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# **Public School Choice and Authorization in Colorado: Current Practices and New Pathways**

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## KEY TAKEAWAYS

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- Colorado is home to a variety of public schools of choice—traditional, charter, innovation schools, and more.
- Public school choice, while widespread, is limited by authorization processes and requirements that can be burdensome for new schools of choice, particularly when those processes involve hostile authorizing entities.
- Only a handful of authorization pathways exist for Colorado schools of choice. Charter schools, for instance, may only be authorized by local school districts or the Colorado Charter School Institute.
- Other entities, including Boards of Cooperative Educational Services (BOCES) may also authorize schools, although this authorization authority is more rarely used.
- Some organizations in Colorado are working to develop new pathways, often through BOCES, for new public schools of choice to receive authorization when they cannot obtain that authorization from a local school board. In the absence of significant legislative expansions of school choice, these new pathways represent the best way to expand options for Colorado students and families.
- Colorado lawmakers could and should consider a variety of policy solutions that will allow more innovation and choice for Colorado families, including through the expansion of charter-authorization pathways.

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## INTRODUCTION

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Colorado families have access to a wide variety of public school options. Students can open enroll in public schools other than their assigned public schools, including across school district lines, so long as the receiving schools have the capacity to serve them. Families can also enroll their children in one of Colorado's more than 260 public charter schools or one of many specialized magnet schools, option schools, virtual schools, or innovation schools.

While many parents are familiar with the public options available to their students, few are as familiar with the policy frameworks governing the existence of those options. Many of these school types have existed for decades, which means that they are now simply considered part of the educational ecosystem rather than the results of complex political and policy processes.

Colorado is often used as an example as a state with a successful, diverse charter ecosystem, which can lead to an impression that the state takes a laissez-faire approach to public school choice. In truth, however, the process of opening a public school of choice in Colorado can be highly complex, competitive, and often political. And because there are only a handful of pathways through which such schools can pursue authorization—pathways that often create significant bottlenecks—the reality is that even Colorado's wide array of choice schools reflects only a fraction of the options that could exist.

This issue paper explains the various ways in which public schools of choice can be authorized in Colorado, outlines benefits and flaws in those authorization pathways, and delves into options for expanding or improving the state’s school-authorization laws.

# TYPES OF SCHOOLS AND SCHOOL AUTHORIZATION IN COLORADO

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## PUBLIC CHARTER SCHOOLS

Public charter schools represent the single largest group of public choice schools in Colorado. Created by the passage of Colorado’s Charter School Act in 1993, charter schools have become an integral part of educational ecosystems across the state—urban, suburban, and rural. As of 2022, charter schools serve more than 134,000 Colorado students across 265 schools in dozens of school districts. Today, these schools account for approximately 15 percent of the state’s total public school enrollment.<sup>1</sup>

Charter schools, which are governed by their own independent boards and which operate with more autonomy than district-run public schools thanks to a system of waivers from certain sections of state education law, are free to adopt a wide range of educational models. Parents can choose from charter schools that provide classically oriented education; experiential learning; specialized programming in science, technology, engineering, and math (STEM); and much more.

Despite their independence from local school districts in terms of governance and operations, every public charter school in Colorado must be authorized by one of two bodies: its locally elected board of education or the Colorado Charter School Institute (CSI). However, because nearly all CSI-authorized schools must first be released by

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their local school board for authorization—a process discussed in more detail later in this publication—virtually all prospective charter schools must begin their journey by navigating the complexities of authorization processes in their local school districts.

In theory, these local authorization requirements are meant to ensure that public schools of choice are held accountable for their operations, academic performance, and compliance with various laws. In reality, however, they often represent serious obstacles on the path to creating new choice schools for two key reasons.

First, these authorization processes require that charter schools receive approval from the very entities with which they compete for student enrollment, and therefore for the revenue associated with that enrollment. School districts are often reluctant to allow charter schools to start or grow because they perceive those schools as “stealing” students—and the funding attached to them—from the traditional public schools operated by the school district. Perversely, this bias against charter schools can be particularly severe in cases where charter schools can demonstrate significant parental demand—an illustration of the frequent mismatch between school district interests and the desires of parents.

Second, district authorization processes can subject debates about the formation of charter schools to intense political pressure. Local school board members must stand for election every four years, and their most important voting constituency tends to be employees of the school district they oversee. These boards are responsible for approving not only the budget of the school districts they govern, but the personnel policies, pay systems, benefits, and a variety of other factors that directly impact teachers, non-licensed personnel, and others. Unsurprisingly, it is these groups to which school board members tend to feel most beholden.

