

District Court El Paso County, Colorado Court Address: 270 South Tejon Street Colorado Springs, CO 80903	DATE FILED: March 31, 2021 5:16 PM CASE NUMBER: 2020CV31562 COURT USE ONLY
EDUCATION REENVISIONED BOCES, Plaintiff, vs. COLORADO SPRINGS SCHOOL DISTRICT 11, Defendant vs. COLORADO LITERACY AND LEARNING CENTER, Third-Party Defendant	Case Number: 2020 CV 31562 Division: 24 Courtroom: W460
ORDER RE: COLORADO SPRINGS SCHOOL DISTRICT 11'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SUMMARY JUDGMENT BY ERBOCES AND CLLC	

The Court addresses the above-referenced motions below.

Background

Education reEnvisioned¹ BOCES (hereafter “ERBOCES”) filed a complaint for declaratory relief against Colorado Springs School District 11 (hereafter “District 11) requesting declarations connected to ERBOCES’s establishment and operation of a brick and mortar school, Orton Academy. District 11 filed a counterclaim for declarations essentially opposite to ERBOCES’s requests and filed third-party claims for declarations as to Colorado Literacy and Learning Center (hereafter “CLLC”), a non-profit educational entity contracted by ERBOCES to operate Orton Academy. ERBOCES and CLLC on one hand and District 11 on the other have filed cross-motions for summary judgment. The Court herein addresses those motions.

¹ This is how Plaintiff spells its name.

Standard of review

In resolving a motion for summary judgment, the Court is to “consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits.” C.R.C.P. 56(c). An order for summary judgment is appropriate only where there are no genuine issues of material fact for trial and the moving party is entitled to summary judgment according to applicable law. *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 887 (Colo. 2002). The non-moving party is to receive the benefit of all favorable inferences that may be discerned from the undisputed facts. *Id.* All doubts about whether there is an undisputed fact is to be resolved in favor of the non-moving party. *Id.* “Summary judgment is a drastic remedy to be granted only when there is a clear showing that the controlling standards have been met.” *Id.* at 888. “An adverse party may not rest upon the mere allegations or denials of the opposing party's pleadings, but the opposing party's response by affidavits or otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.” C.R.C.P. 56(e).

Undisputed facts

The parties do not dispute the facts and agree the contested issues involve interpretations of law, hence their agreed upon procedure to file early motions for summary judgment. The Court, nevertheless, sets forth the undisputed facts below.

1. District 11 is a Colorado, public school district. D11 SOF at p. 3.²

² Abbreviations: “D11” means District 11. “SOF” refers to the statement of facts section of each motion for summary judgment, both filed on February 5, 2021. “P” means page.

2. ERBOCES is a Colorado cooperative board of educational services. D11 SOF at p. 3; ERBOCES-CLLC MSJ at ¶1.
3. ERBOCES' members consist of Falcon School District 49, Creede Consolidated School District 1, Durango School District 9-R, and Pikes Peak Community College. D11 SOF at p. 3; ERBOCES-CLLC MSJ at ¶2.
4. CLLC is a Colorado non-profit entity which operates out of Colorado Springs, Colorado. D11 SOF at p. 3; ERBOCES-CLLC MSJ at ¶¶5, 6.
5. ERBOCES and CLLC entered into an Educational Services Agreement on May 15, 2020 that provided for CLLC to operate a school called Orton Academy. The school is operated for ERBOCES. D11 SOF at p. 4; ERBOCES-CLLC MSJ at ¶5.
6. Orton Academy was located within the geographic boundaries of District 11 at 360 Command View in Colorado Springs. D11 SOF at p. 4; ERBOCES-CLLC MSJ at ¶8.
7. Orton Academy opened and is operated at the Command View location since approximately May 2020. D11 SOF at p. 4; ERBOCES-CLLC MSJ at ¶10.
8. Orton Academy had 74 students enrolled as of October 9, 2020, included 26 of whom reside in District 11. Some of the 26 students attended a District 11 school in the prior school year (2019-2020). D11 SOF at p. 4 (not responded to by ERBOCES-CLLC).
9. District 11's permission or approval was not obtained to locate Orton Academy within District 11's geographical boundaries. District 11 does not approve of

“¶” means paragraph. “Resp. to MSJ” means response to motion for summary judgment. “PMSJ” means partial motion for summary judgment.

