COLORADO SUPREME COURT **STATE OF COLORADO** Colorado State Judicial Building 2 E. 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT APR [illegible] OF THE STATE OF COLORADO CLERK
Colorado Court of Appeals, Opinion by Judge J. Jones, J. Graham, concurring Court of Appeals Nos. 11CA1856 & 11CA1857, J. Bernard dissents City and County of Denver District Court Nos. 11CV4424 & 11CV4427 Honorable Michael A. Martinez	
Taxpayers for Public Education, Cindra S. Barnard; Marson S. Barnard; James Larue; Suzanne T. Larue; Interfaith Alliance of Colorado; Rabbi Joel R. Schwartzman; Reverend Malcolm Himschoot; Kevin Leung; Christian Moreau; Maritza Carrera; and Susan McMahon, Plaintiffs-Appellees, v. Douglas County School District; Douglas County Board of Education; and Colorado Department of Education, Defendants-Appellants, and Florence and Derrick Doyle, on their own behalf and as next friends of their child, Alexandra and Donovan; Diana and Mark Oakley, on their own behalf and as next friends of their child, Nathaniel; and Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, Max. Intervenors-Appellants.	**▲ COURT USE ONLY ▲** Case No. 13SC233

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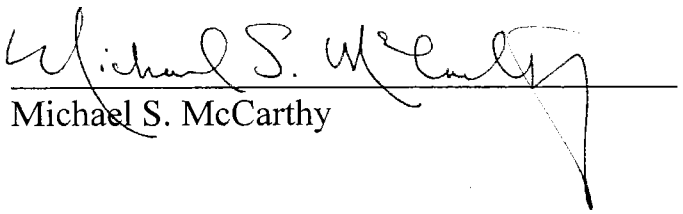
PETITION FOR WRIT OF CERTIORARI BY THE TAXPAYER PLAINTIFFS

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

As required by C.A.R. 32(a)(3), the undersigned counsel certifies that this petition for certiorari contains 3,722 words, exclusive of the appendix, and therefore complies with the word limit set forth in C.A.R. 53(a). Counsel relied on Microsoft Word to obtain this word count.



Michael S. McCarthy

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APPENDIX

1. *Taxpayers for Public Education v. Douglas County School District*, Nos. 11CA1856 & 11CA1857 (Colo. App. Feb. 28, 2013)

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Plaintiffs-Appellees Cindra S. Barnard, Mason S. Barnard, and Taxpayers for Public Education ("the Taxpayer Plaintiffs" or "Plaintiffs") respectfully request that this Court grant certiorari review of the court of appeals' February 28, 2013 decision in this case. The Taxpayer Plaintiffs also join in the Petition for a Writ of Certiorari filed in this case by the LaRue Plaintiffs.

ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

I. The Taxpayer Plaintiffs are students who attend Douglas County School District schools, the parents of those students, and taxpayers whose taxes support state public schools through the Public School Finance Act ("the Act"). Plaintiffs claim and the trial court found that the District, with the active support of the State Board of Education, violated the Act through a Voucher Program that uses public school funds to pay for private school tuition. *Did the court of appeals erroneously restrict Colorado's standing doctrine by holding that the Act's mere grant of authority to the State Board to issue rules and regulations necessarily deprives the Plaintiffs of standing and precludes any private action to enjoin the District from violating the Act?*

II. To eliminate spending disparities between school districts with different tax bases, the Act bases a district's funding on the number of pupils enrolled and actually attending a district's public schools. *Does the Voucher Program violate the Act by including in the District's student count for funding 500 Voucher Program students "enrolled" in an illusory Charter School who actually attend private schools in the District and elsewhere?*

III. Article IX, Section 3 of the Colorado Constitution mandates that money from the Public School Fund may be expended *only* for maintenance of the State's public schools, in addition to and not a substitute for other monies directed to public schools. By statute, money from the Fund is pooled with other monies appropriated to public schools. The District uses money from that pool to support private schools through the Voucher Program. *Did the court of appeals err in ruling that the District's Voucher Program is entitled to a presumption of constitutionality under Article IX, section 3 that can only be rebutted by proof of unconstitutionality "beyond a reasonable doubt," and therefore deeming that Fund monies were not spent on the Voucher Program, notwithstanding the trial court's factual finding to the contrary?*

DECISION OF THE COURT OF APPEALS

The court of appeals entered its Opinion and Judgment (the "Opinion") on February 28, 2013 in *Taxpayers for Public Education v. Douglas County School District.* A copy is attached in the Appendix at Tab 1. The Opinion will be published. The Pacific Reporter citation is not yet available, but the decision may be found online at 2013 Colo. App. LEXIS 266 and 2013 WL 791140.

