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COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
CITY AND COUNTY OF DENVER DISTRICT COURT Honorable Catherine A. Lemon Case No. 07 CV 3538	▲ **COURT USE ONLY** ▲
Plaintiffs-Appellants: DOLORES HUERTA PREPARATORY HIGH, LAURA MAESTES, DENISE GALLEGOS, and MARITZA MARTINEZ; v. **Appellees:** The COLORADO STATE BOARD OF EDUCATION, and PUEBLO SCHOOL DISTRICT NO. 60, a Colorado municipal corporation. .	Case No.: 08 CA 664
Attorneys for Appellees: JOHN W. SUTHERS, Attorney General ANTONY B. DYL, #15968, Senior Assistant Attorney General, tony.dyl@state.co.us * LORNA A. CANDLER, #24497, Assistant Attorney General, lorna.candler@state.co.us* 1525 Sherman Street, 7th Floor Denver, CO 80203 Phone Number: (303) 866-5264 FAX Number: (303) 866-5671 *Counsel of Record	

APPELLEE'S ANSWER BRIEF

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Appellee, the Colorado State Board of Education (the "State Board"), hereby submit its Answer Brief.

ISSUES PRESENTED FOR REVIEW

Colorado's General Assembly, as part of its effort to expand educational opportunities for Colorado's children, passed the Colorado Charter Schools Act, which, under certain circumstances, allows disputes arising between a charter school and its authorizing district to be appealed to the State Board of Education for a final determination. The charter school here appealed such a dispute to the State Board, which found in favor of the school district. The issues presented by this appeal are:

I. Whether the doctrine of political subdivision standing bars the Appellees claims against the State Board; and

II. Whether Appellees constitutional challenge against the State Board's decision is a nonjusticiable political question.

STATEMENT OF THE CASE

I. Nature of the Case and Proceedings Below

This is an action by Dolores Huerta Preparatory High ("DHPH"), a public charter school located in Pueblo School District 60 ("Pueblo 60"), and three individually named parents of DHPH students ("Named Parents") for declaratory

relief, certiorari under C.R.C.P. 106(a)(4), and mandamus under C.R.C.P. 106(a)(2). Appellants allege the State Board erred in rejecting a non-binding arbitration award made pursuant to an appeal under §§ 22-30.5-107.5(3)(b) and (4), C.R.S.[1] Appellants make three distinct allegations:

1) Individually, DHPH alleges in the first three Claims for Relief that the State Board "misconstrued and improperly failed to recognize State Board authority over the Charter Schools Act," specifically § 22-30.5-105(2)(c), C.R.S., and requests declaratory relief, certiorari, and mandamus. R., V. 1, pp. 6-7.

2) All Appellants allege in the Fourth Claim for Relief that the State Board and Pueblo 60 made "inadequate and inequitable provisions for DHPH public school facilities and funding," in violation of the Colorado Constitution's requirement that Colorado's system of public schools be "thorough and uniform." R., V. 1, pp. 7-8.

3) All Appellants also allege in the Fifth Claim for Relief that the

[1] § 22-30.5-107.5 of the Colorado Charter Schools Act governs the dispute resolution process concerning governing policy provisions of charter school contracts. § 22-30.5-107.5(3)(b) provides, in pertinent part "If the parties do not agree to be bound by [the] written findings of [a] neutral third party, the parties may appeal such findings to the state board…"

"inadequate and inequitable provision of public school facilities and funding" unconstitutionally imposes on a parent's exercise of public school choice under the Fourteenth Amendment to the Constitution of the United States and Art. II, §§ 3 and 25 of the Colorado Constitution. R., V. 1, p. 8.

On June 18, 2007, Appellees filed Motions to Dismiss all of Appellants' claims on three grounds: that under § 22-30.5-107.5, C.R.S. and the Colorado Supreme Court's decision in *Academy of Charter Schs. v. Adams County Sch. Dist. No. 12,* 32 P.3d 456 (Colo. 2001), the State Board's resolution of DHPH's claims were final and not subject to review; that DHPH lacked standing to challenge the State Board of Education's Order under the doctrine of political subdivision standing; and that Petitioners Fourth and Fifth Claims for Relief were nonjusticiable. The District Court's Order dated February 21, 2008, granted Appellees' motion. R., V. 3, pp. 632 - 634. This appeal followed.

II. Statement of the Facts

A. Nature of the Dispute at issue

This case arises out of a dispute concerning the interpretation of governing policy provisions of the charter school contract entered into between DHPH and Pueblo 60 on May 11, 2004 (the "Amended Contract"). The governing policy at

issue concerns the financing of a permanent facility for the DHPH Charter School. The statute governing dispute resolution of governing policy provisions provides that "any disputes that may arise between a charter school and its chartering school district concerning governing policy provisions of the school's charter contract shall be resolved pursuant to this section," and allows the contract dispute to be submitted to non-binding arbitration and for an appeal of the arbitrator's decision to the State Board. § 22-30.5-107.5(1), C.R.S.

B. Negotiation and Approval of the Amended Contract.

The Amended Contract whose terms are at issue in this case was approved by the Pueblo 60 Board during its meeting of May 11, 2004. As presented to the Board at the meeting, the original Contract contained provisions allocating $900,000 of school district funding for the purchase and improvement of a particular site for the charter school. R., V. 3, pp. 595 - 596. However, when approval of the proposed Contract was moved and seconded by the Pueblo 60 Board, the motion failed by a vote of three to two. R., V. 3, p. 608. After the rejection of the proposed Contract, discussion among members of the Pueblo 60 Board ensued. Three members of the Pueblo 60 Board stated that they had voted against the proposed Contract due to the financial impact on the Pueblo 60 District,

referencing the "huge budget cuts we are also facing," that the amount of money for facilities was "still too much," and that the expenditure of such a large amount of money at that time "would not be a responsible financial decision." *Id.*

At this point, negotiations ensued between the representatives of DHPH, Dr. Lawrence Hernandez and DHPH's attorney Delores Atencio, and the Pueblo 60 Board. As a result of these negotiations, Dr. Hernandez agreed to amend the proposed Contract to remove the $900,000 contribution in return for the Pueblo 60 Board's approval of the Amended Contract. R., V. 3 at p. 610. Dr Hernandez's offer was affirmed by DHPH's attorney, Ms. Atencio. *Id.* With this proviso, Pueblo 60 Board member Gail Rodosevich then proposed that the District 60 Board of Education approve the contract between DHPH and Pueblo 60 without the financial contribution, and to give DHPH the ability at a future date to go forward with a mill levy or take this issue the voters in order to secure a permanent facility for these students. R., V. 3 at p. 611. Ms. Atencio then stipulated to these changes prior to execution. R., V. 3 at p. 615. Following this, the Pueblo 60 Board voted five to zero to approve the Amended Contract. R., V. 3 at p. 616.