School district employees tend to prioritize the traditional schools in which they work above choice schools, which are often viewed as external pressures or even threats. For instance, a recent national poll found that 61 percent of teachers oppose the formation of charter schools.<sup>2</sup> Thus, school board members who are viewed as championing school choice rather than representing district interests can find themselves in challenging political straits. These political pressures can create powerful incentives for school board members to limit or block the creation of new charter schools within their district boundaries.

For example, a 2022 effort to authorize a new charter school, Ascent Classical Academy, in Durango School District faced a months-long fight before ultimately being denied by the local school board. This charter would have been a new campus for an existing charter network with successful schools in other school districts.

During a summer hearing about the network’s proposed Durango campus, opponents argued that authorizing a new charter would “spread district resources too thin.” Others expressed concerns about the school’s proposed level of autonomy, its resources, and the organizations behind it.<sup>3</sup> Even the local paper’s editorial board weighed in on the very public fight, expressing concerns particularly about the diversity of the students Ascent planned to serve. Ultimately, the editorial board concluded that

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the charter application was correctly rejected, adding that “If up to 600 families are really behind Ascent Classical Academy, we encourage them to open a private school.”<sup>4</sup>

Ascent subsequently appealed the decision of the local school board to the Colorado State Board of Education, but their appeal was denied by the board’s Democrat majority with 4-3 party-line vote.<sup>5</sup> The State Board appeals process, as well as its limitations, is discussed in the next section of this publication.

Similarly, Merit Academy faced a steep climb to authorization in Woodland Park School District despite the fact that the community lacked adequate public options to meet the needs of families. The charter’s application was denied in December 2020 after months of debate over various operational aspects of the school.<sup>6</sup>

With few other options, the school had little choice but to pursue authorization as a non-charter public school of choice through a rarely used mechanism under Colorado’s law governing boards of cooperative educational services (BOCES). It was ultimately authorized by the Education reEnvisioned BOCES, a BOCES with statewide reach and operations, for the 2021-22 school year.<sup>7</sup> After a successful opening and first year of operation—as well as an election in which school choice supporters won a majority on the Woodland Park school board—Merit Academy finally won approval as a charter school in May 2022 following a question-filled board meeting attended by more than 100 parents, teachers, and community members. This approval came nearly two years after the school’s initial application.<sup>8</sup>

These stories are not unique. In Denver Public Schools, the largest school district in the state, a teachers union-backed school board majority has been a consistent impediment to the further expansion of public options in the city. Falling enrollment in the wake of the COVID-19 pandemic has caused the school board to further tighten its grip, putting a significant damper on the once-friendly district’s willingness to authorize new schools.<sup>9</sup> And across Colorado, the operational and political

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complexities of opening a new charter school have challenged even the most ardent school founders in a variety of communities.<sup>10</sup>

## Redress for Charter Schools

Denial by a local school board is not necessarily the end of the road for prospective charter schools in Colorado. Charter founders or operators who feel they have been treated unfairly may, under the Charter Schools Act, appeal the decision of the local school board to the Colorado State Board of Education.

The State Board is tasked with determining whether a decision to deny a charter was contrary to the best interests of the pupils, school district, or community. If the board finds that this is the case, it has the authority to remand decisions to the local school board with recommendations about how to proceed after hearing both sides of the case. If those recommendations are ignored and a school appeals a second time, the State Board can issue a final mandatory decision that cannot be appealed by either the appealing school or the authorizing school district.<sup>11</sup>

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Although the appeals process can be an effective path for charters that have been unfairly denied by their local authorizers, it is not without its weaknesses. For instance:

- It relies on the State Board itself to act as a fair and impartial decisionmaker—a challenging proposition for a partisan elected body subject to many of the same electoral pressures as local school boards.
- Even if the State Board does overturn the denial of a charter application, the school may face significant challenges. Charters authorized over the objections of their local districts may face hostility from the district that may make operation challenging, especially when it comes to renewal processes and various services.
- The appeals process itself is vulnerable to attack or manipulation by hostile legislation. For instance, HB21-1295—notably sponsored by a representative who also served on the Denver school board with union support and a senator heavily involved in previous union-backed school board election efforts in Jefferson County—sought to tie the State Board’s hands with regard to future charter appeals. The bill ultimately failed in committee.

