

ESP SCENARIOS

SCENARIO A: BOARD/ ESP TENSION

An elementary charter school managed by Gold Star Learning Systems, an expanding comprehensive ESP, is approaching the start to its fourth year of operation with over 350 students enrolled. Gold Star's strong record in managing a dozen schools in other states was a major selling point when the school's charter application was approved.

Near the end of the school's third year, Board members began to verbalize their dissatisfaction with the academic performance of the school and feel strongly that the root of the problem lay with the school leader. After completing a thorough year-end evaluation of the school leader the Board believes they have the evidence that points to letting the school leader go. In an executive session, the Board reached an agreement that the school leader should be fired and a committee of Board members should initiate a search process.

Gold Star Learning Systems, who recruited the school leader with board approval, and is the school leader's employer, is adamant that the school leader should not be fired for the overall stability of the school and has pledged their support to the school leader. The fate of the school leader has caused great tension between the Board and Gold Star as each tries to exercise their authority in the situation. The contract between the two parties requires Board's approval on hiring of the school leader, but delegates responsibility for his/her oversight and evaluation to Gold Star. The Board and Gold Star can not come to agreement on how best to resolve this conflict. With the first day of school quickly approaching, there is a serious crisis on hand.

Questions:

1. What is the role of the authorizer?
2. What is the role of the Board?
3. What is the role of the ESP?
4. In retrospect how could have this conflict been avoided? What roles do each of the parties play in ensuring such conflicts don't happen again?

SCENARIO B: LARGE ESP INITIATES A CHARTER SCHOOL

An application is pending for a new K-8 charter school that will be operated by a large nationally recognized comprehensive ESP currently managing 25 charter schools throughout the U.S. over the last three years. This school's projected enrollment is 750 students. A prominent local community member signed the application document (as the applicant and potential board member). It is no secret that the ESP initiated the idea of locating a new charter school in this community and recruited the seven proposed board members (including the applicant). Facilities in this area are very hard to secure and starting a large school without the ESP's financial guarantee will be impossible. The application is also very similar to two previously approved charter school applications in the state. Various national and local assessments indicate that more than half (16) of these ESP managed schools appear to be effective and successful within the communities they are located in. However, there has been recent media coverage indicating that the remaining schools have had a number of issues (i.e., low test scores, low enrollment, compliance issues). One of these "perceived failing" operational schools is located in your state. The other ESP-managed operational school in your state appears to be successful and managed effectively.

As part of their application process, the authorizer is holding interviews with the applicant groups. The ESP has inquired whether or not a representative from their company can sit in on the interview. Typically, the attendees are only the members of the founding group, however, whether an ESP can or should attend has not come up before.

Questions:

1. As the ESP, what role would you like to play in the interview?
2. As the Board, what role you want the ESP to play in the interview? How does that differ from the Board's role? Do you need the ESP there?
3. As the authorizer, why is this a policy decision? How do you view these two parties in an application process?

SCENARIO C: FATE OF A ESP MANAGED CHARTER SCHOOL

One of your authorized K-5 charter schools, managed and operated by an expanding comprehensive ESP, is nearing the end of its first year in operation with over 350 students enrolled. The school was approved two years prior, but did not open its doors until this past year due to difficulty finding a building site. The original approved board consisted of five knowledgeable and somewhat experienced members who, after careful deliberations (and submission of the contract to your organization for review), unanimously decided to enter into a five-year contract with the ESP. During the first (pre-operational) year, two of the original five board members resigned because of other commitments and were replaced by two new members just prior to the school's opening.

During the first year of operations, there were various changes in school staff and the ESP had become slow in responding to both staff and parent community concerns. There were also some problems with the ESP's method of financial reporting, which did not yet correlate with current state requirements. The ESP acknowledged its shortcomings early in the school year and pledged to resolve these issues "very quickly." It is now May and these issues have still not been resolved. The board has become disillusioned with the ESP's practices and frustrated with the lack of follow-through, especially the two new board members who insist that the board put the ESP on notice of breach and send the ESP a demand to cure the default, as required under the management agreement. A third board member is now "on the fence" about this issue. In spite of these concerns, several school site observations seem to indicate that students love this school and their teachers (all of whom have been hired and trained by the ESP), and are genuinely motivated to learn.

