

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

- I. Introduction.** These Policies on Contracting with Educational Service Providers (“Policies”) 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 Policies 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 Policies. Failure by the organizer to comply with these Policies may result in the non-issuance of a Charter, or for existing charter schools, 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:
- i.** List of all ESP owner(s), directors and officers;
  - ii.** Type or form of entity (for-profit corporation, non-profit corporation, limited liability company, etc.);
  - iii.** Name of ESP’s primary banking institution;
  - iv.** Legal counsel for the ESP, and contact information;
  - v.** Accounting firm for the ESP, and contact information; and
  - vi.** 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.
- 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 may not have any direct or indirect 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

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<sup>1</sup>“Educational Service Provider” or “ESP” means a service provider that manages or operates a charter school or provides administrative, managerial or instructional staff to the charter school.

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. 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.
- 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 these Policies or the Charter. The form attached to these Policies 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. 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. By not disapproving an ESP agreement, the University is in no way giving approval of the ESP, the fee arrangement, or any other provisions contained in the ESP agreement.
- 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 other 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 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.

#### **IV. ESP Agreement Provisions**

##### **a. Required Provisions**

- i. Costs of Operating School. The ESP agreement must contain at least one of the following methods for paying fees or expenses: (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.
- ii. 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, as well as performance reports on the educational program operations from the ESP at public meetings of the organizer held in accordance with the Indiana Open Door Law (IC 5-14-1.5).
- iii. 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.

- iv. Additional Access to Records. The ESP agreement must require the ESP to provide to the Organizer and/or the University such reports and information in addition to such access to any books and records (financial or otherwise) and access to personnel, facilities and operations pertaining to the charter school as may be required for the Organizer to comply with the terms and conditions of the Charter and the law.
- v. 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.
- vi. 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.
- vii. 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.
- viii. 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.
- ix. 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.

- x. 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.
- xi. 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 agreement, and such liability insurance shall name as an additional insured the State of Indiana, Ball State University, and its Board of Trustees, officers, employees, agents, and contractors.
- xii. Indemnification. The ESP agreement must contain the clause for indemnification of the University by the ESP specified in the Charter and an agreement to indemnify the charter school against any negligent or willful actions of any employees, agents, or contractors of the ESP.
- xiii. 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.
- xiv. 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.
- xv. No Assigning or Subcontracting. The ESP shall prohibit the ESP from assigning the ESP agreement without the consent of the charter school and the charter school's authorizer 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.

- xvi. 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.
- xvii. 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.
- xviii. 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 Contract. 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. 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.

- vi. 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.

- 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.

## **EXHIBIT A**

[Date]

Executive Director  
Office of Charter Schools  
Dean's Office — Teachers College  
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]

Ladies & Gentlemen:

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:

*Revised November 30, 2012*



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.

Very truly yours,

[Name of Organizer's Legal Counsel]