

Issue Brief

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Authorizing Matters

The Terms of the Deal: A Quality Charter School Contract Defined

Introduction

Man, an animal that makes bargains.¹

A contract is about commitment and responsibility. It is about the commitment that two or more parties make and the responsibility to deliver on those commitments. When school developers and authorizers turn a charter application into a contract, the relationship transforms: it shifts from aspiration to expectation and from theory to practice. The charter application contains the aspirations and theories of what the school can be. The contract defines the practical expectations for what, in fact, the school will become.

The contract is the embodiment of the autonomy-for-accountability bargain and the commitments of both parties. The authorizer commits to entrusting public dollars and public school students to the independent governing board of the school. It also commits to giving the governing board more flexibility in how it operates the school than is afforded traditional public schools. In return, the school's governing board commits to handling the funds responsibly, complying with its legal obligations, and educating the students well.

NACSA's *Principles and Standards for Quality Authorizing* state that a quality authorizer "negotiates contracts with charter schools that clearly articulate the rights and responsibilities of each party regarding school autonomy, expected outcomes, measures for evaluating success or failure, performance consequences and other material terms."

The contract is what makes school-based autonomy and accountability real and thus is critical for making

the charter school concept work. This Issue Brief² presents the legal framework in which the contract operates, the categories that the material terms should cover, and limitations on the scope. The purpose is to provide the reader with an overview of how to develop a quality charter school contract.

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External Authority

*Justice requires that to lawfully constituted authority there be given that respect and obedience which is its due.*³

Contracts do not exist in a vacuum. Authorizers and schools operate under the shadow of laws and regulations. Charter schools operate within a multi-layered legal framework that typically includes federal law, state law, local codes and school board policies.

At the same time, charter schools are often intended to be exempt from many laws and regulations that constrain the operation of traditional public schools. It is important for the parties to understand and be able to determine which external rules apply and which do not. For that reason, the contract should recognize and identify the external authorities that are relevant to the school's operation.

Federal Law. Charter schools are not exempt from federal education- and civil rights-related law including No Child Left Behind (NCLB), the Individuals with Disabilities Education Act (IDEA), FERPA (education records privacy), Title VI (civil rights), Title IX (sexual harassment), and ADA (disabilities). The contract should, at a minimum, identify federal laws to which the school is subject. To the extent that the state has developed specific requirements related to the implementation of NCLB, those should be included in the contract.

State Law and Regulation. In contrast to the uniform application of federal law, the applicability of state law and regulation to charter schools varies widely. In some states such as Arizona, charter schools have an automatic waiver from many state laws and regulations that constrain the decision-making authority of traditional public schools. In other states, such as Colorado, charter schools may receive waivers based on a satisfactory explanation of the

reason. In still others, schools are presumed to be subject to all relevant education laws unless the charter law specifically provides otherwise.

Whatever the availability of waivers, the following are among the categories of state law and regulation that typically apply to all charter schools:

- Health, safety and welfare
- Civil rights
- State testing and accountability
- Open government (public records and meetings)

The contract should explicitly identify the state law and regulations with which the school is expected to comply.

Authorizer Requirements. Particularly in the case of school district authorizers, it is sometimes within the authorizer's discretion to determine which, if any, of its policies and procedures will apply to charter schools. For example, it may be up to the authorizer to decide whether protocols and procedures for reporting performance information that apply to traditional public schools will also apply to charter schools. The contract should identify which authorizer policies and procedures are applicable.

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The *Authorizing Matters Issue Briefs* are a publication of the National Association of Charter School Authorizers, a professional resource for authorizers and public education officials working to achieve quality through new public schools. NACSA broadly disseminates each Issue Brief in print and electronic forms. Additional printed copies are available by request.

Your comments, questions and suggestions about this brief or the series are welcome.

