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## LEGAL UPDATE

April 16, 2019

**To: Superintendents, Member School Districts (K-12)**

**From: Jennifer Henry, Assistant General Counsel *J.H.*  
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**Subject: Required Procedure When the Governing Board Approves or  
Extends the Superintendent’s Contract or Sets the Salary of the  
Superintendent  
Memo No. 06-2019 - REVISED**

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The purpose of this Revised Legal Update is to clarify the requirement for an oral report, in open session, regarding any changes to salary or fringe benefits for a “local agency executive,” which includes a district superintendent. The duty to make an oral report in open session regarding other high level positions in a district prior to taking action is referenced in our Legal Update Memo No. 05-2019. Please discard the previous version of Legal Update Memo No. 06-2019 and please reference this revised version.

This Revised Legal Update provides a review of the recommended protocol when the governing board wishes to approve or extend the superintendent’s contract or set the salary of the superintendent.

### **A. BOARD APPROVAL OF OR AMENDMENT TO EMPLOYMENT CONTRACTS**

The Government Code sets forth the procedures for a governing board’s approval of a district superintendent’s employment agreement. Prior to taking action in open session to approve a superintendent’s contract, Government Code section 54953 requires an oral summary of the recommendation for approval of the salary and fringe benefits provided to the superintendent.

#### **1. Open Session Ratification of the Superintendent’s Contract.**

Government Code sections 53260-53264 apply to various local agency employment agreements, including school district contracts involving the superintendent.



Section 53262 provides that the contract of employment of a district superintendent “shall be ratified in an open session of the governing body which shall be reflected in the governing body’s minutes.” This provision assumes that the governing board took action in closed session to appoint or re-employ the superintendent pursuant to Government Code section 54957.

The requirement to approve or ratify the contract in public session exists for new contracts and for extensions or other amendments of existing contracts.

Contract approval of superintendent contracts must be taken at a regular meeting only. Government Code section 54956(b) provides:

(b) Notwithstanding any other law, a legislative body shall not call a special meeting regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits, of a local agency executive, as defined in subdivision (d) of Section 3511.1. However, this subdivision does not apply to a local agency calling a special meeting to discuss the local agency's budget.

If the governing board takes action in closed session to approve the contract at a regular meeting, the open session agenda must have an action items as follows:

- 1.0 *Oral Recommendation Regarding Salary and/or Fringe Benefits*
- 2.0 *Ratification of Superintendent’s Employment Agreement*

The term “ratification” makes it clear that the Board already took action in closed session on the same subject (which would have been “reported out” by the Board, as described below). However, prior to taking action in open session to ratify the superintendent’s contract Government Code section 54953 requires an oral summary of the salary and fringe benefits provided to the superintendent.

If the Board will not take action in closed session, the open session agenda would have an action item as follows:

- 1.0 *Oral Recommendation Regarding Salary and/or Fringe Benefits*
- 2.0 *Consideration and Possible Approval of Superintendent’s Employment Agreement*

As with any other final action by the Board, action taken to approve or ratify the agreement must be duly noted in the minutes. Also, prior to taking action in open session to approve the superintendent’s contract Government Code § 54953 requires an oral summary of the salary and fringe benefits provided to the superintendent.

## **2. Closed Session Consideration of the Contract (Excluding Compensation).**

As noted above, Section 54957 of the Brown Act authorizes, but does not require, a governing board to meet in closed session to consider the appointment or employment of



any employee of the public agency. Section 54957 also allows, but does not require, a board to take action in closed session with respect to the appointment or employment of employees.

Any closed session consideration of the superintendent's employment or continued employment should be described on the agenda as follows:

- 1.0 *Public Employee Appointment/Employment*  
(Government Code section 54957)  
Title: *Superintendent*

### **3. Reporting Action Taken in Closed Session.**

Section 54957.1 of the Brown Act requires certain public disclosures after closed session if “reportable action” was taken in closed session. As applicable here, Section 54957.1(a)(5) provides that following the closed session the Board “shall publicly report any action taken in closed session, and the vote or abstention of every member present ... to appoint [or] employ ... a public employee ...”

Thus, following any closed session during a regular meeting where the Board votes to approve or extend the superintendent's contract, the Board president must publicly announce the action taken in closed session and the vote of each board member present. This announcement must be made in public session at the same regular meeting as the closed session and the action and vote must be noted in the minutes.

Even though the Board has publicly disclosed the closed session action, the Board should still ratify the employment agreement in public session as described above.

## **B. THE BOARD'S CONSIDERATION OF THE SUPERINTENDENT'S SALARY**

### **1. Closed Session Discussion of the Superintendent's Salary.**

Section 54957 provides that a closed session held pursuant to that section shall not include discussion or action on proposed compensation.

Thus, when the Board meets in closed session pursuant to Section 54957 to consider the employment or further employment of the superintendent, no discussion of salary can take place.

Section 54957.6 of the Brown Act authorizes the Board to meet in closed session with its “designated representatives regarding the salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees ...”

Under this section, the Board may discuss the superintendent's salary in closed session. The superintendent should not be present in the closed session during this discussion. The protocol for any closed session discussion of the superintendent's salary should be exactly the same as for a closed session discussion of salaries for represented employees: in closed



session, the Board will give instructions to its negotiator (typically the Board president) who will then meet with the superintendent outside of the closed session and report back to the Board on the results of the discussion. When an “agreement” has been reached (it being recognized that the Board may unilaterally set the salary of all unrepresented employees) that “agreement” must be “sunshined” by way of the open session ratification of the contract described above.

If the closed session is to include a discussion of the superintendent’s salary or compensation package the regular meeting agenda should contain the following closed session description:

1.0 *Conference with Labor Negotiator (Government Code section 54957.6)*  
*Agency Negotiator: (specify name)*  
*Unrepresented Employee: Superintendent*

### C. OTHER CONSIDERATIONS

- Effective January 1, 2016, a superintendent contract executed after that date cannot include a cash settlement upon termination that is greater than 12 months salary, or the number of months left on the contract, whichever is less. (Government Code section 53260(a).) Other administrators can still be granted up to 18 months salary upon non-renewal of the contract, or the number of months left on the contract, whichever is less.
- Any superintendent contract shall not include “an automatic renewal of [the] contract that provides for an automatic increase in the level of compensation that exceeds a cost of living adjustment.” (Government Code section 3511.2(a).)
- In light of the “City of Bell” legislation involving abuse of office, we recommend including the following provision in the contract: “To the extent applicable to school districts, this Agreement is subject to the provisions of Government Code sections 53243-53243.4 which requires reimbursement under the circumstances stated therein.”
- The superintendent and all other employment contracts are public records. (Government Code section 53262(b).) (Some redactions may be permissible.)

For the protocol of board approval of salary changes for **high level administrators** other than the superintendent, please see our Legal Update Memo No. 05-2019 dated February 26, 2019.

Please contact our office with questions regarding this Legal Update or any other legal matter.

*The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.*

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