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The Comings and Goings of Superintendents

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■ INTRODUCTION¹

□ Sensitive and Challenging Topic

- Corporate and individual pride and emotions for a School Board and its Superintendent²
- Affects egos, professional careers and involves the welfare of the community
- Both the coming and going can be very public
- Media can relish controversy over hiring and firing Superintendents
- Some if not many Board members have limited experience in hiring, evaluation and termination of employees at this executive level
- Arguably still a somewhat challenging environment for recruiting and retaining Superintendents³
- School division lawyers sometimes develop close professional relationships with Superintendents and the boundaries can become blurry or misunderstood and misperceived

□ Critical Relationship for Host of Reasons

- Implicates Most Critical Board Judgment and Governance Ethic
 - The choice of a Superintendent is the most important Board decision
 - Selection, evaluation and, if necessary, removal of CEO have same importance for all organizations, not just schools
 - The governance ethic of the board directly impacts the relationship with the Superintendent and how that Superintendent operates and is perceived internally and externally
- Mutually Dependent Relationship
 - The common—and vital—mission of successfully educating students requires closely developed collective goals and coordinated efforts between the Board and its Superintendent

¹ This document, using short-hand form and reference citations, is intended solely for use in this context exclusively in conjunction with the oral presentation and not as a stand-alone resource. It may not be used or cited otherwise, and some of its assertions and questions are designed to provoke thought and discussion as a tool, not necessarily reflecting the views of the presenter or of the presenter's affiliates. Nor is it to be considered as creating an attorney-client relationship or offering legal advice. Given the changing nature of the law, legal references may change and become inapposite and should be checked for any subsequent developments in statutes, regulations or case law.

² "Superintendent" is used in this document as a short-hand reference. The nomenclature under Virginia law is "division superintendent of schools." See Va. Code §§ 22.1-58. The nomenclature reflects that the state is divided into school divisions by the Virginia Board of Education. Va. Const. art. VIII § 5; Va. Code § 22.1-25.

³ See generally, W. Cunningham & G. Burdick, *Empty Offices*, American School Board Journal (December 1999).

- A School Board rarely can be successful without a good Superintendent
- And a Superintendent must have the genuine support of the Board in order to be effective

■ LEGAL FRAMEWORK—STATUTORY AND REGULATORY

- ❑ No references exist in the Virginia Constitution to a Superintendent,⁴ although strong authority prevails for the local school board to govern and organize its management structure as it deems advisable⁵
- ❑ Statutory—Virginia Code, Title 22.1, Chapter 6
- ❑ Requirement statutorily to have Superintendent
 - Mandated for each school division⁶
 - Same person may serve more than one school division⁷
- ❑ Qualifications
 - Prescribed by the Virginia Board of Education⁸
 - The Virginia Board of Education's regulations categorize the qualifications⁹
 - E.g., personal qualities—good character, etc., demonstrated ability as educational administrator¹⁰, education—minimum hours of graduate

⁴ The Virginia Supreme Court has observed that as an historical matter, the office of county superintendents of schools had its genesis in the Virginia Constitution. The office and method of selection, subject only to the condition of someone being on the “list of eligibles” maintained by the Virginia Board of Education, became a local matter in the constitutional revision of 1928. *See generally, Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982).

⁵ *See* Va. Const. art. VIII § 7 (exclusive authority to supervise the local schools vested in the school board). It appears that Virginia is among a small handful of states that include in their state constitutions an express provision about the primacy of local control of education. *See generally, James A. Rapp, Education Law* § 3.05[3][a] (2012)(listing Colorado, Florida, Georgia, Kansas, Montana, and Virginia). The Virginia Supreme Court continues to recognize the vitality of the Commonwealth of Virginia's constitutional provision on local control and the local school board's authority even as to other officials and tribunals. *See, e.g., Doe v. Commonwealth*, 278 Va.223, 682 S.E.2d 906 (2009); *Russell County Sch. Bd. v. Anderson*, 238 Va. 372, 384 S.E. 598 (1989); *Harrison v. Day*, 200 Va. 439, 106 S.E.2d 636 (1959); *Bd. of Sup'v. v. County Sch. Bd.*, 182 Va. 266, 28 S.E.2d 698 (1944). *See also Fairfax County Sch. Bd. v. Zurita*, Order Upon Pet. Under Code § 8.01-626 (Va. Sept. 28, 2010)(three-justice panel acting to vacate circuit court order and dissolve injunction blocking enforcement of school board student attendance rule). Federal courts in Virginia also have recognized the unique nature of a Virginia school board's constitutional authority under state law. *See, e.g., Bacon v. City of Richmond*, 475 F.3d 633, 640 (4th Cir. 2007) (Wilkinson, J.).

⁶ Va. Code § 22.1-58.

⁷ Va. Code § 22.1-62 (“Any two or more school divisions may appoint the same person to be division superintendent.”). How service to multiple school divisions would be reflected in contractual arrangements is a legal and practical challenge and would require careful thought and discussion involving counsel for each of the parties.

⁸ *See* Va. Code § 22.1-59.