Thus, in the Amended Contract, Pueblo 60 agreed to permit DHPH to use two modulars, rent free, agreed that DHPH could apply for Qualified Zone

Academy Bonds and E-Rate, that it would be notified of any District mill levy override or bond issues, and that DHPH could apply to such bond programs to meet future facility needs.

C. DHPH's Appeal under § 22-30.5-107.5, C.R.S.

On April 6, 2006, DHPH invoked third-party dispute resolution, pursuant to § 22-30.5-107.5, C.R.S. and Article 19.2 of the Amended Contract, concerning the funding of its long-term facility needs. R., V. 1, p. 4. The arbitrator ruled in favor of DHPH, determining that Pueblo 60 did not meet its legal obligations under §§ 22-30.5-105(2)(c) and 22-30.5-504(5)(a)(II)(B), C.R.S., to support DHPH's long-term facilities needs. R., V. 1, p. 4. The arbitrator awarded $900,000 to DHPH.

The parties did not agree to be bound by the findings of the arbitrator, and Pueblo 60 appealed the award to the State Board, which exercised jurisdiction pursuant to § 22-30.5-107.5(3)(b), C.R.S. The State Board ruled that the arbitrator had exceeded his statutory authority and misconstrued the provisions of the Charter Schools Act. R., V. 1, pp. 23 - 28. Specifically, the State Board found that under § 22-30.5-107.5, C.R.S., neither the mediator nor the State Board had the authority to impose upon Pueblo 60 new contractual terms that were not a part of the

Amended Contract bargained for and agreed to by the parties, and that to do so would raise serious constitutional issues under the "local control" provision of the Colorado Constitution, Art. IX, § 15.[2] The State Board also concluded that no section of the Charter Schools Act requires any particular manner or amount of contribution towards long term facilities funding and that both the amount and manner of such support is statutorily determined through negotiations between the charter applicant and the chartering district. Finally, the State Board found that in this case, the bargain negotiated by DHPH and Pueblo 60 was that DHPH would forego direct funding in exchange for approval of the Amended Contract and the chance to participate in a future mill levy or bond request. Thus, the State Board granted Pueblo 60's appeal and vacated the arbitrator's non-binding award. *Id.*

SUMMARY OF THE ARGUMENT

The School's First, Second and Third Claims for Relief must be dismissed, because the State Board's resolution of disputes between a district and its charter school over governing policy provisions in the charter school contract are not subject to judicial review. Additionally, all of the School's Claims must be

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[2] Colo. Const. Art, IX, § 15 provides that local school district board of education "shall have control of instruction in the public schools of their respective districts."

dismissed under the doctrine of political subdivision standing, since a political subdivision of the state lacks standing to challenge the constitutionality of a statute directing its performance.

The Colorado Constitution and *Lujan* commit the issue of the educational adequacy of individual public schools to school boards and to the legislative branch. Because the standard for measuring educational adequacy or quality is a matter in which the courts have traditionally deferred to the legislature, the Appellants' Fourth and Fifth Claims for Relief are nonjusticiable in that they present a political question that is improper for judicial determination and would infringe on both the local school boards' powers of "Local Control" and the General Assembly's plenary powers, violating the separation of powers required in Article III of the state constitution.

STANDARD OF REVIEW

This court reviews the decision of the trial court to grant the State's motion to dismiss *de novo*. *Walker v. Van Laningham,* 148 P.3d 391, 394 (Colo. App. 2006). The court must accept as true any well-pled allegations of material fact. *Public Serv. Co. v. Van Wyk,* 27 P.3d 377, 385–386 (Colo. 2001). Because they assert that the State Board's decision is unconstitutional, Appellants bear the heavy

burden of overcoming the presumption that the State Board's decision is constitutional unless proven unconstitutional beyond a reasonable doubt. *See Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933, 942 (Colo. 2004).

ARGUMENT

I. Governing Policy Provisions of the School's Charter Contract are not Justiciable and are Reserved for Resolution by the State Board

As an initial matter, it is important to note that Appellant's Opening Brief commences with arguments related to the merits of the case, which are not properly before this Court, and only addresses the issues of justiciability and standing in the latter part of the brief. Appellees' Brief addresses the standing questions which are properly before this Court, and will briefly address Appellants' argument regarding the merits to the extent they relate to standing. Furthermore, the first three Claims for Relief in the Complaint are brought by DHPH; the Named Plaintiffs are only included in the Fourth and Fifth Claims for Relief. Therefore, when discussing why this Court must uphold the grounds for dismissal of the first three Claims for Relief, Appellees shall reference only DHPH, and not the Named Plaintiffs.

DHPH attempts to confound the essential issues of justiciability and standing by re-characterizing the facts and by arguing that it is exempt from applicable Colorado law. The argument against dismissal of its claims can be summarized as follows: this Court should decline to apply the holdings and reasoning of *Board of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639 (Colo. 1999) and *Academy of Charter Schs. v. Adams County Sch. Dist. No. 12,* 32 P.3d 456 (Colo. 2001) to the claims presented here because doing so would concentrate all relevant powers over charter schools with the local board of education. Opening Brief ("Brief") pp. 14-15. Ancillary to this argument, DHPH also contends that the local control authority constitutionally vested in school district boards of education under Colo. Const. Art. IX, § 15 is not implicated by their claims, Brief p. 16, and that statutes other than the Charter Schools Act authorize DHPH to sue its chartering district and the State Board. Brief pp. 22-23. Lastly, it asserts that *Lobato* is distinguishable. DHPH's arguments are contrary to applicable law.

