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The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 11

Supreme Court Case No. 21SC885
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA641

Petitioners:

Colorado State Board of Education and Douglas County School District RE-1,

v.

Respondents:

Judy A. Brannberg and John Dewey Institute, Inc.

Judgment Reversed
en banc
March 6, 2023

Attorneys for Petitioner Colorado State Board of Education:
Phillip J. Weiser, Attorney General
Michelle Berge, First Assistant Attorney General
Joseph A. Peters, Senior Assistant Attorney General
Jenna Zerylnick, Assistant Attorney General
Denver, Colorado

Attorneys for Petitioner
Douglas County School District RE-1:
Caplan and Earnest LLC
Elliot V. Hood
Boulder, Colorado

Respondent Judy A. Brannberg, pro se
Littleton, Colorado

Respondent John Dewey Institute, Inc., pro se
Littleton, Colorado

Attorneys for Amicus Curiae
Colorado Charter School Institute:
Phillip J. Weiser, Attorney General
Davin Dahl, Senior Assistant Attorney General
Noah Patterson, Assistant Solicitor General
Denver, Colorado

JUSTICE GABRIEL delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 This case requires us to determine whether the last sentence of section 22-30.5-108(3)(d), C.R.S. (2022), of the Charter Schools Act (the "Act"), which provides that "[t]he decision of the state board [of education] shall be final and not subject to appeal," applies to *all* decisions of the Colorado State Board of Education ("State Board") under section 22-30.5-108(3),

thereby precluding judicial review of all such decisions.[1]

¶2 Section 22-30.5-108 ("section 108") of the Act creates a four-step procedure in which a charter school applicant may potentially twice appeal an adverse decision of a local board of education to the State Board. The parties agree that section 108 precludes judicial review of State Board decisions rendered after a second appeal under section 108(3)(d). They disagree, however, as to whether this appeal-preclusion language also bars judicial review of final decisions of the State Board rendered after a first appeal under section 108(3)(a)—a scenario in which the State Board has affirmed the local board's decision to deny a charter school application, thus rendering a second appeal unnecessary.

¶3 Applying the plain language of section 108 and the statutory scheme as a whole, we now conclude that section 108(3)(d)'s appeal-preclusion language applies to *all* final decisions of the State Board rendered under section 108, including when, as here, the State Board affirms the local board's denial of a charter school application during an initial appeal, thereby ending the matter and rendering a second appeal unnecessary.

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[1] Specifically, we granted certiorari to review the following issue:

> Whether the last sentence of section 22-30.5-108(3)(d)—"The decision of the state board shall be final and not subject to appeal"—applies to all state board decisions under section 108(3).

¶4 Accordingly, we reverse the court of appeals division's ruling below declaring that final decisions of the State Board rendered after a first appeal are subject to judicial review, and we remand this case with instructions that the case be returned to the district court for the dismissal of plaintiff John Dewey Institute, Inc.'s ("JDI's") claim for lack of subject matter jurisdiction.

I. Facts and Procedural History

¶5 In 2019, JDI submitted a charter school application to the Douglas County School Board. That local board denied JDI's application, and pursuant to the appeals procedure outlined in section 108, JDI appealed to the State Board. In the course of this initial appeal, the State Board affirmed the Douglas County School Board's denial of JDI's application, thus effectively ending the matter and eliminating any need for a second appeal under section 108(3)(c).

¶6 Pursuant to the State Administrative Procedure Act, § 24-4-106, C.R.S. (2022), JDI then filed a complaint for judicial review against defendants Douglas County School Board and the State Board (collectively, "defendants"). In its complaint, JDI alleged that, in denying its application, defendants had failed to comply with a number of the Act's procedural requirements.

¶7 Defendants jointly moved, pursuant to C.R.C.P. 12(b)(1), to dismiss JDI's complaint for lack of subject matter jurisdiction. In this motion, defendants argued, as pertinent here, that the appeal-preclusion clause in

section 108(3)(d) barred judicial review of the State Board's final decision.

¶8 The district court ultimately agreed and thus granted defendants' motion to dismiss. In so ruling, the court discerned "some ambiguity" in section 108(3)(d)'s finality and appeal-preclusion language, particularly given that that language appears only in the section of the statute concerning second appeals. In the court's view, the placement of this language in section 108(3)(d) raised a question as to whether the finality and appeal-preclusion language applied only to final decisions rendered by the State Board after a second appeal, or whether it applied to any final decision of the State Board, including final decisions made after a first appeal. The court ultimately "construe[d] this finality language to apply to all charter application decisions by the State Board, whether those are decisions in initial appeal or in second appeal." In support of this conclusion, the court explained that it would make no sense to read section 108 to permit judicial review when both the local board and the State Board denied an application but to preclude such review when the State Board remands to the local board for reconsideration, the local board adheres to its position, and after a second appeal, the State Board relents and accepts the local board's denial. The court found further support for its position in the fact that article IX, section 1 of the Colorado Constitution vests in the State Board "general supervision" of public schools, and the Act gives the State Board the ultimate power to decide whether the local board's decision regarding a charter

school application was "'contrary to the best interests of the pupils, school district, or community' as required by section 22-30.5-108(3)(d)."

¶9 JDI appealed, contending, as pertinent here, that the district court had erred in concluding that section 108(3)(d) precludes judicial review of State Board decisions rendered after a first appeal. *Brannberg v. Colo. State Bd. of Educ.*, 2021 COA 132, ¶ 14, 503 P.3d 893, 897. A division of the court of appeals agreed and concluded that the appeal-preclusion language in section 108(3)(d) was clear—"it does not explicitly or by necessary implication limit Colorado courts' jurisdiction to review first-appeal state board decisions." *Id.* at ¶ 25, 503 P.3d at 898.

¶10 The division found support for its conclusion in the facts that (1) the appeal-preclusion clause appears only in section 22-30.5-108(3)(d) (the provision detailing the State Board's second-appeal review); and (2) that section references a "singular and definite 'decision' in a process containing two possible state board decisions." *Id.* at ¶¶ 25, 28-31, 503 P.3d at 898-99.

¶11 The division also relied on a comparison of the language and structure of section 108 with the language and structure of the appeal-preclusion language in section 22-30.5-107.5, C.R.S. (2022) ("section 107.5"). *Id.* at ¶¶ 25, 34-38, 503 P.3d at 898, 900. The division observed that section 107.5 details the appeals process for certain charter contract disputes. *Id.* at ¶ 34, 503 P.3d at 900. The division noted that, like section 108, section 107.5 allows parties to appeal to the State

Board for review. *Id.* Unlike section 108, however, section 107.5 provides only for a single appeal. *Id.* And section 107.5 "concludes with a provision, set off in its own subsection, stating as follows: 'Any decision by the state board pursuant to this section shall be final and not subject to appeal.'" *Id.* (quoting § 22-30.5-107.5(6)). In the division's view, this statutory structure, in contrast with the structure of section 108, made it "abundantly clear" that section 107.5's appeal-preclusion language applies to any State Board decision under that section. *Id.* at ¶ 36, 503 P.3d at 900. And the division believed that its construction was reinforced by the facts that (1) section 107.5 adds "pursuant to this section" in its appeal-preclusion provision (language that does not appear in section 108(3)(d)); and (2) section 107.5(6)'s appeal-preclusion language refers to "[a]ny decision," rather than merely "the decision," which is the language in section 108(6)(d) (and which the division believed concerns only a decision after a second appeal). *Id.* at ¶¶ 37-38, 503 P.3d at 900.

¶12 Finally, the division rejected defendants' suggestion that its interpretation of section 108 was absurd, noting that the division could "envision at least one plausible justification" for the General Assembly's according first and second appeals different degrees of finality. *Id.* at ¶ 44, 503 P.3d at 901. Specifically, in the division's view, barring judicial review of second appeals "affords the process a level of conclusiveness to what may be contentious conflicts between the state board and local boards," and "[n]o such justification undergirds a bar to review of first-appeal state board

decisions." *Id.* at ¶¶ 45-46, 503 P.3d at 901. The division thus reversed the district court's order dismissing JDI's complaint and remanded the case for further proceedings. *Id.* at ¶ 48, 503 P.3d at 902.

¶13 Defendants petitioned this court for certiorari review, and we granted their petition.

II. Analysis

¶14 We begin with the applicable standard of review and principles of statutory interpretation. We then consider the plain language of section 108(3) and the statutory scheme as a whole, and we conclude that when the State Board makes a final decision concerning the denial of a charter school application, that decision is not subject to appeal, regardless of whether the State Board makes this determination after a first or second appeal.

