

NEA Collective Bargaining & Member Advocacy

**NEA Issue Brief on Pension
Protections in State Constitutions**

June 2004

The National Education Association (NEA) is the nation's largest professional employee organization, representing 2.7 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become teachers.

NEA Executive Committee Members

Reg Weaver, President

Dennis Van Roekel, Vice-President

Lily Eskelson, Secretary-Treasurer

Michael Billirakis

Mark Cebulski

Carolyn Crowder

Michael Marks

Rebecca Pringle

Marsha Smith

John L. Wilson, Executive Director

Acknowledgment: We wish to acknowledge the work of The Moore Law Firm, PLLC, which researched and wrote this publication. Data is current as of March 2004.

Reproduction: No part of this report may be reproduced in any form without permission from NEA Collective Bargaining & Member Advocacy, except by NEA-affiliated associations. Any reproduction of the report materials must include the credit line and the copyright notice. Address communications to NEA Collective Bargaining & Member Advocacy or call (202) 822-7080.

Copyright June 2004 by the National Education Association.
All Rights Reserved.

NEA Issue Brief on Pension Protections in State Constitutions

Teachers and education support professionals (ESPs) in U.S. public schools are usually eligible for a pension when they retire from service, and the pension is generally in the form of a defined benefit plan. Such a plan provides teachers, ESPs, and other public employees with a pension benefit based on a formula, generally years of service multiplied by his/her final average compensation multiplied by some percentage (usually 1.5 to 2.5 percent).

Due to past efforts to undermine pension benefits, protections have been enacted to discourage future activities. Such protections arise through statutes, judicial interpretations, and state constitutions. Constitutional pension protections (CPPs) are the strongest of the protections because amending a constitution is a lengthy, detailed process that involves the voters of the state. Moreover, once a provision becomes part of the constitution, it preempts any statute that conflicts with it. Currently, 31 states have such protections in their constitutions, although the type of protection varies widely.¹

This issue brief examines various aspects of this subject including:

- An overview of constitutional protections;
- The prevalence of CPPs;
- The types of CPPs;
- A summary of recently enacted CPPs; and
- Model language for those wishing to enact or improve state constitutional pension protections.

The issue brief also contains an appendix that shows the various types of CPPs the 31 states have enacted.

¹ If a state does not have a pension protection in its constitution, applicable statutes and case law provide protections for the pensions of teachers and ESPs. As will be explained, a constitutional provision is preferred because it provides the broadest protections.

Constitutional Protections

A constitution is a system of fundamental laws for the government of a nation or a state. In the United States, we have a federal constitution for the national government, and each state has its own constitution.

A constitution is a document that furnishes the basis for the government it establishes. Further, it defines the powers of that government and assigns to the different departments of the government their respective powers and duties. It also sets out certain fixed principles. In the pension area, many state constitutions contain the principle that their retirement systems must be properly funded. Others establish the principle that retirement benefits are a contractual right protected by the constitution.

A constitution differs from a statute, which usually provides some details of a particular subject. A constitution, as noted above, states broad principles. Moreover, a constitution forms the supreme law and stands above the legislative law. If a statute and a constitutional provision conflict, the constitutional provision prevails.

Because constitutional provisions preempt statutes, they are the strongest form of law. They also offer another advantage, although one that is somewhat paradoxical. The advantage is the complexity of making changes in the constitution. The complexity sets high hurdles for advocates of change, but once the change is approved, it is equally difficult to undo.

Changing a state constitution usually requires approval by a supermajority of the legislature -- for example, three-fifths instead of a simple majority. If a supermajority approves, the new language goes to the voters for final approval.

In some but not all states, there is a second process: an initiative procedure that gives the voters the right to propose constitutional changes independent of the legislature. Under that process, proponents gather the required number of signatures to put the new language on the ballot.

Altering state statutes, on the other hand, is less difficult. The power to amend generally resides in the state legislature unless the state has an initiative process. The legislature can, at any time, weaken or even eliminate provisions including those that protect pensions.

To relate this discussion to pension protections, assume that advocates wish to add a pension guarantee to their state's constitution. The guarantee would establish that membership in a public retirement system is an enforceable contractual relationship and that the benefits of that relationship shall not be diminished or impaired. The advocates would first go through the applicable process in their state. If they succeed and the guarantee is added to the constitution, their efforts would certainly be worthwhile because if another group wishes to remove the guarantee they would have to use the same arduous process. Moreover, the proponents of the removal could be accused of trying to take away promised and protected pension rights.