## Colorado Charter School Institute

Charter schools that do not succeed on appeal or that choose not to appeal may also seek authorization from the Colorado Charter School Institute. Created in 2004, CSI acts as the only non-district charter authorizer in Colorado. As of 2022, CSI authorizes more than 40 charter schools statewide, including schools that had difficulty winning authorization from local authorizers.

Unfortunately, however, even the CSI pathway is fraught with obstacles. In nearly all cases, Colorado school districts have exclusive chartering authority (ECA), meaning they are the sole legal authorizers of charter schools within their geographic boundaries. Exclusive chartering authority is obtained by applying for such authority from the State Board of Education—a simple process that has resulted in nearly every



district in the state obtaining ECA. Only six school districts currently do not have such authority.<sup>12</sup>

In order for CSI to authorize a school in a district with exclusive chartering authority, the local school board must grant permission for that authorization by “releasing” the applicant to CSI. Given that it is these school boards that are denying the charter application in the first place—and often after protracted and heated battles—gaining such release can be difficult. Even if permission is granted, the CSI authorization process itself is arduous and sometimes lengthy.

Exclusive chartering authority can be revoked from a local school district in some rare instances. Charter schools, charter school applicants, or an organization that represents charter schools can file a request for revocation of ECA with the State Board that outlines a case for why the school district should not retain ECA.<sup>13</sup> In most cases, the reason for such filings is unfair treatment of charter schools or charter applicants within the district, particularly with regard to access to funding or services.

The process of challenging a district’s ECA is long and often difficult, involving the filing of hundreds of pages of documentation, supporting evidence, and other materials. For instance, the Colorado League of Charter Schools challenged Littleton School District’s exclusive chartering authority in 2020, filing a 301-page document supporting that challenge.<sup>14</sup> The workload is such that a serious challenge may be out of reach for many charters without external support.

Additionally, even once the challenge process has been completed, the State Board is typically reluctant to revoke ECA from a school district. Combined, these two factors make directly challenging a district’s ECA a longshot for charters in most cases. In the case of the League challenge to Littleton School District’s ECA, the State Board denied the revocation request three months after it was filed, allowing the district to retain

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its exclusive chartering authority despite significant evidence of bias against charter schools.<sup>15</sup>

Schools denied charter status may have the opportunity to pursue authorization as non-charter public schools of choice. However, as detailed in the next section, most of these pathways still rely on the approval of the local school board.

## **AUTHORIZING OTHER PUBLIC SCHOOLS OF CHOICE**

### **Option/Magnet/Alternative Schools**

Though less common than public charter schools, option, magnet, and alternative schools are another heavily utilized form of school choice in the Colorado public education system. These schools often offer specialized or unique programming to elementary and/or secondary students. For instance, the Denver Center for International Studies focuses on teaching foreign languages and exposing students to different cultures, while Renaissance Academy in Douglas County provides programs focused on expeditionary learning through a partnership with Outward Bound.<sup>16</sup>

Because option, magnet, and alternative schools are ultimately governed and operated by school districts, they require the authorization of local school boards. The exact number of these schools is difficult to obtain due to varying terminology and reporting.

### **Single- and Multi-District Online Schools**

Colorado is also home to dozens of online schools. Single-district online schools must be authorized by their local school district and serve only students from that authorizing district in most cases. There are 16 single-district online schools in Colorado.<sup>17</sup>

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By contrast, multi-district online schools may be authorized by one of several bodies and certified by the Colorado Department of Education to begin operation. Authorizing entities for these schools include a local school district, a group of two or more school districts, or a BOCES. There are 27 multi-district online schools operating in Colorado.<sup>18</sup>

To further complicate the landscape, some multi-district online schools are actually authorized as charter schools. In these cases, the schools must win authorization from a local school board or the Charter School Institute before applying for certification.<sup>19</sup> Currently, seven Colorado schools are authorized as multi-district online charter schools.<sup>20</sup>

## Innovation Schools

Innovation schools operate with increased autonomy thanks to certain waivers from sections of state law or school district policy. In this regard, they look much like charter schools.

However, innovation schools differ from charter schools in that they are not governed by independent school boards. Instead, they operate under the umbrella of the larger school district that approved their status as innovation schools.

These schools must submit innovation plans to their local districts for approval. Once approved by the school district, these plans must also be approved by the State Board of Education. There are 107 approved innovation schools operating in Colorado.<sup>21</sup>

## BOCES Schools

A final, more rarely used path to school authorization is through a board of cooperative educational services. These organizations, known colloquially as BOCES, are typically comprised of school districts that have agreed to collaborate to provide various services. These issues can range from transportation to special education services to professional development. There are 21 BOCES currently operating in Colorado.