ERBOCES or CLLC operating Orton Academy within its boundaries. D11 SOF at p. 4; ERBOCES-CLLC MSJ at ¶¶12, 13.

10. ERBOCES and CLLC entered into a lease for the 2020-2021 school year to continue operating at the Command View location and obtained a school number from the Colorado Department of Education. D11 SOF at p. 4; ERBOCES-CLLC MSJ at ¶11.
11. Per pupil revenue for Orton Academy students is paid by the Colorado Department of Education to an ERBOCES member entity which then pays the funds to the school operator, less a fee. ERBOCES does not spend any locally raised tax funds from District 11. ERBOCES-CLLC SOF at ¶¶3, 7 (not responded to by District 11).
12. The focus of Orton's curriculum is reading achievement for children with challenges such as dyslexia. ERBOCES-CLLC SOF at ¶4 (not responded to by District 11).

Analysis and order

School District's area of control

District 11 first addresses the Colorado Constitution and statutory provisions that apply to the conflict. District 11 contends that the Colorado Constitution controls its ability to have a say as to the educational instruction that occurs within its geographical boundaries. ERBOCES and CLLC respond that District 11's interpretation is overbroad.

The main authority relied upon by District 11 for its assertion that its permission must be obtained for a school to be established and operated within its boundaries is Article IX, Section 15 of the Colorado Constitution. That Section states:

[t]he general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

While District 11 does not contend that the provision expressly states that its permission must be obtained to establish a school within its boundaries, it cites to authority for the proposition that the courts have recognized and upheld the importance of local control. District 11 primarily relies upon the guidance set forth in *Bd. of Educ. of Sch. Dist. No. 1 in City & Cty. of Denver v. Booth*, 984 P.2d 639 (Colo. 1999). There, the Colorado Supreme Court considered an apparent conflict between the margins of local school board authority versus the State Board of Education in relation to a charter school application. 984 P.2d at 643. In resolving the conflict, the Court set out guiding principles as to local school board authority:

[f]irst, a local board's resolution of individual cases such as teacher employment decisions inherently implicates its ability to control instruction. Second, as a corollary, generally applicable law triggers control of instruction concerns when applied to specific local board decisions likely to implicate important education policy. Third, local board discretion can be restricted or limited in such circumstances by statutory criteria and/or judicial review. Fourth, such general statutory or judicial constraints, if they exist, must not have the effect of usurping the local board's decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible.

Id. at 649. District 11 notes the decision aligns with a school district's statutory authority to "determine which schools of the district shall be operated and maintained." §22-32-110(1)(l), C.R.S. (2020) (as one of the statutorily enumerated powers of a board of education of a school district to be exercised in the board's discretion).

ERBOCES and CLLC set forth four reasons they assert that District 11's reliance on *Booth* is not supported by the decision itself: 1) that the Supreme Court upheld the constitutionality of charter schools and the ability of the State Board of Education to override a local board's denial of a charter application does not support the breadth of local control District 11 asserts; 2) the Supreme Court's recognition of the General Assembly's authority to establish and maintain a thorough system of free public education and to abolish, divide or alter school districts supports that the establishment of the BOCES Act as relative to the disputed issue in this case does not support the territorial authority asserted by District 11; 3) the Court's statement that local boards and the State Board "exist to promote and serve the educational welfare of public school students in this state, and, more broadly, to serve the state's democratic interest in a well-educated population" (*Booth* at 649) is more supportive of ERBOCES' and CLLC's aim in establishing and operating Orton Academy than the District's assertion of territorial control; and 4) because two of the elements of local control, instruction at district's expense and management of programs for which a district is responsible, are not at issue as to Orton Academy, *Booth* is not supportive of District 11's aims.

