



# Evaluating Education Services Provider (ESP) Agreements

## Colorado Charter School Institute

The purpose of this guidance is to assist authorizers and charter school governing boards in reviewing and evaluating contracts or agreements entered into between charter school governing boards and Education Service Providers (e.g., for-profit or nonprofit entities that provide certain third-party education management services to a charter school, which may include academic, financial, and/or operational components, as defined in a contract). Note: Other terms that may be used for an ESP include an “Education Management Organization” (EMO), or “Education Management Provider” (EMP). Often times these terms are used interchangeably.

This guidance may not apply to third-party entities providing limited services, such as payroll, as those agreements may not warrant such an extensive review.

### **Role of the Authorizer**

The authorizer will review a draft ESP Agreement (1) as part of the charter application; and, (2) whenever an existing charter school requests permission to contract with an ESP (a Charter Contract will typically require advance authorizer approval for entering into an agreement with an ESP). The authorizer may also choose to review ESP agreements as part of renewal or in other high-stakes decision-making.

The authorizer itself is not entering into a contract with the ESP. In order to preserve the charter school’s autonomy, the authorizer’s review of a draft agreement should focus on two primary questions: (1) whether the school’s governing board is aware of the effect of the management agreement; and, (2) whether any provisions of the agreement contradict the terms of the contract or prohibit adequate oversight of the school. Below are sample questions to be considered and directed to members of the governing board.

#### **1. Whether the school’s governing board is aware of the effect of the management agreement**

- Is the school’s governing board aware of the key terms of the ESP Agreement and the effect those terms may have on the school?
- What due diligence did the governing board perform in selecting the proposed ESP?
- Did the governing board have the opportunity to negotiate the terms of the proposed ESP Agreement to ensure that it is the most advantageous for the school?
  - Was the governing board represented by independent counsel in these negotiations?
- Do certain provisions in the Agreement raise questions as to the governing board’s capacity to administer proper oversight?
- Does the governing board understand the division of roles and responsibilities that are set forth in the ESP Agreement?

#### **2. Whether any provisions contradict the terms of the Charter Contract or prohibit the authorizer’s adequate oversight of the school**

- Does the agreement violate any laws, rules, policies, or contract provisions?
  - Look For:

- Adherence to TABOR (e.g., 1 year term, subject to annual appropriation of funds)
  - Adherence to Financial Transparency posting and reporting requirements
  - No attempts to restrict the governing board from waiving its governmental immunity
  - Recognition that all records pertaining to the school are subject to open records requests; ESP will make all records readily available to school and authorizer
  - All financial records relating to the school will be made available to school's independent auditor
  - All materials purchased with federal dollars remain property of the school
- Does the ESP Agreement hinder the authorizer's ability to hold the governing board accountable?
  - Look For:
    - The ESP Agreement should make evident the primacy of the Charter Contract over the ESP Agreement
    - Governing board remains ultimately responsible for the performance of the school (academic, financial, and operational)
    - The ESP is clearly defined as a vendor of services
  - Examples of Potentially Problematic Provisions:
    - Provisions that would prohibit the authorizer to communicate with the governing board
    - Provisions stating that if the charter school breaches its contract, the ESP can step in to cure the breach

## **Look-For's: Protecting Governing Board Autonomy and Authority**

The following are "look for's" to be utilized by governing boards when reviewing or considering an ESP Agreement. No single factor necessarily determines the strength of the Agreement, rather the review should consider all factors holistically.

### **1. Understand what services are being provided**

- Look For: The ESP Agreement includes a clear and detailed description of the services to be provided pursuant to the agreement, leaving very little ambiguity.
  - Are all terms clearly defined?
  - Do the use of mandatory (e.g., "shall") and permissive (e.g., "may") terms align with the intent of the agreement?
  - Example of ambiguous description of services:
    - "The ESP will provide all educational services" – what does that mean? Curriculum and instruction? Hiring teaching staff? Administering assessments?

### **2. Understand roles of the ESP and school board, including decision-making authority**

- Look For: The ESP Agreement clearly delineates the roles and responsibilities of the ESP versus those of the school board.
  - Questions to ask:

- Who makes staffing decisions?
- Who has the authority to hire/fire the school leader?
- Who is preparing academic or financial reports?

### **3. Ensure that internal controls are in place to support board autonomy**

- Look For: The ESP Agreement does not include any provisions that would hinder the independence of the governing board.
  - Questions to ask:
    - Does the ESP have any role in selecting, approving, or compensating board members?
    - Do any employees of the ESP sit on the board?
    - Does the board have its own attorney, accountant, audit firm that are paid for by the board?
    - Does the board understand its fiduciary duties?

### **4. Understand when and how the board can terminate the ESP Agreement**

- Look For: The ESP Agreement clearly states the circumstances under which the governing board can terminate the agreement, and these circumstances are favorable to the school.
  - Questions to ask:
    - When can the board terminate the agreement? At the end of the school year? At renewal? At any time?
    - Under what conditions can the board terminate the agreement?
    - How much and what kind of notice must be provided to the ESP?
    - Are there clear and specific performance measures in the ESP Agreement?
  - Examples of potentially problematic provisions:
    - Numerous hurdles for the school to jump through if seeking to terminate
    - Term of the agreement is longer than the charter term and the school can only terminate “with cause”
    - Broad or vague performance expectations for the ESP that would render it difficult to terminate the Agreement “with cause”
    - Damage provisions that may make the school liable for costs not yet incurred
    - Mandatory arbitration provisions or mandatory dispute resolution provisions that are unduly burdensome
    - Automatic renewal of the contract upon charter renewal or some other prescribed automatic renewal that may limit the ability of the school to terminate the ESP Agreement