Questions:

From each of the three roles:

1. Can or should the school continue to operate?
 - A. If not, why not?
 - B. If so, what strategies/processes should be used to save it? (How can the authorizing entity help)? Is it appropriate to suggest that the Board and the single-entity ESP contract with an experienced multi-site ESP as a condition of keeping the charter contract?
2. What do you perceive as appropriate roles/responsibilities of the involved governing entities (Authorizer, School Board, and ESP)?

Management Contract Review checklist

School name: _____

EMO: _____

Date of review, reviewer: _____

- 1) The contract must comply with all applicable laws and regulations. The contract's choice of law provision, a standard provision in most contracts, must specify that Massachusetts law applies to any legal proceeding arising out of a dispute between the Board of Trustees and the EMO.

Done?/Comments:

- Boards should pay special attention to the public records law, G.L. c. 66, that requires schools to provide access to certain records to any member of the public upon request.

Done?/Comments:

- The term of the contract with the EMO may not exceed the term of the school's charter.

Done?/Comments:

- The Board cannot abdicate its legal or fiduciary responsibilities. For example, the contract must provide for sufficient Board oversight and cannot assign to the EMO the Board of Trustees' responsibilities as defined in G.L. c. 71, § 89.

Done?/Comments:

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- The contract must include provisions dealing with ownership of physical and intellectual property developed by the EMO or by the school's employees. Keep in mind that the charter school has an obligation to disseminate information to other schools in the Commonwealth. G.L. c. 71, § 89(II), and all contract provisions must conform to this requirement.

Done?/Comments:

- 2) The contract must include a description of how the parties will develop, approve, and oversee the school's budget and curriculum and how the Board of Trustees will monitor and oversee the EMO's financial and management services.

Done?/Comments:

- The contract should reflect that Boards have the ultimate responsibility for establishing the school's budget and determining its curriculum. G.L. c. 71, § 89(x).

Done?/Comments:

- The contract should have clear, easily understandable methods for determining the EMO's compensation. Ideally, methods of compensation should create incentives for the EMO that parallel the Board's goals for the school. The method of compensation should indicate all contract payments, lease payments, management fees, administrative fees, licensing fees, expenses, and other amounts payable to the EMO and under what conditions these amounts are payable.

Done?/Comments:

- The contract should indicate upon what sources of revenue the fee is based, especially if it is based upon a percentage of the school's revenues.

Done?/Comments:

Massachusetts Department of Education
Charter School Office

- The contract should include a provision specifying that the Board of Trustees hires the school's independent auditor. G.L. c. 71 § 89(hh).
Done?/Comments:

- The contract should require that the EMO furnish the charter school with all information deemed necessary by the charter school for the proper completion of the budget, financial reports and audits.
Done?/Comments:

- The contract should indicate that all financial reports provided or prepared by the EMO should follow generally accepted auditing principles and with the Department's prescribed format for charter school reporting.
Done?/Comments:

- All loans to, or investments in, the charter school by the EMO must be evidenced by appropriate documentation. In the case of investments, such documentation must explain how the investment will be treated on the books of the charter school and clearly state the EMO's expected return on equity.
Done?/Comments:

- Budgets prepared by the charter school should include all revenue anticipated and all expenses, as well as anticipated expenses and incidentals, associated with the operation and management of the charter school. The EMO must submit invoices and supporting documentation to justify expenses.
Done?/Comments:

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- 3) The contract must include a description of the specific services that the EMO will provide and a description of the Board of Trustees responsibilities. Be sure to include responsibilities required by law, such as the development of an annual report.

Done?/Comments:

- 4) The contract must include termination provisions. The contract should protect the Board of Trustees from unwarranted termination by the EMO and give the Board an opportunity to terminate the contract if the EMO fails to meet mutually agreed upon goals or standards.

Done?/Comments:

- 5) The contract must include a description of the relationship between the EMO and the Board. For example, the contract should clarify how the parties will hire, evaluate, and dismiss the school leader,

Done?/Comments:

- 6) The contract must include a direct reference in the contract to the school's academic accountability plan as approved by the Department, a commitment by the EMO to achieve the goals stated in the plan, and a description of how the Board will evaluate the EMO's progress toward achieving the plan's goals.