One notable lawsuit illustrates the value of having protections in the constitution. In the early 1990s, the New York legislature altered the funding method for the state's retirement systems. The change effectively eliminated the state's obligation to make a funding contribution to the system in that particular year. New York's highest court invalidated the legislature's action by relying on the pension protection in the state's constitution, *McDermott v. Regan*, 82 NY2d 354, 604 NYS2d 890, 894-95 (1993). The provision mandates that membership in a state or local retirement system is a contractual relationship. Under such a relationship, the benefits of system members "shall not be diminished or impaired," (Article V, Section 7). The court found that the elimination of the funding for the particular year reduced the available assets for investment and thus impaired the financial health of the retirement system.

The Prevalence of CPPs

Currently, 31 states have constitution pension protections covering educators.² Of these, 29 protect the pensions of teachers and ESPs, but in two states, the constitutional protections are either inapplicable to ESP coverage or are limited.

In North Dakota, ESP pensions are not protected by the state CPP. The constitution requires the appropriation of necessary funds for payments to beneficiaries of the teachers' retirement system, but ESPs are in a separate retirement system, which is not protected by any similar constitutional provision.

² The source for information on CPPs covering teachers that were enacted prior to 2000: *Is Your Pension Protected?*, published by the National Retired Teachers Association, Washington, D.C. 20049.

In Virginia, only some ESP pensions are protected because most ESPs are in local government retirement systems that are not included in the state CPP. Other ESPs lack retirement coverage altogether. Among ESPs, only school clerical workers are covered by the state CPP.

Types of CPPs

CPPs vary considerably among the states, but can be grouped into five broad categories. Some states have more than one type.

- A. Retirement system funding;
- B. Protection of retirement system assets;
- C. Retirement system management, including investment of assets;
- D. Guarantee of pension rights; and
- E. Other types of protections.

A. Retirement System Funding

As noted at the outset of this issue brief, retirement systems that serve teachers and ESPs are usually defined benefit plans. These plans are generally funded on a reserve basis. In other words, employer and employee contributions -- as well as investment returns -- generate sufficient funding to pay benefits not only to current retirees but also to future retirees.

The level of employer (though usually not employee) contributions is not a fixed amount, but rather is whatever is necessary to fund the promised benefits. The amount cannot be precisely ascertained because it depends on a variety of factors such as:

- The level of earnings the contributions generate between the time they are added to the trust fund under the plan and the time benefits must be paid;
- The level of salary increases;
- The age at which employees retire; and
- The length of time employees live after retirement.

The amount of funding also depends on the type of actuarial cost method used by the retirement system. An actuarial cost method is a procedure for computing the actuarial present value of pension benefits that will be provided in the future. It assigns

that value and the cost of such benefits to particular time periods. Many accepted actuarial cost methods exist, and they all share the same goal of fully funding all benefits promised as they become due. However, they assign costs in different ways during an employee's career.

In determining the amount of needed contributions, actuaries use assumptions such as the rate of investment return and employees' salary increases. A change in either the assumptions or the funding method can alter the level of the employer contribution. For example, a higher assumption on investment returns will reduce the level of the necessary contribution. By the same token, a proposed change in the actuarial cost method could affect the contribution for a particular year, as illustrated by the *McDermott* case noted above in which the employer contribution was eliminated.

It is important to note that the funding of retirement systems can be subject to political pressure. For example, in times of fiscal stress, some legislatures have resorted to such changes as reducing employer contributions in ways that may impair the funding of the retirement system. To discourage such actions, advocates in several states have successfully secured CPPs that relate to funding. Many such provisions direct the retirement system to be funded according to "generally accepted actuarial standards" or on an "actuarially sound basis." Under this broad language, if a legislature fails to fund the retirement system according to the standard, it violates the constitutional mandate.

In Louisiana and Maine, their constitutions set out a more specific standard for funding: the CPP mandates the legislature to pay off the unfunded liability of the retirement system. The unfunded liability is the difference between the funds needed to pay promised benefits and the amount of funds actually available to pay them. If insufficient funds exist to pay promised future benefits, the retirement system has an unfunded liability (Maine's constitution also has the general funding standard discussed above.). Fourteen states have some type of funding provision in their constitutions.