JURISDICTION OF THIS COURT

This petition arises from the trial court's order dated August 12, 2011 (R. ID #39266572, hereinafter "Order") granting Plaintiffs' motion for preliminary injunction, and the court of appeals' February 28, 2013 decision reversing the trial court and vacating the injunction. The Taxpayer Plaintiffs filed the present petition within 42 days of issuance of the court of appeals decision, and this Court has jurisdiction under C.R.S. § 13-4-108, C.A.R. 49(a)(1), (2), and (3), and C.A.R. 52(b)(3).

STATEMENT OF THE CASE

The Taxpayer Plaintiffs incorporate the Statement of the Case in the LaRue Plaintiffs' Petition for Writ of Certiorari and offer the following additional information focused on the statutory and constitutional school finance issues.

Under the Act, Colorado's public schools are funded through a combination of local and State revenues. The State's share derives from personal income, corporate, sales, and use taxes and from the Public School Fund established by Article IX, Section 3 of the Colorado Constitution. C.R.S. § 22-54-106. The money each school district receives from the State is determined by multiplying the district's per-pupil funding amount by the number of enrolled public school students in the district. *Id.* § 22-54-104. For the 2011-2012 school year, the Douglas County School District estimated that it would receive $6,100 per pupil in revenue from the State. (Order at 55.)

In 2010, the District began creating plans for a Voucher Program through which the District would pay select District students' tuition to attend private and religious schools. The Colorado State Board of Education (the "State Board") actively encouraged the District's preparation of these plans. (*See id.* at 2 ¶¶ 3–6; Tr. Vol. I, 136:25–137:1-16 (State Board Chairman Bob Schaffer wanted to "pave the way" for the Voucher Program "right away within CDE [Colorado Department of Education]," and instructed his staff to "identify any barriers at CDE regarding funding or anything else.").) CDE staff met with District officials on multiple occasions in early 2011 to plot the Voucher Program's structure and advised them

how to design the Program to receive State per-pupil funding. (*See, e.g.*, Order at 2 ¶¶ 4–6 (discussing "church/state" and "excessive entanglement" problems, and charter school formation).)[1]

On March 15, 2011, the District School Board approved the Voucher Program as a "pilot program" for the 2011-2012 school year (*see id.* at 2 ¶¶ 3–4), and began implementing the Program the following day. (*Id.* at 3 ¶ 7.) Under the Voucher Program, the District offers up to 500 "scholarships" per year to District students to pay tuition at designated private schools. (*Id.* at 4 ¶ 12.) The District counts "scholarship students" attending these private schools as being enrolled in its public schools for purposes of State per-pupil funding, and created a sham charter school, the "Choice Scholarship Charter School," where scholarship students are "enrolled" for the sole reason of being counted as "public" school students to obtain funding from the state. (*Id.* at 6 ¶ 26.) This "school" has no buildings, employs no teachers, requires no supplies, has no curriculum, and does not instruct a single Douglas County Student. (*Id.* at 6 ¶ 25.)

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[1] The court of appeals' cursory dismissal of this collusion between the District and the State Board as an "*ad hominem* assertion" "unsupported by the record" is unfounded. (Opinion at 16.) As noted above, the record is replete with evidence that the two bodies worked hand-in-hand to establish the Voucher Program.

The District transfers 100% of the State per-pupil funding it receives for "scholarship students" to the Charter School, less overhead expenses. (*See id.* at 6 ¶ 26.) Once a "scholarship student" is accepted at a private school, the Charter School gives the student's parents a restrictively endorsed check for 75% of the State's per-pupil funding or the private school's actual tuition fee, whichever is less, and retains the remaining 25% to cover "administrative costs." (*Id.* at 3 ¶ 9).

The Voucher Program would divert to private schools at least $3 million in public education funding each year. (*See id.* at 20.) The District hopes to expand the Voucher Program to more students, which would divert even more State funds to private schools. (*Id.* at 16 ¶ 64.)

