at the request of the Superintendent and in accordance with state law, shall withhold and transfer an amount of salary annually or semi-annually or monthly, said amount to be determined by the Superintendent, from the Superintendent's annual salary into any tax-favored annuity or retirement program chosen by the Superintendent. The Board shall match the Superintendent's contribution to any such tax-favored annuity or retirement program, with the Board's matching contribution being subject to an annual limit of three percent (3%) of the Superintendent's aggregate annual salary, or any lesser limitation imposed by law.*
16. *In addition to the compensation described above, the Board will make an investment of \$6,000.00 annually in a tax-deferred annuity or other investment program to be selected by the Superintendent.*
17. *In consideration of the exemplary performance of the Superintendent and the fact that his retirement will be adversely affected due to his employment out of the State of North Carolina for a number of years, the Board agrees to make a one-time contribution in the amount of five thousand dollars (\$5,000.00) to a Section 403(b) of the Internal Revenue Code program of the Superintendent's selection.*

7. EMPLOYEE CONTRIBUTIONS

Sample Provision

Another approach is for the board to pay the Superintendent's required contribution to provided plans, such as the Teachers' and State Employees' Retirement System, Medicare, and Social Security. This benefit will rise along with salary increases.

Sample Provision 18 provides this benefit succinctly. It also could include any tax consequences for payment into these plans.

18. *Each month, the Board shall pay the Superintendent's contribution to the State Retirement System and Social Security/Medicare.*

8. SALARY INCENTIVE TO STAY

Summary

Any benefit can be structured as an incentive for a superintendent to remain through the term of the contract. For example, a board can make contributions to an annuity that

becomes the property of the superintendent only if he or she stays a certain amount of time. Such a benefit might appeal to boards because it is both enticing to the superintendent and relatively easy to implement. It allows boards to make clear the conditions that must be met, without specifying subjective performance standards that may be difficult to apply.

Sample Provision

In Sample Provision 19, from a large school system in North Carolina, the school board has structured a salary bonus as an incentive to stay. As the provision is written, the bonus would constitute compensation for purposes of the state retirement system.

19. For each of the contract years, _____ to _____, the Board shall pay an amount equal to twenty-five percent (25%) of the Superintendent's annual aggregate salary as deferred compensation which shall be payable to the Superintendent on June 30, _____, [final year of contract] provided that he completes the term of this amended contract. No funds shall be set aside by the Board for the purpose of funding this deferred compensation; such deferred compensation shall be an unfunded liability of the board. Should the Superintendent fulfill the requirement to receive the deferred compensation, the Board shall pay the deferred compensation to him in cash on _____ and report this amount as taxable income in the year received by him. Should the Superintendent fail to complete the term of this amended contract he shall forfeit the deferred compensation in its entirety. Should the Superintendent be unable to complete the term of this amended contract due to death or disability, all accrued deferred compensation shall be payable to the Superintendent or his beneficiary at the time of separation.

9. OPTIONS FOR FURTHER COMPENSATION FOR TIME

Summary

Some contracts in North Carolina provide ways for superintendents to be compensated for their time beyond the state vacation days and rollover provisions. Although additional leave days that would affect the retirement system cannot be given, some other options are identified below.

Negotiation Issues

Boards likely will vary in their ability and interest in providing additional compensation for time, just as superintendents are likely to have different perspectives on whether they want this issue addressed in the contract. Superintendents should be clear about whether they are looking to this provision for additional compensation or use of vacation days. Attorneys should be involved in drafting

provisions to make sure that they are consistent with legal requirements.

Legal Standards

State law specifies that "included within [superintendents'] term of employment shall be annual vacation leave at the same rate provided for State employees."¹² Superintendents also can accumulate annual leave within limits, as follows:

Vacation days shall not be used for extending the term of employment of individuals and shall not be cumulative from one fiscal year to another fiscal year: Provided, that superintendents may accumulate annual vacation leave days as follows: annual leave may be accumulated without any applicable maximum until June 30 of each year. On June 30 of each year, any superintendent with more than 30 days of accumulated leave shall have the excess accumulation converted to sick leave so that only 30 days are carried forward to July 1 of the same year An employee shall be paid in a lump sum for accumulated annual leave not to exceed a maximum of 240 hours when separated from service due to resignation, dismissal, reduction in force, death, or service retirement.¹³

Although no formal regulations or appellate decisions provide further guidance, an advisory issued by former State Controller Edward Renfrow addresses the issue of providing additional leave.

Please be advised that no local school has the authority to grant leave in excess of those benefits provided by the Teacher's and State Employee's Retirement System which are governed by Chapter 135 of the North Carolina General Statutes. The State Treasurer has shared with me several instances where the local units have adopted practices in conflict with, or in excess of, that allowable by state law. This practice is unacceptable and could lead to serious legal consequences. In addition, failure to carefully adhere to state laws and standards regarding employee benefits could jeopardize your Disbursing Agreement from the State Controller's Office. Therefore, I suggest that you review your practices to insure compliance with G.S. 135.¹⁴

Sample Provisions

The following provisions are intended to offer additional time or compensation within the legal parameters mentioned above. Some contracts provide that the

12. G.S. 115C-272(b)(1).

13. G.S. 115C-272(b)(2).

14. State Controller's Advisory to Local School Units (March 23, 1999).

superintendent be compensated for vacation time he or she does not use. The number of days for which the superintendent can receive compensation varies, as illustrated in Sample Provisions 20 and 21.