Advocates drafting a funding CPP must be careful about designating who has the power to decide the actuarial issues. In Georgia and Louisiana, the CPP gives the power to the legislature, whereas in Montana and New Mexico, the retirement system board makes the decisions — which is the preferred choice. First, the board has a mandate under the state's fiduciary laws to protect the retirement system, including taking action to

ensure it has adequate funds to pay benefits. Second, the legislature must deal with competing pressures for revenues. Not only must it finance the retirement system, but it must also pay for the operation of state agencies and programs. These demands may cause the legislature to decide to provide insufficient funding for the retirement system.

B. Protection of Retirement System Assets

Retirement assets come from three sources. One, the employer -- either the state or local government -- contributes an amount of funds each year. Two, each employee annually pays a share of his/her salary. (Employee contributions are a phenomenon in state and local government retirement plans. Private sector retirement plans rarely require employee contributions.) Three, the retirement system (or other entity such as a separate investment board) invests the employer and employee contributions, thereby earning income.

The system's assets are separate from the general funds of the state or local government sponsoring the system. The separation is necessary: General funds are for programs benefiting all citizens of the state or local government; retirement system assets, on the other hand, are dedicated to the payment of benefits.

Because of the specific purpose of retirement assets, they may not be used for any other reason. Constitutions embody this principle in three different ways. First, under the exclusive purpose rule, the CPP establishes that the assets may be used for retirement purposes only. Second, a complement to the exclusive purpose rule is a CPP in which the diversion of assets for non-retirement uses is prohibited. In the third type of CPP, retirement assets are trust funds and, as such, they are separate from the general funds of the state. This latter provision concentrates on the need to physically separate retirement assets from the general funds of the state or local government. In states in which a separate trust fund is not explicitly required, retirement assets are still usually accounted for separately from general funds. In sum, the foregoing principles stand for the same idea: Retirement assets are dedicated to a particular purpose and the legislature or other body cannot remove such assets for non-retirement uses. Sixteen states have one or more of these provisions in their constitutions.

A recent situation in Rhode Island shows the value of such protections. Due to a budget shortfall in 1991, the legislature removed approximately \$20 million from the retirement system for non-retirement purposes. The state apparently had no provision, either in its constitution or its statute, which protected the assets from non-retirement uses. The federal Internal Revenue Service (IRS), which has jurisdiction over certain activities of state and local government retirement systems, became involved and compelled the state to return the money with accrued interest. The IRS also required the state to ensure that language was adopted to prevent the state or any other person or entity from diverting assets for a non-retirement purpose.

The Rhode Island situation illustrates that a provision protecting retirement assets is an important shield against improper legislative activity. Such language, whether statutory or constitutional, discourages legislatures from taking such action. As discussed above, the constitutional language is preferable to statutory language.

C. Retirement System Management, Including Investment of Assets

Constitutions of 11 states address the management of retirement systems. Five constitutions (California, Montana, Nevada, New Mexico, and Texas) require a board of trustees to administer the retirement system.

Other constitutional provisions endow retirement boards with specific powers. The constitutions in California, New Mexico, and Texas authorize the boards to invest the retirement system assets. The California, Montana, Nevada, and New Mexico constitutions empower their respective retirement boards to decide actuarial issues.

These provisions protect the pensions of teachers, ESPs, and other public employees by insulating the retirement system from political pressure. The legislature has no power, for example, to disband the board if it makes a decision with which the legislature disagrees. These provisions also discourage the legislature from interfering with the retirement system's authority to invest assets and make actuarial decisions that affect the level of the retirement system's funding.

D. Guarantee of Pension Rights

The foregoing protections relate to the retirement system as a whole: They specify some standard of funding; they protect retirement system assets; and they set out the management of the retirement system by mandating the powers of the board. The fourth protection discussed in this issue brief concerns the protection of the pension for the individual. Nine states have this type of protection.

Teachers and ESPs generally have a right to receive their retirement benefits at a defined point in the future once they have satisfied certain conditions. This is called vesting. Conditions include working for a certain minimum number of years in a position covered by the retirement system.

