



Evaluating Education Service Provider Agreements

Guidance & Considerations

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Introduction

Georgia law requires state charter schools to be governed by the boards of non-profit organizations. These non-profit governing boards must maintain decision-making authority in personnel decisions, financial decisions, curriculum and instruction, resource allocation, establishing and monitoring the achievement of school improvement goals, and school operations.¹ However, a charter school’s non-profit status does not prevent the governing board from contracting with a for-profit entity, like an Education Service Provider, for management and other services.²

An Education Service Provider (ESP) is a nonprofit or for-profit organization that contracts with charter schools to provide multiple educational, operational, or comprehensive management services, including, but not limited to, curriculum design, instructional resources, professional development, financial and operational management, facilities management, or any combination thereof. ESPs may also be called Education Management Organizations (EMO) or Education Management Providers (EMP). Non-profit ESPs are often referred to as Charter Management Organizations (CMO).

Whether a state charter school contracts with an ESP for comprehensive or limited support, it must ensure that the governing board remains involved in school-level governance and responsible and accountable for all operations, compliance, and performance of its contractors. Robust ESP agreements preserve the governing board’s ability to safeguard the academic, financial, and operational health of the charter school and ensure the governing board maintains the autonomy to act in the best interests of the charter school.

This guidance is intended to assist petitioners and governing boards in evaluating arrangements with ESPs or finalizing the terms of ESP agreements. This guidance does not constitute legal advice and should not be a substitute for seeking independent legal counsel concerning the propriety and legal compliance of any agreement

¹ O.C.G.A. § 20-2-2062(12.1); O.C.G.A. § 20-2-208(4); See also State Board of Education (SBOE) 160-4-9-.06

² O.C.G.A. § 20-2-2065(b)(1).

or arrangement with an ESP. In addition, governing boards are encouraged to review the guidance herein to ensure they exercise appropriate due diligence before entering an agreement with an ESP.

The Authorizer's Role

If a state charter school elects to contract or amend a contract with an ESP, the charter school must seek and receive approval of the contract or amendment from the SCSC Executive Director prior to its execution. Petitioners who plan to contract with an ESP must gain approval of the ESP agreement or contract before SCSC staff will make a recommendation for petition approval. The governing board should not submit an ESP agreement for SCSC review until all board members have had an opportunity to review the proposed ESP agreement with the governing board's legal counsel.

ESP agreements and amendments should be submitted for review no later than thirty (30) days before intended execution; however, earlier submission is strongly encouraged. The SCSC Executive Director reserves the right to disapprove of the proposed ESP agreement and to require changes to the agreement consistent with applicable law; rules, regulations, and policies of the State Board of Education and SCSC; and, in the interest of public policy.

Although the SCSC Executive Director must review and approve ESP agreements before their execution, the SCSC, as an authorizer, does not enter into contracts or other agreements with the ESP. The SCSC's review of ESP is targeted at ensuring the governing board maintains the autonomy to execute its functions to provide school-level governance for the charter school. The SCSC reviews ESP agreements to ensure that (a) the governing board is aware of the impact of the agreement and (b) the provisions of the agreement align with the terms of the charter contract and permit adequate oversight of the charter school. This guidance includes questions petitioners and governing board members may consider when vetting ESPs or defining the terms of a management agreement with an ESP.

Additionally, pursuant to SCSC Rule 691-2-.06, any plan by a petitioner or state charter school to use, lease, occupy, purchase, remodel, or renovate a site, building, or facility through an arrangement with an ESP must be codified through a written agreement with the ESP. The SCSC Executive Director must approve the written agreement before its execution.

Governing Board Due Diligence

When considering a potential contract with an ESP, members of the school governing board should perform sufficient due diligence to establish that the ESP has the appropriate financial resources, educational services, and managerial experience to provide the contracted services. Generally, governing boards may wish to:

- Evaluate the ESP's academic track record.
- Review the ESP's financial audits.
- Review court filings/judicial records.
- Review ESP leader resumes.
- Identify ESP donors and funding sources.
- Identify partners, affiliated entities, and subsidiaries.
- Verify information provided by the ESP.