⁹ 8 VAC 20-390-10 *et seq.*

- work¹¹, experience—minimum of 5 years of administration or supervision¹², recency of professional education and/or experience¹³
- Must be on the list of “eligibles” maintained by the Virginia Board of Education¹⁴
- Some individuals are expressly ineligible, by Virginia statute, to hold the office of Superintendent, such as a member of the governing body and others, and no chairman of any political party may hold the office¹⁵

☐ Appointment and Term of Division Superintendent

- Appointment by School Board¹⁶
- Initial term of appointment 2-4 years¹⁷
- “At the expiration of the initial term,” the appointment can be ≤ 4 years¹⁸
- Appointment after vacancy must occur within 180 days¹⁹
- If not appointed within 120 days of vacancy, School Board must make written report to the Virginia Superintendent of Public Instruction²⁰
- If the School Board fails timely to appoint, the Virginia Board of Education has the authority to make the appointment²¹

☐ Oath

- Required²²
- Must be taken “before entering upon duties of office”²³
- Form of oath is prescribed in the Virginia Code²⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Va. Code § 22.1-60(A) (“The division superintendent of schools shall be appointed by the school board of the division from the entire list of eligibles certified by the State Board.”).

¹⁵ Va. Code § 22.1-63.

¹⁶ Va. Code § 22.1-60(A).

¹⁷ *Id.*

¹⁸ *Id.* See *infra* n. 60

¹⁹ *Id.*

²⁰ *Id.*

²¹ Va. Code § 22.1-61.

²² Va. Code § 22.1-64.

²³ Va. Code § 22.1-64.

²⁴ Va. Code § 49-1 (“I do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia, and that I will faithfully and impartially discharge all of the duties incumbent upon me as [division superintendent of _____ Schools] according to the best of my ability, (so help me God).” (The words “affirm” and “God” are apparently included statutorily as parentheticals to indicate optional language for the oath of office.)

■ POLICY FRAMEWORK—THE RESPECTIVE ROLES AND EXPECTATIONS

□ Role of Board vis-a-vis Role of Superintendent

- Is there really a CEO or CAO in practice?
- Roles too infrequently addressed directly and clearly—and candidly
- The best governance practices have been studied and highlighted—with a body of literature to consult on this issue.²⁵
- The most consistent advice given by management experts, including those commenting in the education field, is to have the Board set policy and not micromanage staff— and to have the CEO and staff carry out the Board’s policies, faithfully and competently, with accountability²⁶
- Superintendents must be cautious about trying to dictate to Boards, and mature Board members likewise should regularly ask themselves whether a particular matter is a management staff function and whether the Board is to be involved, except to receive information

□ Role of Chair v. Individual Members v. Superintendent

- Virginia statutory law declares that *no* School Board member has any "organization or duties except as such may be assigned by the School Board as a whole"²⁷
- Proper, legal School Board action is as a corporate body—not individual Board member action—absent express delegation by affirmative vote of a majority of the School Board or by policy adopted by the Board²⁸
- In general, the Chair presides, often informally speaks publicly for the Board, and interfaces more directly and regularly with Superintendent but has no separate legal and no superior power to make decisions or act unless expressly granted by Board action or policy²⁹

²⁵ E.g., *Effective Superintendents, Effective Boards*, Special Report of the Education Writers Association (2013), available at <http://www.ewa.org/docs/leadership.pdf>.

²⁶ See generally, J. Carver, *Remaking Governance*, American School Board Journal (March 2000).

²⁷ Va. Code § 22.1-71.

²⁸ *Id.*

²⁹ The Virginia School Boards Association’s Code of Conduct for School Board Members states that “I will delegate authority for the administration of the schools to the superintendent” See VSBA Website, available at <http://www.vaschoolboards.org/images/uploads/1213samplecodeofconductforschoolboardmembers.pdf>.

☐ Qualifications and Duties³⁰

- Aside from the statutory and regulatory qualifications for a Superintendent, the Board also may expressly and does implicitly decide the qualifications and duties of the Superintendent
- Some School Boards have adopted a policy on the relationship between the School Board and the Superintendent³¹, attempting to reinforce the governance-management distinction and lines of communication and reporting
- A Superintendent legally reports to the Board as a corporate body, not to any individual³² although across Virginia the practice is varied

☐ Administrative Organization Policy and Chart

- Numerous school divisions have a written policy on who has the authority to organize the school division management and often includes a chart to illustrate the structure and reporting lines
- The Superintendent's contract even may include some reference to the Board's and Superintendent's roles in changing the structure and any necessary approval—a point of contractual negotiation, perhaps³³
- Implications are both legal and practical

☐ Staff Communications with Superintendent and with Board³⁴

- Communications by Board members, except for routine information, should generally be with Superintendent and, when with senior staff, not in any way to offer direction or prescriptive action
- The question of managerial authority within the organizational structure can have other legal implications³⁵

³⁰ See, e.g., Virginia School Boards Association Model Policies CBA, CC, and CCA.

³¹ The Arlington Public Schools specifies that “the Superintendent works only for the Board as a whole, not for any individual member. . . . The only staff members to whom the Board may give direction are the Superintendent and the Clerk of the Board When presented with citizen concerns, Board members refer them to appropriate levels of authority, in appropriate sequence [and] [w]hen in doubt, Board members check with the Superintendent.” See Policy 10-7, available at <http://www.apsva.us/site/default.aspx?>

³² Va. Code § 22.1-71.

³³ See *infra* n. 47

³⁴ See, e.g., Virginia School Boards Association Model Policies BC and GBD.

³⁵ See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (the question of managerial hierarchy can assume significance because, for example, a sexually harassing manager with immediately or successive higher authority over the affected employee can make the employer vicariously liable, subject to limited affirmative defenses). The same can apply to the school board and even the members themselves, according to a recent decision of the Western District of Virginia. See *Johnson v. Scott County Sch. Bd.*, 2012 U.S. Dist. LEXIS 106117 (W.D. Va. 2012) (corporate status of school board does not create a shield to board members as to § 1983 claim for purported violation of equal protection based on alleged sexual harassment by person hired or appointed by the board).