Six constitutions (Alaska, Arizona, Hawaii, Illinois, Michigan, and New York) set out a two-part articulation of this right. First, membership in a retirement system is a contractual relationship. Second, because of that relationship, pension benefits cannot be reduced or impaired. In Louisiana, the provision is slightly different. It makes membership a contractual right and guarantees payment of the benefit.

New Mexico's provision lacks the strength of the others. It creates a property right, not a contractual right. The property right ensures due process protections, but not the strong guarantee of a contractual right. The Missouri provision affects the transfer, a number of years ago, of employees from one retirement system to another. It deals with a unique situation and is, therefore, different from the other provisions.

In those states without a constitutional guarantee, statutes or judicial interpretations provide similar protections, but can always be changed by the legislature. Placing the guarantee in the constitution best insulates it from adverse changes.

E. Other Types of Protections

The remaining constitutional provisions address several issues. The most prevalent ones address the issue of extra compensation and prohibiting elimination of retirement systems.

When states were developing retirement programs for teachers and other public employees, many had laws that prohibited public employees from receiving extra compensation for their work. In other words, once someone is paid, he/she is not entitled

to further compensation. The question arose whether a pension qualified as extra compensation. The constitutional provisions make clear that pensions, cost-of-living adjustments, or both, do not represent extra compensation and are, therefore, legally payable. States with these provisions are Georgia, Nebraska, Oklahoma, Pennsylvania, Washington, and Wisconsin.

Other states' constitutions mandate a retirement system. The constitutions of both Louisiana and Texas require a system to cover teachers and other employees of public education in the state. Thus, teachers and ESPs are both included. Because the provisions are in the constitution, the legislature alone could never abolish these systems. Instead, the voters would have to approve an amendment to their respective constitutions in order to eliminate them.

Recently Enacted Constitutional Pension Protections

The 1990s were an active time for the inclusion of pension provisions covering teachers, ESPs, and other public employees in state constitutions. Voters in 11 states approved 12 such provisions as the list below shows. Maine, where voters approved two separate provisions -- one in 1991 and the other in 1995, accounts for the difference in the two numbers. The list does not include an Oregon provision that is no longer valid. Their 1994 provision limited, not protected, pensions, and it was struck down by the Oregon Supreme Court in *Oregon State Police Officers' Association v. Oregon*, 323 Ore. 356, 918 P.2d 765 (1996). Since 1998, no new CPPs have been enacted that cover teachers or ESPs.³

³ On March 29, 2004, the Connecticut General Assembly took the first step toward approving a constitutional amendment to provide pension protections and sending it to the voters for enactment. The protections include funding standards and insulation of retirement system assets from other governmental funds. The Connecticut Education Association is advocating for these protections.

Recently Enacted Constitutional Pension Protections

State	Date(s)	Provisions
Maine	1991, 1995	Incorporates funding standard for state retirement system
California	1992	Protects retirement system assets and requires a board of trustees to administer retirement system, invest its assets, and decide actuarial issues
Oklahoma	1992	Protects retirement system assets
Montana	1993	Protects retirement system assets, requires sound funding, and mandates prudent investments
Nevada	1996	Requires a board of trustees to administer retirement system, mandates board to hire an executive director and an independent actuary, and prohibits loans to state from retirement system or retirement system assets invested to purchase obligations of state
Indiana	1996	Eliminates ban on investment of retirement system assets in equities
South Carolina	1996	Eliminates ban on investment of retirement system assets in equities
Virginia	1996	Requires a retirement system, mandates retirement system assets to be deemed separate and independent from state funds, protects assets in its trust funds, and incorporates funding standard
West Virginia	1997	Eliminates ban on investment of retirement system assets in equities
Arizona	1998	Incorporates funding standard, protects retirement system assets, and makes retirement benefits a guaranteed right
New Mexico	1998	Incorporates funding standard, protects retirement system assets, and requires a board of trustees to administer retirement system, invest its assets, and make the actuarial decisions necessary to determine amount of funding for retirement system

Model Language for Constitutional Pension Protections

The foregoing discussion explains why pension protections in state constitutions are effective. It also sets out the various types of protections, including four that are fundamental to protecting the retirement system and its members. These protections:

- Incorporate a funding standard;
- Insulate retirement system assets;

- Provide for retirement system management, including investment of assets; and
- Guarantee pension rights.

