

**Ball State University Office of Charter Schools**  
***POLICY ON CONTRACTING WITH EDUCATIONAL SERVICE PROVIDERS***

**I. Introduction.** This Policy on Contracting with Educational Service Providers (“Policy”) shall apply to all charter schools for which Charters are issued or renewed by Ball State University (the “University”) on or after the effective date of the Policy and shall apply prospectively to any existing charter school or organizer (hereinafter “Organizer”) that enters into an agreement with an Educational Service Provider (“ESP”)<sup>1</sup> on or after the effective date of the Policy. Failure by the Organizer to comply with this policy may result in (1) the non-issuance of a Charter or (2) for existing charter schools, interventions, including but not limited to being placed on probationary status or the initiation of revocation proceedings under the charter.

**II. Organizer Due Diligence**

- a. Prior to executing any agreement with an ESP, the Organizer must provide evidence to the University that it has performed sufficient due diligence to establish that the ESP has the appropriate financial resources, educational services, and managerial experience to provide the contracted services. Prior to contracting with an ESP, the Organizer must obtain sufficient information to conclude that the ESP agreement, on the proposed terms and conditions, is in the best financial and educational interest of the charter school. In connection with such due diligence, and prior to the execution of an ESP agreement, the Organizer shall provide, at a minimum, the following information to the University Office of Charter Schools (OCS):
  - i. A copy of the ESP’s response to a request for proposals in accordance with IC 20-24-3-2.5.
  - ii. List of all ESP owner(s), directors and officers;
  - iii. Documentation of the form of entity (for-profit corporation, non-profit corporation, limited liability company, etc.);
  - iv. Name of ESP’s primary banking institution;
  - v. Legal counsel for the ESP, and contact information;
  - vi. Accounting firm for the ESP, and contact information; and
  - vii. A written statement regarding the ESP’s experience in providing educational services, the types of educational service to be provided and the ESP’s educational philosophy.
  - viii. Evidence of the education service provider's success in serving student populations similar to the targeted populations, including demonstrated

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<sup>1</sup> “Educational Service Provider” or “ESP” means a for profit or nonprofit service provider that provides comprehensive school management, design or support to the charter school as provided in I.C. 20-24-1-6.1 as amended, restated, or recodified.

academic achievement as well as successful management of nonacademic school functions, if applicable.

- ix. If applicable, any bankruptcies, tort claims, or audit findings related to the ESP
  
- b. Members of the board of the Organizer and/or the charter school, and employees of the Organizer or charter school, and their respective spouses or immediate family members<sup>2</sup> may not have any direct or indirect financial, ownership, employment, contractual or management interest in any ESP that contracts with the Organizer or charter school. The Office of Charter Schools may formally waive this requirement for persons who have an ownership interest in an ESP that contracts with the Organizer or charter school if it concludes that the ownership interest is minimal and such waiver will not violate any applicable laws or regulations.
  
- c. The Organizer must retain independent legal counsel to review and negotiate the ESP agreement and any amendment or extension thereto. Legal counsel for the Organizer or the charter school must not represent the ESP or principals thereof. The ESP agreement must be an arms-length, negotiated agreement between an informed Organizer board and the ESP as provided in I.C. 20-24-3-2.5 (4).
  
- d. Any proposed ESP agreement (which for purposes of this paragraph includes any proposed amendment thereto) must be submitted to the University Office of Charter Schools for review no later than thirty (30) days prior to the proposed date of execution. Earlier submission is strongly encouraged and may accelerate the review process. Together with the proposed ESP agreement, the Organizer must submit an opinion letter from its legal counsel, certifying to the University that the Organizer has fulfilled its obligations described in these Policies, and that the proposed ESP agreement is in no way inconsistent with this Policy or the Charter. The form attached to this Policy as Exhibit A should be used for this purpose.

Unless the University Office of Charter Schools Executive Director extends the review period, the University shall notify the Organizer within thirty (30) days of receiving the proposed ESP agreement if the agreement or amendment is disapproved, and the basis for disapproval. The Organizer shall not enter into an ESP agreement that has been disapproved by the University Office of Charter Schools. The University reserves the right to disapprove an ESP agreement that it determines is not in compliance with the Charter, applicable law, and/or University policies. The Organizer's board must approve the final contract in the same form as was approved by the OCS Executive Director

In the event the ESP Agreement is amended, the submission requirements outlined above apply. ESP amendments will be added to the charter school's

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<sup>2</sup> Family members include mother, mother-in-law, father, father-in-law, son, son-in-law, daughter, daughter-in-law, sister, sister-in-law, brother, brother-in-law, spouse or domestic partner.