■ RECRUITING THE “PERFECT” SUPERINTENDENT

□ Board or Headhunter—Pros and Cons

- Outside perspective—valuable
- Third party professional recruiter can offer advantages
- Clerical challenge internally of sorting, organizing applications, references etc.
- Confidentiality and privacy—safeguards essential
- Headhunting firm offers experience informing the process and critical analysis for comparison

□ Headhunter Selection and Contract—a few issues for attention

- Review the Virginia Public Procurement Act³⁶
- Clear, comprehensive scope of duties to be performed and the standard of performance are vital
- Representation and warranty about qualifications of the firm and assigned staff should be included, if only to incorporate by reference those qualifications and other representations stated in a proposal
- Designation of headhunter lead contact and communications protocol also should find description in any contract
- Will there be a requirement of success—and how defined?
- Timeline requirements for specified milestones, with some flexibility, is important from the Board’s standpoint
- The Board should reserve the right to see, as a body corporate, all applications and references and working papers and require the headhunting firm to preserve all records for a minimum number of years
- Include “guarantee” provision dealing with possible premature departure of the selected candidate within set period of time, *e.g.*, 2 years and trigger free or reduced rate for new search
- Stipulate in the agreement that any previously selected person’s name will not be included in a new search process for a minimum number of years
- Include affirmation that the firm assures compliance with all applicable law, both statutory and otherwise, is a prudent provision given the nature of background checks and the risks
- Watch forum selection provision and other similar provisions that misallocate the risks of the bargain

³⁶ *E.g.*, Va. Code §§ 2.2-4303(G), 2.2-4311 (employment non-discrimination provision requirement), 2.2-4311.1 (unauthorized alien employment provision requirement), & (2.2-4312 (drug-free workplace provision requirement),

- ☐ Special Application—reviewed by counsel?
- ☐ Public Input—Show or Real?
 - Generally, because the system belongs to the community, a method of assessing public sentiment and soliciting and synthesizing its collective views sometimes can be helpful, both as to the decision and as to enhancing public support for the ultimate choice
 - The School Board needs to be clear about the purpose of the public input—avoiding misleading the public into thinking the decision is based on public response or that the issues raised in the public process are automatically accepted as requirements for Superintendent
 - Headhunting firm and Board must understand that there are FOIA implications to surveys used as a tool to identify what is desired in the profile for a new Superintendent³⁷
 - Be mindful of risk of the process ill-advisedly creating agenda for new Superintendent, based on anger or passion or outside an orderly Board consideration
 - Any role for governing body or its members? Legal answer: Va. Const. art. VIII § 7
- ☐ Background Checks
 - In the headhunter contract, keep an eye on the provisions dealing with the background checks that will be performed
 - Criminal and civil checks are critical—as are Internet and social media sources
 - To the extent that issues are identified, what protocol by contract will be followed in safeguarding the information and dealing with any candidate's request to challenge and submit a written response?
 - Consider whether the headhunting firm is an “agency” under the provisions of the Government Data Collection and Dissemination Practices Act?³⁸

³⁷ See AO-15-03 Virginia Freedom of Information Act Advisory Council (June 18, 2003); AO-04-03 Virginia Freedom of Information Act Advisory Council (February 14, 2003) (status as public records, lack of exemption or exception and related matters).

³⁸ See Va. Code 2.2-3801 (“‘Agency’ shall also include any entity, whether public or private, with which any of the foregoing [governmental entities] has entered into a contractual relationship for the operation of a system of personal information to accomplish an agency function.”)

❑ Culling—Headhunter or Board?

- Getting honest, candid and complete reference checks can be a challenge in a legal environment in which the risks of defamation exposure seem heightened in the review and culling process
- Board needs to be on guard for hint of unlawful discriminatory actions on its behalf or the effect of such actions by a headhunter
- Board should have the right to see all applications even if it chooses not to do so.

❑ The “Short List” Interviews—Venue, Process, and FOIA

- Is the process a beauty contest and, consequently, also going to involve interviews by the public, not just by the Board?³⁹
- The short-listed candidates presumably have existing contracts—and is there any risk of a claim of tortious interference with contract⁴⁰ or being dragged into litigation with the current employing board?
- Help your Board appreciate the potential impact of public vetting on pool of candidates
- Selection is critical⁴¹

■ THE ART OF NEGOTIATING THE DEAL

❑ Factors for Board Point-Person Choice

- Board chair or other Board member or Board lawyer?
- Criteria: Prior contact and rapport with top candidate, confidence of Board, prior experience in the negotiating role, ease of access/responsiveness are factors to consider in selecting lead negotiator for the Board

³⁹ The School Board conditionally may hold the Superintendent interviews in a discreet location. “The notice provisions of [the Virginia Freedom of Information Act] shall not apply to closed meetings of any public body held solely for the purpose of interviewing candidates for the position of chief administrative officer. Prior to any such closed meeting for the purpose of interviewing candidates, the public body shall announce in an open meeting that such closed meeting shall be held at a disclosed or undisclosed location within fifteen calendar days.” Va. Code § 2.2-3712(B). Is an announcement by the Chair sufficient or must the Board, as a body corporate, act formally to make the announcement, such as by motion or resolution? The statute refers to the “public body” making the announcement.

⁴⁰ See generally, *Lewis-Gale Center LLC v. Alldredge*, 282 Va. 141, 710 S.E. 716 (2011). The Virginia Supreme Court has recognized that the tort of intentional interference with performance of a contract by a third party is a cause of action in Virginia. The elements are: the existence of a valid contractual relationship or business expectancy; knowledge of the relationship or expectancy on the part of the alleged interferor; intentional interference inducing or causing a breach of a contract or termination of the relationship or expectancy; and resultant damage to the disrupted party. *Chaves v. Johnson*, 230 Va. 112, 120, 335 S.E.2d 97, 102 (1985).

