

THE SCHOOL RULE:

Introduction to Effective Contract Practices

by David R. Hostetler, Esq.

This article begins a new “School Rule” series on effective contract practices. The following provides an introduction to some of the basic problems that often arise. Subsequent columns will address other key legal principles, pitfalls, and practices, including contracts for employment, admissions, and professional and support services.

Recently I reviewed a contract previously entered into by a school and a technology contractor. The contractor agreed to assess the school’s technology needs, prepare a technology plan, and submit an e-Rate application to the federal government. The school referred the matter to me when it wanted to discontinue the contract because the contractor had not performed according to the client’s expectations. Consequently, the contractor was demanding that the client pay early withdrawal penalty fees. The contract, in confusing terms, essentially gave the contractor the opportunity to terminate the arrangement but did not give the client a mutual right to do so.

Whether and how a client may legally “back out” of an arrangement for a contractor’s shoddy work typically depends on how the contract is drafted and what factually has transpired up to that point. Unfortunately, the technology contract I mention above exemplifies typical contract problems that frequently arise when schools enter into arrangements to operate. These include contracts for employment, admissions, professional consulting, and support services. The types of problems are as varied as the types of schools.

Many problems arise from general mistakes at the start. These include contracts that

- are drafted by the contractor, rarely modified, and one-sided (favoring the contractor);
- are drafted by lay people who have borrowed someone else’s template or copied and pasted provisions from a variety of sources;
- are never drafted (and should be): the parties entering into an “informal” or “gentlemen’s” arrangement that should have been specified in writing.

Specific problems include contracts that are:

- **vague**—the failure to include specific expectations, quality standards, and timelines (e.g., when will the services be delivered, will there be opportunity for review, what happens if there is non-delivery or inadequate performance?)
- **inconsistent**—inadvertent or confusing clauses that contradict one another (e.g., do the obligations begin when the contract is signed or following the occurrence of a specific event?)
- **incomplete**—the failure to include key provisions (e.g., how will disputes be resolved and in what jurisdiction; who will pay legal expenses?)
- **confusing**—terms full of “legalese” and/or convoluted text (e.g., what is that “WHEREFORE” there for?)
- **don’t terminate**—the absence of any clear terms of contract termination and non-renewal. (E.g., how much and what kind of advanced notice is required to terminate? On what grounds? Who decides?)
- **costly**—the failure to adequately address and prevent hidden and punitive costs (e.g., what is the cost for failing to give timely notice of nonrenewal? What costs accrue following a particular event?)

There are general steps that can eliminate or reduce many of these problems, some of which involve common sense (which can go AWOL in the hurriedness of school operations). Be cautious and deliberate when considering contractual obligations. Ensure a reasonably safe review process with proper safeguards. Calculate the full and potential costs of each contract. Have an attorney review (and draft as necessary) any new contract. Have your school risk management team (per the October 2011 “School Rule”) periodically review existing contracts and future contract needs.

Effective contracting practices require a basic understanding of numerous other contracting principles, pitfalls, and practices. We will address these more specifically in subsequent “School Rule” columns.

Note: This column is for information only and not offered as formal legal advice. Readers are urged to consult a school law attorney to address specific legal questions.

The “School Rule” column is designed to offer legal updates and practical legal recommendations. Mr. Hostetler, legal consultant for ACCS, specializes in education law, is founder and director of Lex-is School Law Services (Chapel Hill, NC), and is an associate professor of education law, policy, and ethics at Appalachian State University (Boone, NC). He may be contacted at hos@Lex-is.com or (919) 308-4652. More information is available at www.Lex-is.com.