Although not widely discussed, BOCES also have the authority to authorize schools. A total of nine brick-and-mortar schools have been authorized by various BOCES. Like other choice schools, these campuses often provide specialized programs to students in one or more BOCES member districts. For instance:

- Rocky Mountain School of Expeditionary Learning, collaboratively authorized by Aurora, Cherry Creek, Denver, Douglas County, and Littleton school districts through the Rocky Mountain School of Expeditionary Learning BOCES, provides an expeditionary learning experience that focuses heavily on the principles of Outward Bound.<sup>22</sup> Interestingly, this BOCES exists for the sole purpose of operating RMSEL.
- Yampah Mountain High School, authorized by the Colorado River BOCES (made up of Garfield 16, Garfield RE-2, De Beque Joint District 49-JT, Roaring Fork Schools, and Aspen School District), provides personalized learning plans to students, including through the use of blended learning.<sup>23</sup>

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- School of Excellence, authorized by the Pikes Peak BOCES (made up of 14 school districts in the Pikes Peak Region), houses a variety of programs designed to serve students with diverse social, emotional, and behavioral needs.<sup>24</sup> Notably, this school is located outside a member school district.

In most cases, these schools are authorized within the boundaries of a BOCES member district. However, there have been instances—such as the School of Excellence—where schools have been authorized outside the boundaries of member districts, albeit normally with the permission of the receiving school district.

## A NEW FRONTIER IN SCHOOL AUTHORIZATION

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### TESTING THE LIMITS - BOCES-AUTHORIZED SCHOOLS

One BOCES, the Education reEnvisioned BOCES (ERBOCES), has begun to test the limits of BOCES' school-authorization authority as it works to create additional pathways for new public schools of choice.

ERBOCES differs from many other BOCES in that it is not confined to a specific geographic region. Created in 2013 by Yuma School District and El Paso County District 49, the BOCES originally operated as the Colorado Digital BOCES and maintained an exclusive focus on online education. Beginning in 2018, after expanding its membership to cover Creede School District, Montezuma-Cortez School District, District 49, and Pikes Peak State College, the BOCES changed its name and broadened its focus to include additional services.<sup>25</sup>

In recent years, the ERBOCES has authorized a variety of both online and brick-and-mortar schools. The physical schools include:

- Merit Academy in Woodland Park, Colorado – Discussed earlier, Merit Academy successfully sought authorization as an ERBOCES school after its charter application was denied by its local school district. It has since won approval as a charter school from Woodland Park School District and left the ERBOCES.
- Pueblo Classical Academy – Serves students in grades five through nine with a classically focused education.
- Ascend College Prep – Serves only 11th- and 12th-graders with a curriculum focused on STEM fields, experiential learning, and dual enrollment with institutions of higher education.
- Orton Academy – Serves elementary and middle school students who suffer from dyslexia or other reading-related disabilities.

### Legal Challenges

One brick-and-mortar ERBOCES school, Orton Academy, has become the subject of intense legal and legislative debate about the limits of the BOCES' ability to authorize schools outside the boundaries of its member districts.

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Orton Academy is physically located in Colorado Springs School District 11, which is not a member of the ERBOCES. While this situation is not unique among BOCES-authorized schools, it is complicated by the fact that District 11 did not provide permission for the school to be authorized within its boundaries and, in fact, opposed its creation.

ERBOCES' decision to authorize Orton Academy within the boundaries of a non-consenting school district triggered a lawsuit from District 11 claiming that ERBOCES lacked the statutory authority to authorize schools within its boundaries without its explicit permission. The ERBOCES countered by pointing to the language of the Colorado BOCES Act, which states (emphasis added):

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



*or use any moneys in its bond redemption fund, except in accordance with the provisions of section 22-45-103 (1)(b).*<sup>26</sup>

The district further argued that the authorization of Orton Academy violated Article IX, Section 15 of the Colorado Constitution. Also known as the Local Control Clause, this provision states:

*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.*<sup>27</sup>

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The “control of instruction” provision has been broadly interpreted by Colorado courts to cover nearly every aspect of a school district’s operation, from curricular decisions to personnel matters.

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The “control of instruction” provision has been broadly interpreted by Colorado courts to cover nearly every aspect of a school district’s operation, from curricular decisions to personnel matters. As such, District 11 argued that allowing the school to be authorized without its permission usurped its ability to exercise local control over instruction within its boundaries.