### **5. Ensure that the school can continue if the ESP Agreement is terminated**

- Look For: The ESP Agreement does not unreasonably burden the continued operation of the school should the ESP Agreement be terminated.
  - Examples of potential threats to continued operation of school:
    - All instructional materials are the property of the ESP and not the school
    - The ESP owns or holds the lease to the school facility
    - The ESP owns all school personal property and furniture

- The school has accrued financial “debt” to the ESP that would have to be paid back if the Agreement is terminated
- All finances are in an account controlled by the ESP
- Provisions that would prohibit the board from contracting with a different ESP for similar services if the Agreement is terminated

## 6. Understand the financial relationship between the ESP and governing board

- Look For: The governing board retains fiscal oversight of the school, and any fees paid to the ESP are reasonable and clearly defined.
  - Considerations:
    - How much is the school paying the ESP for the services?
      - The fee charged should be reasonable in light of the services provided, directly related to costs incurred, and based on fair market value.
    - Whether payments from the authorizer flow to a bank account controlled by the governing board
      - All public funds should be paid to and controlled by the governing board.
      - The governing board should maintain control of the school’s bank account.
    - Are all services included in the fee? Are there any extra, fee-based services? Are the services provided clearly defined in the ESP Agreement?
    - Whether the ESP is providing the school with any start-up loans or advances. What are the terms of these loans or advances?
    - Who owns items and materials purchased by the ESP with public funds?
    - Does the ESP have the ability or authority to sell or assign any public funds received?
    - Does the ESP agree to submit all financial disclosures and information as required by state law or the Charter Contract?
    - Are there provisions that would hinder the governing board from controlling the budget?

## 7. Identify any affiliated entities

- Look For: The ESP Agreement does not force the school into doing business with other affiliated entities that would result in a financial windfall to the ESP.
  - Questions to ask:
    - Is the ESP itself performing all services or simply acting as a “middle man” to obtain the services?
    - Does the ESP Agreement contain references to any other entities?
    - How do these other entities and the ESP benefit from the ESP Agreement? Are rates for services fair? What value does the ESP provide in this process? Could a lower rate be secured by contracting directly for those services?
      - Example: The agreement references a separate but affiliated entity that will own the facility and lease it back to the school. The ESP

fee is very low, but the affiliated entity will make a significant profit from the lease of the facility.

## **8. Understand the employment implications**

- Look For: The relationship between the ESP and teachers and staff is clearly defined and allows continued involvement by the governing board.
  - Considerations:
    - Whether the ESP or the school employs staff may determine whether employees are eligible for state benefits and retirement systems, and so this employment relationship should be carefully considered.
    - Whether the ESP Agreement allows the governing board to have sufficient oversight of the operations of the school.

## **9. Plan for the worst case scenario**

- Look For: A clear plan for division of roles and responsibilities should the School close while under the ESP agreement or shortly thereafter.
  - Considerations:
    - If the School were to close while the ESP Agreement is in effect, who would be responsible for School closure tasks such as the transferring of student records, disposition of assets, notification to employees, etc.?
    - Who would be responsible for ongoing data reporting responsibilities?
    - Who would be responsible for the financial audit for the fiscal year in which the ESP Agreement was in effect?

## **Pre-Contract Process**

Prior to entering into a contract with an ESP, the school's governing board must become familiar with state laws and authorizer rules regarding competitive bidding and approval of ESP Agreements, as well as conduct due diligence investigations of a potential ESP.

### **1. Competitive Bidding**

You may be subject to state or federal laws or local policies regarding competitive bidding, and an existing school should have competitive bidding policies consistent with these laws and policies and best practices. A governing board should be sure to review these when considering a prospective ESP.

### **2. Authorizer Approval**

The governing board should be sure to check with its authorizer when considering contracting with an ESP. An authorizer will typically review any proposed ESP Agreement at the time of charter application. If not reviewed at the time of application, the authorizer may require the charter school to request advance approval of any proposed ESP Agreement.

### **3. Due Diligence Investigations**

The school's governing board should be sure to conduct due diligence investigations of any prospective ESPs. These investigations may include:

- If the ESP has worked with other schools, reviewing the academic, financial, and operational performance of the other schools the ESP has served
  - Review academic performance data
  - Review financial audits
  - Speak with the authorizers of other schools with which the ESP works regarding operational performance
  - Check any court or judicial records that may be available
  - Check 990 Forms
  - General Google searches of the ESP and the directors of the ESP
- If the ESP does not currently work with other schools, determine what other information is available to assess the strength of the ESP
  - Resumes of ESP leadership
  - Donors and funding sources of ESP
  - Partner organizations and affiliated entities
  - Verification of any information provided by the ESP to demonstrate its strength
- If the ESP has not worked in the state before, what steps has the ESP taken to understand the Colorado landscape and all state-specific laws and regulations?

### **Questions?**

Please contact Trish Krajniak, Director of Legal and Policy Initiatives, at the Colorado Charter School Institute ([trishkrajniak@csi.state.co.us](mailto:trishkrajniak@csi.state.co.us)).

### **Resources:**

- Colo. Dep't. of Educ., "Colorado Charter School Sample Contract Language and Attachments," (Nov. 2014), pg. 41, available at: <https://www.cde.state.co.us/cdechart/distauthinfo>.
- Elisa Westapher and Gregg Stevens, National Association of Charter School Authorizers 2017 Fall Conference, "Deconstructing Management Agreements," Oct. 17, 2017.
- Nat'l Ass'n of Charter School Authorizers, "Principles & Standards for Quality Charter School Authorizing," 2015, available at: [http://www.qualitycharters.org/wp-content/uploads/2015/08/Principles-and-Standards\\_2015-Edition.pdf](http://www.qualitycharters.org/wp-content/uploads/2015/08/Principles-and-Standards_2015-Edition.pdf).