First, DHPH fundamentally misunderstands the statutory and constitutional position of a charter school within Colorado's system of public schools. A charter school, like any other elementary or secondary school in Colorado, does not have independent constitutional status. Rather, a charter school is a statutorily-

authorized entity existing only by the approval of the local school district, is considered to be a public school of the school district that approves it, and is accountable to the local board of education like any other public school. § 22-30.5-104(2)(b), C.R.S. Thus, first DHPH is a political subdivision of Pueblo 60, therefore under control of its School Board (a constitutionally-created entity vested with local control over its own public schools). Second, a charter school is a public school under the general supervisory authority of the State Board pursuant to Colo. Const. Art. IX, § 1. It is within this constitutional and statutory framework that we must view the Colorado Supreme Court's decision in *Academy of Charter Schs. v. Adams County Sch. Dist. No. 12,* 32 P.3d 456 (Colo. 2001), which considered whether contractual disputes between a charter school and its local board were subject to judicial review.

In *Academy,* the Court stated that the State Board's resolution of disputes between a district and its charter school over governing policy provisions in the charter school contract are not subject to judicial review. *Academy,* 32 P.3d at 461. In that case, as here, the charter school sued the local district alleging contractual violations. In considering the claims, the Court distinguished between "service agreements" and "governing policy agreements". "Service agreements" are contracts entered into pursuant to § 22-30.5-104(7)(b), C.R.S., "for the use of a

school building and grounds" and for services that enable the charter school "to carry out the educational program." "Governing policy agreements" are required by §§ 22-30.5-105 and 106, C.R.S., and "broadly encompass almost all aspects of the governance and policies of a charter school, including the curriculum, goals, objectives, pupil performance standards, employment policies, and budget." *Id.* at 462.

The Court found that "service agreements" were judicially enforceable only because "[t]he General Assembly expressly granted charter schools the authority to seek judicial enforcement of these contractual provisions," *Id.* at 461. This statutory authority creates a **narrow and limited** exception to the general rule that subordinate political subdivisions may not sue their superior governmental bodies, since such disputes are better reserved for determination through the political process. *Id.* at 464. The Court then stated that the State Board's decision concerning disputes over "governing policy agreements" was final and not subject to judicial review:

> The processes outlined in section 22-30.5-108 set forth a scheme of review in which the State Board has final, unappealable, authority. § 22-30.5-108(3)(d). Because the governing policy provisions of a charter contract are formed subject to the State Board's final authority, *see* § 22-30.5-107, the State Board has complete statutory authority to settle any disputes arising from

> implementation of those governing policy provisions of that contract. *In essence, the governing policy provisions of the charter contract are not subject to judicial review.* The State Board oversees those governing policy provisions of a charter contract agreed upon through the application process outlined in section 22-30.5-106, and ultimately decides how they are to be interpreted, applied, and enforced.

Id. at 462. (Emphasis added). This rule preserves the constitutional authority recognized in *Booth* of both the State Board's "direction, inspection, and critical evaluation of Colorado's public education system," *Booth*, 984 P.2d at 648, and Pueblo 60's authority to "implement, guide, or manage the educational programs for which it is ultimately responsible." *Booth,* 984 P.2d at 649.

Here, there is no dispute that the contract provisions regarding long term facility needs are governing policy provisions under the Charter Schools Act. R., V. 1, p. 3. Thus, *Academy of Charter Schools* is squarely on point and stands for the proposition that DHPH's claims seeking review of the State Board's action are not justiciable.

DHPH characterizes the effect of the State Board's arguments as concentrating all authority with the local school district. Brief, pp.14-15. This argument is misguided in several ways. The current structure balances the local school board's control of local schools against the State Board's statewide general

supervisory authority. *Academy* held that legislatively vested power to resolve disputes involving governing policy provisions of charter school contracts belongs to the State Board, the entity constitutionally empowered with "general supervision" of public schools. A process whereby the State Board reviews local boards' actions cannot be described as concentrating all authority in local boards. The State Board fulfilled its proper role adjudicating this dispute according to the powers granted by the legislature and the Constitution. Because the State Board construed the Contract against DHPH's position does not, as DHPH claims, render exercise of its discretion violative of separation of powers. Rather, it represents an appropriate exercise of the State Board's authority to provide "general supervision" of Colorado public education. Colo. Const. Art. IX, § 1.

The State Board's citation to *Booth* in its final order merely recognized that it was statutorily precluded from imposing new contractual terms not bargained for between the parties. In reaching this conclusion, the State Board's order fully addressed the merits of the dispute it was statutorily authorized to resolve and refrained from overstepping. The State Board determined that the contract fulfilled the statutory mandate: it included a governing policy provision respecting long-term facility needs. Upon concluding that the contract complied with the terms of the statute (by addressing the manner in which the district proposed to provide for

the funding of the facility), the State Board correctly concluded that *Booth* prevented it from imposing new contract terms. The State Board did not misunderstand this power. Rather, it recognized the controlling statute, applied it to the facts of the case, and ruled that the contract fulfilled the requirements of the controlling statute. That the Board's decision was contrary to DHPH's preference is not tantamount to misunderstanding its authority. Only if it had inserted itself as a party to the contract and altered governing terms, (DHPS's request) would there be a legitimate claim that the Board had misinterpreted or overstepped its authority, as such an alteration would require mutual agreement of both parties in writing.

DHPH seeks to limit *Academy* by arguing, citing *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004), that local control is not implicated in this case because control over school district funds, and not over curriculum and methodology, student admissions and discipline, and teacher employment policies, are at issue here. Brief, p. 20. DHPH fundamentally misunderstands both the *Owens* case and the doctrine of local control.