The governing board should retain independent counsel to review and negotiate a proposed ESP agreement. In other words, counsel for the governing board should not also represent the ESP, its principles, or its officers. Counsel for the governing board should not be paid or compensated by the ESP or any entity or organization affiliated with the ESP. The proposed ESP agreement should be an arms-length, negotiated agreement between

the school governing board acting independently and autonomously in accordance with the charter contract and its fiduciary duties to the charter school.

Guiding Considerations

Governing boards are encouraged to refer to the following considerations and questions when deciding whether to contract with an ESP or when evaluating a proposed ESP agreement. These considerations should not be construed as or used as a substitute for independent legal advice. State charter schools are strongly encouraged to consult with independent legal counsel before entering any contract or written agreement with an ESP.

General Provisions

1. Are all parties to the contract accurately identified and consistently referenced throughout the agreement?
2. Does the contract contain definitions for frequently used terms or terms of art? Is the terminology used throughout the agreement clear and unambiguous?
3. Are cross-references within the agreement accurate?
4. Does the agreement accurately state the status and relationship of parties to the agreement (e.g., independent contractor, agent, employee, division, subsidiary, etc.)?

Roles, Functions, and Responsibilities

5. Does the agreement provide a clear and detailed description of the services to be provided under the agreement? For example, does the agreement state generally that the “ESP shall provide educational services” without detailing the specific services the ESP will provide?
 - a. Will the ESP be responsible for creating or providing the school’s curriculum? If so, does the management agreement contain a mechanism for governing board approval of curriculum selections or changes? Does the agreement permit the governing board to ensure the curriculum aligns with the Georgia Standards of Excellence? Does the management agreement contemplate which party will be responsible for bridging curriculum gaps if any are identified?
 - b. Will the ESP be required to maintain the school’s website? If so, does the agreement require the ESP to ensure the website complies with the website requirements in [SCSC Rule 691-2-03 State Charter School Monitoring](#) and [SBOE Rule 160-4-9-.04 Charter Authorizers, Financing, Management, and Governance Training](#)?
 - c. Does the management agreement contemplate the ESP playing a role in developing school policy? If so, does the governing board maintain the authority to evaluate, adopt, and revise school policies? Does the agreement require that policy recommendations made by the ESP comply with laws, rules, and policies applicable to the school and governing board?
 - d. Does the agreement permit the ESP to subcontract any of the services to be provided under the contract? If so, does the agreement require governing board notice and approval? Are there certain services that the board does not want to be subcontracted? If so, does the agreement list those services explicitly?
 - e. Does the agreement clearly reflect all entities that will perform services under the agreement? Does the agreement refer directly or indirectly to other parties? If so, which services are provided by the ESP, and which will be provided by a subcontractor, affiliated

organization, or subsidiary? What is the relationship between the ESP and any other parties that will perform services under the agreement? How do these other entities or the ESP benefit from the arrangement? Are the rates for these services fair based on fair market values? Does the ESP provide a value consistent with its proposed fee?

- f. **Does the agreement address the circumstances under which the ESP may assign the performance of some or all services?** Does such an assignment require governing board notice and advance approval?
- g. **Does the agreement permit the ESP to seek loans, grants, or sign contracts on behalf of the school?** Does the agreement appropriately safeguard the use and control of public funds? Does the agreement contemplate the ESP's handling of federal grants, including the Charter School Program (CSP) grant? Is the ESP's control or handling of federal grant funds consistent with the requirements of the grant or program?
- h. **Does the agreement permit the governing board to procure goods and services from other vendors or contractors or is the board prohibited from doing so?**
- i. **Will the ESP or its staff have obligations related to creating, maintaining, or storing school records?** If so, does the agreement clearly reflect the ownership interest of student and other records? Does the agreement accurately uphold the governing board and school's obligations pursuant to the Georgia Open Records Act? Does the agreement appropriately address the school's Family Educational Rights and Privacy Act (FERPA) obligations?
- j. **What, if any, personnel, or human resources functions will the ESP provide?** What role does the ESP play in personnel or human resources decisions?
- k. **How broad is the authority granted to the ESP?** For example, does the agreement contain a provision that states that the ESP will provide "additional services" or "any other function necessary for school operations?"
- l. **What is the ESP's role with respect to the school's facility?** Does the school lease its building from the ESP? Is that lease agreement separate from the ESP agreement? Are the terms supportive of the governing board's autonomy? Does the school plan to take loans or enter other financial arrangements with the ESP for use of or access to a facility? Are the terms and conditions of such agreements separate from the management agreement? Are they fully severable? Does the agreement reference a separate entity affiliated with the ESP that will own the school's facility and lease it back to the school? If the ESP fee seems low, will an entity affiliated with the ESP make significant profits from the lease of the facility?
- m. **What school closure obligations does the ESP have?** If the school were to close while the management agreement is in effect, who is responsible for transferring students' records, disposing of assets, and notifications to the school community and employees? Who will manage ongoing data reporting obligations? Who will ensure financial accounts are closed and audits are completed?

