Evaluating Education Management Provider (EMP) Agreements

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 Management 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 EMP include an “Education Management Organization” (EMO), or “Education Service Provider” (ESP). Oftentimes 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.

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# Role of the Authorizer

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

The authorizer itself is not entering into a contract with the EMP. 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 EMP Agreement and the effect those terms may have on the school?
* What due diligence did the governing board perform in selecting the proposed EMP?
* Did the governing board have the opportunity to negotiate the terms of the proposed EMP 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 EMP Agreement?
1. **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; EMP will make all records readily available to the school and authorizer
		- All financial records relating to the school will be made available to the school’s independent auditor
		- All materials purchased with federal dollars remain property of the school
* Does the EMP Agreement hinder the authorizer’s ability to hold the governing board accountable?
	+ Look for:
		- The EMP Agreement should make evident the primacy of the Charter Contract over the EMP Agreement
		- Governing board remains ultimately responsible for the performance of the school (academic, financial, and operational)
		- The EMP is clearly defined as a vendor of services
	+ Examples of potentially problematic provisions:
		- Provisions that would prohibit the authorizer from communicating with the governing board
		- Provisions stating that if the charter school breaches its contract, the EMP 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 EMP 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 EMP 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 EMP will provide all educational services” – what does that mean? Curriculum and instruction? Hiring teaching staff? Administering assessments?
1. **Understand roles of the EMP and school board, including decision-making authority**
* Look for: The EMP Agreement clearly delineates the roles and responsibilities of the EMP 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?
1. **Ensure that internal controls are in place to support board autonomy**
* Look for: The EMP Agreement does not include any provisions that would hinder the independence of the governing board.
	+ Questions to ask:
		- Does the EMP have any role in selecting, approving, or compensating board members?
		- Do any employees of the EMP 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?
1. **Understand when and how the board can terminate the EMP Agreement**
* Look for: The EMP 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 EMP?
		- Are there clear and specific performance measures in the EMP 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 EMP 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 EMP Agreement
1. **Ensure that the school can continue if the EMP Agreement is terminated**
* Look for: The EMP Agreement does not unreasonably burden the continued operation of the school should the EMP Agreement be terminated.
	+ Examples of potential threats to continued operation of school:
		- All instructional materials are the property of the EMP and not the school
		- The EMP owns or holds the lease to the school facility
		- The EMP owns all school personal property and furniture
		- The school has accrued financial “debt” to the EMP that would have to be paid back if the Agreement is terminated
		- All finances are in an account controlled by the EMP
		- Provisions that would prohibit the board from contracting with a different EMP for similar services if the Agreement is terminated
1. **Understand the financial relationship between the EMP and governing board**
* Look for: The governing board retains fiscal oversight of the school, and any fees paid to the EMP are reasonable and clearly defined.
	+ Considerations:
		- How much is the school paying the EMP 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 EMP Agreement?
		- Whether the EMP 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 EMP with public funds?
		- Does the EMP have the ability or authority to sell or assign any public funds received?
		- Does the EMP 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?
1. **Identify any affiliated entities**
* Look for: The EMP Agreement does not force the school into doing business with other affiliated entities that would result in a financial windfall to the EMP.
	+ Questions to ask:
		- Is the EMP itself performing all services or simply acting as a “middle man” to obtain the services?
		- Does the EMP Agreement contain references to any other entities?
		- How do these other entities and the EMP benefit from the EMP Agreement? Are rates for services fair? What value does the EMP 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 EMP fee is very low, but the affiliated entity will make a significant profit from the lease of the facility.
1. **Understand the employment implications**
* Look for: The relationship between the EMP and teachers and staff is clearly defined and allows continued involvement by the governing board.
	+ Considerations:
		- Whether the EMP 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 EMP Agreement allows the governing board to have sufficient oversight of the operations of the school.
1. **Plan for the worst-case scenario**
* Look for: A clear plan for division of roles and responsibilities should the school close while under the EMP agreement or shortly thereafter.
	+ Considerations:
		- If the school were to close while the EMP 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 EMP Agreement was in effect?

# Pre-Contract Process

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

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 EMP.

1. **Authorizer Approval**

The governing board should be sure to check with its authorizer when considering contracting with an EMP. An authorizer will typically review any proposed EMP 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 EMP Agreement.

1. **Due Diligence Investigations**

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

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

# Questions?

Please contact LegalandPolicy\_CSI@csi.state.co.us.

# Resources

* Colorado Department of Education., “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.
* National Association 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>.