In *Owens*, the Colorado Supreme Court expressly held "local control of instruction" in Art. IX, § 15 means control over locally raised funds. *Id.* at 935. At issue in *Owens* was whether the Colorado Opportunity Pilot Program

("Program") violated local control provisions of Art. IX, § 15. Under the Program, eligible students accepted into private schools would receive four assistance payments from the school district. A substantial amount of the funding for the Program would have come from local tax revenues. *Owens*, 92 P.3d at 937. The Colorado Supreme Court found the Program unconstitutional because it deprived school districts of control over locally-raised funds:

> [I]n *Lujan v. Colorado State Board of Education,* 649 P.2d 1005 (Colo. 1982), we held that our state-wide system of school finance is designed to preserve local control over locally-raised tax revenues, and that control over these funds is essential to maintain the democratic framework created by our state constitution. . . . . Without control over locally raised funds, the representative body mandated by our state constitution loses any power over the management of public education.

Id. at 935-936.

Owens affirmed an interpretation of Art. IX, § 15 first enunciated by the Colorado Supreme Court in *Belier v. Wilson*, 59 Colo. 96, 147 P. 355 (1915), and *School Dist. No. 16 in Adams County v. Union High School No. 1 in Adams County*, 60 Colo. 292, 152 P. 1149 (1915). Both cases involved the constitutionality of legislation allowing students in school districts without a high school to attend a high school beyond the control of the local district, yet at its

expense. The Court found the statutes invalid under § 15, holding that local control requires that school districts have discretion over any instruction paid for with locally-raised funds: "In either case the money raised in one district by taxation of the property therein is, without the consent of the board of directors thereof, expended for instruction in another district over which the board of directors of the former district have no control." *Id.* at 294. Thus, in both *Belier* and *School Dist. No. 16*, the Colorado Supreme Court defined "local control" to mean district control over locally-raised funds. *See also Hotchkiss v. Montrose County High School Dist.,* 85 Colo. 67, 69, 273 P. 652, 653 (1928) (statute permitting students to attend public school in neighboring district yet requiring that home district to pay tuition to neighboring district was unconstitutional).

Here, financing of capital construction for school districts, including money that may be provided by a school district for long term facility needs of charter schools, consists almost entirely of locally raised bond and mill levy funds. *See* § 22-30.5-402, C.R.S. It can be characterized no other way, despite how Appellant attempts to clothe the argument. Thus, the doctrine of local control is directly implicated by DHPH's claims, because DHPH is requesting that the State Board unilaterally order Pueblo 60 to expend $900,000 in local funds against the desires

of Pueblo 60's School Board. Thus, this case falls squarely within the justiciability doctrine of the *Academy* case.

DHPH then attempts to circumvent Pueblo 60's constitutional authority by arguing that its claim involves a contract omission, and that a neutral third-party can unilaterally amend the Contract against the will of Pueblo 60 without violating local control. Brief, pp. 19-20. However, the Contract does indeed include a "manner" of providing for long term facility needs, although admittedly not the one favored by DHPH. Furthermore, *Booth* suggests maintaining consistency with local control prevents the State Board from unilaterally imposing non-bargained for contract provisions, particularly ones allocating locally raised funds. Indeed, the lynchpin of *Booth* was that any such authority would raise serious constitutional infirmities. *Booth* at p. 653.

DHPH then claims that *Academy* is inapplicable to it for several reasons. First, it attempts to distinguish *Academy* on the basis that it involved a contract dispute, while DHPH's claims here are statutory. Brief at pp. 20-21. This allegation, however, ignores the clear language of § 22-30.5-107.5, C.R.S., under which review is limited to "any disputes that may arise between a charter school and its chartering school district *concerning governing policy provisions of the school's charter contract*...." § 22-30.5-107.5(1), C.R.S. (Emphasis added).

Clearly, this dispute arises under the charter contract, or section 107.5 would be inapplicable. Thus, DHPH cannot characterize the dispute as "statutory," as no dispute would exist independent of the charter school contract. The issue here is whether the contract's governing policy provision fulfilled the statutory requirements. *Academy* commits these determinations to the sole discretion of the State Board, which has appropriately exercised that discretion in the affirmative. It is settled that mandamus does not lie to compel a quasi-judicial tribunal, like the State Board in this case, to exercise its discretion in a particular way. *State v. Peck*, 92 Colo. 224, 19 P.2d 217 (1933).

DHPH then argues that its status as a nonprofit corporation with the authority to "sue and be sued" somehow trumps the political subdivision standing rule and the explicit holding of *Academy*. Brief, pp. 22-23. The assertion that the Non-Profit Act somehow confers explicit power upon DHPH to sue the state is misguided. The power extended to non-profit charter schools through § 7-123-102(1)(a), C.R.S. is precisely the power to sue under the contract to enforce provisions of "service contracts" as contemplated in *Academy*. It is implausible to suggest that the legislature, when enacting the Charter Schools Act, intended to imbue non-profit charter schools with powers separate and distinct from other charter schools as well as traditional public schools within the district. This

unfounded assertion is even belied by the Complaint, which identifies DHPH not as a private nonprofit corporation but as "a Colorado and Pueblo School District No. 60 public charter school". R., V. 1, p. 1. All charter schools reside under the overarching umbrella of public schools subject to the longstanding political subdivision analysis. Appellant's argument failed in District Court as it must here because capacity to sue or be sued in general does not confer standing upon a school district to challenge an order of the State Board. *See Board of County Com'rs of Dolores County v. Love*, 172 Colo. 121, 470 P.2d 861, 863 (Colo. 1970).

In addition, in *Academy*, the Colorado Supreme Court rejected a similar argument, finding that the fact that associations generally are conferred the power to sue did not give standing to the Academy Association, since the actual contract was between the charter school and the school district. *See Academy*, 32 P.3d at 469–470. The structuring of the charter school as a non-profit has absolutely no bearing on the proposition for which *Academy* stands. In fact, the court explicitly chose to treat the unincorporated voluntary association and the non-profit corporation as one in the same for purposes of its legal analysis of contract and statutory issues. See *Academy,* 32 P.3d 456, 460 FN2.