Governing Board Obligations

- 6. Does the ESP have any role in selecting, approving, or compensating governing board members?
- 7. Do any governing board members or school employees sit on the ESP's board?
- 8. Does the governing board have its own attorney and accountant?

9. Has the governing board identified an independent auditor for the school?
10. Do all governing board members understand their fiduciary duties to the school and agree to adhere to a conflict of interest policy that is, at minimum, consistent with O.C.G.A. § 20-2-2084?
11. Does the agreement uphold the governing board's legal decision-making authority as codified in O.C.G.A. § 20-2-2062(12.1), which defines "school-level governance"?
 - a. Does the agreement require the ESP's approval to amend the school's charter contract?
 - b. Does the agreement uphold the governing board's obligations for school oversight, as codified in the charter contract?
12. Does the agreement uphold the obligation of the governing board as an employer consistent with the requirements of [SBOE Rule 160-4-9-.04 Charter Authorizers, Financing, Management, and Governance Training](#)?
 - a. Does the agreement clearly reflect who will be employed by the ESP and who will be employed by the governing board? Are the designations consistent with applicable regulations? Does the agreement reflect the circumstances under which the ESP may employ and or otherwise direct the work of school staff?
 - b. What impact do the employment terms have on employees' access to state benefits, including health and retirement benefits? Does the proposed staffing structure permit the governing board to exercise its authority over school personnel? Do the arrangements infringe upon that authority?
13. Are the terms of the agreement consistent with the governing board's obligation to comply with the Open Meetings Act, O.C.G.A. § 50-14-1 et seq., and the governing board and school's obligations to comply with the Open Records Act, O.C.G.A. § 50-18-70 et. seq.?
 - c. Does the agreement contain confidentiality provisions that are inconsistent with the school's obligations under applicable open government laws? For example, does the agreement require that certain documents and information be kept confidential in violation of applicable laws?
 - d. Does the agreement mandate the ESP's attendance during executive sessions of the governing board? Is the arrangement permitted under the Open Meetings Act?
14. Do any provisions in the agreement impair the governing board's ability to control the school budget?

Charter Term, Amendments & Termination

15. Does the agreement accurately reflect the length/term of the agreement and procedures for termination and renewal of the agreement consistent with [SCSC Rule 691-2-.07 Multi-Year Contracts Beyond the Charter Term](#)?
16. Does the agreement reflect the governing board's obligations to seek and receive SCSC approval before executing amendments to the agreement as required by the charter contract? Does the agreement include the process and procedures for amending the agreement?
17. Does the agreement clearly define the conditions upon termination of the agreement and the related obligations of all parties?
 - a. Are the circumstances warranting termination specifically defined? For example, what are the notice requirements (method of notice and timing) required for termination? When can the governing board terminate the agreement? Any time? At renewal? At the end of a school year?

Under what circumstances can the governing board terminate the agreement? Are related ESP performance measures clearly identified in the agreement? Is there a penalty for early termination of the agreement by either party?