20. *In order to provide essential services to the Board which might not otherwise be provided, the Superintendent may not be able to use all of his earned vacation in a year and/or be unable to schedule vacation at a desirable time. In consideration of such circumstances, the Board annually on June 30 shall compensate the Superintendent in an amount equal to a maximum of five (5) vacation days accumulated beyond the state limit, computed at 1/222 of the Superintendent's aggregate annual salary.*
21. *Each June 30 the Superintendent will receive compensation (at his daily rate of pay) equivalent to the value of any unused annual leave beyond the amount allowed to be accrued by the State. This compensation shall be a supplement and shall not be in lieu of any other uses of this leave as determined by the State Board of Education.*

Another approach is to provide “compensatory time,” which is used like vacation time but is not accumulated and does not have any impact on salary. Sample Provision 22 illustrates this approach.

22. *The Board recognizes that the Superintendent does and will commit to the services of the _____ School System many hours of additional time, above and beyond those necessary for the completion of his duties, including time spent locally and outside of _____ representing the Board, often at night and on weekends. As additional compensation for these extra work hours, the Board shall permit the Superintendent to take compensatory time off from his normal schedule up to and including forty (40) hours per year. Any and all compensatory time shall be taken prior to the Superintendent using any of his annual vacation days, with each eight (8) hours of compensatory time constituting one (1) full work day. Any such hours of compensatory time which are not used during the year in which they are earned shall be forfeited and may not be accumulated or carried over to the following fiscal year, nor shall they be carried over at the termination of the Superintendent's employment.*

Yet another approach is to leave an open-ended provision for compensation for compensatory time. Sample Provision 23 does not provide any assurances to the superintendent that such payments will be made. It does, however, give the board some flexibility in recognizing a superintendent's hard work, either during the contract or at the end of the contract.

23. *The Board may elect to compensate the Superintendent for any compensatory time that may be accumulated at any time during the duration of this contract either through remuneration or crediting his accumulated vacation and/or sick leave.*

The board can use local funds to provide additional compensation for time. However, this provision could be better worded to make it clear that the board cannot add additional vacation or sick leave days that could affect the superintendent's status in the state retirement system.

10. OTHER BENEFITS RELATED TO SALARY

Summary

The range and the types of benefits provided to superintendents vary considerably from district to district. In addition to considering monetary value, boards and superintendents should consider benefits from other perspectives. One issue is whether the benefit is considered a part of salary. If it is, then it likely will be taxable. It also could contribute to compensation for purposes of computing benefits in the state retirement plan. Another issue is the flexibility to shift from one benefit to another or to convert benefits to additional income. Some flexibility may be useful if the superintendent anticipates that his or her needs may change over the term of the contract.

Negotiation Issues

As with other salary issues, the availability of additional benefits is likely a matter of the board's resources and philosophy. What is reasonable for a superintendent to seek will depend on the school district's resources and the community's attitude toward compensation, in addition to the superintendent's qualifications. One option is to seek some of the benefits during contract renegotiations after a successful stint of employment. However, the superintendent should at least address the benefits that are important to him or her as a part of initial negotiations.

Legal Standards

Superintendents receive all state-funded benefits accorded to other public school employees. Local boards have discretion to use budgeted local funds to provide additional benefits.

The Internal Revenue Service has a broad definition of “taxable income,” which includes salary, some kinds of benefits, and “nonaccountable plans.” An example of a non-accountable plan is a monthly travel allowance in which the employee is not required to return any funds not used for travel. To be sure of the tax consequences of benefits, superintendents may want to review compensation packages with a certified public accountant or a tax attorney in advance of making an agreement.

The state retirement system uses a different income base, which it calls "compensation," to determine what should be included in calculating the level of retirement benefits. Local salary supplements and performance bonuses are part of compensation. Payment of additional benefits and reimbursement of business or personal expenses are not compensation. However, if additional benefits are converted to salary, then that amount does count toward compensation. A full copy of this definition is provided in the sidebar.

Sample Provisions

This section is not intended to reflect the range of possible benefits or the amount of benefits provided to superintendents.

Sample Provision 24 specifically states that additional medical payments the board agrees to pay are considered a part of salary.

24. In addition to health insurance as set out above, the Board agrees to pay a maximum sum of Fifteen Hundred Dollars (\$1,500.00) for the uninsured medical, dental, and eye care bills of Superintendent and his spouse, during the term of this contract. . . . For the term of this contract in order to enhance retirement base, any sums received as additional medical payments under this provision shall be received as salary.

Sometimes referred to as an "inclusion of costs" clause (because the board covers the costs of taxes along with the benefits), Sample Provision 25 is useful to superintendents if the benefits provided are taxable as additional salary. For example, a monthly allowance to cover a superintendent's travel expenses incurred in performing official duties is most likely taxable as additional income.

25. The Board shall reimburse the Superintendent for the tax consequences to him which result from the inclusion of costs of the benefits provided for herein.

Sample Provision 26 is an example of providing flexibility to shift the costs of benefits to additional salary.

26. The Board will enable the Superintendent to select from among those benefits provided herein (other than those mandated by State law or regulation) and to transfer the costs of those benefits, to be received by him instead as additional salary compensation in lieu of those benefits.

11. PERFORMANCE PAYMENTS

Summary

Although salary increases and contract extensions are all essentially performance-based decisions, some contracts include structured performance payments. Performance payments are a relatively new provision in most superintendents' contracts. The structure of the performance

Statutory Definition of Compensation (from N.C.G.S. 135-1(7a) through (7c))

a. "Compensation" shall mean all salaries and wages prior to any reduction pursuant to sections 125, 401(k), 403(b), 414(h)(2), and 457 of the Internal Revenue Code, not including any terminal payments for unused sick leave, derived from public funds which are earned by a member of the Retirement System for service as an employee or teacher in the unit of the Retirement System for which he is performing full-time work. In addition to the foregoing, "compensation" shall include:

1. Performance-based compensation (regardless of whether paid in a lump sum, in periodic installments, or on a monthly basis);
2. Conversion of additional benefits to salary (additional benefits such as health, life, or disability plans), so long as the benefits are other than mandated by State law or regulation;
3. Payment of tax consequences for benefits provided by the employer, so long as they constitute an adjustment or increase in salary and not a "reimbursement of expenses";
4. Payout of vacation leave so long as such payouts are permitted by applicable law and regulation; and
5. Employee contributions to eligible deferred compensation plans.

b. "Compensation" shall not include any payment, as determined by the Board of Trustees, for the reimbursement of expenses or payments for housing or any other allowances whether or not classified as salary and wages. "Compensation" includes all special pay contribution of annual leave made to a 401(a) Special Pay Plan for the benefit of an employee. Notwithstanding any other provision of this Chapter, "compensation" shall not include:

1. Supplement/allowance provided to employee to purchase additional benefits such as health, life, or disability plans;
2. Travel supplement/allowance (nonaccountable allowance plans);
3. Employer contributions to eligible deferred compensation plans;
4. Employer-provided fringe benefits (additional benefits such as health, life, or disability plans);
5. Reimbursement of uninsured medical expenses;
6. Reimbursement of business expenses;
7. Reimbursement of moving expenses;
8. Reimbursement/payment of personal expenses;
9. Incentive payments for early retirement;
10. Bonuses paid incident to retirement;
11. Contract buyout/severance payments; and
12. Payouts for unused sick leave.

c. In the event an employer reports as "compensation" payments not specifically included or excluded as "compensation," such payments shall be "compensation" for retirement purposes only if the employer pays the Retirement System the additional actuarial liability created by such payments.

payment varies considerably. In addition to the amount of the bonus, key differences are (1) whether the performance payment is based on objective goals or a subjective evaluation by the board; (2) whether the superintendent is involved in establishing the goals; and (3) whether the contract specifies any process for determining if performance payments should be made. Numerous articles that have been written on performance payments provide further insight into whether and how performance payments should be incorporated into a superintendent's contract.¹⁵

Negotiation Issues

A well-written provision on performance payments is critical to minimize potential confusion or conflict in implementation. Negotiation should not be limited to the amount of the potential payment; it also should include the process for determining whether the performance payment has been earned. The negotiation provides a good opportunity for the board and the superintendent to agree on how goals for the operation of the school district will be established. Developing a process that is not likely to cause divisiveness among board members is a benefit to the superintendent as well as the board.

Legal Standards

There are no specific legal requirements regarding performance payments. However, there are limitations on using various funding sources. For example, local funds may be restricted to certain types of spending, such as for student services or personnel.

Sample Provisions

The following provisions illustrate the range of performance payments and the ways in which they are provided. The provisions do not necessarily reflect the range of bonus amounts.

Sample Provision 27 calls for objective goals agreed on by the board and the superintendent but does not specify the amount of the bonus.

27. In addition to the local supplements set forth above, the Board agrees to pay the Superintendent an unspecified amount to be set by the Board each year based on the Superintendent's achievement of objective goals agreed upon by the Board and the Superintendent each year.

15. A useful sampling includes Thomas E. Glass and Louis A. Franceschini, *The State of the American School Superintendency: A Mid-Decade Study* (Lanham, Md.: Rowman & Littlefield Education, 2007); John R. Hoyle et al., *The Superintendent as CEO: Standards-Based Performance* (Thousand Oaks, Calif.: Corwin Press, 2004); and John R. Hoyle et al., "Superintendent Evaluation in a Standards-Based Environment: A Status Report from the States," *Journal of Personnel Evaluation in Education* 15 (2001): 97-110.

Sample Provision 28 ties the performance bonus into the evaluation process. The amount of the bonus increases each year, providing an incentive for the superintendent to remain with the school district.

28. In addition to the aggregate annual salary paid the Superintendent, Superintendent may receive from local funds an annual bonus of up to \$2,000.00 after completion of the first year; \$4,000.00 after completion of the second year; and \$6,000.00 after completion of the third year, the payment of which will be contingent upon the Board's annual evaluation of the Superintendent's performance pursuant to Paragraph _____, herein.

Sample Provision 29 establishes the standards and the process to be used for determining the goals.

29. In addition to the Superintendent's aggregate annual salary provided in Section _____ above, he shall be eligible for performance-based compensation in an amount equal to ten percent (10%) of his aggregate annual salary during each year of this Contract. The Superintendent shall earn such performance-based compensation by reaching or exceeding specific goals to be agreed upon by the Board and Superintendent no later than September 15, 1999, and by no later than August 15 of each year thereafter, for each fiscal year. The Board and the Superintendent shall consult prior to establishing any such goals, which shall be reasonable, attainable, and challenging. The Board shall determine how such compensation shall be awarded at the time annual goals are established. To the extent practicable, depending upon goals selected, the Board shall determine by June 30 of each year the goals that have been attained and the amount of performance-based compensation to be paid during that fiscal year.

Sample Provision 30 allows the superintendent to present the goals to the board. The provision is quite specific in describing the amount of bonus to be received.

30. At the beginning of each school year the Superintendent shall identify four specific goals. These goals will be presented to the Board as the goals for the Superintendent. If the Superintendent achieves three or more of these goals, he will receive from local funds a bonus of four percent (4%) of his total salary for each school year in which the goals are met. In the event that the Superintendent achieves only two of the stated goals, he shall receive only 50 percent (50%) of the amount outlined above; if he achieves only one goal, he shall receive only 25 percent (25%) of the amount outlined above.

It also is possible to base performance payments on accomplishment of school and system requirements in the federal No Child Left Behind Act or the state School-

Based Management and Accountability Program (generally known as the ABCs). Using this type of standard eliminates subjective judgments. However, the board and the superintendent must first agree that the measures in the laws are reasonable standards of student performance and the superintendent's leadership. Perhaps for that reason, this approach seems to be a less popular option.