II. School Districts are Political Subdivisions and Cannot Challenge the Constitutionality of a Statute that Directs their Performance or Otherwise Defines their Responsibilities

Standing is a fundamental jurisdictional issue without which a case must be dismissed. *Wimberly v. Ettenberg*, 194 Colo. 163, 167, 570 P.2d 535, 539 (1977). Standing is premised upon a two prong test: Plaintiff's ability to show that it has suffered an injury in fact to a legally protected interest. Id. at 539; *Lobato v. State of Colorado*, ___ P.3d ___, 2008 WL 194019; *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). To meet the first prong, Plaintiff's injury must be real, not speculative or vague. Secondly, Plaintiff must establish a legally protected interest for each claim so that courts do not unnecessarily intrude into matters which are more properly committed to another branch of government. *Lobato*; C*ity of Greenwood Village v. Petitioners for Proposed City of Centennial,* 3 P.3d 427, 437 (Colo. 2000), citing *Romer v. Board of County Com'rs of County of Pueblo, Colo.,* 956 P.2d 566, 573 (Colo. 1998). Mere assertion of this right, as in the present case, is not sufficient. The court in *Branson School Dist. RE-82 v. Romer*, 958 F. Supp. 1501 (D. Colo. 1997), *aff'd* 161 F.3d 619, 630 (10th Cir. 1998), pointedly affirmed Colorado's doctrine of political subdivision standing, finding that "mere

disagreement by a political subdivision with the policies of its parent state will not be sufficient to overcome the traditional barrier to political subdivision standing."

Martin v. District Court, 550 P.2d 864 (Colo. 1976), established a rule precluding standing when: (1) the agency seeking judicial review is subordinate to the agency whose decision is sought to be reviewed, and (2) no statutory or constitutional provision confers a right on the subordinate agency to seek judicial review of the superior agency's decision. Id. at 866. Therefore, in analyzing claims similar to those issued by Appellants, Colorado courts have consistently held that the interests of political subdivisions of the state are deemed commensurate with the interests of the state itself absent specific constitutional or statutory provisions to the contrary. *Romer v. Fountain Sanitation Dist.,* 898 P.2d 37, 40 (Colo. 1995); *Board of County Com'rs of Dolores County v. Love*, 172 Colo. 121, 470 P.2d 861, 862-863 (1970). Public policy prohibits subordinate subdivisions from challenging state statutes directing the performance of duties properly promulgated to them through legislative acts unless it first establishes the right to do so, *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 438 (Colo. 2000); *Mesa Verde Co. v. Montezuma County Bd. of Equalization*, 831 P.2d 482, 484 (Colo. 1992), and also prevents subordinate

state agencies from challenging actions of superior state agencies. *Greenwood Village, 3* P.3d at 438.

Colorado school districts and their governing boards are unquestionably political subdivisions of the state. *Lobato v. State of Colorado*, ___ P.3d ___, 2008 WL 194019 at p. 4 (Colo. App. 2008); *Bagby v. School Dist. No. 1, Denver*, 186 Colo. 428, 528 P.2d 1299, 1302 (1974). *See Maloney v. City and County of Denver*, 35 Colo. App. 167, 530 P.2d 1004, 1006 (Colo. App. 1974); *Beeson v. Kiowa County School Dist. RE-1*, 39 Colo. App. 174, 567 P.2d 801 (1977). Accordingly, courts have uniformly held that school districts lack legally protected interests in a statutory or constitutional sense, and thus have applied the long-standing bar preventing school districts from challenging the validity of state statutes. *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1380 (Colo. 1980) (school district lacks standing to challenge constitutional validity of urban renewal statute); *Denver Ass'n for Retarded Children, Inc. v. School Dist. No. 1 in City and County of Denver*, 188 Colo. 310, 317, 535 P.2d 200, 204 (Colo. 1975) (school district lacks standing to challenge constitutional validity of method of funding special education services); *Clear Creek School Dist. RE-1 v. Holmes,* 628 P.2d 154, 155 (Colo. App. 1981) (school district lacks standing to challenge constitutional validity of eminent domain statute). As schools are subordinate to the districts in

which they reside, and districts are subordinate to the State, it is manifest that schools are also subordinate to the state.

Similarly, because charter schools are subordinate to school districts, DHPH, a political subdivision, lacks standing to challenge the State Board's interpretation of § 22-30.5-105(2)(c) or its decision concerning the charter contract's facilities funding provision. The rule of law regarding political subdivision standing is not dependent upon the claim asserted, but on the nature of the political subdivision. While *Academy* recognizes that charter schools are statutorily authorized to sue the school district on a service agreement provision of a charter contract, it clearly holds that charter schools have no authority to sue the State Board. *Academy,* 32 P.3d 456, 462.

DPHP claims that standing is conferred by other statutes, including the Declaratory Judgment Act, the Administrative Procedures Act, and by Certiorari. However, the case law is clear that standing to sue is not conferred upon subordinate political subdivisions by other statutes. The Colorado Supreme Court has previously ruled that the Declaratory Judgment Act does not confer authority upon subordinate political subdivisions to seek declaratory judgment against the state concerning constitutional validity of state statutes or ordinances. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 40-41 (Colo. 1995).

The Colorado Supreme Court has ruled that C.R.C.P. 106(a)(4) does not confer standing upon persons or parties who would not otherwise have it. *State, Dept. of Personnel v. Colorado State Personnel Bd.*, 722 P.2d 1012, 1019 (Colo. 1986). Likewise, the Colorado Supreme Court has previously held that the Administrative Procedure Act, Section 24-4-106, C.R.S. ("APA"), does not confer upon a subordinate state agency standing to seek judicial review of state agency decisions. *Romer v. Board of County Com'rs of County of Pueblo, Colorado*, 956 P.2d at 576-577 ("Section 24-4-106(4) of the APA, therefore, does not create a legally protected right so as to confer upon the County standing to seek judicial review"). *See also Board of County Com'rs of Dolores County v. Love*, 172 Colo. 121, 470 P.2d 861, 863 (Colo. 1970).

