COURT OF APPEALS, STATE OF COLORADO Court Address: 2 E. 14th Avenue, Denver, CO 80203 (303-861-1111) Name of Lower Court: Denver District Court, Denver, Colorado Trial Court Judge: The Honorable Catherine A. Lemon Case No. 07CV3538	
Appellants: DOLORES HUERTA PREPARATORY HIGH, LAURA MAESTES, DENISE GALLEGOS and MARITZA MARTINEZ, v. **Appellees:** COLORADO STATE BOARD OF EDUCATION; and PUEBLO SCHOOL DISTRICT NO. 60, a Colorado Municipal Corporation,	▲ COURT USE ONLY ▲
Attorneys for Appelle Pueblo School District No. 60: PETERSEN & FONDA, P.C. Thomas T. Farley, # 2614 Patrick Garcia, # 9737 James R. Gerler, # 8293 Bradley Bufkin, #33794 Mary E. Jensen, #39275 215 West Second Street Pueblo, CO 81003-3251 Tel.: (719) 545-9330 Fax: (719) 542-8515 E-mail: info@petersen-fonda.com	Case Number: 08 CA 664

ANSWER BRIEF OF APPELLEE PUEBLO SCHOOL DISTRICT NO. 60

PETERSEN & FONDA, P.C.
James R. Gerler, #8293
Thomas T. Farley, #2614
Patrick Garcia, #9737
Bradley T. Bufkin, #33794
Mary E. J. Jensen, #39275
215 West Second Street
Pueblo, CO 81003-3251

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES:

STATUTES:

Pueblo School District No. 60 (District), by and through their attorneys, Petersen & Fonda, P.C., submits its Answer Brief as follows:

II. STATEMENT OF FACTS

On May 11, 2004 Dolores Huerta Preparatory High (DHPH) entered into a Charter Contract with Pueblo School District No. 60 (***See Exhibit 25, Folder 2 Marked as Exhibits Tendered by JAG [Dolores Huerta Preparatory High Charter School Contract Dated May 11, 2004]***). This agreement demonstrates that DHPH and the District agreed to provide for funding in the long run by including DHPH in mill levy and bond elections. In that Contract, Sections 12.5 and 12.6 deal with the issue of long-term capital funding. On that May 11, 2004 date, DHPH and the District agreed to strike provisions in the agreement that would have provided $900,000 to DHPH. Pertinent portions of the transcript of that meeting are found at (***See Exhibit A, Folder 1 Marked as Exhibits Tendered by JAG [Transcript of 5/11/04 School Board Meeting Regarding the DHPH Contract]***). DHPH later invoked third party mediation pursuant to C.R.S. 22-30.5-107.5 concerning long-term facility funding. The Mediator in that case concluded that C.R.S. 22-30.5-105(2)(c)(II) required the Contract to address long-term facilities needs and that in conjunction with C.R.S. 22-30.5-404 and 504(5)(a)(II)(B) funding be comparable to other high schools in the District. That

Order also required the District to pay DHPH at least $900,000. The mediation Order was appealed by the District to the State Board of Education which vacated the mediation award and granted the District's appeal.

DHPH filed suit in the Trial Court asserting claims for declaratory relief, certiorari and mandamus. The Trial Court held that the claims of the individual parents and the claims of DHPH were non-justiciable, and the Trial Court deferred to the proposition that makes schools a matter of local concern and that deviation from that principle must be taken up in a political and not judicial arena.

III. ARGUMENT

A review of the legislative history regarding funding of charter schools provides clarification for what is expected of local districts. During that history, there was a brief period when language was in place suggesting that charter schools be treated proportionately based on population with other schools in the District. In 2001 C.R.S. 22-42-104.5 passed which stated in pertinent part that a charter school:

> Shall receive a portion of any bond proceeds in proportion to the ratio of the qualified charter schools pupil enrollment at grade levels that are also served by one or more similarly situated non-charter public schools that will be constructed, repaired or otherwise maintained or improved by the district's expenditure of bond proceeds to the total pupil enrollment of all schools in the district that will be repaired or otherwise maintained or improved by the district's expenditure of bond proceeds.

That legislation was the only example of specific funding directives from school districts to charter schools. However, a few months later that language was repealed in Part 4 of the Charter Schools Legislation and new language was enacted. Specifically C.R.S. 22-30.5-402 leaves the issues of funding for capital construction of charter schools to the individual district and charter school to decide. That intent is stated in C.R.S. 22-30.5-404 as follows:

> (1) In enacting this section, it is the intent of the general assembly to respect the principle of school district local control and to encourage school districts and charter schools to work together to ensure that the capital construction needs of charter schools can be met.