⁴¹ See generally, D. Eadie, *Choosing the Perfect Superintendent*, American School Board Journal (November 2011).

- Match with the person who will negotiate on behalf of the candidate, possibly including legal counsel?⁴²
 - If the Superintendent choice utilizes a lawyer, the Board's lawyer likely may become more directly involved
- ☐ Negotiating Strategy and Tactics
- Impacted by timeline
 - Not: get cheaper deal—unless you accept risk of "cheap" and misunderstanding
 - Board's lawyer should be prepared to field questions about negotiating strategy and offer suggestions
- ☐ The Role of Legal Counsel
- Support or lead?
 - Seek clarity for your role, appreciating that the process is dynamic
 - Watch the "wagging tail" risk?
 - Be careful in contact with candidate—ethical rules and more⁴³
- ☐ Advance Development and Discussion of Contract Form
- Most constructive to do well in advance with the Board
 - Be prepared for some Board members' belief that a commonly circulated template can simply be used—because "cheaper"
 - Start with the core elements and build understanding for more complicated points potentially
 - Develop a preferred form, that reflects strategy, before the short list is finalized⁴⁴
- ☐ Development and Use of Term Sheet—What and Why
- Distills information for Board members, who often are busy with other matters
 - Promotes cohesive and unified voice
 - Sends positive message to the candidate of Board planning and coordination, and confident leadership and focus
 - Allows focus on strategy without prematurely getting into the fine details with a candidate

⁴² See generally, M. Sneed, *Who Should Negotiate Your Contract?*, 5 American Assoc. of Sch. Admin. 69 (May 2012) (contending that superintendent candidates should utilize legal counsel to do the negotiation).

⁴³ See generally *infra* n. 73

⁴⁴ Circulating in Virginia are several template forms of agreement. Other sources for ideas on Superintendent contracts exist. See, e.g., James A. Rapp, *Education Law*, F3.02-1(2012).

- Gets top candidate's concurrence on reasonably clear terms more quickly

■ **THE CONTRACT—MORE THAN JUST A CONTRACT?**

☐ Parameters—Business Not Personal

- Presenting or insisting on a one-sided deal or onerous terms might be counter-productive to the negotiation and the relationship
- Examples—trying to micromanage and contract away some Superintendent practical prerogatives, requiring Superintendent to attend X number of functions each week, etc.
- Prepare Board members that they should expect a candidate to push back in negotiations

☐ Basic Elements⁴⁵

☐ Tough and Trouble Spots?

- Superintendent's authority⁴⁶
- Board's role⁴⁷
- Pay for performance—meaningful and measurable⁴⁸
- Superintendent expenses to be covered⁴⁹

⁴⁵ Elements include a variety of items: length of initial term, definition of role and standard for performance, compensation (including deferred compensation) and automatic compensation adjustments, relocation expense reimbursement, fringe benefits (health insurance, disability insurance, etc.), provision of support equipment, termination provisions, and others. *See generally*, M. Sneed, *What You Want Covered by Your Contract*, American Association of School Administrators (September 2012).

⁴⁶ “A division superintendent shall perform such other duties [beyond those prescribed by the Virginia Code] *e.g.*, may be prescribed by law, by the school board and by the [Virginia] State Board [of Education].” Va. Code § 22.1-70. The Virginia Board of Education’s regulations include various duties of a Superintendent. *See* 8 VAC 20-90-40. One of those sets of duties—to visit and inspect each school in the school division under the provisions of—is currently the subject of a notice of a petition for comment before the Virginia Board of Education. The petition seeks regulatory action to amend the regulation to require documentation and preservation of such records regarding the visits and inspection for this purpose. *See* <http://townhall.virginia.gov/L/ViewPetition.cfm?petitionId=181> (March 15, 2013).

⁴⁷ Will the Board commit to not micromanaging, instead actually governing and letting the division superintendent be the chief executive and administrative officer of the school division? *See generally*, J. Carver, *Remaking Governance*, American School Board Journal (March 2000) (“Boards frequently give direction to subordinates of the superintendent, degrading the chief executive role and the board’s own ability to hold the superintendent accountable. Only if the board expresses its aims for the system as a whole—rather than part by part—can the powerful utility of the chief executive role be harnessed, simultaneously simplifying accountability and saving board time”). Be prepared for a candidate to negotiate a provision to have Board assurances included in the contract.

⁴⁸ *See generally*, Edward P. Cox, *Pay Performance Contract Provisions for Superintendents*, Journal of Scholarship & Practice (Vol. 2 No. 4, Winter 2006); Edward W. Costa, *Performance-Based Education for Superintendents*, *The School Administrator* (Oct. 2004); Tom McGowan and Edward W. Costa, *Performance-Based Superintendent Evaluations: No Superintendent Left Behind*, available at <http://www.eastlongmeadow.org/schools/supteval.pdf>.

- Fringe benefits—treatment of what’s included in VRS “total creditable compensation”⁵⁰ and enforcement of discrimination testing for healthcare benefits favoring highly compensated employees as to eligibility and benefits, under the federal Patient Protection and Affordable Care Act⁵¹
- Outside consulting or work?⁵²
- Liquidated damages for Superintendent’s premature departure⁵³
- Waiver of jury trial, forum selection for dispute resolution?
- Indemnification and hold harmless inclusion and wording⁵⁴

☐ Realistic Timetable

- Too often the timetable is not so realistic for the Board and Superintendent
- Give everyone sufficient time for contract development
- Always assume it will take longer than expected

☐ The Board’s Understanding of the Final Draft Contract

- Critical that all Board members understand the contract

⁴⁹ School boards statutorily are required to “provide for the necessary traveling and office expenses of the division superintendent [and] . . . [d]etailed records of all such expenses shall be kept by the division superintendent.” Va. Code § 22.1-67.