Charter Application. The charter application is not the same as the contract. The application contains a blueprint for the school as conceived by the founding group; however, not every part of the application need be part of the contract. Only those pieces that are integral to the school's identification or operation, such as the school's mission, location, educational philosophy and program, should be incorporated. In general, components of the application that are material to the school's operation and form the basis on which the authorizer will hold the school accountable should be incorporated into the contract. The topic of materiality is discussed in more detail, below.

Material Terms

A lean agreement is better than a fat lawsuit.

The contract should present the material terms (see “*What is a Material Term?*” below) in an organized way that is coherent and easy to reference. In its work with authorizers like the Recovery School District in Louisiana and the Florida Schools of Excellence Commission, NACSA has used the following categories for material terms.

Recitals. This introductory section should reiterate the purposes of the charter school law, the authority of the authorizer and the school to enter into an agreement, and the circumstances under which the contract is being entered (such as the date and status of the application approval). Typically, the recitals are presented as a series of “Whereas ...” statements.

Establishment of the School. This section should define the circumstances of the school’s existence, including affirming legal status of the school, authority of the signatories, and restrictions or requirements that apply to the school’s governing body. The authorizer should be contracting not with an individual or group of individuals but with an entity that is legally defined and established consistent with the state’s charter school law. In most states this entity must be a not-for-profit corporation.

The section on Establishment of the School should also identify the school’s location.

Operation of the School. This section typically begins with the school’s approved mission statement, either by stating it or by reference to the approved application. It should also address governance issues such as the requirement that the governing board adopt legally valid bylaws; operate consistent with those bylaws; and hold open meetings consistent with statutory transparent governance requirements.

The application should serve as a constant reference for the school’s operational requirements. The application will often have addressed issues such as the grade ranges and number of students, student recruitment and enrollment

practices, the school calendar, student discipline, handling of student records, and various assurances related to how the school will operate. In most cases, the contract can reference relevant parts of the approved application or applicable law. However, even where a topic has been addressed in the application, the contract term may require more specificity. For example, the application will likely specify a target enrollment number, but the contract should also address the degree of variation from that number (either above or below) that will be treated as material compliance. Similarly, the typical application will present a discipline plan that ultimately needs to be translated into a formal policy. The policy is what should be incorporated into the contract. In this way, the approved application serves as a constant touchstone for the contract without being assumed to have fixed the exact terms of that agreement.

School Financial Matters. Schools are entitled to clarity around the funding process and amounts, particularly when the funding flows through the authorizer. The School Financial Matters section should document the funding process and calculation from enrollment reporting to the funding formulas, to the schedule for funding transfers.

Schools should know the authorizer’s expectations with respect to financial management and records. To this end, the section on School Financial Matters should address annual audit requirements, reporting requirements, asset ownership, and asset disposition in the event of school closure.

Personnel. Charter schools usually have a great degree of autonomy over personnel matters. A standard personnel provision expresses the charter school’s election to have “at will” employment. Other Personnel provisions address background check requirements and restrictions for school employees, certification requirements for teachers and para-professionals consistent with the No Child Left Behind Act, and a requirement for the adoption of employment policies. On the whole, the school’s broad authority to han-

WHAT IS A MATERIAL TERM?

“Materiality” is one of those rare legal concepts whose legal meaning is both straightforward and has remained generally consistent with common usage. Something is material if it is relevant and significant to the outcome. For example, a material witness is someone who has information relevant and significant to determining the guilt or innocence of the defendant. For charter schools and authorizers, the relevant outcome is a renewal decision. So consideration of whether a charter contract term is material hinges first and foremost on whether it would be relevant and significant to the authorizer in making a renewal decision.

dle personnel matters means that the Personnel section should be relatively brief.

Charter Term, Renewal and Revocation. The charter school contract should state the length of the charter term. This section should also provide guidance regarding the basis on which the authorizer will make a renewal decision, the circumstances that may warrant revocation, and authority for the dissolution of assets in the event of school closure.

Operation of the Contract. There are typically a number of standard provisions that clarify how the contract itself will operate. These include indemnification, notice, waiver, severability, assignment, dispute resolution, amendment, and merger (entirety of the agreement). Most of these are generic legal terms for which legal counsel can provide standard language. However, the definition of and procedure for contract amendment and dispute resolution require authorizer input and judgment.