That section goes on to state the expectation that charter schools should be included in future bond issue elections. That was appropriately stated in the contract between DHPH and the District. The Legislature by enacting C.R.S. 22-30.5-402 confirms that there is no mandate for specific amounts of funding. That section states:

> (1) The general assembly hereby finds and declares that: (a) The "Charter Schools Act", part 1 of this article, was enacted by the general assembly without providing a method for funding the capital construction needs of charter schools.

C.R.S. 22-30.5-105(2)(c)(II) further emphasizes the importance of deferring to local control in funding decisions where it requires only that a contract between a charter school and a district show "the manner in which the school district

governed by the local board of education will support any long-term facility needs of the charter school." (emphasis supplied). The District has complied with the letter and spirit of the law when it specifically included language in the contract allowing for participation in future mill levy elections as required and contemplated by the statute. The added provisions in the contract concerning qualified zone academy bonds and e-rate demonstrate support as contemplated by C.R.S. 22-30.5-105(2)(c)(II).

Given that there is no specific legislative guidance to local districts how they are to support long-term facilities needs of charter schools other than the directive that charter schools be offered the opportunity to be included in mill levy elections, the charter contract here clearly conforms with legislative expectations. There is only one legislative suggestion that funds be distributed to charter schools for capital needs. That is found in C.R.S. 22-30.5-402(1)(b) which requires that a portion of the State education funds be given to charter schools for capital construction.

A. Application of C.R.S. 22-30.5-105

DHPH and the parents complain that the District has violated C.R.S. 22-30.5-105 apparently as a result of the District and DHPH agreeing to strike $900,000 in funding from the charter contract. However, as argued in the

Legislative history portion of this brief, the Legislature has resisted mandating payment of funds from local districts to charter schools. DHPH and the parents mischaracterize the language of Section 105. Throughout their argument about Section 105, they suggest the obligation of local districts to "assist" charter schools as opposed to using the language of Section 105 that requires that the contract state the manner in which the District will support charter schools. Support for future capital construction needs is certainly not limited to funding. For example, a district could offer a facilities expert on staff in the district to manage a construction project begun by the charter school.

A consideration of Section 105 cannot be undertaken independently from consideration of the principle of local control. DHPH and the parents downplay the impact of the *Board of Educ. of School Dist. No. 1ex rel. City & County of Denver v. Booth*, 984 P.2d 639 (Colo. 1999). However, *Booth* is most instructive in setting forth the scope of authority that the State Board has in dictating to local districts what they must do in the context of charter schools. *Booth* at p. 652 states:

> The General Assembly clearly defined the State Board's role: If the State Board finds the local board's decision to be "contrary to the best interests...it shall remand such final decision...with instructions to approve the charter application." It does not authorize other action. (citations omitted).

At p. 654 *Booth* goes on to say: "Therefore, when the State Board orders a local board to approve a charter application it is not requiring the local board to open a school." A logical extension of that is that the local board is not required to give the charter school any money for capital construction either.

One can reasonably infer from that language that in general once a charter application is approved, the rest is up to the local district and the charter school to iron out their difference, including what support the District will provide whether in dollars or other means.

DHPH and the parents seem to suggest that adherence to the principle of local control in school districts is limited in the context of capital construction. However, the language in C.R.S. 22-30.5-404 states:

> (1) In enacting this section, it is the intent of the general assembly to respect the principle of school district local control and to encourage school districts and charter schools to work together to ensure that the capital construction needs of charter schools can be met.

The rationale for not stepping on the toes of local districts is a practical one. For example if local school facilities are adequate to house and educate the current enrollment, paying for the construction of a new school because a group of parents desires to go a different direction in their children's education, likely places undue financial burdens on the local district. However, if a local school district has an existing building available for use by the charter school, the District is required to

allow the charter school to use that facility. That is the only statutory context in which the local district is specifically mandated to provide a facility.

B. Reformation of Contract

In their reformation argument, DHPH and the parents persist in their faulty premise that Section 105 somehow requires specific amounts of funding to be contained within the Charter Contract. They argue, beginning on page 18 of their brief that:

> It is by no means out-of-bounds to bring a "contract" between public entities charged with a public purpose into compliance with law. Here the District improperly forced the School to forego a statutory benefit. The law should be enforced.

This bold assertion is made without citing a single word of statutory authority that requires the result they seek. To the contrary, the statute mandates no monetary benefit. A reading of the transcript of the Board Meeting when the Charter Contract was agreed upon certainly suggests that there was a heated exchange but that ultimately the Director of DHPH himself withdrew the $900,000 request. Counsel for DHPH at that meeting, Dolores Atencio, acknowledged that the inclusion in the future of DHPH in District mill levy or bond issues was sufficient. She stated on page 3 of that transcript:

> You would make no contribution to the long-term facility. At least in this particular contract. Obviously, we would ask at some point, per the contract, that either you include the Dolores Huerta facility in a

> bond or mill levy request to the voters, and/or approve the Dolores Huerta for going to the voters on such a request, if Dolores Huerta decides in the future to do that.