12. PERFORMANCE EVALUATION

Summary

The literature on performance evaluation encourages establishment of specific criteria and objective measures for evaluation, but the contractual provisions actually in place for superintendents in North Carolina vary in both the criteria used and the formality of the process.¹⁶ Boards and superintendents have latitude in how to approach evaluation. Informal processes allow for frequent feedback and exchange. Such interaction is part of a healthy board–superintendent relationship.

On the other hand, informal processes do not provide much structure for boards that may be split on how to approach evaluation or are not knowledgeable about evaluation processes. Formal evaluations offer procedural protections on some of these issues but may seem unnecessarily rigid to a board and a superintendent that have a close working relationship. Maintaining the confidentiality of formal written evaluations also may become a concern.

In September 2007 the State Board of Education approved seven standards for superintendents based on research on effective leadership: (1) strategic leadership, (2) instructional leadership, (3) cultural leadership, (4) human resource leadership, (5) managerial leadership, (6) external development leadership, and (7) micropolitical leadership.¹⁷ A board can use the standards to develop goals and objectives for evaluating a superintendent. According to the minutes of the State Board meeting in September 2007, the Department of Public Instruction will use the standards to develop a new evaluation instrument for superintendents.

Negotiation Issues

Performance evaluation is a critical issue to be addressed by a board and a superintendent. There is no requirement that it be addressed in the contract, but the contract provides the opportunity for the superintendent to reach agreement with the board on the evaluation process to be used. From a board's perspective, it may be important to leave enough

flexibility in the process to take into account whatever key issues have emerged regarding the superintendent's leadership. For the superintendent, having input into the process of setting goals and objectives and providing a self-evaluation can help ensure that the evaluation is aligned with the most important aspects of the superintendency. If the board and the superintendent use attorneys in drafting provisions, the parties should talk directly about evaluation expectations.

Legal Standards

There are no statutory requirements for evaluating superintendents unless a certain proportion of schools is designated as low-performing. In that instance, G.S. 115C-333 requires the board to evaluate the superintendent and submit the results to the State Board of Education. The law does not specify the kind of evaluation to be used.

The open meetings law allows the board's evaluation of the superintendent to be held in a closed session of the board.¹⁸ Although boards generally choose to take advantage of this choice, they have a choice. Therefore, a superintendent's interests are better served by having a contractual provision that requires evaluations to be held in a closed session unless both parties agree otherwise.

State law makes the written evaluation a confidential document to be included in the personnel files.¹⁹ State law further stipulates that a public official who "knowingly, willfully, and with malice permits unauthorized access to information in the personnel file is guilty of a Class 3 misdemeanor."²⁰

With some evaluation methods, the board members individually rate the superintendent. A board can act only as an entity, so these individual ratings do not carry any separate weight. However, it is important to dispose of them in a manner that will maintain the confidentiality of the process.

Sample Provisions

Although Sample Provision 31 provides for an informal evaluation, it sets expectations for informing the superintendent of inadequacies.

31. *The Board shall provide the Superintendent with periodic opportunities to discuss Superintendent–Board relationships and shall inform her, at least annually, of any inadequacies perceived by the Board.*

16. For a sampling of the literature, see n. 15.

17. State Board of Education, North Carolina Standards for Superintendents: Future-Ready Students for the 21st Century, State Board Policy QP-C-006 (Draft June 2007), www.ncpublicschools.org/sbe_meetings/0709/tcp/0709tcp01.pdf. As of May 2008, the policy website had not been updated.

18. G.S. 143-318.11(1), (6).

19. G.S. 115C-319.

20. G.S. 115C-321(c).

Sample Provision 32 also provides for an informal process, but it goes a step further in establishing procedural protections if there are inadequacies.

32. *The Board shall provide the Superintendent with periodic opportunities to discuss Superintendent–Board relationships and shall inform her, at least annually, of any inadequacies perceived by the Board. The Superintendent shall be provided reasonable opportunity to correct such failures or inadequacies as indicated by the Board.*

Sample Provision 33 is much more formal. It gives the superintendent an active role in developing goals and in the evaluation process.

33. *The Board and the Superintendent shall develop together a plan for evaluation of the Superintendent’s work. The plan shall emphasize goals of the board for which the Superintendent is expected to provide leadership. Semi-annually, the Board, in executive session with the Superintendent, shall evaluate the Superintendent and shall provide a Board-approved statement of feedback information and direction, which shall be maintained as a confidential part of the Superintendent’s personnel file. The plan for evaluation of the Superintendent’s work shall be updated and redeveloped at least annually, with allowance for modifications resulting from the semi-annual evaluation sessions. The Superintendent is responsible for setting the evaluation date and notifying the Board that an executive session will be convened for the purpose of evaluating the Superintendent.*

In the absence of written criticisms, reprimands, or suggestions for improvement made in official executive session, the performance of the Superintendent will be deemed satisfactory.

The Superintendent has the obligation to formally evaluate the Board, in executive session, in terms of its adherence to policy and its compliance with the specific provisions of the Superintendent’s contract.

Sample Provision 34 provides a process for the superintendent to submit a report as a part of the evaluation, and it makes clear that the evaluation is maintained as a confidential record.

34. *During the term of his appointment as Superintendent, the Board shall provide the Superintendent with an annual evaluation of his performance of his duties as Superintendent by September 1 by a method determined after consultation with the Superintendent. The Superintendent shall prepare a report of his accomplishments in meeting the goals and objectives as provided in Paragraph _____ herein. The Board shall consider this report as a part of its evaluation. A confidential, written*

record of each evaluation shall be maintained in the files of the Board.

