The contract between the school and the head of school sets the stage for the relationship between the head of school and the board. This agreement outlines the fundamental support that the head of school will receive, but also outlines the expectations that the board has for the head. It may refer to other systems and documents, but it reflects the understanding of the parties and is where each party looks for guidance when questions arise. Given its importance, it is somewhat incongruous that its development is often left to the end of the search process and can become more like a footnote for the parties as they move quickly from making the hiring decision to announcing the decision to the community. This race is often unaided by the search firm or legal counsel that is actually familiar with contracts for heads of school. These contracts are not like other executive agreements in other industries. Boards and heads ignore this reality at their own peril.

Understanding Nonprofit Compensation
Before a head of school search even begins, the board, search firm, and the business office need to understand at least a rough range for where compensation will be set. This is because, for all nonprofits, there are concerns about intermediate sanctions from the Internal Revenue Service (IRS). Intermediate sanctions are the IRS’ way of making sure that certain individuals who are compensated by nonprofits are provided with reasonable compensation – that is, they are not compensated beyond the value of the services or products being provided to the nonprofit. This is the IRS’ way of ensuring that nonprofit fiduciaries, namely boards and upper level administrators, perform due diligence to determine the appropriate amount of compensation. If a nonprofit pulls together the documentation to show the reasonableness of the compensation, provides the data, discusses the information at the board level, has a vote of all those board members without a conflict of interest in the decision, and properly records the discussion and the vote, the nonprofit has engaged in what is called “building a rebuttable presumption of reasonableness.” While this language is somewhat dense, it essentially means that the IRS views that compensation package with a presumption that the compensation package is reasonable for the nonprofit to pay.

This process is required for the salaries or other compensation for all heads of school, most business officers, board members, major donors, and others within the school administrative structure who might have influence within the organization such that they can significantly influence the financial operations of the school. For the head of school and board members in particular, board involvement is required.

In practice, the process often looks like this:

- The board appoints a compensation committee that includes conflict of interest free members (e.g., none of the members are receiving compensation from the school for any services or goods) to gather the documentation around the compensation.
- This compensation data should include similar schools in like circumstances (e.g., budget, size, locale, etc.), and compensation should be considered broadly. It must include salary, but it should also include things like vehicle allowances, tuition remission, travel allowances for spouses, and similar benefits. The compensation group itself will include independent schools in the same or similar markets, but it might also include other local nonprofits of similar budget size or complexity.
- This committee will document the conflict-free nature of the committee as well as the documentation that has been gathered and the process used.
- This committee will then make a recommendation to the board for a compensation amount and explain its decision-making process. In many nonprofits, this amount might be a range of compensation within a
set amount and the committee or a representative of the board may carry out the final contractual negotiations.

- The vote of the board will be included in the overall documentation of the compensation process.
- The board will then approve the documentation of the vote at its next meeting (usually with the regular minutes of the meeting).

The Data
Schools often have questions about gathering the data. The IRS provides that boards can rely on the reasonable insight from professional compensation consultants who are hired to help in the process and make specific recommendations or provide documentation. However, schools do not need to hire a third party and the data can be collected from schools’ form 990s available on Guidestar. Data can also be provided by third parties, such as statistical databases that gather this information on a regular basis. The important part is that the board considers data that provides a window into the compensation as paid by similar schools in similar situations.

Given that the IRS is looking for compensation beyond the norms, many schools are hesitant to be at the upper end of the compensation range for similar schools in similar circumstances. Boards can and should, when appropriate, be at the upper end of the spectrum when there are reasons for doing so; the reasons should be part of the discussion and documentation by the compensation committee and the board. For example, a school that has experienced recent challenges in fundraising and enrollment might pay an experienced head with specific skills in these areas more than a head who is lacking these skills. Or, upon entering a second contract, the board may decide to increase the head’s compensation given deeper experience and a now-proven track record with the school.

Either way, the board will want to know where its compensation will likely be before the search starts and will want to ensure that it can meet all of the documentation, discussion, and voting requirements before a final contract is signed.

Common Question: Should the entire board know the head of school’s compensation?
Answer: Yes, the head of school is an employee of the board of trustees and oversight of this singular employee is a key part of the board’s fiduciary responsibility. According to the IRS, best practice dictates that the entire board knows the compensation for the head of school. This information is also available on the school’s form 990, which the entire board should also see.

