



EDUCATION LAW & GOVERNANCE UPDATE

WINTER 2012

NEGOTIATING CONTRACTS: TIPS FOR SUCCESS

By: *Cliff Schneider*

While schools follow an academic calendar and a fiscal year that ends in June, many vendors and service providers take the New Year as an opportunity to renew the terms of their contracts. We routinely review contracts of all kinds for our clients who, as we like to remind them, are not only charter schools but also not-so-small businesses when one takes into account the number of people they employ and the volume of revenues and expenses they manage year in and year out. While traditional district schools have the benefit of central purchasing at the district level or, at the very least, a district law department to review and negotiate contracts, charter schools do not generally have access to such resources. Although they are no substitute for legal advice, the following factors may be helpful for charter school leaders and networks to keep in mind as they interact with vendors.

Many of you have heard the Latin term *caveat emptor* which means "let the buyer beware." How does this apply to contracts? Well, with some exceptions, the law presumes that when two parties enter into a contract, that contract and all of its terms are enforceable.

So in other words, once the contract is signed and the products and/or services begin to flow, it is improper for a buyer who may be having second thoughts to decide to back out of a contract without penalty. Under many circumstances, the penalty for terminating the contract would consist of paying out the entire fee stated in the contract. Additionally, there are critical points, some that are simply unique to the charter school setting, that should be considered prior to the signing of any contract.

We are often called on by schools to assist with vendor and service provider negotiations, and have found the following quick pointers to be helpful:

1. Term and Termination.

Many contracts have a defined term (e.g. "the term of this agreement shall be one year"), some with auto-renewal provisions (e.g., "if either party does not provide two months' prior written notice, the term shall automatically renew..."), with and without specific termination provisions

Important Upcoming Dates for NY Charter Schools:

State Education Department RFP for New Applications:

<http://www.p12.nysed.gov/psc/startcharter.html>

Related Deadlines:

2012 Round One Submission
Deadlines:

Full Applications: February 27,
2012.

Note: Letters of Intent were
due on January 17, 2012.

2012 Round Two Submission
Deadlines:

Letters of Intent: June 25, 2012
Full Applications: July 18, 2012

SUNY Charter Schools Institute RFP for Spring Round of Applications:

<http://www.newyorkcharters.org/openAppKit.htm>

Related Deadlines:

Completed Spring Proposals:
February 28, 2012.

Note: Letters of Intent and
Evidence of Active
Community Outreach for the
Spring 2012 application cycle
were due on January 18,
2012.

Charter Schools Lobby Day in Albany: February 7, 2012

2012 National Charter Schools Conference

<http://www.publiccharters.org/conference/2012/home.aspx>

June 19-22, Minneapolis
Convention Center, MN

(e.g., "this contract can be terminated only for breach"; "this agreement may be terminated by either party upon 30 days prior written notice...").

- If agreeing to an auto-renewing term, consider whether the notice required to elect not renew is sufficient time for your school to make a proper decision. Also, make sure to calendar the date by which notice must be sent to opt out of the renewal term to ensure no issues arise. Too often, schools miss the notice date and fall into the renewal of a contract that they may prefer to terminate.
- Even in cases where a school wants to continue a contract, missing the notice date for an auto-renewing contract may take away a bargaining chip – If the school sends a notice letting the vendor know that it may elect to opt out of the contract, it can then negotiate the terms of any renewal.
- With respect to termination, consider having both a termination for cause provision that permits termination should the vendor or service provider not fulfill the terms of the agreement, and a termination for convenience provision that allows you to end the term after providing reasonable advance notice. The latter will provide the school with the flexibility to go after a better deal or change things if the relationship is not working out well but does not rise to the level of a breach of contract.

2. Indemnification and Insurance. While your school should possess sufficient insurance coverage to protect it from injury to person and/or property, when entering into a contract with a vendor or service provider, the liability for any potential mishap should be appropriately defined and assigned from the outset.

- At the very least, each party should be responsible for the actions or inactions (omissions) of its own people. So, in other words, the school should not be responsible for what a vendor's employees may do or forget to do that may lead to some sort of

loss or injury.

- Consider requesting that vendors and service providers name the school as an additional insured party on the vendor/service provider's insurance policy and provide the school with a copy of an insurance certificate evidencing that this has been completed. A copy should be retained with a copy of the agreement in the school's files in the event a legal issue stemming from the agreement may arise.
- With respect to a school's insurance coverage, the school's board and administration should review the school's policies at least annually, ensuring that the types of coverage required by the school's charter and advisable from a risk management perspective are current and sufficient to meet the school's needs. Such coverage should include general liability, property, directors and officers, employment practices, errors and omissions, automobile, medical expense, workers' compensation, disability and other forms of coverage required by the school's charter and/or state law.

3. Privacy and Security. A school is unique in the respect that due to the presence of students, certain privacy laws and regulations apply. Also, for this same reason, the character and background of those individuals who regularly interact with students must also be accounted for.

- Agreements that provide vendors or service providers with access to students' information should properly spell out that vendor/service provider's duties of confidentiality, non-disclosure, etc. and those provisions should be strictly enforced.
- Agreements that have vendors or service providers providing services to schools on a school's campus,

placing their personnel on the campus, should include provisions that provide for the proper level of background screening of the individuals that may come into contact with students. There are specific New York State laws and regulations that define such requirements and these should at a minimum be reviewed and, where appropriate, worked into the terms and conditions of an agreement to ensure the safety of students and staff at the school.

Signing any contract has many legal implications and should be carefully considered. The pointers above represent a few areas that should be considered when negotiating a contract and a school's particular needs, the vendor or service provider with which the school desires to contract and potential legal issues should be analyzed during the course of negotiation.

Cohen Schneider LLP would be happy to assist you with reviewing all types of contracts and agreements. Please feel free to contact Cliff Schneider at cshneider@cohenschneider.com or any of our other attorneys for assistance.

State Education Department:
<http://www.p12.nysed.gov/psc/AddingBoardofTrusteeMembers.html>

SUNY CSI:
<http://www.newyorkcharters.org/schoolsBOT.htm>

NYC Department of Education:
<http://schools.nyc.gov/community/planning/charters/Accountability/default.htm> (bottom right, under "Key Documents")