13. TRANSPORTATION EXPENSES

Summary

Transportation offers an example of how differently an issue can be treated in various contracts, from a simple statement that transportation will be provided, to an exhaustive explanation of how and what transportation expenses will be paid by the board. Options include providing a leased car, paying a monthly car allowance, or reimbursing the superintendent for mileage and other expenses. Alternatively, the board could increase the local salary supplement by an amount similar to anticipated expenses. Some contracts provide different options for in-county and out-of-county travel.

Negotiation Issues

An initial issue is whether the board and the superintendent want to use a transportation allowance as a salary supplement. This option may appeal to boards that want to limit salary increases (which typically apply only to the local salary supplement and not to other benefits). Superintendents may be receptive to a transportation allowance as a source of additional funds, but as a nonaccountable plan, the allowance is taxable and does not count toward compensation under the state retirement system.

A leased car or a state car avoids the tax consequences (except to the extent that it provides a personal benefit). Boards may prefer this option if they see it as more cost-effective or more appealing to the community. Some superintendents also may prefer not to use their own car for the extensive driving required in some communities.

Leased cars are complicated, though. If the board and the superintendent choose to lease a car, the provisions should be clear on who can use the car, whether or not it is for personal as well as official use, and who is responsible for maintaining insurance and keeping up with maintenance and repairs.

However coverage is achieved, superintendents will want to be reimbursed for all reasonable transportation expenses incurred in the performance of official duties. The negotiations provide the opportunity to be clear about this intent.

Legal Standards

There are no statutory requirements related to transportation reimbursements. Reimbursement of expenses does not constitute compensation for purposes of the state retirement system (see sidebar page 9).

Sample Provisions

Although no details are specified, Sample Provision 35 provides full transportation for the superintendent.

35. *The Board shall provide transportation for the Superintendent as such might be required for the performance of the Superintendent's duties, as herein before set forth, during the term hereof.*

Sample Provision 36 is a straightforward provision for the amount of a travel supplement. The amount varies across districts, depending on the size of the district and travel demands, ability to pay, and the extent to which the supplement also serves as a salary supplement.

36. *The Board shall provide the Superintendent a monthly travel allowance for school business conducted within the _____ School System in the amount of Seven Hundred Seventy-Five Dollars (\$775.00) per month. The monthly travel allowance provided herein shall be prorated on a daily basis for each portion of a month that the Superintendent serves pursuant to this agreement. The Board shall reimburse the Superintendent for out-of-system travel in his personal vehicle at the same rates as provided for all employees.*

Sample Provision 37 ties the cost of a transportation allowance to specific needs and also provides for out-of-county travel pursuant to board policy.

37. *The Board shall provide transportation for the Superintendent as might be required for the performance of the Superintendent's duties. The Board expects the Superintendent to perform duties in inclement weather so long as it is reasonably safe. In light of the road conditions in _____ County in inclement weather, the Board agrees to pay travel expenses that would allow the Superintendent to purchase a four-wheel drive vehicle. The Board agrees to pay the Superintendent \$700 per month to cover these expenses. The Board shall reimburse the Superintendent for all out-of-county travel as provided by Board policy. The board shall not provide a state car for daily use.*

Sample Provision 38 is clear on the use of the vehicle and the payment of operating expenses.

38. *At the request of the Superintendent, the Board will provide a vehicle for his exclusive use. The vehicle may be used by the Superintendent in the performance of official school business and for his own personal use; provided, however, no one other than the Superintendent may operate the vehicle for purposes other than official school business. The expenses of insurance, maintenance, and repair of the vehicle shall be paid by the Board, except when the cost of repairs is not paid by insurance and the need for repairs is caused solely by personal use.*

Sample Provision 39 establishes the type of vehicle to be provided and the expectations for maintenance.

39. *In light of the administrative and professional duties of the Superintendent, the Board shall lease for the Superintendent a Pontiac Bonneville automobile, or such vehicle as may be mutually agreeable to the parties, or at the Superintendent's election, shall provide to the Superintendent an automobile allowance equal to the full cost of the lease (including maintenance fees) of a leased vehicle in compensation for the in-county automobile travel required in the performance of his official duties as Superintendent.*

14. TECHNOLOGY EXPENSES

Summary

Superintendents are expected to be available at all times, and technology is an essential tool in making this happen. Contracts have identified the need for cellphones, laptop computers, and Internet connections. With changing technology, boards can either supply the technology needed, reimburse superintendents for actual expenses, or provide a technology allowance. Alternatively, boards can increase the local salary supplement to build in the expectation that the superintendent will cover these costs.

Negotiation Issues

Some of the negotiations are likely to be based on practical matters of what is the most cost-effective and efficient means for providing technology. If the board provides the equipment, it will be important to clarify parameters for personal use. Further, both parties should understand that bills received and paid for by the school system are public records. If the board intends the superintendent to have extensive personal use of equipment, such as a cellphone, providing an allowance may be simpler.

Legal Standards

For superintendents to function in a "prompt and efficient manner," state law requires the board to "adequately furnish" the superintendent's office and provide "all necessary office supplies" and "sufficient office machines and equipment."²¹ By today's standards, doing this reasonably includes providing the technology that the superintendent needs to continue conducting business when he or she is out of the office.

The superintendent's contract, including any provision on technology, is a public record and available for public inspection. As mentioned above, bills received by the school

21. G.S. 115C-277.

district for technology, such as phone statements, are also public records.

Sample Provisions

Sample Provision 40 makes clear that the superintendent can purchase items within the school board's budget.

40. *Phone and technology expenses. The Board recognizes that in order to fulfill the Superintendent's duties, the Superintendent will need to have use of portable technology such as a cell phone or lap top. The Superintendent is authorized to purchase such items within the approved budget as he deems necessary to perform his duties.*

Sample Provision 41 provides the alternative of a salary supplement.