For the foregoing reasons, DHPH's first three Claims for Relief must be dismissed.

III. The District Court Properly Dismissed Appellants' Fourth and Fifth Claims for Relief because the Colorado Constitution leaves Resolution of Questions Concerning Adequacy and Manner of School Funding to Local Districts and the Legislature.

Appellants' Fourth and Fifth Claims for Relief were brought both by DHPH and by three individual parents (the "Named Plaintiffs"). Appellants' Fourth Claim of Relief asserts that the State Board's decision renders DHPH's funding

"inadequate and inequitable" in violation of the Colorado Constitution's general provision for the establishment of "a thorough and uniform system of free public schools," Colo. Const. Art. IX, § 2, and in violation of the Colorado Constitution's Equal Protection provisions, Colo. Const. Art. II, § 25. R. V. 1, pp. 7-8. Appellants' Fifth Claim for Relief similarly asserts that inadequate and inequitable public school facilities and funding unconstitutionally imposes on the Named Plaintiffs' right to exercise public school choice. R., V. 1, p. 8.

The District Court dismissed both these claims for relief, finding that the Colorado Supreme Court has held in *Lujan v. Colorado State Board of Education,* 649 P.2d 1005 (Colo. 1982), that Colorado's constitutional scheme regarding public education has left the resolution of questions concerning adequacy and manner of funding for public education to local school districts and the legislature. R., V. 3, p. 634.

This Court should uphold the District Court's Order, since the responsibility for determining what constitutes adequate funding or adequate facilities is constitutionally committed to the General Assembly and locally-elected school boards. *Id.* at 1018. Accordingly, under *Lujan* these issues are not justiciable.

A. The Thorough and Uniform and Equal Protection Clauses do not Create a Cause of Action in this Case.

Colo. Const. Art. IX, § 2 states, "[t]he general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform *system of free public schools* throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." (The "Thorough and Uniform Clause") (emphasis added). Appellants ask this Court to interpret this provision as sanctioning a cause of action that would allow each and every individual elementary and secondary public school in the state to sue its own school board and/or the State Board of Education whenever the school disagrees with the adequacy of the funding or other resource allocation decisions of its school district. To recognize such an action as justiciable would constitute a complete rewrite of Colorado law governing public schools.

Contrary to Appellants' suggestion, Colorado courts have not sanctioned the types of claims raised here, and instead, as *Lujan* noted, left such matters to the discretion of the school districts or to the legislature. Indeed, *Lujan* specifically rejected claims based upon both the Thorough and Uniform and Equal Protection Clauses of the Colorado Constitution. *Lujan*, 649 P.2d at 1023, 1025.

Specifically, *Lujan* found that the Thorough and Uniform Clause is satisfied "if thorough and uniform educational opportunities are available through state action *in each school district.*" *Id.* at 1025 (emphasis added).

Thus, the Thorough and Uniform Clause is not even applicable to funding disputes involving individual schools, but to the public school *system* as a whole. In this case, Appellants have made no allegation that the public school *system* as a whole is failing to provide them with the opportunity for a free public education – only that the charter school contract which they negotiated with Pueblo School District No. 60 did not provide them with as much funding as they would have preferred. Clearly, this type of specific contractual dispute raises no claim for relief under the Thorough and Uniform Clause. Indeed, in no case cited by Appellants have Colorado courts exercised jurisdiction to determine the constitutional validity of individual school district decisions over funding levels for its school district educational programs.

In *Denver Parents Assn. v. Denver Bd. of Education*, 10 P.3d 662 (Colo. App. 2000), parents of children enrolled in the Denver Public Schools brought suit for breach of contract based on the alleged substandard quality of the district's education. In upholding dismissal of the complaint, the Colorado Court of Appeals stated:

> Plaintiffs cannot hold a public school district to the implementation of its educational objectives in a judicial setting. This matter is of a political nature, inasmuch as the school district is a political entity and, therefore, such policy issues should be addressed at the ballot box, not presented as a judicially enforceable contract claim.

Id. at p. 665. Likewise, in the present case, Pueblo 60's decision on the allocation of its local budget is a policy issue that does not rise to the level of a constitutionally cognizable claim. Rather, funding decisions of a political entity regarding allocation of local funding should be addressed at the ballot box, and not in the courts. *Id.* at 665.

Most recently, in *Lobato v. State of Colorado*, ___ P.3d ___, 2008 WL 194019 (Colo. App.) *(cert. granted)*, this Court rejected an allegation that the current school finance system violated the Thorough and Uniform Clause due to inadequate funding, finding that questions of the adequacy of educational funding are barred by the political question doctrine. *Id.* at p. 9. In *Lobato*, the Colorado Court of Appeals rejected the parents' argument that *Lujan* impliedly established that claims of adequacy of school funding were justiciable, finding instead that "there is a significant difference between determining whether a ... court has 'jurisdiction over the subject matter' and determining whether a cause over which

a court has subject matter jurisdiction is 'justiciable.'" *Id.* at p. 9 (*quoting Powell v. McCormack,* 395 U.S. 486, 512, 89 S.Ct. 1944 (Colo. 1969)).

In determining that the Plaintiffs' claims were not justiciable, the Colorado Court of Appeals in *Lobato* applied the six independent factors set forth by the U.S. Supreme Court in *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691 (Tenn. 1962):

> Baker sets forth six independent factors to review in determining whether a nonjusticiable political question has been raised: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; or (2) "a lack of judicially discoverable and manageable standards for resolving it"; or (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; or (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; or (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Id. at p. 7. In applying the *Baker* test to the facts before it, the Court found first that there was a textually demonstrable constitutional commitment of the issue of school financing to a coordinate political department – the General Assembly. *Id.* at p. 11. Second, the Court found that the ordinary meaning of the Thorough and Uniform Clause does not provide a standard to determine whether there is a

qualitative educational guarantee in terms of educational funding, and ultimately that under *Lujan*, the Thorough and Uniform Clause mandated that the General Assembly provide to each school age child the opportunity to receive a free education by establishing "guidelines" for a thorough and uniform system of public schools. The Court found that the reference to "guidelines" in *Lujan* weighed against interpreting "thorough and uniform" as providing the means to define any qualitative educational guarantee. Id. at p. 12. Thus, the Court "concluded that this language does not provide any manageable standard for determining the qualitative guarantee asserted by the parents as a method of assessing adequate funding." *Id.* at p. 12.