Common Question: What happens if we don’t build this presumption of reasonableness?
Answer: This is a more complex question that you might think. First, the IRS will look at the documentation of the compensation through the contract, the school handbook, tax forms, etc., and determine if it is reasonable. Any compensation that is not documented in some way is considered automatic excessive compensation, even if the total compensation is reasonable in light of the data (this makes the contract particularly important). Any excessive compensation requires the individual receiving it to return any excess compensation and pay a 25% tax on that excess amount. If the amount is not paid back, with interest, that penalty can go up to 200%. What gets more exciting is that individual board members who knowingly participate in an excess benefit transaction (e.g., a board member who knows that the head of school’s compensation is too high) will be penalized 10% of the excess benefit or $20,000, generally whichever is less.

Additional Resources
Executive Compensation, National Council of Nonprofits
Quick Tips for Setting Nonprofit Compensation, Charity Lawyer
What Should a Nonprofit Pay Its Chief Executive, National Council of Nonprofits
Intermediate Sanctions and the Risks of Executive Compensation: What You Need to Know, Laura Kalick
Thinking About Compensation

While your school may go through the compensation steps, when it comes to negotiating a head of school’s contract, different compensation structures may work better for different heads of school. Below is a list of the kinds of benefits schools tend to see. Some are more common than others. All should be documented either in the head of school’s contract or through other school benefits plan information. Boards and heads of school should understand that all of these items have become reasonable compensation considerations for the IRS. While standard benefits like health insurance tend to be more interchangeable, benefits like dollar amounts beyond standard remission policies, paying for vehicle leases, and similar compensation do carry weight. While they may affect the tax impact of the compensation, these items are still considered benefits.

Types of Compensation:

- **Salary** – Standard amount, easily set when looking at comparable data.
- **Bonus** – Generally smaller than in the corporate world, although some independent schools use more aggressively. Bonuses should either be smaller and part of general recognition of a job well done or larger and tied to measurable goals. They must still fall within reasonable overall compensation.
- **Deferred compensation**
  - 403(b) – Standard retirement, similar to 401(k) agreements
  - 457(b) – Tax beneficial investment savings over time
  - 457(f) – Can be qualified or unqualified. Often known as “golden handcuffs” and provided in the term sheet above. These can be useful in getting an employee to stay for a set period of time as the account amount tends to vest after a certain amount of service.
- **Cost of health insurance, dental, life, disability, liability, flex benefits** – For heads of school, the most likely variations from standard benefits are in disability or life insurance. In both cases, it is not uncommon for there to be a higher benefit and/or for the head of school to own the policies and the school pays for the premiums or reimburses the head of school. This allows the head of school to own the policies and makes them transferable to the next job.
- **Other compensation** – This can be almost anything from babysitting costs, college tuition for older children, travel, sabbatical professional development, etc.
- **Foregone interest on loans** – Particularly the case on a bridge loan if the head of school is moving from another part of the country and has not yet sold the former home.
- **Forgiven loan principal** – Generally should be smaller loans as the IRS looks closely at these arrangements
- **Education assistance plan**
- **Tuition remission**
- **Spousal travel**
- **Housing allowance / on-campus housing**
- **Parking pass / transit passes**
- **Auto allowance**
- **Club membership / dues**
- **Cash out of sabbatical / vacation / other days off**

The Negotiation and Term Sheets

The contract process, and the documents themselves, can be overly complex, and schools can simplify the process by using a term sheet that covers the fundamentals of the relationship rather than jumping right into a contract. This is particularly helpful because it draws out the key terms of the relationship from the contract itself, where nuances can get lost. Ideally, the term sheet is ready to send to a candidate upon selection. The negotiating arm of the board and the potential head of school should be ready to negotiate some of these terms, with both sides remembering that it is important to preserve the relationship throughout the negotiation. In many cases, the needs of one head of school are different from another, so it stands to reason that some of the terms may need to be adjusted. Similarly, not all schools are situated the same in every market, so what is a reasonable term in one school agreement may not work for another school.
The term sheet below is provided as a sample and gives a window into many of the key terms and benefits schools and heads see. It is not a complete list of all the terms that are in many agreements (e.g., arbitration, mediation, boilerplate authority terms, etc.). However, it and the explanations that accompany the sections might be useful to you and your school as you either enter into a contract for the first time or renew your agreement. Attorneys familiar with head of school contracts, nonprofit compensation issues, and the school itself can help keep the process compliant and ensure that the final agreement reflects the negotiations of the parties.

