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ER BOCES and Contract Schools:

Questions & Preliminary Answers

Working Draft by Alex Medler



1070 Edinboro Drive, Boulder, CO 80305

CACSA is a Colorado non-profit organization

www.coauthorizers.org

# Introduction

The Education Reinvisioned BOCES (ER BOCES) is a Colorado BOCES that has approved two brick and mortar public schools to operate within the geographic boundaries of districts that are not members of the BOCES. A recent judgment from the El Paso County District Court found that these actions were not prohibited by Colorado law.

These schools are described as “contract schools,” which are not charter schools. There are important differences between charters and contract schools, as well as some similarities. Both types of public schools operate with a contract, and in both cases, an outside group can propose to open a public school, and a district (and apparently a BOCES), may approve the proposal and enter a contract with the group. That group then then operates a public school according to the terms of their contract.

In some respects, a district contracting with an outside entity to operate a public school or educational program is a relatively common practice, with examples that inform discussion of the ER BOCES’ activity. At the same time, a BOCES approving a group that recently had a charter application denied by a district, to operate a public school in the district that denied the same group’s charter application, and to operate a school outside the boundaries of any of the BOCES’ member districts, is a new development that raises questions.

This document presents a series of questions and preliminary answers regarding contract schools. These preliminary answers are based on conversations with stakeholders and could be subject to correction, and alternative interpretations of law and policy. Some observations regarding legal and policy implications could also be subject to legal challenges, and it is not clear what legal precedents would apply. Consequently, all analysis should be treated as preliminary.

# Questions & Preliminary Answers

1. **Is there a legal basis for contract schools? And if so, what is it?**

Yes. School districts have the right to contract with outside entities for the provision of educational services, including paying a vendor to operate a public school for the district. The recent summary judgment by the El Paso County District Court found that a BOCES also has this right.

In contrast to charter schools and Multi-District On-Line (MDOL) schools, there is very little legislative or regulatory structure controlling district’s contracting practices or “contract schools” as a distinct class of public school. In contrast, there is a large body of statutory and regulatory infrastructure that guides and applies to charter schools and charter school authorizers.

There is also a great deal of legal and regulatory structures that control non-chartered public schools (i.e., “normal public schools”). Contract schools are, in many but not all respects, subject to the legal and regulatory requirements that control district-operated public schools. There is relatively little statutory or regulatory guidance that distinguishes between a directly-operated (i.e., district-operated public school) and a public school or educational program operated by an Education Service Provider (ESP) through a contract with a school district. The term “contract school” does not appear in statute but is the product of two distinct powers held by a district or BOCES: the power to contract with third parties, and the power to operate schools.

1. **What did the District Court find?**

The El Paso County District Court issued a summary judgment that found that nothing in Colorado law prevents a BOCES from operating a public school within the geographic boundaries of a district that is not a member of the BOCES. Further, nothing in law requires the BOCES opening such a school to seek or receive approval from the school board of the district in which such a school might be located for such a school operate, including in a district that is not a member of the BOCES or bordering a district that is a member of the BOCES.

1. **Could the recent Summary Judgment in District Court be overturned on appeal?**

Possibly. Colorado Springs District 11, which lost its argument in the district court, could appeal this decision and the legal decision of the District Court could be overturned on appeal. It is not clear how long an appeal would take and there is no obvious basis to predict the outcome of an appeal.

Lawyers with expertise in Colorado education law have different views on the likelihood of the decision being overturned. Some have considered the judgment to be a plain reading of law while others consider it to have been made in error.

Part of the issue may depend on whether BOCES are to be treated as districts and are assumed to be a form of district. In this case, they could enjoy the rights of districts, including rights that are not explicitly provided to BOCES in statute. Alternatively, a BOCES may be determined to be different from a district, in which case the BOCES would only enjoy those rights that are clearly spelled out for a BOCES in state statute. The district court judgment is based on the first view. An appeal that might eventually overturn the decision would perhaps be based on the second framing of BOCES’ rights. In one case that may or may not be considered be relevant, the State Board of Education decided that BOCES may not apply for innovation district status because that power is not explicitly granted to BOCES in statute, whereas the right of districts to do so is codified in law.