A. Standard of Review and Principles of Construction

¶15 We review questions of statutory construction de novo. *Bd. of Cnty. Comm'rs v. Colo. Dep't of Pub. Health & Env't*, 2021 CO 43, ¶ 17, 488 P.3d 1065, 1069. When interpreting statutes, we seek to discern and give effect to the General Assembly's intent. *Id.* In doing so, we apply words and phrases in accordance with their plain and ordinary meanings, and we consider the entire statutory scheme to give consistent, harmonious, and sensible effect to all of its parts. *Id.* In addition, we will avoid constructions that would render any words

or phrases superfluous or that would lead to illogical or absurd results. *Id.* And in construing a statute, we must respect the General Assembly's choice of language. *UMB Bank, N.A. v. Landmark Towers Ass'n*, 2017 CO 107, ¶ 22, 408 P.3d 836, 840. We therefore do not add words to the statute or subtract words from it. *Id.*

¶16 If the statutory language is unambiguous, then we must apply it as written, and we need not resort to other rules of statutory construction. *Bd. of Cnty. Comm'rs*, ¶ 17, 488 P.3d at 1069.

B. The State Board and the Act

¶17 Article IX, section 1(1) of the Colorado Constitution provides, "The general supervision of the public schools of the state shall be vested in a board of education whose powers and duties shall be as now or hereafter prescribed by law." Construing this provision, we have observed that the framers of our constitution

> contemplated general supervision to include direction, inspection, and critical evaluation of Colorado's public education system from a statewide perspective, that they intended the State Board to serve as both a conduit of and a source for educational information and policy, and that they intended the General Assembly to have broad but not unlimited authority to delegate to the State Board "powers and duties" consistent with this intent.

Bd. of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 648 (Colo. 1999).

¶18 Article IX, section 15 of our constitution, in turn, sets forth the role of local school boards:

> The 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.

¶19 We have construed "control of instruction" to require "power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction." *Booth*, 984 P.2d at 648.

¶20 Against this background, the General Assembly adopted the Act to create a form of direct citizen participation in government through which members of a community can come together to build and operate a public school. § 22-30.5-102, C.R.S. (2022). The schools remain subject to the oversight and indirect control of the local school board through a charter contract. *See* § 22-30.5-104, C.R.S. (2022). They are therefore known as charter schools. § 22-30.5-103(2), C.R.S. (2022).

¶21 Individuals or groups that want to create a charter school must first submit a charter school application to a local school board. §§ 22-30.5-106(1), -107, C.R.S. (2022). This application is a proposed agreement

that details the proposed school's mission statement, goals, objectives, and pupil performance standards; provides evidence that an adequate number of parents, teachers, and pupils support the formation of the proposed school; and includes descriptions of the proposed school's educational program, governance, and operation. § 22-30.5-106(1).

¶22 Upon receipt of such an application, the local board reviews the application, holds public hearings, and evaluates the merits of the proposed charter school. *See* § 22-30.5-107(2). If the local board approves the proposal, then the charter school application "serve[s] as the basis for a contract between" the charter school and local board. § 20-30.5-105(1)(a), C.R.S. (2022). If, however, the local board denies the application, then an applicant has the right to obtain review of that adverse decision pursuant to the appeal and review process outlined in section 108. *See* § 22-30.5-107(3).

¶23 Because the resolution of the question before us turns on the proper construction of section 108, we quote the pertinent portions of that section at some length:

> (1) Acting pursuant to its supervisory power as provided in section 1 of article IX of the state constitution, the state board, upon receipt of a notice of appeal or upon its own motion, may review decisions of any local board of education concerning the denial of a charter school application . . . , in accordance with the provisions of this section.

. . . .

(3) If the notice of appeal, or the motion to review by the state board, relates to a local board's decision to deny a charter application . . . , the appeal and review process shall be as follows:

(a) Within sixty days after receipt of the notice of appeal or the making of a motion to review by the state board and after reasonable public notice, the state board shall review the decision of the local board of education and make its findings. If the state board finds that the local board's decision was contrary to the best interests of the pupils, school district, or community, the state board shall remand such decision to the local board of education with written instructions for reconsideration thereof. Said instructions shall include specific recommendations concerning the matters requiring reconsideration.

(b) Within thirty days following the remand of a decision to the local board of education and after reasonable public notice, the local board of education, at a public hearing, shall reconsider its decision and make a final decision. . . .

(c) Following the remand, if the local board of education's final decision is still to deny a charter application . . . , a second notice of appeal may be filed with the state board within thirty days following such final decision.

> (d) Within thirty days following receipt of the second notice of appeal or the making of a motion for a second review by the state board and after reasonable public notice, the state board, at a public hearing, shall determine whether the final decision of the local board of education was contrary to the best interests of the pupils, school district, or community. If such a finding is made, the state board shall remand such final decision to the local board with instructions to approve the charter application. . . . *The decision of the state board shall be final and not subject to appeal.*

§ 22-30.5-108 (emphasis added).

¶24 As the foregoing makes clear, section 108(3)(a) details the State Board's initial review of the local board's decision. During this initial review, the State Board decides whether the local board's decision "was contrary to the best interests of the pupils, school district, or community." § 22-30.5-108(3)(a). If the State Board finds that it was, then the State Board must remand the decision to the local board with written instructions (including specific recommendations) for reconsideration thereof. *Id.*

¶25 Sections 108(3)(b) and (c), in turn, describe the processes by which the local board reconsiders the application on remand and reaches its "final decision." §§ 22-30.5-108(3)(b)-(c). If, after reconsideration, the local board decides to approve the application, then the local board and the charter applicant complete the charter contract, rendering a second appeal to the

State Board unnecessary. *See* § 22-30.5-108(3)(b). If, however, the local board's final decision is again to deny the application, then the applicant may file a second notice of appeal with the State Board. § 22-30.5-108(3)(c).

¶26 Thereafter, the State Board, at a public hearing, must determine whether the local board's "final decision" was "contrary to the best interests of the pupils, school district, or community." § 22-30.5-108(3)(d). If the State Board decides that it was, then the Board again remands the matter, this time with instructions to the local board to approve the application. *Id.* The State Board's decision "shall be final and not subject to appeal." *Id.*

¶27 The parties agree that the appeal-preclusion clause in section 108(3)(d) bars judicial review of State Board decisions rendered after a second appeal. They disagree, however, as to whether that section also bars judicial review of final State Board decisions rendered after a first appeal. JDI contends that section 108(3)(d) applies only to State Board decisions concerning charter school applications that are made after a second appeal under section 108. Thus, in its view, State Board decisions made after a first appeal are properly subject to judicial review. Defendants, in contrast, assert that section 108(3)(d) precludes judicial review of *all* State Board decisions concerning charter school applications, including final decisions rendered after a first appeal. For the following reasons, we agree with defendants.

¶28 First and foremost, section 108's plain language makes clear that the statute precludes judicial review of all final decisions of the State Board concerning charter school applications, whether rendered after a first or second appeal. As we have previously recognized, section 108 establishes "a scheme of review in which the State Board has final, unappealable, authority." *Acad. of Charter Schs. v. Adams Cnty. Sch. Dist. No. 12*, 32 P.3d 456, 462 (Colo. 2001). Specifically, when read as a whole, section 108 plainly gives to the State Board the final word on matters concerning the approval of charter school applications, and when the State Board's work is complete, section 108(3)(d) makes clear that the Board's decision "shall be final and not subject to appeal." § 22-30.5-108(3)(d); *see also Booth*, 984 P.2d at 648 (noting "the Charter Schools Act's designation of the State Board as final arbiter of disputes involving local boards").

¶29 We are not persuaded otherwise by the fact that section 108(3)(a) is silent as to the effect of a State Board decision, after a first appeal, agreeing with the local board's decision to deny a charter school application. In such a scenario, it is unnecessary for the State Board to remand that decision to the local board for reconsideration or to conduct a second appeal before making a final decision. Rather, as the division below recognized, "[A] first-appeal affirmation would constitute the state board's ultimate decision on the matter." *Brannberg*, ¶ 10, 503 P.3d at 897. Accordingly, a final decision of the State Board rendered after a first appeal becomes "[t]he decision" of the State Board on the

matter, and section 108(3)(d) plainly states, "The decision of the state board shall be final and not subject to appeal." § 22-30.5-108(3)(d). Such a conclusion is fully consistent with our prior statements recognizing that section 108 establishes a statutory scheme under which the State Board "has final, unappealable, authority," *Acad. of Charter Schs.*, 32 P.3d at 462, and is the "final arbiter" of disputes in this area, *Booth*, 984 P.2d at 648.