Charter Agreement through the Charter Agreement amendment process identified in the Charter Agreement's Terms and Conditions.

- e The Organizer's board shall not approve an ESP agreement until all board members have been given the opportunity to review the proposed ESP agreement with the Organizer's legal counsel.
- f If the Organizer desires to enter into or amend or restate a loan agreement or a lease agreement with the ESP retained by the Organizer or any organization controlling, controlled by, under common control with, or otherwise affiliated with the Organizer (including any contractual arrangement by which the third party serves as the exclusive or primary lender or property owner for schools who contract with the ESP) (any such entity, an "ESP Affiliate"), before entering into such agreement, the Organizer shall perform reasonable due diligence to confirm that the financial and other terms of the agreement are reasonable and shall document such efforts to the Executive Director of OCS. The Organizer's board shall not approve such an agreement until all board members have been given the opportunity to review the proposed agreement with the Organizer's legal counsel.

### **III. Organizer's Administrative and Fiduciary Responsibilities**

- a If it negotiates an ESP agreement, the Organizer must still budget adequate resources to fulfill its Charter requirements which may include, but are not limited to: negotiation of the ESP agreement and any amendments, oversight of ESP, payment of staff costs, insurance required by the ESP agreement and any lease as well as insurance required by the Charter, financial audits, legal counsel, consultants, recording secretary and any other such cost necessary for the Organizer's operations.
- b The ESP shall present to the Organizer's board, on a frequency established by the Organizer's board, a detail of budget to actual revenues and expenditures with an explanation of variances. The ESP shall present to the Organizer's board, on a frequency determined by the Organizer's board, a detailed schedule of expenditures at object level for review and action by the Organizer's board.
- c The Organizer must be informed of the level of compensation and fringe benefits provided to employees of the ESP assigned to the charter school.
- d The Organizer shall have exclusive control of funds received by the Charter School and financial matters of the Charter School.
- e The Organizer is the recipient of all public funds disbursed to fund the operations of the charter school and all other funds to which the charter school or the organizer is entitled.

#### IV. ESP Agreement Provisions

##### a. Required Provisions

##### i. Roles and Responsibilities.

- a. The ESP agreement should clearly identify, define and differentiate the role of the Organizer and the ESP in the management and operation of the school(s), and specifically identify the independent authority of the Organizer and the responsibilities of the Organizer, including but not limited to the oversight, monitoring, routine evaluation of the ESP, and each parties' responsibilities in the event of cessation of operation of the charter school. IC 20-24-3-2.5(2)
- b. Any agreement between the Organizer or the charter school and an ESP must require the ESP to agree to, and comply with, the terms and conditions set forth in the Charter. The provisions of the Charter shall supersede any contrary or competing provisions contained in the agreement between the Organizer or the Charter School and the ESP. Further, the agreement between the Organizer or the charter school and the ESP shall include a paragraph incorporating by reference the Charter and specifically stating that the terms of the Charter supersede any contrary provisions in that agreement.
- c. In accordance with Indiana code, "the ESP Agreement must require an assurance that the Organizer will be structurally independent of the education service provider and shall set and approve school policies (IC 20-24-3-2.5(4))," including but not limited student conduct, school calendars, and dispute resolution.

ii. Term. The ESP agreement must specify a reasonable fixed term, not to exceed the term of the Charter. In addition, the ESP agreement must be terminable (i) at any time by the mutual written agreement of the Organizer and the ESP; (ii) by the Organizer upon any material breach of the ESP agreement by the ESP; (iii) by the Organizer if the ESP agreement or its implementation would serve as grounds for revocation under the Charter, would jeopardize the tax exempt or not-for-profit status of the Organizer, would create adverse tax consequences for the Organizer, or would cause the Organizer to be in violation of applicable law; (iv) by the Organizer should the ESP fail to meet the performance criteria outlined in the University's Accountability Frameworks; or (v) by the Organizer or ESP upon such other grounds as are specified by the ESP agreement. The ESP agreement must contain appropriate wind-down provisions delineating the rights and responsibilities of both parties upon cessation of operation of the charter school.

iii. ESP Performance Measures and Evaluation. The ESP agreement must clearly define performance measures, aligned to the ESP roles and responsibilities as defined in the agreement. The ESP agreement must

identify the procedures, data sources, and timeline the Organizer shall use to monitor and formally evaluate these defined measures on an annual basis.