Model language embodying these four protections appears below. The language draws from constitutions that best exemplify the protections. A discussion of each protection appears after the text.

Text of Model Language for a Constitutional Pension Protections

1. Funding Standard. Retirement systems of the state and its political subdivisions shall be funded with contributions and investment earnings using methods and assumptions that are consistent with generally accepted actuarial standards. The members of the retirement board of each system shall make actuarial determinations based upon recommendations of an independent actuary with whom they contract, as provided in paragraph 3(d).
2. Protection of Retirement System Assets. The assets of retirement systems of the state and its political subdivisions, including investment earnings and contributions, are separate and independent trust funds and shall be invested, administered, and distributed by law for the exclusive purpose of the members and beneficiaries of the retirement systems. None of the assets, proceeds, income, contributions, or payments shall be used, loaned, encumbered, or diverted to or for any other purpose whatsoever.
3. Retirement System Management, Including Investment of Assets. Each retirement system of the state and its political subdivisions shall have a board that has plenary authority and fiduciary responsibility for the investment of funds and administration of such system. The members of such a board shall:
 - (a) Act solely in the interest, and for the exclusive purpose, of providing benefits to participants of the retirement system;
 - (b) Discharge their duties with respect to the retirement system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar

with these matters would use in the conduct of an enterprise of a like character and with like aims;

(c) Diversify, consistent with the fiduciary duties under this paragraph 3, the investments of the retirement system so as to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly not prudent to do so; and

(d) Have, consistent with the fiduciary duties under this paragraph 3, the sole and exclusive power to make actuarial determinations based upon recommendations of an independent actuary with whom they contract.

4. Guarantee of Pension Rights. Membership in retirement systems of the state and its political subdivisions is a contractual relationship, the benefits of which shall not be diminished or impaired.

Discussion

Preliminary Note about Scope

Advocates should ensure that they do not unintentionally exclude groups of employees from the CPP. To avoid omitting groups of employees, the wording of the CPP should cover the retirement systems of not only the state but also political subdivisions, such as school boards, counties, cities, towns, and special districts. The model language above contains text in each of its four paragraphs intended to cover all types of public employees, including those who work for political subdivisions.

This language is necessary because, in some cases, a state retirement system automatically covers teachers, but a local government employer, such as a school district, decides whether ESPs should be covered. For example, the protections in the Virginia constitution apply to individuals covered “by a retirement system for state employees and employees of *participating* political subdivisions and school divisions” (Article X, Section 11, emphasis added). Under the applicable statute, teachers and other professional employees in Virginia must be covered by this system, and ESPs who are clerical employees must also be covered. Other ESPs either have no retirement coverage, or they are covered by a different retirement system of a political subdivision or school

division. Because most ESPs with retirement coverage are in a separate system, the protections in the constitution do not apply to them.

In other instances, a state retirement system covers virtually every public employee, not only those who work for the state, but also local government employees such as teachers and ESPs. This type of CPP is preferred because it will cover all state and local workers in the state regardless of their employer.

Funding Standard

Retirement systems of the state and its political subdivisions shall be funded with contributions and investment earnings using methods and assumptions that are consistent with generally accepted actuarial standards. The members of the retirement board of each system shall make actuarial determinations based upon recommendations of an independent actuary with whom they contract, as provided in paragraph 3(d).

The funding standard should include three parts. First, it should state how the retirement system is financed. The model language provides that contributions and investment earnings fund the system. The model language does not specify whether the contributions are from both employers and employees. In most states, both contribute to the system. Other states fund their retirement system with employer contributions only. The model language is broad enough to cover either situation.

Second, the CPP should contain a general statement about how the level of funding is determined. Most funding standards require the use of methods and assumptions that are consistent with generally accepted actuarial standards. Actuaries, individuals knowledgeable in the mathematics of determining funding needed for retirement programs, life insurance policies and the like, use a well-established set of standards. By including the word “actuarial” in the CPP, advocates ensure that the concepts underlying that term are part of the protections.

Third, the CPP should state which entity is responsible for actuarial decisions. The model language specifies that the members of the retirement board make those decisions based on recommendations of an independent actuary. The board members contract for the actuary’s services subject to their fiduciary duties. “Independent” means

that the actuary acts solely in the interest of the retirement system and not for any other entity of state or local government. (See “Retirement System Management, Including Investment of Assets” below for a discussion of retirement boards.)