¶30 Moreover, section 108 nowhere gives a charter school applicant standing to file a lawsuit or the right to seek judicial review when the State Board renders a final decision after a first appeal. This is significant because when the legislature intended to confer such standing or rights of judicial review, it has done so expressly. *See*, *e.g.*, § 22-30.5-104(7)(b) ("The charter school shall have standing to sue and be sued in its own name for the enforcement of any contract created pursuant to this paragraph (b)" (concerning agreements between a charter school and others for the use of a school building and grounds, the operation and maintenance thereof, and the provision of certain services, activities, or undertakings).); §§ 22-63-302(10)(a)-(d), C.R.S. (2022) (allowing a teacher who was dismissed by a local school board to seek review in the court of appeals and providing that the court of appeals must review the record "to determine whether the action of the board was arbitrary or capricious or was legally impermissible").

¶31 Here, to the extent that section 108 says anything about judicial review, it provides that the State

Board's decision is final and *not* subject to appeal. *See* § 22-30.5-108(3)(d). As noted above, we may not add words to the statute to create a right of judicial review that the statute nowhere affords. *See UMB Bank, N.A.*, ¶ 22, 408 P.3d at 840. And interpreting the statute to allow judicial review in circumstances like those before us would mean that the judiciary has the final say in such circumstances, directly contrary to the statutory scheme, which gives the final word to the State Board. *See Acad. of Charter Schs.*, 32 P.3d at 462; *Booth*, 984 P.2d at 648.

¶32 Second, we deem it significant that the State Board's analysis is the same during both a first and second appeal. Specifically, in both contexts, the State Board determines whether the local board's decision "was contrary to the best interests of the pupils, school district, or community." §§ 22-30.5-108(3)(a), (d). And in both scenarios, the State Board effectively "substitute[s] its judgment for that of the local board." *Booth*, 984 P.2d at 651. Accordingly, unlike the division below, we perceive no textual basis in the statute for creating a right of judicial review in connection with (and imposing a lesser degree of finality on) final decisions of the State Board rendered after a first appeal. To the contrary, like the district court, we can discern no basis for affording an applicant a right of judicial review after the local board and the State Board agree at the outset to deny a charter school application, when, as all parties here agree, the statute precludes judicial review if the State Board remands to the local board to reconsider, the local board persists in its denial, and

the State Board ultimately agrees with the local board's decision to deny the application. In both cases, the local board has voted to deny an application, and the State Board has affirmed that decision. In our view, under the plain language of section 108, the State Board's decision should be afforded the same level of finality in both scenarios.

¶33 Third, interpreting section 108 to authorize judicial review of State Board decisions concerning charter school applications after a first appeal is inconsistent with the General Assembly's intent to expedite consideration of charter school applications. *See* §§ 22-30.5-107 to -108 (setting forth the timelines for the filing of an application, the local board's consideration at each stage, and the initial and, if necessary, second appeals to the State Board); *Booth*, 984 P.2d at 652 (noting that "the entire application process indicates legislative intent for efficiency and decisiveness"). Specifically, the Act envisions a process by which a charter school application can be filed early in one school year so that the charter school, if approved, can begin operating in the next school year. *See* §§ 22-30.5-107 to -108. Allowing judicial review in a scenario like that present here would undermine the expeditious process that the legislature has created.

¶34 Finally, although we have not directly addressed the precise issue now before us, our case law regarding the State Board's authority is fully consistent with the decision that we reach today.

¶35 In *Booth*, 984 P.2d at 642, for example, the Denver School Board challenged the constitutionality of the second-appeal provision of section 108. The question presented was whether the General Assembly could constitutionally "authorize the State Board of Education to order a local school board to approve a charter school application that the local board ha[d] rejected when the State Board finds approval to be in the best interests of the pupils, school district, or community." *Id.* We concluded that the second-appeal provision was constitutional. *Id.*

¶36 In reaching this conclusion, we first discussed the State Board's "general supervision" power under article IX, section 1(1) of the Colorado Constitution and determined that the framers of our constitution contemplated "general supervision" to include the State Board's "direction, inspection, and critical evaluation of Colorado's public education system from a statewide perspective." *Id.* at 648. We then examined the derivation of the State Board's powers, noting how, in 1877, the legislature had established a procedure by which a person aggrieved by a local school board's decision could appeal that decision first to the county superintendent and then to the State Board, with the State Board's decision being final. *Id.* at 648 (citing ch. 92, sec. 81, 87, 1877 Colo. Gen. Laws §§ 2527, 2533, at 836-37). We explained that this statutory assignment of authority to the State Board is analogous to the role of the State Board in section 108 and provided "legislative precedent for the Charter Schools Act's designation of the State Board as final arbiter of disputes

involving local boards." *Id.* In light of the foregoing, and the respective roles of the State Board and local boards of education, we concluded that the State Board did not unconstitutionally infringe on the Denver School Board's control of instruction when it ordered the approval of the charter school application at issue. *Id.* at 655.

¶37 Our interpretation today similarly recognizes and gives life to the General Assembly's designation of the State Board as the final arbiter of disputes involving local boards in this area.

¶38 In *Academy*, 32 P.3d at 458-59, we considered whether a charter school may seek judicial enforcement of the charter contract with its local school district, and we concluded, as pertinent here, that disputes between a charter school and a district arising out of the statutorily required portions of a charter contract are not justiciable but are reserved for determination by the State Board.

¶39 Specifically, in *Academy*, a charter school sued its authorizing district to enforce both the "service provisions" of the contract and the statutorily mandated "governing policy provisions." *Id.* at 467-68. We concluded that the "service provisions" of the contract, which related to the "use of a school building and grounds" and the "operation and maintenance" thereof, were judicially enforceable under express statutory language. *Id.* at 468 (citing § 22-30.5-104(7)(b)). In contrast, we concluded that disputes over the implementation of the "governing policy provisions," which

consisted of the "charter school application and all agreements and requests releasing the charter school from school district policies[,]" are "funneled into the administrative system embodied by section 22-30.5-108." *Id.* at 462. Turning then to section 108, we explained:

> 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.

Id. We thus concluded, "[A]ny decision rendered by the State Board under section 22-30.5-108 is final and not subject to appeal." *Id.* at 468.

¶40 In our view, the same principles relating to the force and effect of section 108's statutory language apply here.

¶41 We are not persuaded otherwise by any of JDI's arguments. In its answer brief, JDI raised many merits-based contentions and policy claims. JDI did not, however, address the narrow issue of statutory interpretation on which we granted certiorari. Nor did JDI respond in any way to the points made by defendants

in their joint opening brief, which did address the issue before us. JDI's merits-based arguments are simply not before us.

III. Conclusion

¶42 Because the State Board in this case affirmed the Douglas County School Board's decision to deny JDI's charter school application after JDI's first appeal, and because that determination was the State Board's final decision on the matter, we conclude that under the plain and unambiguous language of section 108(3)(d) and the statutory scheme as a whole, the State Board's decision is not subject to judicial review.

¶43 Accordingly, we reverse the judgment of the division below, and we remand this case with instructions that the case be returned to the district court for the dismissal of JDI's claim for lack of subject matter jurisdiction.

COLORADO COURT OF APPEALS **2021COA132**

Court of Appeals No. 20CA0641
City and County of Denver District Court No. 19CV550
Honorble Morris B. Hoffman, Judge

Judy A. Brannberg and John Dewey Institute, Inc.,

Plaintiffs-Appellants,

v.

Colorado State Board of Education and Douglas County School District RE-1,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN*
Daily and Vogt, JJ., concur

Announced October 28, 2021

Klenda Legal LLC, Steven A. Klenda, Denver, Colorado, for Plaintiffs-Appellants

Phillip J. Weiser, Attorney General, Julie C. Tolleson, First Assistant Attorney General, Jenna Zerylnick,

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* Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

Assistant Attorney General, Denver, Colorado, for Defendant-Appellee Colorado State Board of Education

Caplan and Earnest LLC, Elliott Hood, Boulder, Colorado, for Defendant-Appellee Douglas County School District RE-1

¶ 1 Plaintiffs, Judy A. Brannberg[1] and her proposed charter school, John Dewey Institute, Inc. (JDI), appeal the district court's judgment concluding that it lacked subject matter jurisdiction to review the rejection of their charter school application by defendants, the Douglas County School District RE-1 (the District) and the Colorado State Board of Education (collectively, the School Boards). Because we disagree with the district court's conclusion that the statute at issue bars court review of plaintiffs' claims, we reverse the judgment and remand for further proceedings.

¶ 2 This case presents the question of whether the General Assembly has precluded the courts' authority to hear and decide a given class of cases under the Charter Schools Act, sections 22-30.5-101 to -120, C.R.S. 2021. The Act allows individuals or groups to apply to a local school board to create a charter. § 22-30.5-107, C.R.S. 2021. In the event of an adverse decision, applicants may appeal the local board's decision to the Colorado State Board of Education. § 22-30.5-108,

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[1] Defendants assert, and plaintiffs do not disagree, that Brannberg is not properly a party to this case because she was not a party to JDI's appeal before the state board. *See* § 24-4-106(4), C.R.S. 2021. We agree and conclude that Brannberg lacks standing to pursue this appeal. *See State, Dep't of Pers. v. Colo. State Pers. Bd.*, 722 P.2d 1012, 1014, 1016-17 (Colo. 1986).