The Court views *Booth* as turning upon what balance there is to be between the constitutional powers granted to local school districts and the State Board of Education. *Id.* at 649. In so outlining the factors or elements to be considered in striking that balance, the Court determined whether a provision of the charter school statute enacted by the Assembly impermissibly infringed upon the constitutional authority granted to local school districts. Ultimately, the Court found there was no infringement, but only by applying the express language of the provision at issue, and not permitting terms that were not in the statute to be read in. *Id.* at 653. For example:

[i]f an approved charter application became the terms of a contract, then a State Board order to approve an application, substituting its judgment for that of the local board, would authorize a proposed charter school to operate under the terms of an application that the local board had rejected. This result would create a direct conflict with the local board's statutory authority "to determine which schools of the district shall be operated and maintained." § 22-32-110(1). Moreover, it might easily have the effect of usurping the local board's decision-making authority or its ability to implement the educational programs for which it is ultimately responsible. Such an effect would raise serious constitutional infirmities.

Id. Thus, this Court views the issue to be resolved is the interpretation of the express provision ERBOCES and CLLC contend supports that District 11's permission is not necessary and whether that provision conflicts with District 11's constitutional authority.

BOCES provision

“BOCES” stands for a board of cooperative education services. §22-5-103(2), C.R.S. Such an entity is “a regional educational service unit designed to provide supporting, instructional, administrative, facility, community, or any other services contracted by participating members.” *Id.* As relevant to the resolution of the counter motions for summary judgment, ERBOCES and CLLC contend that the following provision allows it the authority to lease the building on Command View.

The boards of education of the school districts participating in a cooperative service agreement may jointly, separately, or, after approval of each participating board of education, as a board of cooperative services construct, purchase, or lease sites, buildings, and equipment for the purpose of providing the facilities necessary for the operation of a cooperative service program **at any appropriate location, whether within or without a school district providing the money for the facilities**. School district moneys in any fund from which moneys may be legally expended for such facilities may be used for carrying out the provisions of this section. The provisions of sections 22-32-127 and 22-45-103 (1) shall apply to any installment purchase agreement or any lease or rental agreement, including but not limited to any sublease-purchase agreement entered into by a school district that is a member of a board of cooperative services pursuant to section 22-43.7-110 (2)(c), entered into by a board of cooperative services or by the boards of education of the school districts participating in a cooperative service agreement. No board of education of a school district participating in a cooperative service agreement shall make any levy for its bond redemption fund, or use any moneys in its bond redemption fund, except in accordance with the provisions of section 22-45-103 (1)(b).

§22-5-111(2), C.R.S. (emphasis added). Further, ERBOCES and CLLC contend that District 11 points to no authority that expressly provides that District 11’s permission must be obtained to operate a program within District 11’s territorial boundaries.

The Court finds that the provision upon which ERBOCES and CLLC rely does not conflict with the language of Article IX, Section 15. Nothing in either provision addresses permission having to be obtained. Section 22-5-111(2) can be interpreted and applied without conflicting with the authority granted to school districts in Article IX, Section 15. See *Booth* at 649. Section 22-5-111(2) is not ambiguous, therefore the Court does not see a basis to apply canons of construction applicable to conflicting laws. *Gen. Elec. Co. v. Niemet*, 866 P.2d 1361, 1364 (Colo. 1994).