Protection of Retirement System Assets

The assets of retirement systems of the state and its political subdivisions, including investment earnings and contributions, are separate and independent trust funds and shall be invested, administered, and distributed by law for the exclusive purpose of the members and beneficiaries of the retirement systems. None of the assets, proceeds, income, contributions, or payments shall be used, loaned, encumbered, or diverted to or for any other purpose whatsoever.

The protection of retirement system assets should have three parts as shown by the model language. First, it should enunciate the exclusive purpose rule, that is, assets of the retirement system are to be used only for members and beneficiaries. Second, it should prohibit the use of assets for non-retirement purposes. Taken together, the first part explains permitted uses of assets and the second sets out impermissible uses. Third, the protection should state that the assets are separate and independent trust funds. They are thus distinguishable from the general operating funds of the respective state or local government.

Retirement System Management, Including Investment of Assets

Each retirement system of the state and its political subdivisions shall have a board that has plenary authority and fiduciary responsibility for the investment of funds and administration of such system. The members of such a board shall:

- (a) Act solely in the interest, and for the exclusive purpose, of providing benefits to participants of the retirement system;*
- (b) Discharge their duties with respect to the retirement system with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise of a like character and with like aims;*

- (c) *Diversify, consistent with the fiduciary duties under this paragraph 3, the investments of the retirement system so as to minimize the risk of loss and to maximize the rate of return unless, under the circumstances, it is clearly not prudent to do so; and*
- (d) *Have, consistent with the fiduciary duties under this paragraph 3, the sole and exclusive power to make actuarial determinations based upon recommendations of an independent actuary with whom they contract.*

The model language makes clear that a board must govern a retirement system. The board has ultimate responsibility for all operations. For most retirement systems, the board manages both the investment of assets and the administration. In some cases, the retirement system board handles the administration only. Some other entity, such as an investment board, invests the system's assets. In those cases, the model language would need to conform to this separation of functions.

The model language then lists two standards of conduct required of board members, followed by two specific responsibilities. Subparagraph (a) imposes on board members a duty of loyalty to the participants of the retirement system. In exercising this duty, the loyalty is solely to the participants as opposed to the board members' own interests or those of third parties. This duty is related to paragraph 2 of the model language regarding the protection of retirement system assets. It differs, however, in that the duty applies to the board members, whereas paragraph 2 concerns the character of the retirement system assets as being independent and used exclusively for retirement purposes.

Subparagraph (b) reflects the well-recognized standard that board members must act prudently in carrying out their duties. Board members satisfy the prudence standard through detailed procedures that they precisely follow in order to ensure they reach the best decisions possible.

Subparagraphs (c) and (d) set out specific responsibilities for board members. The first responsibility is to diversify the assets of the retirement system. In so doing, they must achieve the right balance of minimizing the risk of loss and maximizing the rate of return unless, under the circumstances, it is clearly not prudent to do so. The duties of loyalty and prudence apply as the board members make investment decisions. As noted

above, the retirement system boards in certain states are responsible for administrative functions only. Some other entity, such as an investment board, invests the system's assets. In those states, the language would need to conform to this separation of functions.

The second responsibility of board members is to arrange for actuarial services to determine the funding needed to pay promised benefits. Such services involve adopting actuarial assumptions based upon recommendations made by an independent actuary with whom the board contracts. The duties of loyalty and prudence apply as the board members make investment decisions.

The model language addresses actuarial decisions in two places. First, it is stated in paragraph 3 as one of the responsibilities of the retirement board. Second, it is included in paragraph 1, the funding standard, because the model language designates the board, as opposed to the legislature, as the entity responsible for such decisions.

Guarantee of Pension Rights

Membership in retirement systems of the state and its political subdivisions is a contractual relationship, the benefits of which shall not be diminished or impaired.

An actuarially funded system with protected assets has little value if a legislature can eliminate retirement benefits at will. Consequently, a CPP should have a guarantee of pension rights. The model language embodies two simple ideas. First, membership in a retirement system is a contractual relationship, which is a set of rights provided by the respective state or local government. Second, these rights produce benefits that shall not be diminished or impaired. Diminishment means that benefits are reduced; impairment indicates that although the benefit has not been reduced, it has been made less valuable in some manner.