⁵⁰ See Va. Code § 51.1-124.3 (“the full compensation payable annually to an employee working full time in his covered position”).

⁵¹ Pub. L. 111-148 (enacted March 23, 2010). Under Notice 2011-1, Treasury and the Internal Revenue Service, as well as the Departments of Labor and Health and Human Services, determined that compliance with the non-discrimination provision as to fully insured plans “would not be required (and thus, any sanctions for failure to comply do not apply) until after regulations or other administrative guidance of general applicability has been issued under § 2716.” See <http://www.irs.gov/pub/irs-drop/n-11-01.pdf>.

⁵² Virginia law expressly declares that “[t]he office of any division superintendent, whether full-time or part-time, shall be deemed vacant upon his engaging in any other business or employment during his term of office as such superintendent unless such superintendent was granted prior approval by the school board or school boards appointing him, or upon his resignation or his removal from office.” Va. Code § 22.1-66. The Virginia Attorney General has determined that outside employment must be substantial, not nominal, to trigger the vacancy consequence; and, in any event, the vacancy does not occur automatically. The school board, exercising its authority under Article VIII, Section 7 of the Virginia Constitution, retains the prerogative to reach that conclusion. 1991 Op. Atty Gen. Va. 144.

⁵³ This kind of provision often reads: “If superintendent abandons or leaves employment without the concurrence of the school board, superintendent shall pay ___% of superintendent’s base salary as liquidated damages . . .” The Virginia Supreme Court has recognized that contracting parties may agree to liquidated damages provisions, but a School Board should appreciate that such a clause can prove legally unenforceable if the resulting damages for breach can be measured or if the formulation produces an amount grossly in excess of actual damages. See generally, *O’Brian v. Langley School*, 256 Va. 547, 507 S.E.2d 363 (1998). As a practical matter, they can lead to litigation, and no liquidated damages provision arguably will make a Superintendent put heart into the job.

⁵⁴ See Sharon E. Pandak, *Hold Harmless Provisions and Indemnifications—Real World Applications*, Journal of Local Government Law (VI, No. 2 June 1996). Given a Superintendent’s potential legal exposure, it is reasonable to consider such a provision uniquely for the Superintendent. See generally, Martha McCarthy, Nelda H. Cambron-McCabe, Suzanne E. Eckes, *Public School Law*, 12-13 (2014).

- Each Board member should have the opportunity to see the final draft, with sufficient time to raise issues and maturely resolve them

☐ Public Release—FOIA and Beyond

- PR consultant needed?
- Media Release?
- Smart to go ahead and volunteer copy of contract to media?⁵⁵

■ **LIVING WITH THE DEAL**

☐ Nature of Contract Document

- Contract should be clear and complete but cannot anticipate every issue that might arise in the employment relationship
- Contract is only as good as the good-faith commitment to it
- Expect some need to clarify but appreciate that each amendment runs the risk of negative media attention or other distraction

☐ Access to Contract—Practicality

- Limit internally as a matter of course to only designated staff, such as the Superintendent CEO, the Superintendent's assistant, H.R., finance, and to auditors
- But every Board member should have a copy—or immediate, ready access to a copy of the contract

☐ Interpretation Issues

- Issues usually arise and the Board almost always includes a member who has a slightly different understanding of the meaning of provisions, phrases, words, etc., or has a different recollection
- Often occur because an issue is not necessarily anticipated despite best intentions and efforts
- Board members can change, too, and new board members almost always bring an added, even different, perspective

⁵⁵ See 1985 Op. Atty Gen. Va. 420 (in regards to a FOIA request from the press for access to the written employment contract between the school board and its superintendent, stating that ". . . when the School Board, in open session, votes to ratify or affirm action taken in a lawfully convened executive session, the entire contract need not be made public. But it is equally clear that the substance of the contract must be reasonably identified."). See also Va. Code § 2.2-3705.8

- ☐ Memorializing Interpretations for Future Reference—Why and How
 - Not necessary to over-formalize every interpretation issue, but best to help everyone realize the risks of informality
 - Board may simply acquiesce to the Chair giving written clarification by memorandum in the short-term and then adopting an amendment or added provision when other amendments or a new contract are finalized and adopted
 - Will an informal interpretation satisfy the auditors?

■ EVALUATING THE SUPERINTENDENT

- ☐ Legal
 - Annual evaluation required and must be consistent with Virginia Board of Education guidelines⁵⁶
 - Virginia Board of Education regulations offer guidelines⁵⁷
 - Has the Superintendent met the requirements of Virginia law?
 - Has the Superintendent satisfied the standard of performance stated in the contract within the context of clearly stated obligations?
- ☐ Practical
 - Has the Superintendent carried out the Board's policies in a faithful and competent manner, even if one or more of the policies did not have the Superintendent's strongest advocacy or support?
 - Is the contract deviation by the Superintendent, if any, really significant or material?
 - Has the Board considered whether the Superintendent's issues relate somewhat to the challenge of generational differences?⁵⁸
 - Counsel may be asked about the feasibility of an improvement plan for Superintendent—really?
- ☐ A Topic Meriting Another Session at Another Time by Others⁵⁹

⁵⁶ Va. Code § 22.1-60.1.