C.R.S. 2021. When the initial appeal of the local board's decision—known as the first appeal—occurs, subsection 108(3)(a) instructs the state board either to affirm the decision or to remand the proceeding to the local board. If, on remand, the local board again renders a decision adverse to the applicant, the applicant may take a second appeal to the state board. § 22-30.5-108(3)(c). Following instructions explaining how the state board must decide the second appeal, subsection 108(3)(d) concludes by stating that "[t]he decision of the state board shall be final and not subject to appeal."

¶ 3 The issue in this case is whether this appeal-preclusion language also applies to a state board decision rendered after a first appeal—a scenario in which the Board has affirmed the local board's decision, without the applicant getting to a second appeal and thus to subsection 108(3)(d), where the appeal-preclusion language appears. While the Colorado Constitution vests our courts with broad jurisdiction, the General Assembly may define and restrict this jurisdiction through statutory language that explicitly or by necessary implication does so. *Colorow Health Care, LLC v. Fischer*, 2018 CO 52M, ¶ 21, 420 P.3d 259, 263 (citing Colo. Const. art. VI, §§ 1, 2, 3, 9). Resolving a question of statutory interpretation, we conclude that the appeal-preclusion language in subsection 108(3)(d) does not explicitly or by necessary implication apply to state board decisions rendered after a first appeal. Subsection 108(3)(d) thus does not revoke courts' subject matter jurisdiction to review such decisions.

I. Background

¶ 4 Before turning to the meaning of the provision in question, we provide background on both the procedural history of this case and the charter school appeals process.

A. Procedural History

¶ 5 JDI brought claims against the School Boards under the Colorado Administrative Procedure Act (APA), alleging that they failed to follow the procedures required by the Act. Specifically, JDI's complaint alleged, among other things, that the District violated section 22-30.5-107(2) by failing to rule on its charter application in an official board resolution. JDI also alleged that the District violated section 22-30.50-107(4) by failing to adequately provide reasons for the denial. At a board meeting, JDI alleged, District board members verbally expressed their reasons for denying the application rather than setting them forth in an official, written resolution. JDI alleged that these statutory violations created an inadequate record for review for its state board appeal. Finally, JDI alleged that the State Board erred by affirming the District's denial.

¶ 6 The School Boards moved to dismiss under C.R.C.P. 12(b)(1) on two grounds. First, they argued that subsection 108(3)(d) barred judicial review of both first- and second-appeal state board decisions. Second, they argued that JDI lacked standing to bring the suit under the political subdivision doctrine. The district court did not reach the second ground because it

granted the School Boards' motion on the first ground alone. It concluded that subsection 108(3)(d) was ambiguous with respect to whether it applied to both first- and second-appeal decisions, but that extra-textual considerations weighed in favor of it precluding judicial review of first-appeal state board charter-application decisions under section 22-30.50-108. Accordingly, the court dismissed the case for lack of subject matter jurisdiction. JDI now appeals.

B. The Charter School Application Process

¶ 7 The General Assembly declared that one purpose of the Act is "[t]o provide citizens with multiple avenues by which they can obtain authorization for a charter school." § 22-30.5-102(2)(j), C.R.S. 2021. To this end, sections 22-30.5-106 and -107 of the Act detail procedures and requirements for individuals or groups to submit applications to a local school board to establish a charter school within its district. If the application is approved by the local board, it serves as the basis for a governing contract between the charter school and the local board. § 22-30.5-105(1)(a), C.R.S. 2021. If, however, the local board either denies a charter application or accepts the application with unilaterally imposed conditions on the applicant school,[2] any person may appeal that decision to the state board. § 22-30.5-108(2).

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[2] Section 22-30.5-108, C.R.S. 2021, applies equally where a party wishes to appeal a local board's revocation of, or refusal to renew, a charter school contract. However, for economy of reference and because this case involves an application rather than a

¶ 8 Subsection 108(3) sets forth the procedures and standards the state board must follow in appeals from the local school board. It describes two possible decisions of the state board: (1) a remand or affirmation in the appeal of the local board's initial decision, and (2) in the event the state board remands an initial decision, a second remand with instructions or affirmation in the appeal of the local board's second decision. § 22-30.5-108(3). It is this appeal-remand-appeal process—and the finality accorded to ultimate state board decisions at either step—that is at issue here.

¶ 9 Subsection 22-30.50-108(3)(a) governs the first appeal. It requires the state board to determine whether the local board's initial decision was "contrary to the best interests of the pupils, school district, or community." *Id.* If it so finds, the state board must remand the proceeding to the local board with specific matters for the local board to reconsider. *Id.*

¶ 10 Subsection 108(3)(a) does not explicitly mention the possibility that the state board may affirm the local board's initial decision. Nevertheless, a first-appeal affirmation would constitute the state board's ultimate decision on the matter. Most important for our purposes, subsection 108(3)(a) does not contain any appeal-preclusion language.

¶ 11 On remand, if the local board again denies or unilaterally imposes unacceptable conditions on the applicant, the applicant may again appeal to the state

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revocation or renewal, we discuss section 108 only in the context of charter applications.

board. § 22-30.5-108(3)(b), (c). The state board must then apply the same "contrary to the best interests" standard stated in subsection 108(3)(a). § 22-30.5-108(3)(d). This time, however, if the state board again disagrees with the local board's decision, its remand no longer contains mere recommendations; rather, it is an order to the local board to either approve the application or dispense with any of the board's unacceptable conditions. *See id.*

¶ 12 Like subsection 108(3)(a), subsection 108(3)(d) does not expressly mention the possibility that the state board may affirm the local board's decision on second appeal. Unlike subsection 108(3)(a), however, subsection 108(3)(d) ends with a provision on finality: "The decision of the state board shall be final and not subject to appeal."

¶ 13 The parties agree that this appeal-preclusion language bars judicial review of state board decisions rendered after a second appeal. They disagree, though, about the meaning of this language—specifically whether "the decision of the state board" also includes a state board decision under subsection 108(3)(a) to affirm after a first appeal.

II. The Appeal-Preclusion Language in Subsection 108(3)(d)

¶ 14 JDI contends that the district court erred by concluding that subsection 108(3)(d) precludes judicial review of first-appeal state board decisions. We agree.

A. Standard of Review and Preservation

¶ 15 We review questions of statutory interpretation de novo. *Munoz v. Am. Fam. Mut. Ins. Co.*, 2018 CO 68, ¶ 9, 425 P.3d 1128, 1130.

¶ 16 To preserve an issue for appeal, "all that was needed was that the issue be brought to the attention of the trial court and that the court be given an opportunity to rule on it." *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010). No "talismanic language" is necessary, *People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004), at least so long as the party presented the district court with the "sum and substance" of the argument it makes on appeal, and the district court ruled on it, *Berra*, 251 P.3d at 570.

¶ 17 In the district court, JDI contended that subsection 108(3)(d) did not bar its suit. The court ruled that this subsection was ambiguous, and it interpreted the appeal-preclusion language as barring judicial review of both first- and second-appeal decisions. We therefore conclude that this statutory interpretation issue is preserved.

¶ 18 Despite conceding that the issue is preserved, the School Boards contend that, because JDI asserted in the district court that the statute is "ambiguous," JDI should now be barred from asserting that this text is susceptible of a plain-meaning interpretation. JDI concedes that its "ambiguous" assertion was a misnomer. We conclude that JDI's plain-meaning argument in the district court is the "sum and substance" of the position it now raises on appeal. *See Berra*, 251 P.3d at

570. Therefore, we conclude that JDI adequately preserved its statutory argument.

B. General Principles of Statutory Interpretation

¶ 19 Our primary goal when interpreting statutory text is to effectuate the intent of the General Assembly. *Poudre Sch. Dist. R-1 v. Stanczyk*, 2021 CO 57, ¶ 13, 489 P.3d 743, 747. To accomplish this, we must "respect the legislature's choice of language." *Smokebrush Found. v. City of Colorado Springs*, 2018 CO 10, ¶ 18, 410 P.3d 1236, 1240. Consequently, we always look first to the statutory text at issue, applying its plain and ordinary meaning while ensuring that we are giving "consistent, harmonious, and sensible effect" to every part of the statutory scheme. *Bd. of Cnty. Comm'rs v. Colo. Dep't of Pub. Health & Env't*, 2021 CO 43, ¶ 17, 488 P.3d 1065, 1069.