- iv. Costs of Operating School. The ESP agreement must contain at least one of the following methods for paying fees or expenses, including a clear explanation of services provided: (i) the Organizer may reimburse the ESP for budgeted and approved fees or expenses upon properly presented documentation and approval by the Organizer's board; or (ii) the Organizer may advance funds to the ESP for the fees or expenses associated with the charter school's operation provided that documentation for the fees and expenses is provided before ratification or disallowance by the Organizer's board. The Organizer must retain the ability to disapprove expenditures not within the charter school's approved budget or otherwise approved by the Organizer's board. The ESP agreement may not specify that all or substantially all of the Organizer's state tuition support be paid to the ESP.
- v. Comparison of Budget to Actual Finances. The ESP agreement shall include requirements for reports on budgeted versus actual expenditures and the overall financial condition of the charter school at public meetings of the Organizer held in accordance with the Indiana Open Door Law (IC 5-14-1.5). Reporting requirements should include detailed accounting of grant awards and progress on, and deadlines for, expenditures.
- vi. School Records. The ESP agreement shall provide that the financial, educational, and other records pertaining to the charter school, whether or not generated or maintained by the ESP (including, without limitation, contracts of employees of ESP assigned to or working at the charter school), are charter school property, and that such records are subject to inspection and copying to the same extent that records of a public school are subject to inspection and copying under the provisions of the Indiana Access to Public Records Law (IC 5-14-3). All charter school records shall be available, upon request, at the charter school's physical facilities and, except as permitted or required under the Charter and applicable laws, no ESP agreement shall restrict the access of the Organizer, the University or the public to the charter school's records.
- vii. Additional Access to Records. The ESP agreement must require the ESP to provide to the Organizer and/or the University any data required for the Organizer to comply with the terms and conditions of the Charter, such as but not limited to financial data, enrollment data, demographic data, performance data, and student data, in the possession of the ESP, but may not include any proprietary, intellectual property, or similarly protected data of the ESP.
- viii. School Records Available for Audit. The ESP agreement must contain a provision that all finance and other records of the ESP related to the

charter school will be made available to the Organizer's independent auditor and to the Indiana State Board of Accounts for completion of audits required by law or by the Charter. Such records must be produced in Indiana at the offices of the Organizer or at the charter school facility.

- ix. Unauthorized Access. The ESP agreement must contain a provision requiring the ESP to notify the Organizer within a reasonable time, and in no event more than seventy-two (72) hours afterwards, if the ESP determines that any of the educational records or other personal information of any student then or previously enrolled at the charter school has been accessed by anyone without a legitimate, educational reason to access such educational records or personal information ("Unauthorized Access").
- x. Auditor Independence. The ESP agreement must specify that the Organizer is free to select and retain its choice of the independent auditor for the charter school.
- xi. Property Purchased with Charter School Funds. The ESP agreement shall provide that any equipment, materials and supplies purchased on behalf of or as agent of the charter school or exclusively for the use of the charter school shall be and remain the property of the charter school.
- xii. Rights as to Curriculum. ESP agreements must contain a provision that clearly allocates the respective proprietary rights of the Organizer or charter school and the ESP to curriculum or educational materials. At a minimum, ESP agreements shall provide that the charter school owns all proprietary rights to curriculum or educational materials that (i) are both directly developed and paid for by the charter school; or (ii) were developed by the ESP at the direction of the Organizer with charter school funds dedicated for the specific purpose of developing such curriculum or materials. Notwithstanding the foregoing, ESP agreements may include a provision that restricts the charter school's proprietary rights over curriculum or educational materials previously developed or copyrighted by the ESP, or curriculum or educational materials that are developed by the ESP from funds from the charter school that are not otherwise dedicated for the specific purpose of developing charter school curriculum or educational materials.
- xiii. Disclosure of Curriculum. All ESP agreements shall provide for disclosure of the ESP's educational materials and teaching techniques and other documents used by or in the charter school in accordance with applicable law, based upon the written opinion of the Organizer's legal counsel.
- xiv. Specification as to Employees of Charter School. ESP agreements involving employees must be clear about which positions are to be filled by employees of the ESP, and which positions are to be filled by employees of the Organizer or the charter school. If the ESP leases employees to the Organizer or the charter school, the ESP agreement must