- b. **Is the process for terminating the agreement clear?** Is the period for providing notice of termination reasonable? In other words, can the ESP terminate the agreement with only a few days' notice? Is it overly burdensome to initiate termination? Is arbitration or mediation required before termination?
- c. **Does the agreement detail the effective date of a termination and/or duties and obligations of the parties upon notice of termination?** Does the agreement require the ESP to cooperate with school officials during the transition period following a termination notice? Does the agreement consider the impact of termination on school finances, operations, and academics?
- d. **Are the roles, functions, and responsibilities of the parties detailed and appropriate to ensure the sustainability of school operations, if applicable?** For example, upon termination, who has property rights to instructional materials? How will a termination impact the school's use of a facility leased or owned by the ESP? How will the termination of the management agreement impact any loans or other financial arrangements between the governing board and ESP? Does the governing board have sufficient control and access to the school's financial accounts? Does the agreement prohibit the school from contracting with another ESP? Does the ESP own rights to the school's name?
- e. **Does the agreement specify any amounts or services due upon termination of the agreement?**

Financial Arrangements

- 18. **Does the agreement accurately state the fee the ESP will receive for its services and when and how payments to the ESP shall be tendered and processed?** For example, does the agreement specify which services are included in the ESP's fee and those subject to additional fees? Are any additional fees clearly delineated? Does the agreement contemplate invoicing and governing board approval of additional fees and services?
- 19. **Do the provisions permit the governing board to retain financial oversight of the school?** Do the financial terms permit the governing board to determine whether the ESP's fee is reasonable and clearly defined in the agreement? Is the ESP fee reasonable in light of the services provided, directly related to costs incurred, and based on fair market value?
- 20. **Does the agreement contemplate depositing public funds into a bank account controlled by the governing board?** Does the governing board maintain exclusive control over the school's bank account? Will the governing board receive itemized invoices to allow it to ensure that payments are for services that the ESP actually rendered?
- 21. **Does the agreement reference start-up loans or advances from the ESP? Are the terms of such loans or other financing arrangements clear and unambiguous?** Are they contained in other written agreements? If so, are they incorporated by reference into the management agreement? Are the terms related to or contingent upon continuing the management agreement?
- 22. **Which party owns items and materials purchased by the ESP with public funds?** Does the agreement give the ESP the authority to sell or assign any public funds received?

23. Does the agreement require the ESP to submit financial disclosures and information? If not provided in the agreement, has the ESP agreed to do so prior to executing the agreement?
24. Are there provisions that would hinder the governing board from controlling the budget?
25. Does the agreement detail the ESP's role in the governing board's budget adoption process? Is the ESP's role in the budget approval process consistent with the governing board's obligation to oversee school finances and to approve the annual operating budget in accordance with O.C.G.A. § 20-2-167.1? Does the agreement require ESP approval of the annual operating budget *and* any amendments thereto? Does the agreement permit the ESP to override the governing board's budget approval or amendment? For example, does the agreement allow for termination if the governing board fails to adopt the ESP's budget recommendations?

Miscellaneous Provisions

26. If warranties and representations are included, are they accurate? Do they reflect the legal, regulatory, and contractual obligations of the governing board?
27. Does the agreement specify in what jurisdiction disputes arising under the agreement shall be subject to?
28. Does the agreement specify the requirements for notices made under the agreement?
29. Does the agreement address the extent to which the contract is the sole agreement between the parties; the effect of prior agreements, communications, or understandings; and the impact of waivers of provisions of the agreement?
30. Does the agreement address how it should be interpreted if some provisions are deemed unenforceable?
31. Does the agreement contemplate the impact of acts of God, war, riots, or other extraordinary events on the parties' obligation to perform?
32. Does the agreement state that it will be construed and interpreted in accordance with Georgia law?
33. Does the agreement define through what means any notices required by the agreement shall be made and to whom such notices shall be directed?
34. Does the agreement require parties to comply with laws, rules, regulations, and policies applicable to state charter schools, including compliance with the charter contract?
35. Does the agreement clearly describe any requirements for obtaining insurance, including the scope and amounts of coverage, requirements for identifying insured parties, and other reporting obligations?
36. Are the circumstances, notice procedures, and consequences for breach and default clearly defined for both parties?

SCSC Designees & Technical Assistance

The SCSC General Counsel is the Executive Director's designee for the purpose of ESP agreement review. If you have any questions or require technical assistance, please contact SCSC General Counsel Cerrone Lockett at Cerrone.Lockett@scsc.georgia.gov. The SCSC Legal Division does not provide legal counsel or advice.