1. **Is a contract school just a different name for a charter school?**

No. Many details of what a charter school is and how it operates and fits into Colorado law are specified in statute. The definitions, roles, responsibilities of contract schools are not specified in statute.

When it comes to the regulatory and legal implications for schools and districts, charter schools are distinct from contract schools and operate with different rules and legal and procedural implications. Contract schools should not be considered charter schools operating under a different name. There are important and substantive differences. The ER BOCES schools (Orton Academy and Merit Academy) are clearly not charter schools.

1. **Can a BOCES school operate under contract outside the district that enters the contract without approval of the school board of the district in which the school is located.**

Yes (probably). There does not appear to be any legal requirement for the district contracting with a vendor to operate a public school to seek approval of the contract or the school from the district in which the school would be located.

1. **In what ways do contract schools differ from charter schools?**

A series of differences distinguish contract schools from charter schools. Some of these differences might also be affected by the specific charter or contract and the policies of a district or a BOCES.

1. **Can a contract school receive a charter school start-up subgrant from CDE?**

No. The federal statute governing the Charter School Program (CSP) requires that all subgrant recipients be charter schools operating under their state’s charter school statute.

1. **Do ER BOCES contract schools have access to funding to support start-up costs?**

Yes, but less than charter schools. The ER BOCES does not award grants or gifts to new schools. They do operate a revolving loan program that provides loans to new schools. The loans are for smaller amounts than a CSP start-up subgrant. CSP start-up subgrants can be as large as $1.2 million, whereas ER BOCES start-up loans range from $50,000 to $100,000. The terms of repayment for loans from the ER BOCES are minimal, (e.g., zero interest and a payment of $1,000 per year.)

1. **May a for-profit Education Service Provider (ESP) receive a contract directly from a district/BOCES?**

Yes. A district or BOCES may contract directly with a for-profit entity to operate a public school under a contract. A charter school authorizer, however, may not contract directly with a for-profit ESP to run a charter school under Colorado law.

When authorizing a charter school that is operated by a for-profit ESP, the authorizer must contract with a non-profit entity that receives the charter. The non-profit entity, which then holds the contract from the authorizer, has a second contract with the for-profit ESP that covers the ESP’s operation of the school. The authorizer oversees the charter contract with the non-profit entity, and the non-profit entity oversees the contract with the ESP that covers the day-to-day operation of the school.

Many districts enter directly into contracts with for-profit entities for a wide variety of services and educational programs, including for the operation of public schools. This practice is common, for example, in the operation of district-governed Multi-District Online Programs, or single district online programs. Examples of for-profit ESPs that operate public schools as either charter schools or contract schools include K-12 Inc., Pearson Learning, Academica, Charter Schools U.S.A. and National Heritage Academy.

1. **May a contract school use admissions preferences or admissions requirements that are based on student performance?**

Yes. A contract school may use admissions standards and enrollment preferences to the same extent that district-operated schools may do so.

A charter school has additional restrictions on their admissions covered by state law, and a charter school receiving a federally-funded CSP start-up subgrant is subject to additional requirements. For example, while they are receiving funding from a CSP subgrant, charter schools are required to use a lottery if more students apply than the school can accommodate. These lotteries may be weighted in some circumstances covered by federal guidance. Charter schools with CSP subgrants may also have enrollment preferences, but the details of these preferences are controlled by federal non-regulatory guidance and state policy.

In some rare cases, charter schools have been allowed to implement and continue admissions processes based on test scores, e.g., Stargate Academy has admissions requirements based on student performance on tests and grades.

District-operated schools, including contract schools, are not covered by the state or federal regulations covering charter schools. District schools include schools that may base admissions on student performance, e.g., the Denver School for the Arts has students audition as part of their enrollment process.

Both a charter school and a contract school could be created that serve a particular at-risk population. For example, both a charter school and a contract school might be created to serve homeless youth, pregnant and parenting youth, out of school students, or other at-risk populations. Such schools could have entrance requirements that are based on the specific student population and the school’s target student body.