Even if true that DHPH went kicking and screaming into contract execution, *Booth* does not allow the State Board to get into the middle of the dispute. It is also important to remember that DHPH invoked third party mediation pursuant to C.R.S. 22-30.5-107.5 knowing that that process would end up before the State Board whose decision would be final.

C. DHPH Power to Sue

DHPH wants the Court to disregard the political subdivision standing doctrine and the application of that doctrine as discussed in *Academy of Charter Schools v. Adams County School Dist. No. 12*, 32 P.3d 456 (Colo. 2001). At p. 464 the *Academy* court stated:

> Our rule ensures that, unless the General Assembly has specifically declared its intent that courts are to resolve intra-agency disputes, such disputes will be better saved for determination through the political process. Thus, without a plain and unmistakable expression of legislative intent, the judiciary will not expand the rights of a subordinate agency to sue its superior governmental body. (citations omitted)

Clearly here *Academy* states the general rule that prevents DHPH attempts to circumvent this rule by saying *Academy* only applies the rule in dealing with governing policy provisions in the contract. That is the way DHPH tries to get the

Court to bite on the opportunity to require reformation of the contract to include specific amounts of funding. The general rule does not allow that.

DHPH wants the Court to ignore the political subdivision standing doctrine by invoking its status as a non-profit organization. DHPH chooses to disregard C.R.S. 22-30.5-104(4) which states:

> A charter school may organize as a nonprofit corporation pursuant to the "Colorado Nonprofit Corporation Act", articles 121 to 137 of title 7, C.R.S., which shall not affect its status as a public school for any purposes under Colorado law. (emphasis supplied)

Even though DHPH is permitted to be a non-profit corporation, for purposes of Colorado law it does not lose its characteristics as a public school in all other circumstances.

The position of DHPH in stating that seeking declaratory judgment is permissible under *Academy* is without merit. *Academy* allows for subordinate governmental entities to sue superior governmental entities only when the legislature has specifically given that power. DHPH cites no statutory authority to support its assertion that declaratory judgment is an exception to that rule. Similarly, there is no exception for mandamus and certiorari claims either. The Trial Court perhaps put it best when it stated that the effort of DHPH to seek relief based on mandamus and certiorari is a semantic rather than a substantive

distinction. The goal is to keep these types of disputes out of the courts and resolve them either at the local school board level or in the State Legislature.

In seeking to avoid the finality of the State Board's decisions as imposed by *Academy*, DHPH relies upon *Kirbens v. Martinez*, 742 P.2d 330 (Colo. 1987). That reliance is misplaced. First, the Supreme Court in *Kirbens* granted certiorari to address the propriety of the lower Court's assuming jurisdiction under Rule 106 where other remedies existed. Second, *Kirbens* appears to address the propriety of certiorari to the Supreme Court for the sole purpose of determining whether relief under rule 106 was appropriate. It cannot be remotely argued that certiorari or mandamus at the Trial Court level is supported by *Kirbens* where no specific statutory directive is given to allow the subordinate entity to sue the parent entity.

Also in distinguishing the relief sought in *Kirbens* from the case here, it is important to recall the specific statutory language which here, as in *Academy*, imposes finality at the State Board level. C.R.S. 22-30.5-108(3)(d). *Academy* at p. 465 and continuing to p. 466 addresses the exclusivity of the statutory dispute resolution provisions as contained in C.R.S. 22-30.5-107.5.

The Legislature has made it clear that charter schools do not have standing to sue their superior school districts for disputes arising from implementation of governing policy provisions in their charter contracts as described in Section 22-

30.5-105 and 106. Thus, the only means to seek relief that is available to charter schools is through the administrative process involving the State Board. Because the General Assembly has not granted standing to the charter schools for these types of governing policy claims, courts lack jurisdiction to hear them. Accordingly, DHPH'S claims stemming from implementation of the governing policy provisions of the charter contract, as described in 22-30.5-105 and 106, cannot be brought in the District Court.

Academy gives no exception to certiorari or mandamus. Hence reliance of DHPH on *In the Matter of A.W.*, 637 P.2d 366 (Colo. 1981) is misplaced because clearly and explicitly the legislature has made State Board determinations final in the context of governing policy disputes.