In the present case, there is no question that the pupils in DHPH have been provided with the opportunity to receive a free education, either in DHPH itself or in one of the other public schools available to them in the district. Beyond that, the question of which specific schools to open and the level of funding allocated to each is a question committed to the General Assembly and to local school boards who have control of instruction in their respective districts under Colo. Const. Art. IX, § 15.

Regarding the third *Baker* factor, the Court in *Lobato* found that it was impossible to decide the issue of educational adequacy in the school finance

context without making policy determinations requiring nonjudicial discretion, quoting *Lujan* that "the best public policy which can be adopted to attain quality schools and equal educational opportunity for all children lies within the General Assembly's domain." *Id.* at 13. Likewise, in the present case, the issue of quality schools lies with the General Assembly and with the local school district in its determinations regarding allocation of local funding. Moreover, judicial intrusion into local decisions regarding funding allocation presents a substantial risk of judicial intrusion into the powers and responsibilities of the local district under Colo. Const. Art. IX, § 15, in that they would potentially usurp district control over locally-raised tax funds. *Owens v. Colorado Cong. of Parents, Teachers and Students*, 92 P.3d at 939 (constitution guarantees school district control over local tax funds).

Thus, under *Lobato,* because the Colorado Constitution delegates policy on educational adequacy to the local school boards and to the legislative branch, and because determining what constitutes an adequate education is a question best answered by the local school boards and the General Assembly, any attempt by the courts to correct alleged defects through judicial remedies would be inappropriate.

This Court's holding in *Lobato* is in accord with the Colorado Supreme Court's decision in *Lujan*. Regarding Appellants' claims of educational quality and

adequacy under the Thorough and Uniform Clause, the Colorado Supreme Court recognized that issues of educational quality and opportunity properly lie within the domain of the legislative branch, stating;

> While our representative form of government and 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. This is especially so in this case where the controversy, as we perceive it, is essentially directed toward what is the best public policy which can be adopted to attain quality schooling and equal educational opportunity for all children who attend our public schools.*

Id. at 1018 (emphasis added).

Appellants' claims here would essentially require the court to put itself in the place of both the local and state boards of education and to determine what level of school facilities and funding is constitutionally adequate and equitable for each and every public charter school. Appellants' argument implies that a direct correlation exists between local and State Board decisions on charter school funding and expenditures and the adequacy or quality of education. Brief, pp. 30, 35. However, the Colorado Supreme Court has found that courts in general are "ill-suited" to determine the adequacy of educational opportunities, particularly

because of the "raging controversy" regarding a demonstrable correlation between educational expenditures and educational quality. *Lujan*, 649 P.2d at 1018.

In *Lujan*, the Colorado Supreme Court recognized that in order to decide in favor of the Appellants, the Court would have to make the type of policy decision that was not intended for judicial determination. "We refuse ... to venture into the realm of social policy under the guise that there is a fundamental right to education which calls upon us to find that equal educational opportunity requires equal expenditures for each school child." *Id.*

Lujan also acknowledged that under the Colorado Constitution, school districts are granted control of locally-raised school funds. Article IX, section 15 of the Colorado Constitution provides that schools are to be controlled and directed by local school district directors. *See Lujan* at 1023. Such control is exercised by influencing the determination of how much money should be raised for the local schools and how that money should be spent. *Id.* The Colorado Supreme Court has consistently emphasized the importance of local control to the state's educational system. *See Owens*, 92 P.3d at 939. For example, local control has long been considered a means of guarding against excessive state involvement in education policy by allowing local electors to tailor educational policy to suit the needs of individual districts. *Id.*

In *Lujan*, the Court held that Colorado's system of financing public elementary and secondary education was constitutional because local control was a legitimate state objective rationally furthered by the system. *See Lujan*, 649 P.2d at 1023. As in *Lujan*, the State Board's decision to respect the local authority of Pueblo 60 is consistent with the constitutional mandate of Article IX, section 15 that local school districts exercise control over the management of funds within that school district. Pueblo 60 has done no more than make a policy decision regarding the allocation of scarce educational funding constitutionally vested in them through the doctrine of local control. The fact that the policy decision may not impact DHPH as beneficially as other schools within the district is irrelevant to the constitutional inquiry. Indeed, in the area of economics and social welfare, a legislative scheme may not be condemned simply because it does not effectuate the state's goals with perfection. *Id.* at 1023, *citing Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1162 (1970).

Appellants attempt to call into question the majority opinion in *Lujan* by noting that Justice Erickson's concurrence was necessary to give the opinion a majority of the Court. Opening Brief, pp. 32 - 33. However, a reading of the concurrence indicates that Justice Erickson did not disagree with the reasoning cited above. *See Lujan*, 649 P.2d at 1025–1029. Indeed, Justice Erickson agreed

that education was not a fundamental right, *Id.* at 1026, that "the legislature is granted plenary power in the field of public education," and concludes that under an Equal Protection analysis the Court should not substitute its judgment for that of the legislature. *Id.* Nor does Justice Erickson's view of the Thorough and Uniform Clause give rise to a cause of action for the funding decisions relevant to an individual school. Justice Erickson specifically repudiated the notion, implicit in Appellants' arguments, that the Thorough and Uniform Clause requires comparable services and facilities for each individual school in the state. *Id.* at 1027. If anything, review of Justice Erickson's concurrence reinforces the Appellees' contention that, under *Lujan*, Appellants have failed to state a justiciable cause of action under either the Thorough and Uniform or Equal Protection clauses.