Done?/Comments:

Purchasing services from an Educational Management Organization (“EMO”)

Perhaps the most important procurement decision that some charter school Boards of Trustees will make is the decision to choose an EMO to provide educational and/or administrative services¹ to the school. This decision is critical to the success of a charter school and should be made with the utmost care. Boards should follow their normal procurement procedures, use sound business practices, and “shop around” to maximize competition when choosing an EMO.²

Once a Board has decided with which EMO it plans to contract, the Department strongly recommends that the Board hire legal counsel to help draft the contract. Most Boards of Trustees have less experience with such contracts than EMOs and, absent the assistance of legal counsel, may be at a disadvantage during this process. Boards of Trustees should realize that the educational services field is highly competitive, that there are many options for them to choose from, and that they have a good deal of leverage. It is the school’s Board of Trustees that holds the charter granted by the state.

After a Board has chosen an EMO, it must continue to maintain its independence from the company. For example, it is very unwise for a representative of an EMO to serve on a Board of Trustees of a charter school. If such representatives do serve on the school’s Board, these individuals must take particular care to ensure that they do not violate the state’s conflict of interest law or breach their duty of loyalty to the school.

Resources

The Department **strongly encourages** Boards of Trustees of charter schools exploring contracting with EMOs to consult the resources listed below before drafting the contract.

- 1) *Charting a Clear Course*. See footnote 2.
- 2) *The Inspector General’s Report: A Management Review of Commonwealth Charter Schools*.³
- 3) EMO contracts executed by charter schools. Contact the Charter School Office for samples.

3. Contracts for Educational Services

Department review of contracts for educational services

¹ Examples of administrative services that Boards of Trustees may choose to contract for include:

- Payroll and accounting services;
- Preparation of reports for the Department and other state entities;
- Selection and procurement of instructional materials, equipment or supplies; and
- Operation and/or maintenance of school facilities.

² Refer to page 8 of *Charting a Clear Course*, a resource guide for charter schools, for more information about the steps charter school Boards should take *before* choosing an EMO. Free copies of the guide may be obtained from the Charter Friends National Network at 651-649-5479. The resource guide is also available on the Charter Friends web site at <http://www.charterfriends.org/publications.html>.

³ *The Inspector General’s Report, A Management Review of Commonwealth Charter Schools*, published in November 1999, is available on-line at <http://www.state.ma.us/ig/igpubl.htm>

The Board of Education must approve the terms of charter school contracts with individuals for “substantially all educational services.” G.L. c. 71, § 89(j)(5). The Department has developed standards and procedures for reviewing and approving the contracts. Boards of Trustees of charter schools should review the information below to better understand the standards the Department will use to evaluate contracts with EMOs. EMO contracts are not valid or in effect prior to receiving final approval by the Board of Education. Charter schools may not construe inaction by the Board of Education regarding a request for approval of an EMO contract as approval of, or waiver of objection to, the contract or any provision contained in the contract.

In deciding whether to approve a contract with an EMO, the Department conducts a careful review. All contracts must include the required elements listed below. Once submitted for approval, if a contract fails to include one of these elements, the Department will require the Board of Trustees to change the contract.

Though the Department reserves the right to require any changes based on its overall review of the contract, its review primarily focuses on the issues listed below. The Department may either require the Board of Trustees to change the contract or suggest changes, depending on the specific provision in question.

Required elements of contracts for educational services⁴

- The contract must comply with all applicable laws and regulations. The contract’s choice of law provision, a standard provision in most contracts, must specify that Massachusetts law applies to any legal proceeding arising out of a dispute between the Board of Trustees and the EMO.
- Boards should pay special attention to the public records law, G.L. c. 66, that requires schools to provide access to certain records to any member of the public upon request.
- The term of the contract with the EMO may not exceed the term of the school’s charter.
- The Board cannot abdicate its legal or fiduciary responsibilities as the entity holding the charter. For example, the contract must provide for sufficient Board oversight and cannot assign to the EMO the Board’s responsibilities as defined in G.L. c. 71, § 89.
- The contract must include provisions dealing with ownership of physical and intellectual property developed by the EMO or by the school’s employees. Keep in mind that the charter school has an obligation to disseminate information to other schools in the Commonwealth. G.L. c. 71, § 89(II). All contract provisions must conform to this requirement.
- The contract must include a description of how the parties will develop, approve, and oversee the school’s budget and curriculum and how the Board of Trustees will monitor and oversee the EMO’s financial and management services.
- The contract should reflect that the Board of Trustees has the ultimate responsibility for establishing the school’s budget and determining its curriculum. G.L. c. 71, § 89(x).