41. *Salary Supplement for Technology. In recognition of the costs incurred by the superintendent in maintaining mobile communication devices, the Board will provide a salary supplement of \$175.00 per month.*

Items Related to the Contract Itself

15. UNIQUE POSITION

Summary

The superintendency is a unique position in a local school administrative unit in that it has many specific duties and authorities as the head administrative post. Characterizing the superintendency as "unique" in the contract has specific legal consequences. It can be used to prevent the superintendent from being transferred to another position in the school district. Further, it can help establish a basis for tort liability for damage to a superintendent's career if a board takes action not allowed by law or the contract.

Negotiation Issues

In general, a superintendent will want the right to remain in the superintendent position unless he or she consents to another arrangement. To protect this right, the contract should specifically acknowledge that the position is unique and that the superintendent cannot be reassigned without his or her consent.

Legal Standards

The contract controls the relationship. There are no specific laws on the reassignment of superintendents. There are laws on reassigning the duties of the superintendent, however. Local boards cannot give duties imposed by law on the superintendent, such as those stipulated in G.S. 115C-276, to another employee.

There might be some question about whether the duties convey a right of the superintendent to the duties. However,

the better reasoning is that the General Assembly has established the public policy on those duties and that the board does not have the legal authority to change that delegation.²²

Sample Provisions

Sample Provision 42 establishes the unique position of superintendent.

42. *This is an agreement for the performance of professional services as Superintendent by the Superintendent, who shall not be assigned to any other position or have his duties reassigned to others without his consent.*

Sample Provision 43, from a California system, uses the uniqueness of the position to establish tort damages that typically would be higher than breach-of-contract damages:

43. *The parties acknowledge and agree that the position and responsibilities of the Superintendent are unique; that they require special education, training and experience; that the position and office of Superintendent occupy a separate and distinct professional status within the field of public education. The Superintendent, therefore, desires the uninterrupted opportunity to perform and to advance in his/her chosen profession during his/her term of service to the District under this agreement; similarly the District recognizes this unique professional position and status and agrees that any termination of the Superintendent's employment prior to the expiration of the term of this agreement will necessarily cause substantial damage to the Superintendent in his/her career as a professional public school administrator, as a direct and foreseeable consequence of such termination or attempted termination.*

The parties further acknowledge that damage to the Superintendent resulting from a termination or attempted termination would by necessity be impractical and extremely difficult to fix in actual amount. Therefore, the parties agree that in the event of a breach of this agreement by the District whereby the Superintendent is terminated prior to the expiration of the term of this agreement, the liquidated amount of such damages presumed to be sustained from any such breach shall be as follows, depending on the contract year in which the breach occurs:

More than 3 years remaining under unexpired term:
\$ _____

More than 2 years remaining under unexpired term:
\$ _____

22. See G.S. 115C-36, which limits the board's authority if the General Assembly has expressly conferred authority on another public official.

More than 1 year remaining under unexpired term:

\$ _____

One year or less remaining under unexpired term:

\$ _____²³

16. CONTRACT TERM, RESIGNATION, AND RENEWAL

Summary

A contract must address the superintendent's term of employment. In addition, it can provide processes for extension of the contract and for resignation or nonrenewal. Clarity on these issues can improve board–superintendent relations and allow the board and the superintendent to plan for the future.

Negotiation Issues

Establishing how often and when the board will consider extending the contract can be a crucial provision. The contract could provide for periodic review so that it can be extended to the fullest-possible term. Or the contract could cover only notice of whether the board intends to renew the contract, to be provided near the end of the term of the contract. The purpose of the latter would be to give the board and the superintendent more time to plan if the board's confidence in the superintendent is waning.

Requiring the superintendent to give notice of resignation is reasonable, as is requiring the board to give notice of nonrenewal. The negotiation may be over the amount of notice required.

Legal Standards

G.S. 115C-271 provides that contracts be for a period of one to four years, ending on June 30 of the final year of the contract. The contract may be extended or renewed at any time after the first twelve months of the contract with the superintendent's written consent. However, if new board members have been elected or appointed, a board cannot extend or renew the current superintendent's contract until the new members have been sworn in. The board must vote on any extension or renewal: it cannot build an automatic extension into the contract.

There is no legal requirement that a superintendent give notice that he or she does not intend to accept an extension of the contract. A superintendent who leaves during the period of the contract is in breach of contract. The board could seek compensatory damages, although this rarely, if ever, happens. Such damages, if the board sought them,

would likely be the costs related to obtaining an interim superintendent and a permanent replacement.

There is no statutory requirement that a board give notice of intent not to renew the contract. For a notice requirement to be legally binding, it must be a part of the contract.

Sample Provisions

Sample Provision 44 provides for considering extension or renewal each year.

44. *After each annual evaluation, provided in accordance with paragraph _____ above, but no sooner than July 1, 2000, the anniversary date of this Contract, the Board will consider whether to extend the Contract term for an additional twelve (12) month period. Extension or renewal of the Contract shall be undertaken only by resolution of the Board and pursuant to N.C. Gen. Stat. 115C-271.*

Sample Provision 45 is a fairly standard provision for notice to the board if the superintendent is going to terminate the contract unilaterally.

45. *The Superintendent may, at his option, and upon a minimum of ninety (90) days advance written notice to the Board, unilaterally terminate this contract. In the event of such termination the Superintendent shall continue to render his services and shall be paid his regular compensation as provided herein, up to the date of termination, but no severance allowance shall be paid to him.*

Sample Provision 46 requires notice of nonrenewal from the board.

46. *The Board agrees to notify the Superintendent no later than 180 school days before the expiration date of this Employment Contract the intent of the Board regarding the renewal and/or the extension of this Employment Contract or the issuance of a new Employment Contract. The Superintendent shall place this item on the Board's agenda prior to the expiration of the 180-day period.*

Sample Provision 47 is an example of mutual obligations for notice of intent not to renew.