provide that the leasing company accepts full liability for benefits, salaries, worker's compensation, unemployment compensation and liability insurance for its employees leased to the charter school or working on charter school operations. All employees hired by the ESP to work in the school must be hired in accordance with Indiana law, and Organizer's board approved policies.

Specifically, any contract with an ESP in which it is contemplated that an outside vendor's employees or agents will have direct, ongoing contact with students at the Charter School, the Charter School or Organizer shall include (1) a provision requiring that the vendor perform a criminal background check consistent with the requirements of IC 20-26-5-10 as to any employees or agents who will have contact with students of the Charter School and prohibiting any such person from serving the Charter School if the individual has been convicted of any of the crimes listed in IC 20-26-5-11 or any crime equivalent to any of such crimes; and (2) reference checks in accordance with IC 20-26-5-10.5.

- xv. Insurance. ESP agreements must contain insurance, bonding, and indemnification provisions outlining the coverage the ESP will obtain. The ESP's insurance is separate from and in addition to the insurance the Organizer is required to obtain under the Charter and should be appropriate for risk management of the functions delegated to the ESP. In the event that any employees of ESP are regularly at the charter school, the ESP's insurance shall, at a minimum, include general liability insurance and worker's compensation insurance at the limits that the charter school is required to maintain under the Charter, and such liability insurance shall name as an additional insured the State of Indiana, University, and its Board of Trustees, officers, employees, agents, and contractors.
- xvi. Indemnification. The ESP agreement must contain the clause for indemnification of the University by the "a clause for indemnification of the University by the ESP under the same terms that the Organizer indemnifies the University in the Charter. In addition, the ESP agreement must contain a provision specifically requiring the ESP to indemnify, defend, and hold harmless the Organizer and University for any liability losses, expenses, damages, claims, demands, judgments, fines, charges, liens, liability, causes of action or proceedings of any kind whatsoever arising directly or indirectly from any Unauthorized Access to information or records stored by the ESP.
- xvii. Limits on Marketing Expenses. Marketing and development costs paid by or charged to the charter school shall be limited to those costs specific to the charter school program, and shall not include any costs for the marketing and development of the ESP or other schools operated by the ESP.

- xviii. Compliance with Applicable Law and the Charter Agreement. The ESP agreement must require that the ESP perform all functions delegated to it in compliance with all applicable state and federal laws and with the terms and conditions of the Charter. The Charter must be incorporated by reference into the ESP agreement and the agreement must provide that any provisions in the ESP agreement that are contrary to or conflicting with the Charter shall be superseded by the terms and conditions of the Charter.
- xix. No Assigning or Subcontracting. The ESP agreement shall prohibit the ESP from assigning the ESP agreement without the consent of the charter school and the University and shall prohibit the ESP from further subcontracting the management, oversight or operation of the teaching and instructional program. The Organizer must conduct due diligence with regard to the proposed assignee, as described in Section II.a and ensure against any conflict of interest as described in Section II.b of these Policies. The Organizer shall not consent to such an assignment if the Organizer's due diligence does not provide evidence that the proposed assignee has the appropriate financial resources, educational services, and managerial experience to provide the services contracted under the ESP agreement.
- xx. Open-Door Law. The ESP agreement shall prohibit the ESP from operating the charter school in any manner that is inconsistent with the statutory requirement that the charter school comply with the Indiana Open Door Law and the Indiana Access to Public Records Act.
- xxi. Location of ESP Offices. If the ESP will perform administrative services for the charter school, the ESP agreement must require that the ESP maintain administrative offices in the charter school facility or within the limited radius of the charter school facility required by the Charter.
- xxii. Corrective Action Plan. The ESP agreement must require the ESP to cooperate and participate in any corrective action plan approved by the University to remedy any breach of the Charter that in any way involves services provided by the ESP.

b. Prohibited Provisions

- i. Organizer as Fiscal Agent. No provision of an ESP agreement shall alter the Organizer's obligation to be the fiscal agent for the charter school as required by law.
- ii. Organizer Remains Responsible for School. No provision of the ESP agreement shall interfere with the Organizer's duty to exercise its statutory, contractual and fiduciary responsibilities governing the operation of the charter school. No provision of the ESP agreement shall prohibit the Organizer from acting as an independent, self-governing body. The Organizer must retain the right to exercise its judgment in accepting or rejecting ESP recommendations and may not abdicate its



responsibilities and authority for policy setting, strategic planning, budgeting, the educational program and overall oversight, monitoring and supervision of the charter school.