The Taxpayer Plaintiffs are a Douglas County student, his mother, and a nonprofit organization that includes parents of Douglas County public school students. Plaintiffs brought the present action alleging, inter alia, that the Voucher Program's use of public funds to pay private school tuition (1) violates the Act, C.R.S. § 22-54-104, and (2) violates Article IX, section 3 of the Colorado Constitution.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari review of the court of appeals decision. The central issue in the case—public funding of private and religious education in violation of the Colorado Constitution and the Act—is an important public issue with broad application that warrants the substantive attention of this Court.

The court of appeals decision also imposes unprecedented restrictions on citizens' legal standing to challenge the unlawful actions of their government, making judicial review of statutory violations by local governments much less available. The court of appeals' restrictive standard for standing conflicts with established Colorado precedent. This Court should correct and clarify Colorado standing doctrine.

Finally, the court of appeals decision both extends the "presumption of constitutionality" to include local school board decisions and erects a new and erroneous "beyond a reasonable doubt" burden of proof to rebut the constitutionality presumption. This Court should grant certiorari review to correct this fundamentally erroneous ruling.

I. The Court of Appeals' Ruling Denying Standing to Plaintiffs Departs from This Court's Precedent.

This Court should grant certiorari to address the court of appeals' material constriction of Colorado's standing doctrine. This Court has long recognized the need for a broad standing doctrine in matters of "great public concern." *Colo. State Civil Serv. Emp. Ass'n v. Love*, 448 P.2d 624, 630 (Colo. 1968). Consistent with this policy, the trial court found that Plaintiffs' allegation of injury in fact to a legally protected interest in education granted them standing. (Order at 19–22.) The court of appeals reversed, concluding that the Act's mere grant of rule-making authority to the State Board gives the Board exclusive enforcement power and deprives Plaintiffs of any protectable interest against violations of the Act, notwithstanding the Board's own collusion in the violations. (Opinion at 13–16.)

This ruling substantially restricts the scope of standing in two ways. First, contrary to this Court's precedent, the decision holds that a statutory grant of rule-making authority to a state agency necessarily forecloses any private plaintiff from suing to vindicate the statute and its purpose. Second, the decision imposes new limits on the standing of plaintiffs who seek to require government bodies to obey the state's own laws, forcing such plaintiffs to meet the stricter standing requirements applicable to those who sue *private* parties based on such laws.

(Opinion at 13–16.) These substantial departures from and restrictions on Colorado standing doctrine justify the Court's review of this case.

A. The Court of Appeals Erroneously Restricted Standing by Holding that the State Board's Power to Adopt Regulations Foreclosed Any Private Remedy for a School Board's Violation of the Act.

The court of appeals' cardinal departure from Colorado standing doctrine is its misapplication of this Court's precedent concerning when a statute forecloses private party remedies. The court of appeals held that a statute's mere grant to a state agency of the power to "make reasonable rules and regulations necessary for the administration and enforcement of this article," (Opinion at 12 (quoting C.R.S. § 22-54-120(1))), is sufficient to deprive a private plaintiff of any right to bring suit to prevent violation of the statute. (*Id.* at 13–14.) This holding misreads Colorado standing doctrine and erroneously narrows the rights of citizens to vindicate statutory rights specifically intended for their benefit and protection.

As the court of appeals correctly observed, this Court has declined to recognize a private cause of action based on a statute where the statute itself provides a specific remedy for violation of the statute. (Opinion at 13.) But this rule is limited to cases in which the legislature has in fact provided a *specific* remedy; as this Court put it, "[w]e acknowledge that the ***legislative decision*** to

enact ***a particular administrative remedy*** to redress a statutory violation is consistent with a legislative intent to preclude a private civil remedy for breach of the statutory duty." *Allstate Ins. Co. v. Parfrey*, 830 P.2d 905, 910 (Colo. 1992) (emphasis added). And every case the court of appeals cites in support of its holding on standing, (*see* Opinion at 13–14), involved a statute that provided "a particular administrative remedy" for violation of a statutory duty.[2]

Here, however, the Act provides no similarly specific administrative remedies for violation of its requirements, but merely authorizes the State Board to adopt necessary rules and regulations. Plaintiffs can find no Colorado precedent holding that such agency regulations can bar a private right of action *absent a remedy in the statute itself*, much less that such a bar arises from the mere *authority* to enact regulations. And the court of appeals' holding is particularly incongruous where, as here, the body to whom the regulatory and enforcement responsibility is delegated is itself colluding with the party violating the statute.