An El Paso County District Court judge disagreed, stating that “there is no genuine issue of material fact asserted by District 11 that Orton Academy existing within its boundaries without its permission somehow requires District 11 to take any action or prevents District 11 from taking any action it is required to.”<sup>28</sup> The court ultimately ruled that “Orton Academy was appropriately located without obtaining permission.”<sup>29</sup>

District 11 appealed the ruling, and the Colorado Court of Appeals reversed the district court in November 2022. While the plain language of the law appears to allow BOCES to authorize schools outside the boundaries of its member districts and makes no mention of seeking permission before doing so, the court sought to “effectuate the legislature’s intent” behind the statute.

This interpretive approach is interesting, given that courts typically refrain from such analysis when the law’s language is clear. The judges themselves wrote in the opinion that they “agree with the district court that statute is unambiguous” before going on to reinterpret the statute anyway.<sup>30</sup>

The court also reiterated that legal decisions should not add or subtract language from statute, then proceeded to do exactly that, writing:

*Keeping in mind the “placement and interaction of subsections within the statutory framework,” we read the plain language “any appropriate location, whether within or without a school district providing the money for the facilities,” § 22-5-111(2), to mean any location in the geographic bounds of a participating member school district, whether or not that school district is contributing to the cost of the facilities.*<sup>31</sup>

As of the publication of this paper, the ERBOCES plans to appeal this decision to the Colorado Supreme Court. Until such an appeal, this particular avenue for school authorization appears to be closed.



## Legislative Debate

The El Paso County ruling left open a door that posed a significant threat to the educational status quo in Colorado. If a BOCES could legally authorize schools outside of its member districts without having to seek the approval of the receiving school district, choice schools across the state would be able to form more easily by circumventing the stranglehold local authorizers currently hold over the authorization process.

Recognizing the implications of such a scenario, groups like the Colorado Education Association, the state's largest teachers union, and the Colorado Association of School Boards—both traditional opponents of widespread school choice—filed amicus briefs supporting District 11 in its challenge to Orton Academy's authorization. They were joined by the Colorado BOCES Association, which argued in favor of the currently accepted limits on BOCES school authorization.

The courts work slowly, however, and the initial proceedings seemed to indicate that the ERBOCES held the upper hand under a strict reading of the statute. Thus, opponents of the organization's authorization practices sought a different remedy through the legislature.

The El Paso County District Court decision was filed on March 31, 2021, approximately halfway through Colorado's 2021 legislative session (which was delayed due to COVID-related concerns). On May 11, the legislature introduced SB21-268, the annual School Finance Act that sets funding levels and related parameters for Colorado public schools.

SB 268 quietly included the following language placing new limits on BOCES' ability to authorize schools in non-member districts:



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(a) Notwithstanding any provision of this article 5 to the contrary, during the 2021-22 state fiscal year, before authorizing a full-time school or an additional location of an existing school that is physically located within the geographic boundaries of a school district that is not a member of the board of cooperative services, a board of cooperative services must obtain written consent from such school district.

(b) The requirement for written consent set forth in subsection (4)(a) of this section does not apply to a school authorized or operating prior to June 11, 2021, so long as the school continues to operate for the 2021-22 school year.

(c) This subsection (4) is repealed, effective July 1, 2022.<sup>32</sup>

This language created a new requirement for a BOCES to seek and obtain written permission from a receiving non-member school district before authorizing a school within that district's boundaries. Although this requirement would apply to all of Colorado's BOCES, it was clearly intended to block further authorizations of choice schools by the ERBOCES in particular. This language survived the legislative process and was included in the final version of the bill passed on June 11, 2021.

The language passed as part of the 2021 School Finance Act was originally slated to repeal automatically on July 1, 2022, unless extended by the legislature. As such, there was significant debate both prior to and during Colorado's 2022 legislative session about whether the language would be extended, made permanent, or allowed to repeal as planned—the latter scenario leaving open the door to additional authorizations of choice schools across the state.

Interested in the new frontier the ERBOCES was exploring in Colorado, numerous national advocacy groups wrote about the effort and encouraged the legislature not to extend or make permanent the moratorium.<sup>33</sup> These efforts helped ERBOCES stave off a permanent moratorium on its authorizing efforts during the 2022 session. However, the legislature did extend the moratorium language in the School Finance Act—this time until December 31, 2022.<sup>34</sup>

The ERBOCES' efforts to blaze a trail toward new authorizing pathways in Colorado now finds itself at a critical juncture. Caught between a lingering court case that could conceivably take years to resolve and ongoing legislative discussions, it is not yet clear whether or in what form this new frontier in Colorado's school choice battles will continue.