**The Unique Timing of Head of School Opportunities**

That being said, the most common misunderstanding when negotiating a head of school’s contract arises when a board member or the school’s attorney first encounters the practical realities of the head of school job, as well as the timeline for searches for these positions and how both affect termination provisions. In the sample term sheet below, many boards are surprised to see that when a head is let go, not for cause, it is common to see pay out provisions of a year or more. This happens because the vast majority of head of school positions do not begin until July 1 and most of the searches are completed by December of the previous calendar year. In other words, for a July 1, 2020, start date, most head of school searches are completed by December 31, 2019. If a head of school is let go by the board, not for cause, in January, they have missed most of the search cycle for that upcoming academic year. Practically speaking, this means they may be out of work for the remainder of that academic year and the entirety of the next one. The head of school may be able to find some other work that can offset that payout, but the likelihood of them finding another head of school job is low.

Also, this profession often requires the head of school to move his or her family some distance for the job. All benefits such as housing, tuition remission for the children of the head of school, etc., should be considered when thinking about termination. For example, if the head of school is let go in January, the head’s children may be enrolled at the school for the remainder of the year and potentially the next. In addition, if the head is living in the school’s house, it should be clear what the moving expectations are in the event of termination, and those provisions may need to be consistent with local landlord / tenant laws.

**Term Sheets**

While terms sheets will vary a bit from school to school, they should capture the key terms for the parties. They should address all benefits as well as key contract provisions. The term sheet allows both parties to see the elements, making it easier to come to a final contract.
## TERM SHEET
### Creekside Park School – Head of School