¶ 20 In doing so, we must not "add or subtract words from a statute." *Smokebrush Found.*, ¶ 18, 410 P.3d at 1240. The General Assembly's failure to add certain language to a statute can "indicate[] purposeful omission." *Neher v. Neher*, 2015 COA 103, ¶ 23, 402 P.3d 1030, 1034; *see also Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 22, 488 P.3d 1140, 1145 ("It is just as important as what the statute says [a]s what the statute does not say.") (citation omitted); *Specialty Rests. Corp. v. Nelson*, 231 P.3d 393, 397 (Colo. 2010) ("[T]he General Assembly's failure to include particular language is a statement of legislative intent.").

¶ 21 Our first task is thus to determine whether the text at issue is susceptible of one or more plain-meaning interpretations. *See Bd. of Cnty. Comm'rs*, ¶¶ 18-26, 488 P.3d at 1070-71. A statute is ambiguous "when it is reasonably susceptible of multiple interpretations." *Elder v. Williams*, 2020 CO 88, ¶ 18, 477 P.3d 694, 698. Yet, the mere fact that parties advance opposing plain-meaning interpretations does not establish that the text is ambiguous. *Klun v. Klun*, 2019 CO 46, ¶ 18, 442 P.3d 88, 92.

¶ 22 If the text is unambiguous, our analysis is done; "we apply it as written—venturing no further." *Blooming Terrace No. 1, LLC v. KH Blake St., LLC*, 2019 CO 58, ¶ 11, 444 P.3d 749, 752.

¶ 23 Moreover, we depart from a literal interpretation of an unambiguous statute to avoid a construction that "would lead to illogical or absurd results." *Bd. of Cnty. Comm'rs*, ¶ 17, 488 P.3d at 1069. We are not permitted to give unambiguous text a meaning different from what the plain language supports "in order to avoid a result that we find inequitable or unwise." *People v. Lindsey*, 2020 CO 21, ¶ 44, 459 P.3d 530, 540. Accordingly, the absurdity exception is reserved for the rare circumstance where the literal absurdity is "so gross as to shock the general moral or common sense." *Dep't of Transp. v. City of Idaho Springs*, 192 P.3d 490, 494 (Colo. App. 2008) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 75 L.Ed. 156 (1930)).

¶ 24 An additional consideration applies when interpreting statutory text that limits the jurisdiction of

Colorado courts. The Colorado Constitution confers on its courts "unrestricted and sweeping jurisdictional powers in the absence of limiting legislation." *Matter of A. W.*, 637 P.2d 366, 373 (Colo. 1981). The supreme court has thus ruled that, "[w]hile the General Assembly may define and restrict this jurisdiction, 'no statute will be held to so limit court power unless the limitation is explicit'" or results from necessary implication. *Colorow Health Care*, ¶ 20, 420 P.3d at 263 (quoting *State v. Borquez*, 751 P.2d 639, 642 (Colo. 1988)). Our ultimate task is therefore to determine whether the appeal-preclusion language in subsection 108(3)(d) explicitly or by necessary implication limits Colorado courts' jurisdiction to hear challenges to first-appeal state board decisions.

C. Analysis

¶ 25 We conclude that the appeal-preclusion language in subsection 108(3)(d) is clear—it does not explicitly or by necessary implication limit Colorado courts' jurisdiction to review first-appeal state board decisions. This result is made plain by the provision's placement in only the second-appeal subsection, its reference to a singular and definite "decision" in a process containing two possible state board decisions, and a comparison to similar appeal-preclusion language in section 22-30.5-107.5, C.R.S. 2021. Accordingly, we need not—and may not—rely on other indicia of legislative intent. *See Elder*, ¶ 18, 477 P.3d at 698; § 2-4-203, C.R.S. 2021.

¶ 26 Further, we conclude that this plain-meaning construction of the appeal-preclusion language does not lead to an absurd or illogical result. Rather, we envision at least one plausible explanation for the General Assembly barring judicial review of second-appeal but not first-appeal decisions of the state board.

1. The Plain-Meaning of Subsection 108(3)(d)

¶ 27 Our first task is to determine the plain and ordinary meaning of the statute and whether it is ambiguous—that is, "reasonably susceptible of multiple interpretations." *Elder*, ¶ 18, 477 P.3d at 698. As noted, JDI contends that the appeal-preclusion language does not bar judicial review of first-appeal state board decisions rendered under subsection 108(3)(a). The School Boards disagree. Both JDI and the School Boards argue that the plain meaning of the statute supports their respective positions. We agree with JDI and disagree with the School Boards.

¶ 28 We start with the placement of the appeal-preclusion language in the statute. Through subsections (3)(a) through (3)(d), section 22-30.5-108 sets forth a four-step procedure whereby charter school applicants may twice appeal a decision of the local school board. Most importantly, the text governing the state board's first-appeal decision appears in a separate subsection from that governing the Board's second-appeal decision. The appeal-preclusion language appears only in the latter and uses the definite article "the" to refer to "the decision" of the state board. A familiar principle of

statutory construction is that "the use of the definite article particularizes the subject which it precedes." *Coffey v. Colo. Sch. of Mines*, 870 P.2d 608, 610 (Colo. App. 1993) (citing *City of Ouray v. Olin*, 761 P.2d 784 (Colo. 1988)). By a plain and ordinary reading, "the decision" refers only to decisions made under the subsection in which it occurs—that is, the second-appeal subsection.

¶ 29 Further, no other indicator or cross-reference in the appeal-preclusion language or in subsection 108(3)(d) more generally points to this language's applicability to subsection 108(3)(a). Considering this in tandem with the overall structure of section 22-30.5-108 makes clear that the appeal-preclusion language applies only to subsection 108(3)(d).

¶ 30 If the General Assembly had intended to preclude judicial review of first appeals, it could have added appeal-preclusion language to subsection 108(3)(a); placed the appeal-preclusion provision in subsection 108(3)(d) into its own, separate subsection, as it did in section 22-30.5-107.5; or combined subsections 108(3)(a) and (3)(d) to create a single subsection governing all state board appeals, complete with appeal-preclusion language. Each of these alternatives would have made it clear that the appeal-preclusion language also applies to first-appeal state board affirmations. At the very least, the General Assembly's failure to craft appeal-preclusion language that expressly applies to multiple subsections suggests "purposeful omission." *Neher*, ¶ 23, 402 P.3d at 1034.

¶ 31 We next observe that the appeal-preclusion language in question is singular. It references "the decision" and not "the decisions" of the state board. Yet, subsection 108(3) established a two-appeal procedure where the state board could twice review the actions of a local school board. The School Boards nevertheless contend that, when the state board affirms on a first appeal, it has still only rendered one final decision. The appeal-preclusion language, they argue, only applies to the Board's ultimate decision, whether that is after a first or second appeal. The School Boards' interpretation, however, would be akin to adding language to subsection 108(3)(d) to say: "The *ultimate* decision of the state board shall be final and not subject to appeal." We may not read a word into a provision that the General Assembly did not include. *Smokebrush Found.*, ¶ 18, 410 P.3d at 1240.

¶ 32 We disagree with the district court's conclusion that the appeal-preclusion language "creates some ambiguity." The court observed that the General Assembly could have clarified section 22-30.5-108 by specifying that no appeals would lie from a first-appeal decision of the state board. However, the court did not explain how the statute is subject to reasonable, conflicting interpretations, as is required for a determination of ambiguity. *Elder*, ¶ 18, 477 P.3d at 698. Instead, it concluded that the legislative scheme "makes no sense" and that it would have been more logical for the General Assembly to preclude judicial review of first appeals, rather than second appeals. In so doing, it did not consider whether a plain-language interpretation

of subsection 108(3)(d) could have a plausible rationale, a topic which we discuss below.

¶ 33 Because we conclude that subsection 108(3)(d) does not bar review of JDI's case, we also disagree with the district court's conclusion that the provisions of the APA under which JDI brought claims are inapplicable. At oral argument, the School Boards conceded that their "contrary to best interests" review of local board decisions encompasses review of the local boards' compliance with the procedural requirements of the Act. Given this concession, JDI's claims regarding the District's alleged procedural violations are reviewable under the APA.

¶ 34 Our conclusion that section 22-30.5-108 should be interpreted in accordance with its plain meaning is reinforced by a comparison of this section to one containing similar appeal-preclusion language, section 22-30.5-107.5. Rather than governing charter application disputes, this section governs the appeals process for certain charter contract disputes. Like section 22-30.5-108, it allows parties to appeal to the state board for review. § 22-30.5-107.5(3)(b). Unlike section 22-30.5-108, this section only provides for a single appeal. *See* § 22-30.5-107.5(3)-(6). This section concludes with a provision, set off in its own subsection, stating as follows: "Any decision by the state board pursuant to this section shall be final and not subject to appeal." § 22-30.5-107.5(6).