47. *In the event either party desires not to renew this contract for an additional period of time beyond June 30, 2004, such party will notify the other on or before January 31, 2004.*

17. INTERIM-SUPERINTENDENTS' CONTRACTS

Summary

In the not-too-distant past, a superintendent could work an additional year in the same school system as an interim superintendent. This process gave the board a full year to

23. Association of California School Administrators, *Superintendent Contract Guidelines and Sample Contract Language* (Sacramento, Calif.: Association of California School Administrators, May 1998).

find a candidate and arrange for a smooth transition. The superintendent benefited from retirement system laws that allowed him or her to receive retirement pay while drawing compensation, to the limit allowed by law.

This process has been changed to make sure that the state retirement system complies with federal regulations. With a break in service and no intent to return to work required under the revised state laws, the former process is not possible.²⁴

Still, boards will find themselves in need of an interim superintendent when they have not had time to conduct a full search. In general, the board and the interim-superintendent candidate should approach the process in the same manner as they would any other superintendent's contract. This section identifies a few additional areas for the board and the interim-superintendent candidate to consider.

Negotiation Issues

The most important issue to clarify, but not in the contract, is whether the interim superintendent is expected to create change or stay the course. If he or she is expected to create change, the contract should give him or her full authority to do so, including authority over staff reorganization. In other situations, whether formally or informally, the board may choose to have closer control in order to manage a transition smoothly. These issues should be discussed and, when appropriate, included in the contract.

With the agreement of both parties, the contract can specify an end date or provide for month-to-month renewal of the contract.

Legal Standards

Some legal standards apply to any temporary or interim superintendent. An interim superintendent is subject to the same approval process and must possess the same educational qualifications as required by law for a regular superintendent. Also, an interim superintendent is paid within the categories for superintendent pay established by the General Assembly. These requirements are established in a statute that specifically addresses superintendent vacancies.²⁵

The law does not define *interim*, however. Its regular meaning is "done, made, appointed, or occurring for an [interval]."²⁶ In this context, presumably, the interim period runs until the hiring or the starting date of a superintendent under a regular contract, which, as discussed above, must

be for a period of one to four years. A legal question may arise whether an interim contract can last a year or more. The statute on superintendents' contracts provides that "contracts of employment for a period of less than one year shall be governed and limited by G.S. 115C-275," which is the statute on vacancies in the superintendent's office.²⁷ One way to piece together the statutes is to say that interim contracts must be for less than one year and that all contracts lasting a year or more are to be considered regular contracts governed by G.S. 115C-271. Such an interpretation would likely result in awkward transitions, however. It would not work well, for example, if an interim superintendent started on July 1 and was expected to continue until the end of the fiscal year. Without clear guidance from the General Assembly or the courts, boards and superintendents should be able to enter into one-year interim contracts in good faith when the board is using the time to hire a superintendent under a regular one- to four-year contract.

Although continuing the same superintendent as an interim superintendent no longer works, having a retired superintendent from another system fill in as interim superintendent is possible. Because the retirement laws have been in flux over the last few years, the superintendent and the board should both be certain to follow the current requirements.²⁸

Sample Provisions

Interim contracts are similar to other superintendent contracts, so the sample provisions under other items apply equally, with the exception of provisions related to term.

18. NO-CAUSE TERMINATIONS AND SEVERANCE-PAY AGREEMENTS

Summary

A board terminating its contract with a superintendent without cause often is referred to as a "no-cause termination" or a "unilateral termination." It also is a breach of contract unless the parties have agreed to other terms. The remedy for a breach of contract is the full value of the remainder of the contract. However, the superintendent has the duty to try to mitigate these damages by finding comparable employment. The full award is then reduced by the compensation that the superintendent receives in the new employment. In unusual cases, the termination also may give rise to tort damages for damage to the superintendent's reputation or career (see Sample Provision 43). If a board terminates a superintendent without cause, a superintendent can sue for contract damages or, if applicable, for tort damages. Another option is to specify in the contract what compensation the superintendent will receive if the contract is terminated. This

24. G.S. 135-3(8)c.

25. G.S. 115C-275.

26. *Merriam Webster's Collegiate Dictionary*, 10th ed., s.v. "interim."

27. G.S. 115C-271.

28. See G.S. 135-1 et seq.

amount, termed “liquidated damages” or “severance pay,” could be more or less than what might be given as a matter of law for terminating the contract.

Negotiation Issues

It is not essential to address no-cause terminations in the contract because legal remedies are already available. A superintendent may want to do so, however, in order to negotiate for higher damages than he or she would be likely to obtain by litigation, or to avoid attorney fees, court costs, and the inconvenience of court action. Furthermore, a superintendent may prefer to end the relationship quickly in order to move on without further controversy and potential damage to his or her reputation. Similarly, a board may want to resolve the matter up front in order to minimize disputes among board members or with the superintendent at the time of termination. A contractual agreement on termination also would allow a board to move more quickly in finding a permanent replacement for the superintendent. A board could choose to negotiate for a contract provision calling for higher damages than the likely legal remedies in order to attract a superintendent. Alternatively, it may seek to negotiate for less than the legal remedy.

There also are reasons not to include severance pay in the contract. Perhaps the best reason is that the possibility of litigation may deter a board or individual board members from hastily seeking termination. From this point of view, severance-pay provisions may make it easy for a board to terminate the contract rather than work through its issues with the superintendent.