## WHAT COMES NEXT - OBSERVATIONS AND RECOMMENDATIONS

School choice policy has continued to grow across America, with many states adopting new programs or expanding existing programs—particularly in the realm of private school choice—over the past several years. However, Colorado's fractured legislative and political environments have proven challenging for advocates of school choice, and the state has not seen any significant policy movement toward expanded options since the 2008 Innovation Schools Act.

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Instead, Colorado families are relegated to utilizing those choice schools that can clear the onerous authorization requirements outlined in this publication. And while there is no doubt that the charter sector in Colorado has grown substantially since its inception, the fact remains that many of the most sought-after charter schools have waitlists stretching into the thousands. Exact numbers are difficult to determine, but informal estimates place the total number of students on waiting lists or in lottery pools for Colorado charters in the tens of thousands.

There is a great and pressing need in Colorado to provide new options for students and families. Below are a variety of policy options that could help accomplish that goal.

## **CREATE ADDITIONAL AUTHORIZATION PATHWAYS FOR CHARTER SCHOOLS**

Faced with bottlenecks similar to those Colorado has experienced in the realm of charter authorization, several states have blazed new trails when it comes to which entities can approve these public schools of choice. Here are several options from other states:

### **Allow the Colorado State Board of Education to Directly Authorize Charter Schools**

In Iowa, state lawmakers passed legislation allowing new charters to bypass hostile local school districts and request approval directly from the Iowa State Board of Education. While Iowa law already included a limited State Board appeals process for charter schools denied by local authorizers—somewhat like the appeals process in Colorado—this new legislation significantly expanded the State Board’s role to allow that body to directly authorize charters without the permission of local school districts.

Interestingly, the law requires that students in these state-authorized schools count as funded pupils in the school districts in which the schools are located, and then requires the school districts to pass along related per-pupil funds to the charter school. This approach differs in many ways from Colorado’s state-authorization process through the Charter School Institute, which operates essentially as its own school district with regard to student funding and allocations.<sup>35</sup>

Allowing the Colorado State Board of Education to directly authorize charter schools in addition to CSI would provide an additional pathway for the creation of new schools of choice. It would also allow for CSI and the State Board to develop different approaches to school authorization, thereby potentially increasing the variety of charter models available to families.

Importantly, however, this authorization authority would only be valuable insofar as it allowed charter founding groups to apply directly to the State Board without having to first seek release by their local school districts in cases where exclusive chartering authority exists—a fundamental difference from the current process for CSI authorization, in which a school district must typically release a school to apply to CSI.

### **Allow a Non-Educational Government Entity to Authorize Charter Schools**

Beginning in 2022, Wyoming will allow a non-educational governmental body to authorize public charter schools thanks to 2021 legislation granting the State Loan and

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Investment Board (SLIB) the authority to authorize new charter schools. That board is comprised of the five highest-ranking elected officials in the state—the governor, the secretary of state, the auditor, the treasurer, and the superintendent of public instruction.<sup>36</sup>

The new law allows for the SLIB to act as an authorizer in addition to a school district board. It allows the SLIB to act as a traditional authorizer, with all the responsibilities and requirements that entails, or to delegate those roles to a school district after a school has been in operation for at least one year. It allows charters to choose the authorizer with which it would like to apply, including in cases of renewal for existing charter schools (although the SLIB can reject such renewal requests if the charter is attempting to “avoid necessary corrective measures” from another authorizer). And it creates new appeal options for charter schools that have been denied by local school boards.<sup>37</sup>

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State lawmakers could consider a legislative solution that would make the district release of schools wishing to seek CSI authorization mandatory if certain trigger requirements are met.

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While this exact model could be difficult to implement in Colorado due to the fact that the governor and commissioner of education already appoint members to the CSI board, a variation of it—i.e., the use of an independent committee of elected officials—could be used to provide an additional application, renewal, or appeal pathway to existing and prospective Colorado charter schools. At a local level, Colorado policymakers could consider allowing city councils or boards of county commissioners to authorize charter schools in some instances, even though these bodies are not traditionally involved in educational decisions.

### Remove District Constraints on CSI Authorization in Certain Situations

In most cases, a school district must waive its exclusive chartering authority or formally release a charter applicant to seek authorization from the Colorado Charter School Institute before CSI can begin the process of reviewing and approving an application. This model perpetuates a power imbalance between local school districts—many of which are hostile to the creation of new charter schools or other forms of competition—and those seeking to start new charters.