The parties' dispute centers around the bolded portion of section 22-5-111(2) set forth above. ERBOCES and CLLC maintain that the language permits ERBOCES to lease a building, whether within the boundary of the school district that is a member of the cooperative service, in this instance District 49, or outside of the boundary of District 49. ERBOCES-CLLC MSJ at p. 7. District 11 maintains that "this language only addresses locating schools within any one of a BOCES' member districts. For example, if District 49, as a member of ERBOCES, decided to fund a new cooperative service program, it could locate the new program within District 49's boundaries or within the boundaries of any other school district participating in ERBOCES." District 11 PMSJ at p. 10. District 11 further asserts that the phrase "a school district providing the money for the facilities" would be meaningless if a BOCES were permitted to lease a building within or without any school district. District 11 PMSJ at p. 10. ERBOCES and CLLC cite multiple examples in the statutes where the legislature uses apparently superfluous language or "mutually

reinforcing clauses” such that District 11’s interpretation is not correct. ERBOCES-CLLC Resp. to D11 PMSJ at pp. 8-10.

Whether the language is “mutually reinforcing” or superfluous, the Court finds that to interpret the provision as District 11 asserts assumes information that is not present in the statute. Only by inserting additional terms into the phrase, to emphasize the location must be within or without of a BOCES member school facility providing funds can District 11’s interpretation be supported. The Court declines to do so.

The Court thus concludes that ERBOCES and CLLC’s interpretation is correct. The express language of the provision permits ERBOCES to operate a school “at any appropriate location,” whether inside or outside of a district providing funding for the facilities. §22-5-111(2), C.R.S. ERBOCES and CLLC’s interpretation is supported by the Court of Appeals decision in *Boulder School Valley District RE-2 v. Colorado State Board of Education*, 217 P.3d 918, 926 (Colo. Ct. App. 2009) (holding that an institute charter school statute did “not grant the State Board the power to order local school districts to take action; it does not require them to affirmatively approve, open, or manage institute charter schools. . . does not require the local school districts to accept or approve an institute charter school application; nor does it usurp the districts' decision-making ability to implement the educational programs for which they are ultimately responsible, a potential constitutional infirmity”). In that there is no genuine issue of material fact asserted by District 11 that Orton Academy existing

within its boundaries without its permission somehow requires District 11 to take any action or prevents District 11 from taking an action it is required to, the Court finds that Orton Academy was appropriately located without obtaining permission.

Boulder Valley does not turn so narrowly as to interpret it as applying to only the potential conflict of authority granted to local school districts versus the Board of Education as contended by District 11 in its response to ERBOCES-CLLC's motion for summary judgment. D11 Resp. to MSJ at p. 7. Rather, the Court of Appeals in *Boulder Valley* applied the framework set out by the Supreme Court in *Booth* and assessed whether there was infringement upon a school district's authority by the General Assembly's enactment of the institute charter school provisions. 217 P.3d at 926. It found there was not. The framework for assessing the infringement is comparable to the current case where District 11 attempts to assert authority (that the District's permission must be obtained) that does not expressly exist in the Constitution or the relevant statutes.

District 11 contends both in its motion for summary judgment and in its response to ERBOCES-CLLC's motion for summary judgment that ERBOCES attempts, by relying upon *Boulder Valley* to put itself on the same footing or in the same shoes as the State Board of Education. The Court does not interpret ERBOCES-CLLC's arguments to be in that vein. The Court also does not read either *Booth* or *Boulder Valley* as outlining the potential conflict in that manner. The issue is given the General Assembly's constitutional authority over public education, in what manner

may the General Assembly pass legislation granting authority to other entities that potentially conflicts with the constitutional authority of local school districts (which, technically is also through the General Assembly – Article IX, Section 15). The General Assembly established the BOCES system. In order for this Court to find there is a requirement that a BOCES must first obtain permission before establishing a school within the territorial boundaries of a school district, the Court needs express support in the language, not a principle, to do so. No such express statutory authority on point with the facts presented by the parties has been presented.