Appendix I

Provisions in State Constitutions Concerning Pensions

This information is current as of February 2004. Only provisions affecting teachers and education support professionals (ESPs) appear.¹

State	Citation	Protection of Retirement System Assets <i>A = Exclusive purpose rule B = No diversion rule C = Separate trust funds</i>	Retirement System Funding	Retirement System Management, Including Investment of Assets <i>A = Board must administer system B = Board invests assets C = Board decides actuarial issues D = Other</i>	Guarantee of Pension Rights	Other Provisions
AL	Amend. 472	A, B				
AK	Art. XII, Sec. 7				X	
AZ	Art. XXIX	A, C	X ²		X	
CA	Art. XVI, Sec. 17	A, C		A, B, C		
FL	Art. X, Sec. 14		X ³			
GA	Art. 3, Sec. 10, Para. I, II, & V		X ⁴			X ⁵ , X ⁶
HI	Art. XVI, Sec. 2				X	
IL	Art. XIII, Sec 5				X	

State	Citation	Protection of Retirement System Assets <i>A = Exclusive purpose rule</i> <i>B = No diversion rule</i> <i>C = Separate trust funds</i>	Retirement System Funding	Retirement System Management, Including Investment of Assets <i>A = Board must administer system</i> <i>B = Board invests assets</i> <i>C = Board decides actuarial issues</i> <i>D = Other</i>	Guarantee of Pension Rights	Other Provisions
IN	Art. II, Sec. 12			D ⁷		
LA	Art. X, Sec. 29	A, B	X ⁸ , X ⁹		X	X ¹⁰
ME	Art. IX, Sec. 18, 18-a, -b	A, B	X ¹¹ , X ¹²			
MI	Art. IX, Sec. 19, 24		X ¹³	D ¹⁴	X	
MS	Art. 14, Sec. 272A; Art. 15, Sec. 273	A, B	X ¹⁵			X ¹⁶
MO	Art. IV, Sec. 33; Art. VII, Sec. 14				X ¹⁷	X ¹⁸
MT	Art. VIII, Sec. 13 and 15	A, B	X ¹⁹	A, C, D ²⁰		

State	Citation	Protection of Retirement System Assets <i>A = Exclusive purpose rule</i> <i>B = No diversion rule</i> <i>C = Separate trust funds</i>	Retirement System Funding	Retirement System Management, Including Investment of Assets <i>A = Board must administer system</i> <i>B = Board invests assets</i> <i>C = Board decides actuarial issues</i> <i>D = Other</i>	Guarantee of Pension Rights	Other Provisions
NE	Art. III, Sec. 19; Art. XV, Sec. 17			D ²¹		X ²² , X ²³
NV	Art. 9, Sec. 2	B, C		A, C, D ²⁴		
NH	Pt. 1, Art. 36-a	A, B	X ²⁵			
NM	Art. XX	A, B, C	X ²⁶ , X ²⁷	A, B, C	X ²⁸	
NY	Art. V, Sec. 7				X	
NC	Art. V, Sec. 6	A, B				
ND	Art. X, Sec. 12		X ²⁹			
OK	Art. V, Sec. 62; Art. XXIV, Sec. 12	A, B				X ³⁰
PA	Art. 3, Sec. 26					X ³¹
SC	Art. X, Sec. 16	B	X ³² , X ³³	D ³⁴		

State	Citation	Protection of Retirement System Assets <i>A = Exclusive purpose rule</i> <i>B = No diversion rule</i> <i>C = Separate trust funds</i>	Retirement System Funding	Retirement System Management, Including Investment of Assets <i>A = Board must administer system</i> <i>B = Board invests assets</i> <i>C = Board decides actuarial issues</i> <i>D = Other</i>	Guarantee of Pension Rights	Other Provisions
TX	Art. 16, Sec. 67	A, B	X ³⁵	A, B		X ³⁶
VA	Art. X, Sec. 11	A, B, C	X ³⁷			X ³⁸
WA	Art. II, Sec. 25; Art. XXIX, Sec. 1			D ³⁹		X ⁴⁰
WV	Art. X, Sec. 6			D ⁴¹		
WI	Art. IV, Sec. 26					X ⁴²
WY	Art. 19, Sec. 11	A				
Total of States		16	14	11	9	11