State lawmakers could consider a legislative solution that would make the district release of schools wishing to seek CSI authorization mandatory if certain trigger requirements are met. For instance, legislation could require that applicants be allowed to seek authorization from CSI if a local school board displays a pattern of denying too many applications, draws too many charter appeals to the State Board of Education within a certain time period, or otherwise exhibits behavior indicative of a bias against charter schools operating within its boundaries.

Alternatively, the legislature could task a review body (separately from the State Board of Education) to score or rate charter authorizers on an agreed-upon set of criteria. Those scoring below a certain threshold for a specified period of time would be subject to automatic CSI release for charter schools denied by the local school board.

In many ways, such a system would operate similarly to the current performance framework model for Colorado school districts and could, if properly implemented, increase the level of accountability for Colorado charter authorizers. However,

Careful consideration would have to be given to the structure and membership of this reviewing body, as objectivity and representation of various stakeholder views would be key to its credibility and success.

### Allow Institutions of Higher Education to Authorize Charter Schools

Florida recently enacted legislation allowing state institutions of higher education to authorize or “sponsor” affiliated charter schools. In order to act as an authorizer, a state university or institution of the Florida College System must win approval from the Florida Department of Education. To win that approval, these institutions must demonstrate that the charter school will help “meet regional education or workforce demands” or “offer postsecondary programs leading to industry certifications to eligible charter school students” in its geographic area (including across multiple school districts). The college or university then becomes an official authorizer (or “sponsor”) of that school, including taking responsibility for all the associated requirements.<sup>38</sup>

Such a model could be ideal for Colorado—in part because postsecondary and K-12 education have never been more closely linked through dual enrollment, concurrent enrollment, and a focus on workforce development than they are today, and in part because Colorado is home to a robust ecosystem of state universities and community colleges.

Furthermore, these institutions have a vested interest both in protecting their reputations in a competitive postsecondary enrollment environment and in ensuring that the students feeding into their institutions are well prepared and able to succeed at the college level. As such, perhaps even more so than school districts in many cases, the interests of these institutions of higher learning are closely aligned with producing K-12 student success—precisely the goal of high-quality charter schools.

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## Eliminate or Significantly Scale Back Exclusive Chartering Authority

While the other policy options outlined in this section focus on creating new pathways around and through the existing system of exclusive chartering authority, one more aggressive option to expand public school choice in Colorado would be to eliminate exclusive chartering authority entirely or to significantly scale back its ability to throttle the development of new schools. For instance, state lawmakers could make it significantly more difficult for school districts to win or maintain ECA or require those districts to reapply for ECA under rigorous criteria on a regular basis, perhaps every three to five years.

Scaling back or eliminating ECA would allow the authorization of new charter schools in districts with or without the permission of the local school board. While some would argue that this practice could lead to significant issues, many of the potential problems could be mitigated through careful policy design.

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Even if exclusive chartering authority were removed from school districts, the fact remains that state lawmakers have control over which other organizations are allowed to authorize charter schools—currently only the Colorado Charter School Institute. It would be up to these lawmakers to decide who else, if anyone, could authorize charter schools, as well as under what circumstances those authorizations could occur. While these limits should not stifle the development of new options backed by strong parental demand, they could be designed to take into account the specific needs and considerations of various communities in order to avoid unintended consequences.

Even with only one alternative charter authorizer, this shift in dynamics between charter applicants and school districts could be very powerful. Under the current policy arrangement, school districts exercise near-complete control over which charters are approved or denied for any reason. However, if the possibility existed that a school with significant parental demand behind it could be authorized with or without the district's permission, it could create strong incentives for districts to find ways to work with high-quality charter applicants rather than against them in order to maintain open lines of communication and build stronger relationships with the schools operating within their boundaries.

Readers should note that such a policy change would almost certainly draw a state constitutional challenge under Colorado's Local Control Clause. That litigation could take years to complete. However, if successful, the outright elimination or significant scaling back of exclusive chartering authority could arguably provide the largest expansion of access to new educational options for students in state history.

## REMOVE OR LIMIT RESTRICTIONS ON THE AUTHORIZATION OF NON-CHARTER SCHOOLS OF CHOICE

Legal and legislative attempts to curb the ability of BOCES to authorize choice schools outside their member districts, or to subject those authorizations to the veto authority of a school district without recourse, serve only to further limit the options available to Colorado students.

There are several potential pathways forward for BOCES-authorized schools, all of which are discussed below.