For amendments, the standard typically requires amendment for material changes to the contract. Some authorizers have an annual contract review process so that contract amendments can be made on a regular schedule rather than piecemeal. With respect to dispute resolution, the authorizer and the school should have an understanding and agreement on a procedure for resolving disputes. The procedure will vary depending on the nature of the authorizer. For example, a school district will likely have a different procedure than a not-for-profit or an independent authorizing agency.

Authorizer Policies. In many ways the heart of the contract is the policies and practices that should be included as exhibits. The policies and practices should document the authorizer's expectations from pre-opening through renewal decisionmaking. They should provide a road map for the school of the authorizer's expectations and of what the consequences may be for failure to meet those expectations.

Following are policies that the authorizer should establish and incorporate into the contract:

School Evaluation Framework: presents the performance standards that will provide the basis for renewal decisions based on state, federal and charter requirements.

Pre-opening Procedures: sets expectations for the start-up process and helps schools understand what steps are needed to be prepared to open in an organized, effective fashion.

There are typically a number of standard provisions that clarify how the contract itself will operate.

Financial and Attendance Reporting: establishes clear timeline and content expectations for financial and attendance reporting.

Scope of Independent Audit: defines the appropriate scope of an independent charter school audit.

Comprehensive Educational Services Contract Requirements: establishes a contract review checklist designed to ensure that both the charter board and the authorizer retain authority to fulfill their legal rights and responsibilities under the charter and applicable law.

School Intervention Protocol: documents the circumstances and process by which the authorizer may intervene when the school is not fulfilling its contractual obligations.

Renewal Decision Making Protocol: Documents the process by which the authorizer will make charter renewal decisions.

School Closure Protocol: documents procedures for orderly, structured closure of a school following a nonrenewal or revocations decision.

The Balancing Act, Part I: Means and Ends

When you're committed to something, you accept no excuses, only results.⁵

In developing a charter contract, it is important to distinguish between means and ends. Means are about *how* things get done. They address process. Ends are about *what* the school ultimately accomplishes. They are about results.

The following table briefly illustrates the distinction between means and ends in the context of the charter school contract:

PERFORMANCE CATEGORY	MEANS	-->	ENDS
Educational Performance	Curriculum implementation; daily schedule; quality of instruction	-->	Student outcomes
Financial Performance	Financial management systems	-->	Financial position (reserve); audit results
Organizational Performance	Student recruiting; fundraising	-->	Enrollment; facility quality

It is central to the charter idea that schools be judged not on how they operate but on what they achieve. Charters are intended to have a great deal of autonomy and flexibility when it comes to the means: the educational and operational processes. The inherent tension is that most efforts to ensure educational equity and fairness, such as civil rights laws or the Individuals with Disabilities Education Act (IDEA), focus on procedure. Therefore, the charter contract must substantially regulate the area where charters are intended to have the most autonomy.

The focus on process or means is necessary not only because the contract is about legal compliance but also because the authorizer has a responsibility to ensure that schools are treated consistently and fairly. The authorizer must establish consistent expectations for compliance with the IDEA's procedural requirements. The authorizer must establish consistent expectations for organizational performance, such as compliance with health and safety requirements and fulfillment of the board's duty to operate as a publicly accountable entity. And the authorizer must establish common procedures to ensure that schools are treated fairly with respect to their receipt and management of public funds.

Although most requirements are designed to promote consistency and fairness, authorizers should remain cognizant that every additional compliance requirement demands

time and resources from the school and the authorizer that might otherwise be focused on educational achievement. Each additional requirement places an additional burden on both the school and the authorizer for compliance, oversight and enforcement. Each additional requirement also constrains the school's flexibility and autonomy. As such, requirements intended to prevent failure also risk impeding success. Therefore, the authorizer should weigh the benefit of any new regulations against the potential cost.