⁴ The following criteria and protocol are effective for all contracts that have not yet been approved and apply to all contracts upon expiration of the term of the contract. See *Charting a Clear Course* for more information about these issues.

- The contract should include clear methods for determining the EMO's compensation. Ideally, methods of compensation should create incentives for the EMO that parallel the Board's goals for the school. The method of compensation should indicate all contract payments, lease payments, management fees, administrative fees, licensing fees, expenses, and other amounts payable to the EMO and under what conditions these amounts are payable.
- The contract should indicate upon what sources of revenue the fee is based, especially if it is based upon a percentage of the school's revenues.
- The contract should include a provision specifying that the Board of Trustees hires the school's independent auditor. G.L. c. 71 § 89(hh).
- The contract should require that the EMO furnish the charter school with all information deemed necessary by the school for the proper completion of the budget, financial reports and audits.
- The contract should indicate that all financial reports provided or prepared by the EMO will follow generally accepted auditing principles and will also comply with the Department's prescribed format for charter school reporting.
- All loans to, or investments in, the charter school by the EMO must be evidenced by appropriate documentation. In the case of investments, such documentation must explain how the investment will be treated on the books of the charter school and clearly state the EMO's expected return on equity.
- Budgets prepared by the charter school should include all revenue anticipated and all actual expenses, as well as anticipated expenses and incidentals, associated with the operation and management of the charter school. The EMO must submit invoices and supporting documentation to justify expenses.
- The contract must include a description of the specific services that the EMO will provide and the Board of Trustees' responsibilities. Be sure to address those responsibilities required of the charter school by law, such as the development of an annual report.
- The contract must include termination provisions. The contract should protect the Board of Trustees from unwarranted termination by the EMO and give the Board an opportunity to terminate the contract if the EMO fails to meet mutually agreed upon goals or standards.
- The contract must include a description of the relationship between the EMO and the Board. For example, the contract should clarify how the parties will hire, evaluate, and dismiss the school leader.
- The contract must include a direct reference to the school's accountability plan as approved by the Department, a commitment by the EMO to achieve the goals stated in the plan, and a description of how the Board will evaluate the EMO's progress toward achieving the plan's goals.

Process for submitting educational services contracts for Department review

Once a charter school has selected an EMO and obtained legal counsel, it can begin drafting the contract. To ensure that the Board of Education approves a contract for "substantially all educational services" before the school begins operating, schools should follow the following procedure for submitting the contract to the Department for approval.

- **Step 1:** With the assistance of legal counsel, draft the contract.
- **Step 2:** Send a draft of a proposed contract to the Charter School Office at least 120 days in advance of an intended start date for the contract. To allow for consistent referencing in the case of multiple drafts, the draft should be numbered and dated on the cover page and all subsequent pages.
- **Step 3:** The Charter School Office will review the contract based on the criteria above and attempt to return it to the school within 30 days, along with an EMO Contract Action Letter. If the contract is satisfactory, the Action Letter will state that and may note concerns that the parties should consider. Otherwise, the Action Letter will list specific changes that must be made, raise general areas of concern that the parties must address, and suggest changes that the parties may want to consider.
- **Step 4:** The Board of Trustees, consulting with its legal counsel, should meet with the EMO to review the Department's response and to discuss areas of concern. The Board can use the Action Letter as a guide for this meeting.
- **Step 5:** The parties then must redraft the contract, clearly indicating any changes that have been incorporated in the new draft, and resubmit the contract to the Charter School Office. The parties must resubmit the contract at least 60 days before the intended starting date of the contract. The contract is not valid until it is approved by the Board of Education. G.L. c. 71, § 89(j)(5).
- **Step 6:** If a Board of Trustees wants to change any contract provisions or terminate the contract after it has been approved, it must submit a written request for a charter amendment to the Department for Board of Education approval that follows the procedures in 603 CMR 1.11 and *Charter Amendment - Technical Advisory 03-3*. The Board of Education shall endeavor to approve or deny an amendment request within 60 days of receiving a complete amendment request. 603 CMR 1.11(4).