Endnotes for Appendix I

¹ Maryland and Oregon have constitutional provisions not included here. Some wording in the Maryland constitution appears to prohibit a state pension system (Article III, Section 59). A court of appeals interpreted the provision, however, as applying to military pensions only. It does not affect the retirement programs for teachers, ESPs, and other state and local employees in the state. *Mayor and City Council of Baltimore City v. Fuget*, 164 Md. 335, 165 A. 618 (1933). In 1994, Oregon voters amended their state constitution to add Article 9, Sections 10, 11, 12, and 13. Although the provision related to pensions, it was not a protection. Instead, it limited the pension rights of Oregon public employees. The state Supreme Court ruled that the provision violates the contract clause of the U.S. Constitution. *Oregon State Police Officers' Association v. Oregon*, 323 Ore. 356, 918 P.2d 765 (1996). The provision, therefore, is no longer valid law.

² Arizona: requires actuarial funding of the retirement system.

³ Florida: requires actuarial funding of benefit increases.

⁴ Georgia: requires the legislature to define the funding standards for the retirement systems; standards must assure funding on an actuarially sound basis.

⁵ Georgia: permits benefit increases.

⁶ Georgia: authorizes retirement benefits.

⁷ Indiana: allows the retirement systems to invest assets in equities.

⁸ Louisiana: requires the amortization of the unfunded liability; legislature is mandated to pay off the unfunded liability.

⁹ Louisiana: requires the legislature to determine how to achieve sound actuarial funding of the retirement systems; constitution also specifies that once the legislature decides the actuarial method, the amount of money necessary to fund the retirement system is guaranteed.

¹⁰ Louisiana: requires retirement system for teachers and other employees of the public educational system.

¹¹ Maine: requires actuarial funding of the retirement system.

¹² Maine: requires the legislature to pay off the unfunded liability of the retirement system.

¹³ Michigan: requires accrued retirement benefits to be annually funded.

¹⁴ Michigan: allows retirement system assets to be invested in equities.

¹⁵ Mississippi: requires actuarial funding of benefit increases.

¹⁶ Mississippi: prohibits constitutional changes to retirement system through initiative process.

¹⁷ Missouri: affects the transfer of employees from one retirement system to another; guarantee in other states is broader.

¹⁸ Missouri: requires an actuary's statement before benefits may be changed.

¹⁹ Montana: requires actuarial funding of the retirement systems.

²⁰ Montana: requires the investment of retirement system assets according to fiduciary laws.

-
- ²¹ Nebraska: allows retirement system assets to be invested.
- ²² Nebraska: permits benefit increases.
- ²³ Nebraska: authorizes pensions for surviving spouses.
- ²⁴ Nevada: prohibits investments in the state and loans to the state.
- ²⁵ New Hampshire: requires actuarial funding of the retirement system.
- ²⁶ New Mexico: requires actuarial funding of benefit increases.
- ²⁷ New Mexico: permits modifications to the retirement plan to achieve actuarial soundness.
- ²⁸ New Mexico: grants plan participant who meets the minimum service requirements a vested property right with due process protections in his/her future benefit; different from guarantee in other states, which mandates that the benefits cannot be diminished or impaired.
- ²⁹ North Dakota: requires the appropriation of funds to the beneficiaries of the teachers' retirement system.
- ³⁰ Oklahoma: authorizes retirement benefits.
- ³¹ Pennsylvania: permits benefit increases.
- ³² South Carolina: requires actuarial funding of the retirement system.
- ³³ South Carolina: requires actuarial funding of benefit increases.
- ³⁴ South Carolina: allows retirement system assets to be invested in equities.
- ³⁵ Texas: requires actuarial funding of the retirement system.
- ³⁶ Texas: requires retirement system for persons employed in the public schools, colleges, and universities supported wholly or partly by the state.
- ³⁷ Virginia: requires actuarial funding of the retirement system.
- ³⁸ Virginia: requires retirement system for state employees and employees of participating political subdivisions and school divisions.
- ³⁹ Washington: allows retirement system assets to be invested.
- ⁴⁰ Washington: permits benefit increases.
- ⁴¹ West Virginia: allows retirement system assets to be invested in equities.
- ⁴² Wisconsin: permits benefit increases.