⁵⁷ See Va. Bd. of Educ. Superintendent Performance Standards & Evaluation Criteria, available at http://www.doe.Virginia.gov/teaching/performance_evaluation/superintendent/index.shtml.

⁵⁸ K. Roberts & P. Sampson, *Talking About My Generation*, American School Board Journal (January 2012).

⁵⁹ See generally, G. Goens, *Evaluating the Superintendent*, American School Board Journal (March 2009) (contending that board members “must do what’s necessary to recognize the fundamental nature of leadership and relationships. These relationships and the intangibles that surround them, while difficult to measure, are at the heart of producing tangible outcomes and success.”)

☐ But Some Pointers

- Discretely encourage Chair to have the Board talk about it early with the Superintendent
- Absent an urgent matter, encourage the Chair to have all Board members always use an instrument as a framework for evaluating the performance, with domains, agreed upon early in the relationship
- Encourage the Chair to focus the Board on producing a single, collective evaluation—not averaging or a distribution of individual ratings
- Counsel should avoid being involved in the substantive evaluation process

■ **REVISING THE DEAL**

☐ Amendments—For What and How

- Pay
- Benefits
- Changes in law—VRS, Patient Protection and Affordable Care Act

☐ Doing the “Rollover”—Why and Why Not

- Sometimes arguably done prematurely—and ask: why at all?⁶⁰
- Good reasons: extraordinary performance and approaching next-to-last year of term and wanting assurance of continuity and consistency
- The Attorney General of Virginia has recognized the validity of a contract-vacancy “rollover”⁶¹

☐ Statutory Constraints—Notice and “Blackout” Period

- All Board members must be notified 30 days before renegotiation⁶²
- No renegotiations between the time of Board members’ appointment/election and their taking office⁶³

⁶⁰ The language of the appointment statute might lead to a contention that an early rollover option is available only in the second and any subsequent term. It states: “At the expiration of the initial term, the division superintendent shall be eligible to hold office for the term specified by the employing school board, not to exceed four years.” Va. Code § 22.1-60(A). Yet, when considered in the full context of the statute, the obvious purpose of subsection A arguably is to establish a minimum and maximum period and recognize greater latitude to specify any term of office that can be up to 4 years, not just a minimum of 2 years as with the initial appointment. Moreover, with its action to do the rollover, a School Board essentially is deeming that the initial term has been changed and then has expired.

⁶¹ See 1995 Op. Atty Gen. Va. 146.

⁶² Va. Code § 22.1-60(C).

⁶³ Va. Code § 22.1-60(B).

☐ Governing Body Implications

- Governing bodies sometimes watch matters between a School Board and Superintendent, especially involving economics⁶⁴
- Encourage Board Chair not to surprise but also not to consult—Va. Const., Article VIII § 7
- Governing body can try to influence Board direction or political environment for Superintendent retention indirectly through the budget process⁶⁵ and the appropriations process⁶⁶ or even through a determination that the governing body will be providing certain administrative functions or activities by combining, consolidating or coordinating the activities of the school division with those of the locality⁶⁷

■ WHEN CONFLICT COMES

☐ Some Conflict Predictable

- Special circumstances can put particular pressure on School Board—Superintendent relations: regular interaction between Board members and constituents in community, church, etc., partisan pressures, especially during elections, factionalism on a Board reflecting different voting constituents or different elections
- Recognize that any good Superintendent necessarily will need to advocate occasionally on controversial issues
- Also, realize that some advocates on policy and other issues may seek tactically to drive a wedge between the School Board and its Superintendent—especially on "culture war" issues

☐ Anticipate and Understand Prospect of Conflict in Advance

- Board Chair should play role of informally resolving conflict

⁶⁴ See, e.g., *Wood v. Bd. of Sup'v.* 236 Va. 104, 372 S.E.2d 611 (1988) (board of supervisors unsuccessfully challenged the school board's payment of attorney fees on behalf of division superintendent).

⁶⁵ By having the county administrator or city manager require detailed data, the governing body can, in effect, send a message of doubt. See Va. Code § 15.2-2508. The local governing body also may push for agreement to consolidate functions. According to the Virginia Attorney General, a School Board and a city or county can agree to exercise certain functions jointly as a cost-saving measure and otherwise consolidate, although without citation to legal authority cautioning that "a shared chief financial officer will find it difficult to act independently with each body [and] . . . the appearance of independence would not be present." 2011 Atty Gen. Va. (January 21, 2011).

⁶⁶ The amount appropriated for the public schools can be done by classification and, if also done for other departments and agencies, may also—however impractically—be on a periodic basis (e.g., semiannually, quarterly). Va. Code §§ 22.1-94 & 15.2-2506. See generally, 1980-81 Op. Atty Gen. Va. 9, 12. The governing body also could, according to the Attorney General, establish a contingency fund. 1997 Op. Atty Gen. Va. 55, 57 n.5.

⁶⁷ Va. Code § 15.2-1305.

- Board orientation and workshops (e.g., VSBA) should deal with the issue and attempt to agree in advance on principles for handling conflict

❑ Approaches—Again, Practicality

- Important to be candid and open—but civil and fair—about problems and disagreements⁶⁸
- Chair often plays an important role in setting and managing the tone

❑ The “New Board” Phenomenon

- Board changes occur—and so do its priorities and sensitivities
- Important: How the new Board works with Superintendent who implemented a previous Board’s policies, now criticized by the new Board
- Are there reasonable and fair expectations of Superintendent when policies, directions or even goals shift dramatically with a new Board
- What if the performance of the Superintendent was an overt or implicit issue in the election or appointment of the new Board members?