- iii. Limit as to Term of Agreement. The term of an ESP agreement must not exceed the term of the Organizer's Charter.
- iv. Protection of Non-Profit Status. The ESP agreement must not include payment or financial arrangements inconsistent with the non-profit status of the Organizer.
- v. Employment Contracts. The ESP Agreement shall prohibit the ESP from executing contracts with its staff assigned to the school (including by way of example and not limitation, administrators, teachers, counselors, and the like) that contain non-compete agreements of any nature.
- vi. Prohibited Board Membership. Employees of the ESP, or ESP board members, if applicable, shall not be eligible to be members of the Organizer's governing body, or of any of the Organizer's advisory boards with decision-making authority delegated by the Organizer, unless such prohibition is expressly waived in writing and under such conditions as expressly set by the Executive Director of OCS.
- vii. Limits on Application of Law. The ESP agreement may not limit the manner in which the Organizer or the University may construe applicable laws in determining whether charter school operations and administration as conducted by the ESP are in compliance with such laws.
- viii. Timing of Termination. The ESP agreement must not permit termination without cause by the ESP effective other than at the end of a charter school academic year, unless approved by the Executive Director of the Office of Charter Schools.

**V. Lease and Loan Agreement Provisions.** If the Organizer or charter school intends to enter into a lease, execute promissory notes or other negotiable instruments, or enter into a lease-purchase agreement or other financing relationships with the ESP, then such agreements must be separately documented and not be a part of or incorporated into the ESP agreement. A breach of any such other agreement must not be deemed a breach of the ESP agreement.

**VI. Amendments.** In the event the ESP agreement is amended, the requirements of this policy apply. Amended ESP agreements will be added through the Contract amendment process.

## EXHIBIT A

[Date]

Executive Director Office of Charter Schools  
Teachers College TC-912  
Ball State University  
Muncie, Indiana 47306

[Name of Organizer] [Address]  
[Name of City], Indiana

Re: [Name of Charter School] Educational Service Provider (ESP) Agreement with [Name of ESP]

To Whom it May Concern:

In my capacity as legal counsel to [Name of Charter School Organizer] (the “Organizer”), I have represented the Organizer in connection with the proposed Educational Service Provider Agreement between the Organizer and [Name of ESP]. As legal counsel for the Organizer, I have reviewed copies of the following documents:

1. The attached Educational Management Organization Agreement, (the “Agreement”), between the Organizer and [Name of ESP].
2. The Ball State University Office of Charter Schools Policies for Contracting with Educational Service Providers (“Policies”).
3. The Charter effective [Month, Day, Year], (the “Charter”), issued by Ball State University to the Organizer.

I have also reviewed the articles of incorporation and bylaws of the Organizer, and originals and copies of such other documents, records, and statements of facts as I deemed relevant, and I have made such other investigations and inquiries, as I have determined necessary for the purpose of rendering the opinions set forth herein.

Based upon the foregoing, I am of the opinion that:

1. The Organizer is an Indiana nonprofit corporation duly organized, validly existing and in good standing under the laws of the state of Indiana and has full power and authority to enter into the Agreement.
2. The Organizer’s execution, delivery and performance of the Agreement does not violate any term or provision in the Policies and, to the best of my knowledge after due inquiry, the Organizer has complied with all terms and provisions in the Policies.

3. The Organizer's execution, delivery and performance of the Agreement does not permit or require an improper delegation of the Organizer's:
  - (a) Statutory and fiduciary responsibilities under applicable law; or
  - (b) Obligations and duties under the Charter.

In addition, the Agreement does not conflict with any of the provisions of the Charter or the Policies.

Sincerely,

[Name of Organizer's Legal Counsel]