## Uphold BOCES' Right to Authorize Schools Outside Member Districts Without Permission

Until a recent ruling by the Colorado Court of Appeals on the subject, BOCES could legally authorize new public schools of choice in non-member districts with or without the permission of the receiving district. While this pathway has been rarely utilized over the BOCES Act's nearly 60 years of existence, it was valuable to the Colorado education ecosystem for three reasons.

First, this authorization authority provides a relief valve in situations where prospective school founders cannot not receive fair consideration from their local school board and are locked out of applying to CSI by that same board.

Second, the ability of BOCES to authorize specialized schools for certain populations of students—like the students suffering from reading disabilities at Orton Academy in Colorado Springs School District 11—may allow quicker response to community or family needs due to a reduction in the required red tape and political maneuvering involved in charter applications.

And finally, this provision allows the BOCES to locate schools in the most reasonable, cost-effective, and appropriate facilities without regard for school district boundaries that are largely arbitrary in the world of real estate. Forcing BOCES to locate schools only within its member districts could conceivably lead to situations where these schools must be located in less-than-ideal facilities that are significantly more expensive than better-equipped alternatives a short distance away in a neighboring school district.

Despite claims from opponents that the ability to authorize BOCES schools anywhere will erode the authority of local school districts, there are already safeguards built into the BOCES authorization process to deter large-scale adoption or a preference for this type of authorization over authorization as a charter school. In particular, because BOCES schools do not have access to local property taxes or mill levy overrides, students at these schools tend to be funded at a lower per-pupil level than charter students. Furthermore, BOCES schools do not have access to the same automatic waivers, appeal rights, or other benefits related to authorization as a charter school.

Combined, these factors mean that BOCES authorization will, in almost all cases, be utilized as a last resort for schools that cannot find a fair path to more advantageous authorization elsewhere. And because BOCES retain the right to deny applications for authorization without the possibility of appeal, schools that appear to be poorly considered or otherwise unlikely to succeed can still be culled before they begin operation.

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## Allow BOCES-Authorized Schools to Appeal District Decisions to the Colorado State Board of Education

If lawmakers believe that BOCES should be required to receive written permission before authorizing schools in non-member districts, they should also be mindful of the bottleneck they are creating—the same bottleneck faced by charter schools and other public schools of choice. In giving school districts veto authority over the BOCES schools authorized within their boundaries, they are handing power back to authorizers that could, in some cases, be the primary roadblocks to expanded educational options.

In many ways, such a requirement would be worse than what is in place for charter schools because schools applying to BOCES for authorization currently have no recourse if a school district were to refuse authorization within its boundaries. While charter schools can appeal to the Colorado State Board of Education, no such right exists for schools applying for authorization through a BOCES.

One potential middle-ground solution could be to require that a BOCES receive written permission before authorizing a physical school within the boundaries of a non-member district. Districts should be required to review and respond to such requests in a timely manner and under a specified series of criteria designed to ensure fair evaluation and decision-making.

If a BOCES' request is denied, either the BOCES or the school requesting authorization should be allowed to appeal the decision of the school district to the Colorado State Board of Education—much as charters can now. The specifics of this appeals process could be easily modeled after the existing processes for charters and subject to the same standards of review, transparency, and decision.

By creating such a system, state lawmakers could simultaneously allow school boards to maintain an appropriate level of control over which schools operate within their boundaries while still ensuring that these boards cannot unfairly act as gatekeepers for much-needed or much-desired choice schools that could effectively serve students in their communities.

## CONCLUSION

Colorado is fortunate to be home to a vibrant educational ecosystem that includes many different public options for students and families. However, the fact remains that many thousands of families and hundreds of communities desire new options, school models, and educational services. In too many cases, the individuals and groups who seek to establish these new choice schools are stymied by outdated, overly rigid authorization practices that place school districts in charge of which schools are allowed to exist.

Locally elected school boards undoubtedly have a role to play when it comes to determining what education looks like within the district boundaries they govern. However, policymakers should be careful about allowing these boards—many of which

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have vested interests in limiting competition and the development of new schools—to act as the sole arbiters of how, when, and under what circumstances families can access the educational options their students need.

These political bottlenecks substantively stifle innovation and harm students by allowing the needs of systems to come before the needs of students. Yet, there are ways to alleviate these problems. Through thoughtful debate, policy design, and a focus on the needs of students first, Colorado policymakers can and should think about ways to expand school-authorization pathways in Colorado and foster the creation of new, innovative, high-performing school options in communities statewide.



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