The following questions may be helpful for conducting the cost benefit analysis of a new procedural requirement:

- Is the procedure legally required for charter schools?
- If so, is there authority to grant a waiver?
- If not legally required or if a waiver is possible, is the reason for imposing the requirement compelling?
- What is the additional burden on the school for compliance?
- What is the additional burden on the authorizer for oversight and enforcement?
- Does the need for the requirement outweigh the burden on the school and the authorizer for implementation?

Authorizers should conduct this type of analysis before imposing terms that, both individually and cumulatively, constrain the means by which a school operates.

The Balancing Act Part II: Knowing When to Stop

The rest is a mere matter of detail, to be settled with judgment, discretion, and caution.

At what point does the contract have sufficient detail that the rest can be "settled with judgment, discretion, and caution"? An experienced attorney will tell you that the contract should aim to anticipate and address any foreseeable circumstance that might arise between the parties. That approach is a thorough one. However, in its thoroughness, it contradicts a basic premise of charter schools – that the

school must have flexibility to determine how best to achieve the outcomes for which it will be held accountable.

Perhaps a good test of whether a term warrants inclusion is whether a change to that term would be material (See "What is a Material Term?" on page 3). Typically, material changes to a contract require amendment. For example, the

physical location of the school is clearly material because the adequacy of the facility and the school's compliance with health and safety requirements are relevant and significant for a renewal decision. If a school changes its location, the contract should be amended to reflect the change. However, the decision to move the sixth grade math class to a different room almost certainly is not material. Similarly, most people would agree that the decision to eliminate the technology focus at a Science and Technology

school would constitute a material change to the educational program but that the decision to hold science class in the morning versus after lunch would not. If a change to the contract term would be considered material – that is, if it would be relevant and significant to the renewal decision – then it should be included in the contract. If a change would not be material, then the term might well be unnecessary in the first place.

Closing

True mastery can be gained by letting things go their own way.⁷

A sound contract gives the parties what they need to go their own way. It documents what the school and the authorizer are required to do and what the school is required to achieve. It simplifies the job of oversight,

enabling the authorizer to focus on holding the school accountable for doing what the contract requires. By defining expectations clearly, the authorizer gives the school the autonomy to be responsible for its own success.

FAQs

What is the difference between a “charter,” a “contract,” an “operating agreement,” and a “performance agreement”?

Though it depends on the authorizer and the law, the answer is often that the difference is semantic. If the authorizer uses a document to memorialize the agreement with the school then it doesn't matter whether the name for that document is “charter,” “contract,” “operating agreement,” or something else; as long as two parties have agreed to the terms and signed the document, it should be considered a binding agreement regardless of the name. Sometimes state law determines which term should be used. For example, Colorado law provides that an approved application be developed into a “contract.” In other states, common practice in the charter school community has generated a term of art. In California, for example, the agreement that succeeds and supplements an approved petition (application) has, through common practice, come to be almost uniformly labeled a Memorandum of Understanding. Regardless of the label, a signed agreement between the school and the authorizer that sets out the rights and responsibilities of each party should be treated as binding.

Although the terms are generally interchangeable, you should refer to the law and to the particular authorizer to be certain. A few authorizers distinguish specific parts of the agreement. For example, at State University of New York's Charter Schools Institute, one section of the contract with schools is a performance agreement that focus specifically on the expectations for charter renewal.

How much of the law should be referenced or included in the contract?

As with many aspects of the contract, balancing and judgment is required in deciding how much of applicable law should be specifically referenced or included. On the one hand, the goal is to make the contract a complete documentation of the parties' rights and responsibilities. On the other hand, the contract should be manageable and of practical use. If the contract fails to mention applicable law, it is clearly incomplete. If it explicitly identifies and discusses every applicable law and regulation, it will quickly become unwieldy.