No other authority relied upon by ERBOCES and CLLC

While District 11 addresses other statutory provisions that could potentially support ERBOCES and CLLC's assertion that it need not have District 11's permission to operate Orton Academy within District 11's boundaries, nowhere in the briefing on the motions for summary judgment does ERBOCES rely upon other statutory authority. Nor is other statutory authority relied upon by ERBOCES in its complaint or ERBOCES and CLLC's reply to the counterclaim and third-party claim. The inclusion of section 22-32-122 is only briefly as a cross-reference in ERBOCES's complaint. Complaint at ¶17. Therefore, the Court does not address the argument here.

Other education statutes and Article IX, Section 15

District 11 notes two examples of other educational statutes wherein school district permission is required for types of schools to operate within the school district's

territory, multi-district online schools with a brick and mortar center (C.R.S. § 22-30.7-111) and some provisions of the charter school scheme (C.R.S. § 22-30.5-501). As pointed out by ERBOCES and CLLC in their response³ to District 11's motion for summary judgment, however, those particular examples do not support District 11's request for a declaration that ERBOCES and CLLC must obtain the District's permission.

A multi-district online school has a requirement that the school "seek to enter into a memorandum of understanding with each school district in which the multi-district online school intends to provide instruction within a learning center." § 22-30.7-111(1)(a), C.R.S. Charter schools are required to file an application with a school district to establish a school within the territory of the district. §22-30.5-107, C.R.S. At issue in *Booth*, was whether the General Assembly, with constitutional authority to organize school districts, could through the State Board establish a process by which charter schools could seek an override of a local district decision to deny a charter school application. *Booth*, 984 P.2d at 645. In finding the General Assembly did have such authority, the Colorado Supreme Court held "general statutory or judicial constraints, if they exist, must not have the effect of usurping the local board's decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible." *Booth* at 649.

³ Their response incorporates by reference their arguments contained in ERBOCES and CLLC's motion for summary judgment.

The fact that the General Assembly established requirements for multi-district online schools and charter schools to seek advance permission from local districts before establishing a school within the boundaries of a district but requires no such advance permission from a BOCES, supports that there is no such requirement. If such advance permission were required or desired, the General Assembly has demonstrated as to multi-district online schools and charter schools how to establish such a requirement. Only by reading into the BOCES provisions that District 11's permission must have been obtained, can the Court find there is such a requirement. The Court does not find that the authority cited by District 11 supports such a conclusion. Nor does the authority cited by District 11 support that there is, as a consequence of the Court's determination, a conflict between section 22-5-111(1)(a) and Article IX, section 15. District 11 has failed to show how the existence of Orton Academy implicates District 11's "ultimate responsibility." *Booth* at 649. There is no assertion by ERBOCES or CLLC that District 11 is responsible for Orton. Other than maintaining that its permission must be obtained, District 11 does not state how it is ultimately responsible for Orton Academy. With that missing piece, the Court finds there is no genuine issue of material fact for trial that ERBOCES and CLLC are or were required to have District 11's advance permission to establish and operate Orton Academy within District 11's territorial boundaries.

Conclusion

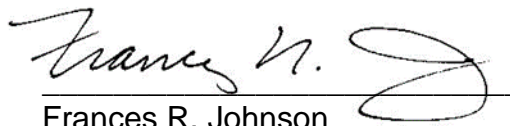
For the reasons stated above, District 11's partial motion for summary judgment is denied and ERBOCES-CLLC's motion for summary judgment is granted.

ERBOCES and CLLC need not immediately cease operating Orton Academy within District 11's geographic boundaries. ERBOCES and CLLC are not under a legal obligation to obtain the permission of District 11's Board to operate Orton Academy within District 11's geographic boundaries. ERBOCES and CLLC are not permanently enjoined from operating Orton Academy within District 11's geographic boundaries. ERBOCES may continue to operate Orton Academy, through its contract with the Literacy Center, at its current location of 360 Command View.

The Court will by separate order transfer this matter to Division 12. All future pleadings in this case will need to reflect the correct division.

So ordered.

Date: March 31, 2021



Frances R. Johnson
District Court Judge