The court of appeals decision also conflicts with that court's own prior holding that a legislative grant of rule-making power to an agency does *not*

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[2] *See, e.g., Bd. of Cnty. Comm'rs v. Moreland*, 764 P.2d 812, 817–21 (Colo. 1988) (criminal penalties, injunctive relief); *Prairie Dog Advocates v. City of Lakewood*, 20 P.3d 1203, 1208 (Colo. App. 2000) (criminal penalties).

foreclose a private right of action. In *Parfrey v. Allstate Ins. Co.*, 815 P.2d 959 (Colo. App. 1991), *aff'd*, 830 P.2d 905 (Colo. 1992), a plaintiff sued an insurer for damages based on a claimed violation of a statutory duty to offer certain coverages to policyholders. The insurer argued that "since the Commissioner of Insurance has the power to supervise and discipline insurers under § 10-4-418, these specific remedies exclude all others." Unlike the court of appeals here, however, the *Parfrey* court rejected this argument, calling the insurer's reliance on the statute "misplaced" and holding that neither the statute's delegation of rule-making power nor the specific rules the agency adopted precluded a private cause of action for violation of the statute. *See id.* at 965–66. This conflict between the court of appeals' decision here and its own precedent justifies this Court's further review. *See* C.A.R. 49(a)(3).

B. The Court of Appeals Mistakenly Applied the Three-Part Standing Test of *Parfrey* for a Statutory Claim against a *Private* Defendant to Plaintiffs' Statutory Claim against a *Governmental* Defendant.

The court of appeals also substantially narrowed Colorado law by imposing this Court's test for claims against *private* parties to claims against a *government* body. The court of appeals applied this Court's test for whether a private party can

pursue a tort remedy for a statutory violation against *another private party*. As this Court said in *Parfrey*:

> Our case law has indicated that the answer to ***whether a private tort remedy is available against a nongovernmental defendant for violating a statutory duty*** involves a consideration of three factors: whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; whether the legislature intended to create, albeit implicitly, a private right of action; and whether an implied civil remedy would be consistent with the purposes of the legislative scheme.

Allstate Ins. Co. v. Parfrey, 830 P.2d 905, 911 (Colo. 1992) (emphasis added).

The court of appeals decision here, however, applies this test to the question of whether a private party has standing to bring a claim against a *government body* for violation of a statutory duty. The court of appeals decision cites no authority for such an extension of the *Parfrey* test and ignores *Parfrey*'s limitation. If this Court's private-defendant standing test is to be extended to claims against government bodies, this Court should make that decision.

II. The District's Use of Public Funds to Pay Private School Tuition Violates the Act.

This Court should review the legality of the Voucher Program under the Act and reinstate the District Court's holding that the Program "violates the Public

School Finance Act funding balance and inappropriately taps resources from other Colorado school districts." (Order at 56.)

This Court's review of the District Court holding is essential for two reasons. Whether and to what degree monies distributed under the Act may be redirected to private and sectarian schools is an issue of vital public concern. The education of Colorado's children is critical to the future of the State, and the Court must address the "overwhelming evidence" of the Voucher Program's violation of the Act. (*Id.*)

Second, disputes over whether such voucher programs comply with the Act will recur. The Voucher Program here was only a pilot program;[3] the District undisputedly intended to expand the program,[4] magnifying both the urgency of the issue and the resulting injuries. And of course, the District is only one of scores of school districts in the state. As the District Court found, the Voucher Program "effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts." (*Id.*) If this voucher program is allowed to stand, other districts will be impelled to create competing

[3] (*See* Order at 3 ¶¶ 3–4, 4 ¶ 12.)
[4] (*Id.* at 16 ¶ 64.)

programs of their own, further undercutting the goal of statewide "uniform" funding of public education.

The legality of the Voucher Program under the Act is unquestionably "a question of substance not heretofore determined by this court," C.A.R. 49(a)(1). The trial court record is fully developed, and the issue is ripe for this Court's review.

III. The Court of Appeals Ruling that the Voucher Program Does Not Violate Article IX, Section 3 of the Colorado Constitution Erroneously Applied a Presumption of Constitutionality.