1. **May a contract school be religious in affiliation or operation?**

This is unclear. In at least one example, a district has operated a contract school program affiliated with and run by a religious school. It is not clear whether such a program would be sustained if challenged legally. Denver Public Schools (DPS) contracted with a religious school, which involved the school serving a portion of its students that were paid for by DPS.

1. **Can contract schools approved by the ER BOCES get waivers of state policy?**

This is unclear. In a potentially relevant case, the State Board of Education determined that the ER BOCES is not eligible to apply for district innovation status. If a similar standard were applied to questions of waivers, contract schools established by the ER BOCES would not be able to apply for waivers from the state. Alternatively, the State Board of Education or the courts, might determine that the BOCES are entitled to apply for waivers on behalf of contract schools in the same manner that districts may seek waivers for district-operated public schools. Several observers believe the BOCES will be allowed to apply for waivers.

If ER BOCES contract schools may receive waivers, it is not clear how the requirements for waivers that apply to district-operated schools would be interpreted for new ER BOCES contract schools. For example, prior to a school starting its operations, waivers for district-run schools require votes by faculty. It is not clear whether the faculty of all schools operated by the ER BOCES would be required to vote to support a waiver application on behalf of a single contract school. These questions could produce burdensome challenges on the efforts of an ER BOCES contract school. These challenges may be lessened once a contract school is operating. Ultimately, if allowed to pursue waivers, the burdens on an ER BOCES contract school attempting to get waivers from the state would be greater than for charter schools.

1. **Does the local community have a guaranteed opportunity to participate in the approval process of a contract school?**

No. A district can open a contract school without soliciting public input or holding a community meeting in the district in which a contract school would operate. A district or CSI must hold a public meeting as part of their charter application review process. CSI is required to inform the district in which a school would operate that they are reviewing a charter school proposal that would operate in within the district boundaries. CSI must also solicit input from the district in which a CSI school would operate and convene a public meeting in the community that a prospective charter school would serve.

1. **Is a contract school subject to the state’s accountability system and accreditation system?**

Partially. Contract schools are subject to the state accountability system. Their students take state tests, the state creates an SPF rating for them. If operated by a district, the contract school is included among the campuses that contribute to the state analysis of the district’s performance for the purposes of the district’s accountability rating.

In the case of a BOCES-approved contract school, it is likely that the school would be treated the same way a contract school approved by a district. However, it is unlikely that the state would treat the BOCES as a district for the purposes of district accreditation. In the case of the ER BOCES, it could be treated similar, in that a contract school would receive a rating and participate in the system, but the ER BOCES would not be treated like a district for accountability purposes.

It is not clear whether state interventions, such as the state review panel, or state board oversight of a district, would be applied to a BOCES or a BOCES-approved contract school because of low performance in the contract school. Charter schools, approved by districts or CSI, are subject to these requirements and the charter schools contribute to the state assessment of their authorizer.

1. **Is a contract school required to serve students with disabilities and follow state and federal laws and regulations regarding special education?**

Yes. As a public school, a contract school is subject to the state and federal laws controlling services for students with disabilities, including the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973 (which addresses “504 plans”), the Americans with Disabilities Act (ADA), and Colorado’s Exceptional Children’s Educational Act. This is similar to charter schools, which are also responsible for complying with these laws and are treated as legally part of the district that has authorized them for the purposes of special education.

Colorado BOCES regularly act as the Administrative Unit (AU) for the purposes of special education. This means that many BOCES oversee and support activity by small districts and their schools related to the delivery of special education services and the education of students with disabilities. The BOCES are created specifically in some cases to help small and rural districts comply with the federal and state requirements related to serving students with disabilities, as well as to help with the administration of other programs where small scale can raise obstacles to successful implementation. The ER BOCES would oversee and support the brick and mortar schools in ways that parallel other BOCES’s support to public schools in their member districts.

It is not clear how decisions regarding the placement of students with disabilities would be addressed when a student applies to a contract school and questions arise regarding whether the contract school can provide a Free Appropriate Public Education (FAPE) for that student’s needs.