❑ Discipline

- Conflict can ultimately lead to a Board entertaining the notion of discipline of the Superintendent
- Virginia law specifically allows “punishment”⁶⁹
- Board may impose fine, suspend or remove Superintendent⁷⁰
- Reality: is a fine or suspension really practical for a CEO/CAO?
- “Sufficient cause” required but not defined (unless in contract), and a School Board has substantial latitude in determining whether sufficient cause exists⁷¹
- What if the Superintendent is charged with a crime?

■ THE IRRECONCILABLE CONFLICT

❑ Likely reasons for irreconcilable conflicts

- General—loss of trust, credibility and good faith that cannot be restored

⁶⁸ D. Eadie, *Making It Work Between Board and Superintendent*, American School Board Journal (March 2012).

⁶⁹ Va. Code § 22.1-65.

⁷⁰ *Id.*

⁷¹ See *Bristol Virginia Sch. Bd. v. Quarles*, 235 Va. 108, 366 S.E.2d 82 (1988) (removal of division superintendent upheld, using standard of review deferential to the school board).

- “Sufficient cause factors”—material breach of contract, insubordination, dishonesty, illegal acts, incompetence, etc. Note that Virginia statutory law does not define “sufficient cause,” so . . . was it defined in the contract?⁷²
 - How did the contract define the standard of performance of the Superintendent?
 - Loss of public or staff confidence; *e.g.*, Superintendent can no longer be effective because large parts of the public and/or much of the staff have lost confidence in the Superintendent
 - If the reason or cause for the concern cannot be fixed with advice and heed, use of a consultant, warnings, specific performance objectives and time to change may be useful in the sense of legal risk management
 - If the Board and Superintendent have incompatible visions for the direction of the school division and the Superintendent does not appear capable of accommodating the Board’s vision, it’s often best that they respectfully recognize the chasm and part company civilly
 - Superintendent as martyr is a possible source of conflict—sacrificial lamb for Board’s mistakes, made unpopular decisions required by civil rights laws, advocated for staff unfairly treated by constituents or even the Board, or declined to forfeit Superintendent’s prerogatives to Board?
- ☐ Involvement and role of legal counsel vital—assessing early in the process any breach of contract and other issues, but be careful about ethics rules⁷³
- ☐ Private v. Public Discussion
- Few if any “win” with public discussion
 - The Board—and all members of the body corporate—have to be committed to candid discussions in discreet, closed sessions that respect confidentiality⁷⁴ and reflect an appreciation for the potential risk of a defamation claim⁷⁵ and other claims
- ☐ Developing a shared plan for unwinding things is often the best approach

⁷² See Va. Code § 22.1-65.

⁷³ Because of a developed close or comfortable professional working relationship, an independently represented Superintendent still may try to engage Board counsel as to particular items or understandings, if only as a perceived convenience. In addition to being awkward, it potentially can occasion issues under the State Bar’s Virginia Rules of Professional Conduct. *See generally, Zaug v. Virginia State Bar*, 737 S.E.2d 914, 2013 Va. LEXIS 35 (2013).

⁷⁴ The Virginia School Board Association’s Code of Conduct for School Board Members states: “I will respect the confidentiality of privileged information and make no individual decisions or commitments that might compromise the board or administration.” *See* VSBA Website, available at

<http://www.vaschoolboards.org/images/uploads/1213samplecodeofconductforschoolboardmembers.pdf>.

⁷⁵ *See generally, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); *Isle of Wight County v. Nogiec*, 281 Va. 140, 704 S.E.2d 83 (2011); *Hyland v. Raytheon Technical Services Co.*, 277 Va. 40, 670 S.E.2d 746 (2009).

■ PARTING COMPANY—RIGHT OR WRONG WAY?

- ☐ A Shared Plan
- ☐ Live and Let Live
- ☐ Negotiating the separation agreement, including severance arrangements, joint public statement, and transition matters⁷⁶ takes time and patience
- ☐ The oft-requested "good-bye" or introduction letter can be a challenge to craft
- ☐ Clear understanding on handling the personnel file and reference inquiries is important

■ THE INTERIM ARRANGEMENT

- ☐ Virginia regulating law recognizes the role of an "acting" Superintendent when a vacancy occurs during regular four-year term⁷⁷
- ☐ Inside or Outside Interim?
- ☐ Profile of Best Interim⁷⁸
 - Often outside, retired person is engaged
 - A retired, outside person arguably may have nothing to prove and no agenda—except being a steady hand
 - Experience and savvy can be invaluable for a variety of reasons—freshly added perspective to the Board
 - A School Board may not contract with an independent consultant to act as Superintendent and supervise the schools, according to the Virginia Attorney General—the person must be an employee of the Board, not an independent contractor⁷⁹

⁷⁶ These agreements require and merit time and discussion and an appreciation for unintended consequences of various provisions, such as a non-disparagement provision. Also, the public's expectations for knowing the details of the agreement have to be maturely weighed, taking into account the applicable provisions of the Virginia Freedom of Information Act. While there is a strong argument that contracts settling public employee employment disputes may be withheld as personnel records, *see* 2.2-3705.8(A), best practice may be to have immediate transparency, lest suspicion and another confrontation are fueled.

⁷⁷ 8 VAC 20-390-30. But what if a vacancy occurs during a term of less than four years?

⁷⁸ *See generally*, D. Gee, J. Hammond & A. Myers, *The Right (Temporary) Fit*, American School Board Journal (July 2010) (identifying and discussing interim types as status quo, healer, or change agent).

⁷⁹ According to the Virginia Attorney General, a school board must appoint a division superintendent as its "employee." 1991 Op. Atty Gen. Va. 140.