¶ 35 Comparing these sections is useful for two reasons. Because these sections concern a similar

subject—an appeals process for charter disputes—we should construe them together to avoid inconsistencies. *See People v. Carrillo*, 2013 COA 3, ¶ 13, 297 P.3d 1028, 1030. Second, because we presume the General Assembly chooses language with an "aware[ness] of its own enactments," *LaFond v. Sweeney*, 2015 CO 3, ¶ 12, 343 P.3d 939, 943, we must at least entertain the possibility that the structural and linguistic differences between these sections are indicative of the General Assembly's intent to craft two appeals processes accorded differing levels of finality.

¶ 36 Accordingly, we again start with the provision's placement in its statute. Unlike section 22-30.5-108, section 22-30.5-107.5 places its appeal-preclusion provision in a separate subsection. Though this section provides for a single appeal to the state board—and thus a single decision per dispute—this structure makes it abundantly clear that section 22-30.5-107.5's appeal-preclusion language applies to any state board decision under that section. If, as we noted above, the General Assembly had used a similar structure for section 22-30.5-108, it would be clear that its appeal-preclusion language did the same.

¶ 37 Likewise, section 22-30.5-107.5 adds "pursuant to this section" in its appeal-preclusion provision. Again, the General Assembly's phrasing makes the scope of that provision abundantly clear. With such a phrase missing in subsection 108(3)(d), it does not inexorably follow that subsection 108(3)(d) applies to subsection 108(3)(a).

¶ 38 Last, section 22-30.5-107.5(6)'s appeal-preclusion language refers to "[a]ny decision" rather than "the decision." We have already noted that the use of the definite article particularizes section 22-30.5-108's appeal-preclusion language to only the second-appeal subsection. The supreme court has repeatedly noted that "the use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings." *People v. Rediger*, 2018 CO 32, ¶ 22, 416 P.3d 893, 899 (citation omitted). The legislature's use of "[a]ny" in section 22-30.5-107.5 thus reinforces our conclusion that the definite article in "the decision" limits that phrase to subsection 108(3)(d).

¶ 39 Given the above reasons, we are especially hesitant to read the appeal-preclusion language as applying to subsection 108(3)(a) considering that such a reading would restrict the jurisdiction of Colorado courts. Such restrictions, our supreme court has ruled, must be explicit or necessarily implied. *Colorow Health Care*, ¶ 20, 420 P.3d at 263. We conclude that the appeal-preclusion provision in subsection 108(3)(d) does not explicitly or by necessary implication restrict jurisdiction for a state board decision rendered under a separate subsection.

2. Two Charter Schools Act Cases—*Booth* and *Academy of Charter Schools*

¶ 40 Because we conclude that the meaning of the appeal-preclusion provision is clear, we need not go

beyond the plain meaning of the text to determine legislative intent.

¶ 41 The parties discuss at length the applicability of two supreme court cases addressing the Act, *Board of Education of School District No. 1 v. Booth*, 984 P.2d 639 (Colo. 1999), and *Academy of Charter Schools v. Adams County School District No. 12*, 32 P.3d 456 (Colo. 2001). Those cases are inapposite for two reasons. First, those cases involved judicial review of either a second appeal, *Booth*, 984 P.2d at 642-44, or a dispute not brought through the state board appeals process, *Acad. of Charter Schs.*, 32 P.3d at 460-61. Neither scenario is the same as that here. Second, *Booth* and *Academy of Charter Schools* did not address whether the General Assembly precluded judicial review of second-appeal but not first-appeal state board decisions.

¶ 42 Accordingly, the seemingly broad language in *Academy of Charter Schools*, 32 P.3d at 468 ("[A]ny decision rendered by the State Board under section 22-30.5-108 is final and not subject to appeal."), must be viewed as dicta because it was contained in a description of the statutory scheme for charter schools and was not part of the court's holding. *Coon v. Berger*, 41 Colo. App. 358, 360, 588 P.2d 386, 387 (1978) ("[A]ny expression of opinion on a question not necessary for the decision is merely *obiter dictum*, and is not, in any way, controlling upon later decisions."), *aff'd*, 199 Colo. 133, 606 P.2d 68 (1980). Further, unlike in *Booth*, this case does not concern whether the General Assembly has the power to authorize the state board to approve a charter school application that a local board had

twice rejected. *Booth*, in fact, explicitly noted that the General Assembly has the constitutional authority to provide for judicial review of local board decisions. 984 P.2d at 649. This, therefore, is not a situation where the combination of the constitution's provision of exclusive authority to a state entity with appeal-preclusion language means that judicial review is barred. *See Colo. Jud. Dep't. v. Colo. Jud. Dep't Pers. Bd. of Rev.*, 2021 COA 82, ¶ 35, ___ P.3d ___, ___.

¶ 43 We thus conclude that, contrary to the School Boards' contention, *Booth* and *Academy of Charter of Schools* do not require a result different from what we reach here.

3. The Absurdity Exception

¶ 44 Finally, we determine that a bar to review of second-appeal but not first-appeal state board decisions is not so absurd as to "shock the general moral or common sense." *City of Idaho Springs*, 192 P.3d at 494 (quoting *Crooks*, 282 U.S. at 60, 51 S.Ct. 49). Rather, we envision at least one plausible justification for the General Assembly according these appeals different degrees of finality.

¶ 45 A bar to judicial review of the state board's second-appeal decisions serves an important purpose in the statutory scheme. Namely, in the event the state board orders the local board to approve or deny a charter application under subsection 108(3)(d), the second-appeal bar to review prevents a recalcitrant local board from litigating to avoid doing so. The bar to

judicial review of second appeals thus affords the process a level of conclusiveness to what may be contentious conflicts between the state board and local boards. *See Booth*, 984 P.2d at 648 (affirming the state board's role as "final arbiter" of disputes between it and local boards).

¶ 46 No such justification undergirds a bar to review of first-appeal state board decisions. In the first-appeal scenario, the state board has affirmed the decision of the local board—that is, the state board and local board agree over whether to approve or deny the charter application. Thus, the General Assembly reasonably could have allowed judicial review of first-appeal state board decisions because there would be no need in that scenario to prevent a recalcitrant local board from prolonging the charter application process through litigation.

¶ 47 Though a bar to review of both first-appeal and second-appeal decisions may be a more logical statutory scheme, absurdity is a high bar to clear. *E.g.*, *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 505 (D.C. Cir. 2016). The School Boards' arguments simply do not clear it. Moreover, we may not "rewrite statutes to improve them." *City of Idaho Springs*, 192 P.3d at 494. The plain meaning of the text the legislature enacted does not explicitly or by necessary implication limit Colorado courts' jurisdiction, and we decline to expand its meaning to so conclude. A bar to first-appeal but not second-appeal decisions simply does not meet the high bar of being too absurd to justify, even if it might not ultimately be better policy. "Every legislature must

grapple with the problem of unintended consequences. If a statute gives rise to undesirable results, the legislature must determine the remedy." *Id.*

III. Conclusion

¶ 48 The district court dismissed JDI's case for lack of subject matter jurisdiction, reasoning that subsection 108(3)(d) barred judicial review of all state board charter-application decisions under section 22-30.5-108. We reach a different conclusion. Because the district court did not rule on the School Boards' other ground for Rule 12(b)(1) dismissal—the applicability of the political subdivision doctrine—we do not reach that issue. We reverse the judgment of the district court and remand for further proceedings.

JUDGE DAILEY and JUDGE VOGT concur., JJ., concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	
JUDY A. BRANNBERG, et al., Plaintiffs, v. DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al., Defendants.	Case No. 19CV550 COURTROOM 215
ORDER	

(Filed Feb. 26, 2020)

For the reasons articulated below, Defendants' "Joint Motion to Dismiss," filed November 15, 2019, is GRANTED, and this complaint for judicial review is DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Plaintiffs allege they submitted a charter school application to Defendant Douglas County School District RE-1 ("Local District"), that the Local District improperly denied the application, that Plaintiffs then timely appealed the denial to Defendant Colorado State Board of Education ("State Board"), and that the State Board improperly denied the appeal. Plaintiffs then brought this complaint for judicial review under

the provisions of the Administrative Procedures Act, § 24-4-106.

In their joint motion to dismiss, Defendants argue that this Court lacks subject matter jurisdiction for two reasons: 1) the State Board's decision is final and not subject to judicial review under the specific provisions set forth in § 22-30.5-108 governing appeals from the denial of a charter school application; and 2) judicial review is in any event precluded by the so-called "political subdivision doctrine." I agree with Defendants that § 22-30.5-108 precludes judicial review, and therefore do not reach the political subdivision argument.