Legal Standards

The summary above describes the legal standards for breach of contract and tort damages. Some limitations on the type of severance pay and the sources of funds should be considered as well. If the benefits are controlled by state law, there may be limits on what benefits can be included as a part of severance pay. State law also prohibits a board from using any of the following funds in terminating a contract: state funds; local funds appropriated for teachers, textbooks, or classroom materials, supplies, and equipment; and funds acquired through donation or fund-raising, except funds raised specifically for this purpose or funds donated by private for-profit corporations. In addition, the board must notify the State Board and make public the funds used for the purpose of terminating the contract.²⁹

There also are constitutional implications for how severance pay is addressed. The North Carolina Constitution includes an “emoluments clause,” which states that “no person or set of persons is entitled to exclusive or separate

emoluments or privileges from the community but in consideration of public services.”³⁰ The clause is interpreted to mean that public service must be rendered for payments received. When severance pay is provided for in a contract, it is regarded as part of the consideration offered to induce the superintendent to accept the position. As such, the severance pay, regardless of the amount, is not considered an emolument. If there is no provision in the contract, the board still can pay whatever it would be legally obligated to pay in contract or tort damages.

In some cases, boards and superintendents want the relationship to end with a voluntary resignation rather than a board termination. Any severance pay or performance bonus in this situation faces a much more difficult constitutional hurdle: with the board having no legal obligation to compensate the superintendent, a court could view any payment as an emolument because it was not made in exchange for service.³¹

Sample Provisions

Sample Provision 48 includes as part of severance pay all salary and benefits remaining in the contract without any duty to mitigate damages. This is more than the legal standard for breach of contract. Tort damages could potentially be higher.

48. The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary and benefits he would have earned under this employment contract from the actual date of termination to the termination date set forth in this employment contract.

Sample Provision 49 has the same effect as Sample Provision 48 but is explicit in not requiring any reductions.

49. The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary and benefits he would have earned under this employment contract from the actual date of termination to the termination date set forth in this employment contract or any extensions hereof, with no reductions or setoffs of any kind or nature.

Sample Provision 50 does not provide for full payment of benefits, as would be required for breach of contract. However, it has the advantage of simple calculations of benefits, and it does not require mitigation of damages:

50. The Board shall pay to the Superintendent, as severance pay, all of the aggregate salary plus twelve percent (12%)

30. N.C. CONST. art. I, § 32.

31. Myers v. Town of Plymouth, 135 N.C. App. 707, 522 S.E.2d 122 (1999); Leete v. County of Warren, 341 N.C. 116, 462 S.E.2d 476 (1995).

29. G.S. 115C-271.

in lieu of other benefits he would have earned under this employment contract.

Sample Provision 51 pays salary, but not benefits, even after the superintendent finds other employment. For some boards and superintendents, this may seem to be a reasonable balance because the benefits likely will be provided by the new employer.

51. In the event that the Superintendent obtains other employment, the payment of benefits, as opposed to salary, will be discontinued.

Some contracts provide for severance pay of salary but not benefits. This is less than the legal standard for breach of contract, but it is offset in Sample Provision 52 because there is no duty to mitigate damages.

52. In the event of such termination, the Board shall pay the Superintendent as severance pay the aggregate annual salary

Some severance-pay agreements provide salary but set an upper limit. This has a result comparable to requiring mitigation of damages because the full contract may not be paid out. Yet, as shown in Sample Provision 53, it offers an advantage over mitigation in that both parties know the upper limit of payment.

53. In the event of such termination the Board shall pay to the Superintendent, as severance pay, all of the aggregate annual salary he would have earned . . . or two hundred fifty thousand dollars (\$250,000.00), whichever is less.

Sample Provisions 54 and 55 give examples of severance-pay provisions that include the duty to mitigate damages by finding another position. One of the provisions provides more requirements or processes than the other.

54. . . . provided, however, that in the event the Superintendent is employed by another school board or employer prior to the termination date of this contract, the said severance pay shall be reduced by the salary received by the Superintendent from that employer.

55. . . . provided that the Superintendent provides monthly verification of his employment status during the severance period and that the severance pay shall be reduced by the amount of any salary the Superintendent receives from another employer during the severance period.

19. ATTORNEY FEES

Summary

A superintendent may incur attorney fees in the process of enforcing provisions in the contract or in defending himself

or herself in a termination hearing. Without a contract provision stating otherwise, the superintendent is responsible for the cost of representation.

Negotiation Issues

Reimbursement of attorney fees does not have to be addressed in a contract. It is up to the superintendent and the board to negotiate whether and to what extent attorney fees are to be included.

Legal Standards

Unless the superintendent is filing suit under a law that provides for reimbursement of attorney fees, no statutory requirements are applicable.

Sample Provision

Sample Provision 56 is a typical one found in some North Carolina contracts.

56. In the event that the Superintendent must hire an attorney in order to enforce provisions of this contract, reasonable attorney fees incurred by the Superintendent shall be reimbursed by the Board. In the event that the Board seeks discharge under Paragraph _____ herein, the Board shall reimburse reasonable attorney fees incurred by the Superintendent if the Board determines that grounds for discharge do not exist, or if the charges are dropped by the Board at some point during the process initiated in Paragraph _____, or if there is an appeal to a court of law that determines that the discharge can not be legally sustained.

Conclusion

This article has focused on specific critical choices. Yet some themes cut across the many choices. In addressing compensation, ideally both parties would be very satisfied with the arrangement, but at a minimum both the board and the superintendent should consider the offer fair in light of all the circumstances. In terms of the degree of detail in the contract, provisions should be sufficiently clear to avoid confusion, but not so rigid as to prevent the relationship between the board and the superintendent from developing and responding to unexpected situations. Perhaps most important, the process of creating the contract and amending it should provide opportunities for the board and the superintendent to discuss their relationship and craft an effective model of governance. In this sense, the contract is not a stand-alone document, but part of an ongoing effort to create effective leadership for schools. For this reason, the choices made are not only important to the board and the superintendent, but critical to education. ■