<table>
<thead>
<tr>
<th>Description</th>
<th>Proposed Terms:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Position</strong></td>
<td>Head of School, reporting to the Board of Trustees</td>
</tr>
</tbody>
</table>
| **Term of Employment** | Five (5) Years  
It is not uncommon to see the head’s first contract be three years. However, this often means that the head of school is negotiating the next agreement at the end of year two, which is often the year when they are starting to make change and it may be a tense time for negotiations. The initial hiring board member may also no longer be the board chair, creating more difficult window. Schools should consider a longer initial contract window, or at least one that corresponds with a familiar board chair and a less turbulent time for the head of school. |
| **Start Date**      | July 1, 2020                                                                  |
| **Renewal/Extension** | The parties shall meet by no later than June 30, 2024 to discuss the renewal, extension or nonrenewal of the Employment Agreement  
This is usually the window during which the head of school and board chair meet to determine if the head will continue past the next academic year. If not, this gives the board time to name a search committee and the head of school time to begin a search for a position that starts at the beginning of the next school year. Generally speaking, these orderly transitions are good for both the school and the head as both have time to create ideal conditions for the next head of school. Less notice, or releasing the head and appointing an interim for the upcoming school year tends to cost strategic momentum, create cultural disturbance within the school community (parents, students, staff, and alumni), and is often the most expensive route (paying the outgoing head of school for the year, the interim head of school either an additional salary or an increase if they are an internal staff member), and the search firm that will perform the next search. Some schools do use an evergreen renewal provision that will automatically reinstate the contract every couple of years. This can work well for an established relationship and can be useful for boards and heads who do not track contract details. The downside of these arrangements is that key terms may never get revisited, including benefits and provisions that may change as a head of school matures in the role. |
<p>| <strong>Compensation:</strong>   | $175,000; Base Salary will be subject to annual increase equal to the percentage increase to the Consumer Price Index for the greater Atlanta-Sandy Springs- Roswell area as provided by the Bureau of Labor Statistics (see <a href="https://www.bls.gov/cpi/cpihome.htm">here</a>) of |</p>
<table>
<thead>
<tr>
<th>Standard Benefits:</th>
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</thead>
<tbody>
<tr>
<td>Retirement Plan</td>
</tr>
<tr>
<td>Group Medical/Dental/Vision</td>
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<tr>
<td>Life Insurance</td>
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<tr>
<td>Long Term Disability Insurance</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Executive Benefits</th>
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</thead>
<tbody>
<tr>
<td>457(f) Plan</td>
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<tr>
<td>Membership Dues</td>
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<tr>
<td>Parking</td>
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<tr>
<td>Legal Fees</td>
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<tr>
<td>Financial Planning</td>
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<tr>
<td>Other Benefits:</td>
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<tr>
<td>Vacation Leave</td>
</tr>
<tr>
<td>Holidays and Discretionary Days</td>
</tr>
<tr>
<td>Business and Travel Expenses</td>
</tr>
<tr>
<td>Head of School House</td>
</tr>
<tr>
<td>Key Terms:</td>
</tr>
<tr>
<td>Termination for Cause/Severance</td>
</tr>
<tr>
<td>Termination for Cause/Housing</td>
</tr>
</tbody>
</table>
| Termination without Cause/Severance | School may terminate without Cause upon thirty (30) days written notice. Upon termination and subject to execution of a general release of liability, head of school shall receive continued payment of her then-existing Base Salary for 15 months from the date of termination. School shall also pay for COBRA coverage during this time, or until head of school is employed in another position that provides health benefits. Head of school shall mitigate school expenses during this time by seeking new employment as a head of another independent school. In the event any new employment does not include a salary of the same or greater amount than the head of school’s original salary at the School, School shall continue to pay the difference in her salary level at termination and her new salary. In the event that head of school begins another position at the same or greater salary level, School shall have no further severance obligations. All tuition remission provided shall remain intact through the end of the school year.  
*This provision should allow time for the head of school to secure the next position. This period can last quite some time, depending on when the head of school is released. Schools can use offset provisions so that if the head receives another position, there isn’t any “double dipping.”* |
| Termination without Cause / Housing | In the event the head of school is terminated without Cause, the head of school will be expected to leave school housing by the end of the next month after termination notice is provided. |
| Resignation | Head of school to provide the School at least six (6) months written notice of resignation.  
*While board members unfamiliar with the head search cycle might argue for a longer resignation notice, the head of school generally will not know they are leaving until they have been offered another job. This might be December for the next school year, creating a shorter window for notice on behalf of the head.* |
| Disability | In the event that head of school becomes disabled during the course of service such that he or she is unable to fulfill the terms of this agreement, but the head of school does not qualify for long-term disability, the board may terminate this agreement upon advice from a mutually agreeable third party medical professional. In this case, termination benefits shall be the same as those in the event of a termination not for Cause. If the head of school qualified for long-term disability payments during that time, the School may reduce its payments to the head of school in the amount of the disability payments received by the head of school.  
*These provisions have become more popular over time and ensure that the board has some latitude for action in the event that the head of school’s disability impacts the ability to perform, even if they do not qualify for long-term disability.* |
Outside Services

All services provided to entities outside the School are subject to approval by the board chair, including nonprofit board service and paid consulting or similar compensable work. This ensures that the totality of the head’s attention is given to the school.

Death Benefits

In the event that head of school passes away during the time of service of this agreement, tuition remission, health benefits, and housing shall be provided to the family of the head of school as currently enrolled or in use at time of death through the end of that fiscal year. Sadly, many schools have had experience with the lack of this provision. Because nonprofits may not benefit a single individual, when a beloved staff member dies, the school is limited in what it can do to help the family. If death benefits are provided in a contract or elsewhere in the school handbooks, etc., then the school has already committed to providing the support as part of the agreement. This also gives the head of school peace of mind if something should happen.

What is not in the term sheet…

There are, of course, very important terms that are not in the list above that will appear in the head’s contract or through some other procedure the school has in place. The head’s job description, which should be in the search materials is one, and the processes for developing goals and evaluating the head of school as part of a regular process is another. All schools should have these foundational cornerstones in place, and they should be included in the head’s agreement or referred to in the agreement if they exist elsewhere. Schools lacking these elements should make sure that they are developed for the good of the head/board partnership.

Conclusion

There is great concern about the rate of turnover in independent school headships at the moment. Around the country, head of school tenures have dropped from eight to nine years to five. This is true for the SAIS membership as well, with k-8 and k-12 schools with enrollments below 500 students being among the more vulnerable. There do not appear to be any silver bullets to stop the turnover, but having an even-handed agreement developed through a good process, as well as one that incentivizes both parties not to trigger an abrupt departure of the head of school and supports the work of the school, is a great place to start a healthy relationship.