Under C.R.C.P. 12(b)(1), plaintiffs have the burden of showing subject matter jurisdiction. *Jim Hutton Educational Fdtn. v. Rein*, 418 P.3d 1156, 1161 (Colo. 2018). Therefore, unlike with motions to dismiss under C.R.C.P. 12(b)(5), trial courts are not required to accept the allegations of the complaint as true. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001). Instead, if the jurisdictional facts appear to be in dispute, the trial court may order an evidentiary hearing to resolve them. *Id.* However, such a hearing is unnecessary if there are no disputes of jurisdictional fact, or if the trial court assumes all the facts of the complaint are true and still concludes there is no subject matter jurisdiction. *Id.* Here, there are no disputed jurisdictional facts, and I may therefore rule on the motion and briefs without an evidentiary hearing.

Detailed procedures for submitting, and appealing the denial of, an application for a charter school are set forth in §§ 22-30.5-107 and -108, which are part of the Charter Schools Act, §§ 22-30.5-101 et seq. An applicant must submit the application to the local board of education, which must act on it, after notice and a public hearing, within 90 days after submission. § 22-30.5-107(1)(b) and (2). If the local board denies the application, fails to act on it within the required 90 days (which is deemed a denial), or approves it with unilateral conditions unacceptable to the applicant, then the applicant may appeal to the State Board. § 22-30.5-107(3).

That appeal is governed by § 22-30.5-108. The unsuccessful charter applicant must file the notice of appeal with the State Board within thirty days after the local board's denial or conditional approval. § 22-30.5-108(2). The State Board, also after notice and a public hearing, must act on the appeal within 60 days after the filing of the notice of appeal. § 22-30.5-108(3)(a).

If the State Board affirms the denial or conditional approval, there is no further review explicitly outlined in the statute (a silence that is the subject of this motion and Order). If the State Board finds that the local board's denial or conditional approval was not in the "best interests of the pupils, school district, or community," the State Board must "remand" the matter to the local board with written instructions that the local board reconsider its decision. *Id.* If the local board refuses, after reconsideration, to alter its denial or conditional approval, then the applicant may file a second

appeal with the State Board. § 22-30.5-108(3)(c). If the State Board persists in its conclusion that denial or conditional approval was not in the best interests of the pupils, school district, or community, the State Board may then order the local board to approve the application, or dispense with some or all of the conditions that were not acceptable to the applicant. § 22-30.5-108(3)(d). Of course, the State Board may also relent and affirm the denial or conditional approval. In either event this same subsection specifically states that the decision of the State Board at this point "shall be final and not subject to appeal."

In their joint motion to dismiss Defendants argue that this language "not subject to appeal" means "not subject to judicial review," and thus deprives this Court of subject matter jurisdiction to entertain this complaint for judicial review. And indeed, our appellate courts have so held. *Academy of Charter Schools v. Adams County School Dist.*, 32 P.3d 456, 458-60 (Colo. 2001); *Board of Educ. of School Dist. No. 1 in the City and Cty. of Denver v. Booth*, 984 P.2d 639, 648 (Colo. 1999).

Plaintiffs counter that these two cases both involved final decisions by the State Board that were before it on second appeal. They contend that because this finality language appears only in subsection (d) of § 22-305-108(3), which governs second appeals, it does not preclude judicial review in this case, in which the State Board never disturbed the Local Board's denial

of Plaintiffs' application, and therefore there was never any remand or second appeal.[1]

This finality language, and especially its placement in the statute, admittedly creates some ambiguity. The General Assembly could have made it clear that if the State Board *affirms* a local board's denial at the initial appeal stage, and thus there is no remand and therefore no second appeal, then in those circumstances the State Board's decision is also final and not subject to appeal or judicial review. Instead, it placed this finality language at the end of subparagraph (3)(d), which deals only with the second appeal. Nevertheless, for several reasons I construe this finality language to apply to all charter application decisions by the State Board, whether those are decisions in initial appeal or on second appeal.

First, it is well-settled that ambiguous statutes should be read to make sense, and that nonsensical interpretations should be avoided whenever possible. *State v. Nieto*, 993 P.2 493, 501 (Colo. 2000). Here, Plaintiffs' construction would mean charter applicants have a right to judicial review when both the local board and State Board deny their application, but would have no right to judicial review if the State Board remands to the local board to reconsider, the

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[1] Although they brought their complaint for judicial review under § 24-4-106, Plaintiffs do not contend in their response to the motion to dismiss that that section controls over §§ 22-30.5-107 and -108. Indeed, the general provisions of § 24-4-106 must yield to the more specific provisions of §§ 22-30.5-108. *Seer Young v. Brighton School Dist. 27J*, 325 P.3d 571, 577 (Colo. 2014).

local board persists in the denial, and the State Board on second appeal relents and accepts the denial. That makes no sense. Why would a decision on which both the local and State boards agree be afforded less finality than a decision on which the State Board first wavered but then ultimately accepted the local board's denial? If there were to be any difference in the reviewability of these two kinds of decisions I would have expected the former to be non-reviewable, not the latter.

It is also important to consider the larger constitutional and legislative context of these review procedures for charter school applications. Article IX, section 1 of the Colorado Constitution vests the "general supervision" of public schools in the State Board. Article IX, section 15 requires the General Assembly to organize public school districts, which are vested with the "control of instruction." There is a rich jurisprudence analyzing the inherent tension between these two constitutional roles and resolving that tension in several different contexts, including fiscal contexts and teacher tenure. *E.g.*, *School Dist. No. 16 v. Union High School No. 1*, 152 P. 1149, 1149-50 (Colo. 1915) (General Assembly cannot constitutionally require money raised in one district to be spent in another without the raising district's consent); *Blair v. Lovett*, 582 P.2d 668, 672 (Colo. 1978) (local boards retain authority to determine whether a teacher's conduct is sufficient to warrant dismissal).

In the Charter Schools Act, our General Assembly has specifically allocated authority between local boards and the State Board when it comes to charter

school applications, and done so in a manner that gives the State Board the ultimate power to decide whether the local board's decision regarding a charter school application was "contrary to the best interests of the pupils, school district, or community" as required by § 22-30.5-108(3)(d). As our Supreme Court put it in *Booth, supra*, 984 P.2d at 651, "the General Assembly has charged the State Board with deciding whether or not a local board made the correct decision." The *Booth* Court also concluded that this arrangement did not violation the constitutional command that local boards retain control over instruction.

This specific and unambiguous allocation of power between local boards and the State Board when it comes to charter school applications informs this question of whether an aggrieved applicant can seek judicial review when the State Board initially accepts a local board's decision to deny an application. If the buck truly stops with the State Board, that should be true whether it initially affirms the denial of an application, initially affirms the granting of an application, ends up forcing a local board that granted an application to deny it, or ends up forcing a local board that denied an application to grant it.

Based on all these considerations, it is clear to me that the General Assembly intended for the "final and not subject to appeal" provision in § 22-30.5-108(3)(d) to apply not just to cases in which there was a second appeal to the State Board but also in cases, like this one, where there was no second appeal because the State Board initially affirmed the Local Board's denial

of the charter application. In both circumstances, the State Board's decision is final and not subject to judicial review.

The joint motion to dismiss is GRANTED and this case is DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

DONE THIS 26TH DAY OF FEBRUARY, 2020

BY THE COURT:

/s/ Morris B. Hoffman
Morris B. Hoffman
District Court Judge

cc: All counsel

COLORADO STATE BOARD OF EDUCATION
2019 REVISED ADMINISTRATIVE PROCEDURES FOR CHARTER SCHOOL APPEALS

A. Applicability & Filing

These procedures shall govern the State Board's jurisdiction to review the determination of a charter school authorizer under:

- § 22-30.5-107.5(3) to (6), C.R.S. (disputes under existing charter contracts);
- § 22-30.5-108, C.R.S. (denials, non-renewals/ revocations, and unilateral conditions, for district charters);
- § 22-30.5-112(9) to (10), C.R.S. (disputes over financial withholdings);
- § 22-30.5-510(4) to (5), C.R.S. (CSI denials); and
- § 22-30.5-511(6), C.R.S. (CSI non-renewals/ revocations).

These procedures do not apply to the State Board's jurisdiction to grant waivers under § 22-30.5-104(6) or § 22-30.5-507(7), C.R.S., nor to the State Board's jurisdiction to determine exclusive chartering authority under § 22-30.5-504, C.R.S.

All required documents shall be filed via state.board.efilings@cde.state.co.us, with a carbon copy to soc@cde.state.co.us. All filings shall be less than 20 MB and provided in PDF format. Should a required filing exceed 20 MB, the parties may arrange for cloud-based

file transfer by jointly contacting the State Board Office. All filings shall include a certificate showing service on the opposing party or, if represented, its counsel.