Moreover, in *Owens*, the Colorado Supreme Court held that Colorado is one of only six states with an express constitutional local control requirement. *Id.* at 939. The *Owens* Court held that control over locally raised funds is essential to effectuating the constitutional requirement of local control over instruction. *Id.* at 939. Appellants are silent on how Article IX can simultaneously, as they suggest, create a cause of action for each elementary and secondary school against its board of education based upon a constitutionally-mandated specific measure of quality or

adequacy, while at the same time delegating control over such decisions to the discretion of each individual school district.

Regarding Appellants' Equal Protection claim, the *Lujan* plaintiffs also alleged that the State's system of school finance violated the equal protection provisions of the United States and Colorado Constitutions by failing to provide equal funding to the State's school districts. *Id.* at 1010-1011. Citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S.Ct. 1278, 1297 (Tex. 1973), the Court held that education is not a fundamental right under the United States Constitution, and therefore is not subject to strict judicial scrutiny. *See Lujan*, 649 P.2d at 1016. Rather, where the state action involves no fundamental right, suspect classification or gender classification, courts should only inquire into whether such action is rationally related to a legitimate state purpose. *Id.*, citing *Fritz v. Regents of Univ. of Colorado*, 196 Colo. 335, 586 P.2d 23 (1978). Having determined that a rational basis standard of review applied, the Court determined that the Colorado public school finance system rationally furthered the legitimate state purpose of local control over the management of funding within a local school district. *Id.* at 1022-23; *see e.g.*, Colo. Const. Art. IX, Sec. 15 (schools to be controlled by local school district directors).

Appellants' Equal Protection claims here are also subject to rational-basis scrutiny because no fundamental right is involved, *id.* at 1016 (education is not a fundamental right), and because the Appellants fail to allege any suspect classification that would warrant heightened scrutiny.[3] The State Board's decision to respect the local authority of Pueblo 60 is rationally related to the legitimate state purpose of local control over the management of funds within that school district. Under the rational basis test, the individual bringing the attack has the burden of refuting the presumptive validity of the state action. *Id.* at 1022. DHPH and the Named Plaintiffs have not only failed to sustain this burden, but utterly failed to allege how the State Board's decision is not rationally related to the legitimate state purpose of local control. Therefore, the State Board's decision is constitutional and Appellants' equal protection arguments in Claims Four and Five must be dismissed for failure to state a claim upon which relief may be granted.

Appellants argue that the fact that their constitutional claims arise in the context of a charter school creates an opportunity for "invidious local action." Brief at pp. 39-40. However, Appellants do not offer any explanation as to why

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[3] Although Appellants' appear to allege discrimination based upon their status as a charter school, Appellants offer no reason why decisions regarding this category of political subdivision should be subject to heightened scrutiny.

the mere allegation of improper motive would give rise to a cause of action for educational adequacy where none is recognized under the Thorough and Uniform or Equal Protection Clauses. If Appellants here are attempting to allege a type of discrimination that would give rise to heightened scrutiny, they have not pled that cause of action in their Complaint.

Indeed, nothing in Appellants' Brief rebuts the fact that, under *Lobato* and *Lujan*, issues of educational adequacy are reserved for school boards and for the legislature. Interpreting the Thorough and Uniform and Equal Protection Clauses to create a cause of action for each individual public school against its own school board over allocation of school district resources ignores local control, Colo. Const. Art. IX, § 15, and the clear holdings of *Booth, Owens* and *Lujan.*

B. Appellants' Fifth Claim for Relief Does Not State a Claim.

Appellants next attempt to read into the United States Constitution a fundamental "right" for parents to demand the provisions of fully funded educational choice schools for their children. Brief at pp. 43-45. However, the cases cited by the Appellants for this novel proposition say no such thing. The fact that the U.S. Supreme Court had recognized a right of parents to direct the upbringing and education of their children simply does not imply an affirmative

duty on the part of school districts or the State to establish and fund new schools of choice catering to each and every educational desire a parent may have.

In essence, Appellants are asking this Court to read into the Constitution an affirmative duty to subsidize school choice. However, public school choice is not a constitutional right, and even if it was, the law is clear that government is not required to subsidize citizens' exercise of their constitutional rights. In *Harris v. McRae*, 448 U.S. 297, 100 S.Ct. 2671 (1980), the Court upheld Congress' denial of Medicaid funding for abortions, even though it extended such funding for costs related to childbirth. *Id.* at 315-18. The Court held that "it simply does not follow that a woman's freedom of choice carries with it constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Id.* at 316. The plaintiff in *Harris* was left "with at least the same range of choice" as she would have had if the government funded no healthcare costs. *Id.* at 317. The Court concluded that "[a]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." *Id.* at 316; *See also DeShaney v. Winnebago County Dep't of Social Services.*, 489 U.S. 189, 196, 109 S.Ct. 998 (1989) ("no affirmative right to governmental aid").

Thus, while parents have a right to direct the education of their children, they have no corollary right to have each one of their educational preferences subsidized with public funding. As Justice Douglas opined:

> The fact that the government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Sherbert v. Verner, 374 U.S. 398, 412, 82 S.Ct. 1790 (1963) (Douglas, J., concurring).

In summary, the Colorado Constitution and *Lujan* commit the issue of the educational adequacy of individual public schools to school boards and to the legislative branch. Because the standard for measuring educational adequacy or quality is a matter in which the courts have traditionally deferred to the legislature, the Appellants' Fourth and Fifth Claims for Relief are nonjusticiable in that they present a political question that is improper for judicial determination and would infringe on both the local school boards' powers of "local control" and the General Assembly's authority over education.

CONCLUSION

For the forgoing reasons, the decision of the district court should be affirmed.

DATED: November 10, 2008.

Respectfully submitted,

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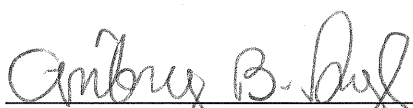

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