☐ The Interim Engagement

- Need not be written agreement but some interims will expect one
- Presumably can only be for a maximum of 180 days?⁸⁰
- The engagement/contract should give Board maximum flexibility on termination
- Indemnification promised to interim?

☐ Post-Interim Transition in Engagement/Contract

- Assures interim will remain available
- Interim's briefing of new Superintendent can be valuable

■ **THE DEPARTURE'S IMPACT ON FUTURE RECRUITMENT**

☐ Media and Internet Impact Always a Potential

- Again, some media like a sustained controversy and headline
- Can affect standing and "brand" of school division
- Internet "news" will spread widely

☐ The "Networks"

- Superintendents have strong, extensive networks
- The Board's action will be interpreted in that network by some and the consensus of interpretation can affect how the Board is viewed

☐ May increase the future headhunter's challenge—and the cost

■ **THE DEPARTURE'S IMPACT ON COMMUNITY**

☐ Effect on attracting business to the community: is there a negative public perception of the effective governance of the schools, the quality and efficiency of the schools, etc.?

☐ Will it exacerbate an already troubled situation in the division in which senior and school based leaders doubt stability of leadership and credibility about who runs the schools?

☐ Effect on perceptions of the community? Popular Superintendent?

⁸⁰ See Va. Code § 22.1-60(A).

■ THE BOARD'S COLD HARD LOOK AT ITSELF

- ☐ The Choice: A Learning Opportunity—or Denial of Reality?⁸¹
- ☐ Counsel may be asked to get involved in discussion—caution

⁸¹ See generally, D. Stover, *Out of Control: A School Board's Self-Destructive Path to Failure Offers Others Some Valuable Lessons*, American School Board Journal (March 2009).

PRESENTER

DOUGLAS L. GYNN has represented numerous private and public clients, including school boards across the Commonwealth and local and regional Virginia public bodies in litigation and transactional work. His education law work has involved a myriad of matters, such as products liability, special education, personal injury, and constitutional and other major target claims in state and federal courts. A member of **The Virginia Education Law GroupSM** at the **BotkinRose** law firm based in Harrisonburg, he also serves as the City Attorney for Staunton for which he selectively handles litigation and manages litigation and other matters handled by outside-engaged counsel. Doug is a Permanent Member of the U.S. Fourth Circuit Court of Appeals Judicial Conference and a Fellow of the American Bar and Virginia Law Foundations. He is a graduate of Virginia Tech, where he finished with distinction in Finance, and a graduate of the University of Virginia Law School, where he served on the editorial board of the *Virginia Journal of International Law*. Doug is rated av®-preeminent and was a charter member and Chair of the Virginia Council of School Attorneys. Doug also does higher education legal work and served on the Virginia State Council of Higher Education (SCHEV), upon appointment by the Governor, and for two terms served as a member of the Virginia Criminal Sentencing Commission, upon appointment by the Speaker of the House of Delegates. He chairs the Virginia State Bar's Judicial Candidate Evaluation Committee, which evaluates and rates candidates for state appellate and for Virginia-based federal judgeships. Doug has represented the Virginia School Boards Association as amicus before the Virginia Supreme Court in several cases involving issues of statewide importance for school boards. His constitutional work in federal courts has included a ground-breaking hostile corporate takeover battle challenging the validity of Virginia corporate governance laws under the United States Constitution, serving as lead trial and appellate counsel for the target Virginia corporation. Doug also has represented professionals, including lawyers, and was lead counsel in the Virginia Supreme Court case establishing the statute of limitations for a legal malpractice claim.

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THE VIRGINIA EDUCATION LAW GROUPSM serves school boards, colleges, and universities, advising on the complex business of education in today's litigious legal environment. With lawyers who do bond, tax and employee benefits work, the firm offers the ability to provide a full spectrum of legal services. In addition to the experience and ability to handle legal issues in employment (EEOC, FLSA, etc.), its lawyers cover special education, procurement, contracts, environmental, constitutional, and other areas for any school board. BotkinRose brings together its collective resources in The Virginia Education Law GroupSM.

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CAROLYN PERRY provides a full range of legal finance and bond services that benefit school boards, education and local government clients. She and Doug had the leading hand in authoring the Virginia School Board Association's legal outline on education finance in the *Budget Manual for Virginia School Boards*. They have also collaborated over the years on numerous issues that have confronted education clients in financing and funding matters.

MARK BOTKIN AND RYAN WAID provide primary support in tax and employee benefits matters that seem to arise ever more frequently for education law clients. Mark and Ryan have very substantial tax law practices for a variety of clients that extend across Virginia and beyond. Mark handles specialized real estate issues as occasions occur that implicate those considerations especially in a tax context, and supports the Group's financing work. He also handles non-profits, including foundations. Ryan, also a tax lawyer, takes the lead in the area of employee benefits.

KEVIN ROSE is the go-to person for construction-related and environmental matters. In addition to his legal training and experience, Kevin is educated and trained as an engineer. Kevin has handled numerous construction law issues and routinely appears in both state and federal courts.

DANIEL LAURO AND LINDSAY BRUBAKER work closely day-to-day, as needed, in service to education law clients. Daniel brings not only civil litigation experience when accident and risk management issues arise, but also familiarity with immigration law matters. Lindsay complements the team by combining her legal knowledge and her ability to relate to those who may be involved in complaints or grievances concerning students and employees, such as Title IX matters. The diversity of her practice, including her prior service as a trusted, court-appointed Guardian *ad litem* in representing the interests of children, enables her to provide wide-ranging legal counsel to educational institutions.