Helpful guidance in managing this balance lies in the “materiality” analysis discussed above. Strictly speaking, all applicable laws are material because violation of the law can be a basis for non-renewal (or even revocation) of the charter. However, some laws are more material than others. The laws that are most directly relevant and significant should receive explicit treatment in the contract, especially if their application to charter schools is not uniform. For example, IDEA, NCLB and the state's accountability system are directly relevant and significant for evaluating educational performance, but there is legitimate variation between states and sometimes even individual authorizers or schools regarding implementation. The contract should not only reference but also discuss explicitly how those laws translate to expectations for the school's operation and performance.

For other laws, the obligation to comply may be similarly significant but the performance expectations may be more commonly and consistently understood. For example, most charter school laws require that a school conduct an annual independent audit. There are well-established professional standards for how to conduct an independent audit of a not-for-profit organization, and there are professional performance standards for the results. In that case, it may be sufficient for the contract simply to state the legal requirement that the school have an annual independent audit conducted by a certified accountant and state the performance expectation that there not be any significant findings.⁸

At the other extreme, there are laws and regulations whose materiality is more a matter of cumulative effect than of individual compliance. For example, charter schools are subject to myriad building codes and regulations. Violation of any one of those codes is, technically, a violation of the law and, therefore, grounds for nonrenewal or revocation. However, short of serious health or safety violations, it is difficult to imagine non-compliance with a single building code having comparable weight in a renewal decision to violation of the IDEA or state accountability requirements. A general contractual reference to compliance with “all applicable law” should be sufficient to incorporate any and all legal requirements that are likely to become significant only in the event of cumulative non-compliance.

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What is the status of the charter application once the contract is signed?

It is helpful for the contract to address the status of the approved application. Some contracts incorporate the application by reference. The benefit of this approach is a clear indication of the charter's status. The limitation is that the application typically contains much content and a level of detail that is not ultimately relevant to the contract. Ideally, a contract will incorporate only the parts of the application that are relevant to how the authorizer will ultimately evaluate the school.

What is the best way to handle contract amendment?

Contract amendment should be approached cautiously. It can be a time consuming and administratively burdensome process, especially for an authorizer that operates within a larger bureaucracy like a school district. In addition, frequent revision undermines the parties' ability to rely on the expectations that were established at the beginning of the charter term.

Yet changed circumstances sometimes make amendment necessary. One way to minimize the administrative burden is to give authorizer staff the authority to approve changes pending ratification by the governing board. Another is to establish an annual process for reviewing and amending contracts so that the contract can be reopened and amended, if necessary, at one time rather than piecemeal throughout the year.

What happens when something is not clear in the contract and the parties are in disagreement?

The contract should establish a dispute resolution procedure. As with other terms related to implementation of the contract, the dispute resolution procedure can generally be a standard term that is the same for all schools. A standard approach to dispute resolution helps to ensure legal compliance as well as consistency and fairness in how the authorizer interacts with its schools.

Should authorizers have one standard contract template for all its schools or negotiate separate contracts with individual schools?

An authorizer that has already chartered or expects to charter more than a few schools should have a contract template from which to negotiate individual agreements. New authorizers often negotiate separate contracts with each school; however, that approach tends quickly to become impractical. Many if not most contract terms, including those related to legal compliance and state performance standards, are imposed by external authorities and are, therefore, non-negotiable. A contract template will help the parties clarify which terms are negotiable and will help the authorizer generate clear consistent agreements with each school.

ENDNOTES

- ¹ Adam Smith
- ² This Issue Brief expands on content presented by William Haft and Paul O'Neill at NACSA's 2008 Annual Conference and provides the basis for NACSA's webinar on "The Rules of the Road: Developing Sound Performance Contracts."
- ³ Pope Pius XI.
- ⁴ German Proverb
- ⁵ Art Turock
- ⁶ John Griffin Carlisle
- ⁷ Tao te Ching
- ⁸ Notwithstanding professional standards, authorizers in some states have found enough inconsistency in accounting practices that they have developed policies establishing minimum requirements for the conduct of an independent audit. It is always important for an authorizer to exercise independent professional judgment based on experience with and understanding of the charter school sector.

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