Even if the statutory history regarding funding for charter schools were to be ignored, *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) restricts the role of the judiciary and leaves all school funding issues in the political arena. *Lujan*, even given the importance, at p. 1018 states:

> While our representative form of government and the democratic society may benefit to a greater degree from a public school system in which each school district spends the exact dollar amount per student with an eye toward providing identical education for all, these are considerations and goals which properly lie within the legislative domain. Judicial intrusion to weigh such considerations and achieve such goals must be avoided.

Further, at page 1018, the Court states:

> Even if we were to accept appellees' contention, we would, nonetheless, refuse to adopt their a priori argument whereby a lack of complete uniformity in school funding between all of the school districts of Colorado necessarily leads to a violation of the equal protection laws in this state.
>
> Lastly, a review of the record and case law shows that courts are ill-suited to determine what equal educational opportunity is, especially since fundamental disagreement exists concerning the extent to which there is a demonstrable correlation between educational expenditures and the quality of education.

So when the Trial Court decided that the claims of DHPH and the individual parents were non-justiciable, it recognized the need to exercise judicial restraint and defer to the legislature in matters of school finance. If every individual or every school district or charter school had the ability to have their school funding grievances resolved judicially, there would truly be non-uniformity in school funding. It would also make such activities as establishing budgets within school districts a virtual impossibility and frustrate the statutory and constitutional mandates for local control. *Lujan* further states, at p. 1018:

> The constitutional mandate which requires the General Assembly to establish "a thorough and uniform system of free public schools," is not a mandate for absolute equality and educational services or expenditures.

Given the competition for the education dollar everywhere, every perceived injustice by an individual pushing for a charter school would be ripe for litigation

to the point of absurdity. It is thus incumbent upon individuals in charter schools to persuade local school boards and/or the State Legislature to provide a mechanism for charter schools capital construction in the context of an already stretched budget.

As noted by the parents of DHPH, this is predominantly a matter of school choice. There is no suggestion anywhere that education in the District, taking DHPH out of the mix, is anything but thorough and uniform.

IV. CONCLUSION

The Trial Court recognized the claims of DHPH and the parents for what they are. The claims are nothing more than an effort to require the State Board to require the District to pay $900,000 to DHPH for capital construction needs. This position is taken despite the Legislature's rejection of specific funding requirements.

DHPH and the District negotiated a contract that provides for the manner in which facilities funding would be managed. The State Board correctly declined to alter the terms of that agreement. Only the District and DHPH can by agreement modify the terms of their contract.

The State Board's authority does not extend beyond the ability to require the District to approve a charter application and interpret governing policy provisions of the contract. The State Board's decisions in this regard are final. Legislation specifically emphasizes the importance of deferring to local control where charter schools are concerned even in the context of funding.

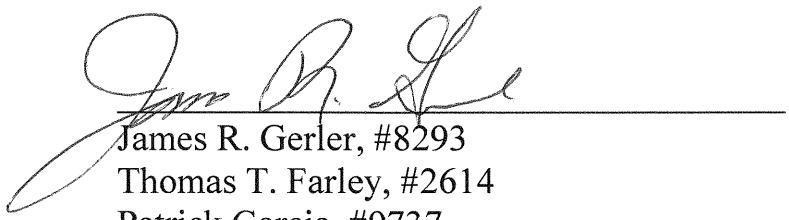
There is no requirement that schools within a district be funded identically. Parents choosing to utilize opportunities that may be offered by a charter school does not suggest that a district is not providing a thorough and uniform education otherwise. Funding is not the determining factor in deciding whether education is thorough and uniform. Presumably DHPH would opine that what they offer their students by way of education is better than what is provided in other district schools.

Colorado Courts have recognized that funding issues in education are best left to the Legislature. Accordingly, the Courts have exercised restraint when asked to get into the middle of school funding disputes. If parents or a charter school are not satisfied with decisions of a local school board, their resort is political not judicial.

The Trial Court should be affirmed.

Respectfully submitted this 10th day of November, 2008.

PETERSEN & FONDA, P.C.



James R. Gerler, #8293
Thomas T. Farley, #2614
Patrick Garcia, #9737
Bradley T. Bufkin, #33794
Mary E. Jensen, #39275
215 West Second Street
Pueblo, CO 81003-3251
719-545-9330

CERTIFICATE OF SERVICE

This certifies that on the 10th day of November, 2008, a true and correct copy of the foregoing ANSWER BRIEF OF PUEBLO SCHOOL DISTRICT NO. 60 was placed in the United States Mail, postage prepaid, addressed to the following:

Anthony B. Dyl, Esq., Attorney General's Office, 1525 Sherman Street, 7th Floor, Denver, CO 80203

William P. Bethke, Esq., Kutz & Bethke, LLC, 363 S. Harlan Street, Suite 104, Lakewood, CO 80226

Dolores S. Atencio, Esq., 633 17th Street, Suite 1700, Denver, CO 80202