B. Initiating a Case

Any person invoking the State Board's jurisdiction to review the determination of a charter school authorizer shall do so by filing a notice of appeal (under § 22-30.5-107.5, § 22-30.5-108, § 22-30.5-510, or § 22-30.5-511, C.R.S.) or request for determination (under § 22-30.5-112, C.R.S.). A notice of appeal must include as an exhibit a copy of the resolution or report at issue; a request for determination must include a copy of any related notices of noncompliance from the authorizer. The notice or request shall also: (1) provide the names, addresses, and phone numbers of all parties and their counsel; and (2) briefly state the grounds for appeal and requested relief. The notice or request need not otherwise present argument and shall be limited to two pages (exclusive of signature blocks, certificate of service, and exhibits).

A notice of facilitation under § 22-30.5-108(3.5), C.R.S., shall be filed in the same manner as a notice of appeal and shall contain the same required elements. If the State Board moves to review a matter on its own motion under § 22-30.5-108 or § 22-30.5-511, C.R.S., the motion will occur as a voting item at an open meeting of the State Board, and the matter will then proceed in accordance with these procedures.

C. Scheduling Conference

As soon as practicable after the filing of a notice of appeal or request for determination, the State Board Office will initiate a telephonic scheduling conference to set a hearing and briefing schedule. The State Board Office will also review the case for jurisdiction and will endeavor to raise any defects with the parties during the scheduling conference.

During the scheduling conference, the State Board Office will set a time and date for any public hearing and will set filing deadlines as follows:

1. The record on appeal, due seven calendar days after the notice of appeal or request for determination;
2. Appellant's opening brief, due fourteen calendar days after the record on appeal;
3. Appellee's answer brief, due fourteen calendar days after the opening brief;
4. Appellant's reply brief, due seven calendar days after the answer brief; and
5. Designations of counsel presenting oral argument and up to three client representatives, due on the same day as the reply brief.

The foregoing schedule may be altered as necessary to accommodate the schedules of the parties and of the State Board. By mutual consent of both parties and of the State Board, the parties may extend the statutory deadlines for the State Board to issue its decision. Public notice of the hearing will be made in the

same manner as public notice of the State Board's regularly scheduled meetings.

D. Briefs and Motions

Briefs shall comply with the formatting requirements of Colorado Appellate Rule 32(a)(1) through (3). Opening and answer briefs shall be no more than twenty pages (exclusive of signature pages and certificate of service), and reply briefs shall be no more than ten pages (exclusive of signature pages and certificate of service). Each party's initial brief must contain a recitation of facts divided into two sections: stipulated facts and disputed facts. The State Board will not consider arguments that do not relate to the issues raised on appeal, nor will it consider evidence outside the record on appeal as described below.

The State Board (or for procedural matters, the State Board Office) may entertain motions such as motions to dismiss, to enlarge page limits, to adjust deadlines, and so forth. Such motions shall substantially comply with C.R.C.P. 121, Section 1-15, including the duty to confer. All motions, whether granted or not, will be part of the formal administrative record.

E. Record on Appeal

The appellant shall request the record on appeal from appellee as soon as reasonably practicable and in any event no later than the date on which appellant files the notice of appeal or request for determination.

The charter school authorizer shall bear any cost of preparing the record on appeal from its own records, except that the costs of any transcripts shall be borne by the party requesting the transcript. To the extent possible, the record shall be compiled into a single bookmarked and sequentially Bates-numbered PDF document, aligned to the list of required documents below, with a table of contents.

The parties shall work in good faith to file the record on appeal as a joint stipulated record, consisting of all the documents and other materials submitted by the charter applicant or charter school or considered by the authorizer in rendering its decision. The record on appeal shall presumptively include:

1. The charter application (if applicable), including all proposed written amendments thereto;
2. The resolution or other written grounds for the authorizer's determination (the absence of which may be deemed a waiver of any such grounds);
3. Any report, findings, or other recommendations of the district accountability committee;
4. Any written record of the authorizer board meetings at which the application or other action concerning the charter school was considered;
5. All written correspondence between the authorizer and the charter applicants/charter school concerning the authorizer's determination; and

6. All other documents, reports, correspondence and other written or electronic materials considered by the authorizer relating to the matters at issue.

7. For a second appeal under § 22-30.5-108(3)(c) and (d), C.R.S., the record on appeal shall also include a supplemental record on appeal consisting of the written decision of the local board and any materials considered by the local board that are not already contained in the record on appeal.

8. For a request for determination under § 22-30.5-112(9) or (10), C.R.S., the record on appeal shall instead consist of the materials described in § 22-30.5-112(9)(b), C.R.S.

9. For an appeal from the written findings of a neutral third party under § 22-30.5-107.5, C.R.S., the record on appeal shall instead consist of the charter contract, any applicable dispute resolution agreement(s), the report of the neutral third party, and any other materials deemed relevant by the parties.

Because these proceedings are generally appellate in nature, the record shall not include materials that post-date the authorizer's decision unless otherwise required by statute. In any event, the State Board may take notice of the routine records of the Colorado Department of Education, regardless of the date of such records.

The parties shall attempt to limit the record on appeal to documents that are relevant to the grounds

for appeal. To that end, the parties shall meet and confer as to whether any of the documents presumptively required by these procedures can be omitted by agreement of the parties. The State Board Office may reject the record and direct the parties to refile the record after further conferral, if it appears the parties have not made a good faith effort to limit the scope of the record.

If a dispute arises over the record on appeal, the undisputed portions of the record shall be filed as a joint stipulated record by the deadline set at the scheduling conference. For disputed portions of the record, the proponent shall file a motion to add the materials to the record on appeal no more than five business days after the joint stipulated record is filed. Such motions shall be no more than ten pages in length. Objections (limited to ten pages) shall be due five business days after service of the motion, and any reply (limited to five pages) shall be due five business days after service of the objection. The Commissioner shall rule forthwith on such motions, and the Commissioner's ruling shall be final.

The parties shall use "pin cites" to refer to specific pages in the record. A party's failure to cite to specific pages may be deemed to waive any argument predicated upon that portion of the record.

F. Conduct of Hearing

The burden of proof shall be on the party invoking the State Board's jurisdiction. Parties shall appear in person for any public hearing, but upon proper motion

and for good cause the Board Chair may grant leave to appear by telephone or videoconference.

For a hearing under § 22-30.5-108 or § 22-30.5-511, C.R.S., each party shall have a maximum of fifteen minutes to present oral arguments without interruption. The Board Chair may interrupt any argument that strays outside the record evidence or the grounds for appeal. The parties may present up to three client representatives, designated in advance, who shall not present oral arguments, but who shall be available at the hearing to answer questions from the State Board. At the beginning of the hearing, the appellant shall designate the amount of time it wishes to reserve for rebuttal. The hearing shall proceed as follows:

1. The appellant shall present its arguments;
2. The appellee shall present its arguments;
3. The appellant shall present any rebuttal for which it reserved time;
4. Each Board Member shall have six minutes to ask questions of the parties, but may reserve the balance of their time for later and may cede any amount of time to other Board Members; and
5. After the time allotted for oral arguments, the State Board shall deliberate and render its decision.

Additional time may be allowed in the sole discretion of the Board Chair. In the event of a remand, the

State Board will ordinarily appoint a committee of two Board Members to draft a written Board Order.

A proceeding under § 22-30.5-112, C.R.S., shall be resolved without a public hearing. A proceeding under § 22-30.5-107.5, C.R.S., shall be resolved without a public hearing unless the State Board elects to conduct a de novo review, which review shall be conducted consistently with the procedures in this Section F. A proceeding under § 22-30.5-510 shall be resolved without a public hearing unless the State Board grants a hearing on motion, which hearing shall be conducted consistently with the procedures in this Section F.

G. Public Comment Prohibited

The State Board does not accept public comment when reviewing the determinations of a charter school authorizer under § 22-30.5-107.5, § 22-30.5-108, § 22-30.5-112, § 22-30.5-510, or § 22-30.5-511, C.R.S. The time for the community to be heard on such matters is during the school district's or charter school institute's decision-making process. Any public comment received by the charter school authorizer as part of its own process may be properly part of the record on appeal before the State Board.

The State Board may, on motion, grant leave for amicus briefs to be filed. The content, form, and time for filing of such motions and briefs shall substantially comply with Colorado Appellate Rule 29(b) through (f).

Adopted September 12, 1994
Revised September 12, 1996
Revised January 13, 2000
Revised January 16, 2003
Revised November 10, 2005
Revised December 11, 2008
Revised September 11, 2019