This Court should also grant certiorari to review the court of appeals' unprecedented expansion of the presumption of constitutionality in addressing the Voucher Program's constitutionality under Article IX, Section 3 of the Colorado Constitution. Section 3 provides that "[t]he public school fund of the state shall . . . forever remain inviolate and intact" and that the Fund's proceeds shall be "expended in the maintenance of the schools of the state" and may not "ever be transferred to any other fund." Colo. Const., art. IX, Section 3. By statute, money from this constitutionally created Fund is pooled with other monies appropriated to public schools. Here, those public school monies went to support private schools through the Voucher Program.

The District Court found that the Voucher Program used money from the "public school fund" to pay tuition to private schools in violation of Article IX, Section 3. (Order at 60–63.) The court of appeals reversed and for the first time: (1) extended a presumption of constitutionality to school board actions, requiring proof "beyond a reasonable doubt" to overcome the presumption, and (2) employed the presumption to cast aside the trial court's factual findings and abandon fundamental common law principles. This Court should grant certiorari to review the court of appeals' erroneous use of a presumption of constitutionality.

A. The Court of Appeals Decision For the First Time Extends a Presumption of Constitutionality to School Board Decisions.

This Court should review the court of appeals' ruling that local school board decisions are cloaked with a presumption of constitutionality, an issue of first impression in Colorado. Although this Court has applied such a presumption to statutes, agency administrative regulations, and county board resolutions (*see* Opinion at 21–22), school board decisions are a different type of government action. *Compare Bagby v. Sch. Dist. No. 1*, 528 P.2d 1299, 1302 (Colo. 1974) (noting school district is "subordinate division" of government "exercising authority to effectuate the state's educational purposes"). No Colorado court has ever before extended the presumption of constitutionality to a school district's

funding actions or required a plaintiff to demonstrate the unconstitutionality of such an action "beyond a reasonable doubt." *See Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1104 (Colo. 1998) (evaluating constitutionality of school-district policy without applying presumption).

Moreover, the court of appeals decision applies the presumption of constitutionality and imposes the "beyond a reasonable" doubt standard without regard to the character of the governmental conduct, contrary to this Court's holdings that the presumption does *not* apply universally to all types of government enactments. *See, e.g., Denver Pub. Co. v. City of Aurora,* 896 P.2d 306, 319 (Colo. 1995). Plaintiffs submit that adoption of a presumption of constitutionality of the breadth and character of the court of appeals' ruling here can and should come only from this Court.

B. The Court of Appeals Decision Uses a Presumption of Constitutionality to Overrule Both the District Court's Findings of Fact and Established Law Concerning Commingling of Funds.

This Court should also grant review because the court of appeals here took the unprecedented step of employing a presumption of constitutionality to override specific findings of fact by the trial court and to impose instead a speculative presumption unsupported by law. In finding that the Voucher Program violated

Article IX, section 3 of the Colorado Constitution, the trial court found that "Plaintiffs have demonstrated that funds from the 'public school fund' will be used, in part, to pay tuition to private schools." (Order at 63.)

On appeal, despite reciting the "clearly erroneous" standard of review, (*see* Opinion at 21), the court of appeals overturned these findings without any identification of clear error. Instead, the court concluded that because "less than two percent of public school funding comes from the public school fund" and only 0.86 percent of District students could enroll in the Voucher Program, "we must construe the [Voucher Program] as funded out of the ninety eight percent of total per pupil revenue that does not come from the public school fund." (*Id.* at 32–33 (citations omitted).) The court of appeals cited no authority for its use of a presumption of constitutionality to overrule trial court findings of fact.

Moreover, this ruling runs roughshod over the basic common-law principle, applicable in many contexts, that the commingling of funds from different sources inseparably merges them and destroys their individual identities and properties.[5] In

[5] *See, e.g.*, *In re Phillips*, 139 P.3d 639 (Colo. 2006) (noting commingling of assets as factor in determining whether defendants are alter egos); *In re Marriage of Green*, 169 P.3d 202, 203-04 (Colo. App. 2007) (holding premarital property commingled with marital property does not retain its premarital character); Colo.

the passage cited above, the court of appeals simply disregards this fundamental legal principle, relying entirely on the presumption of constitutionality to effect a *de jure* segregation of funds.

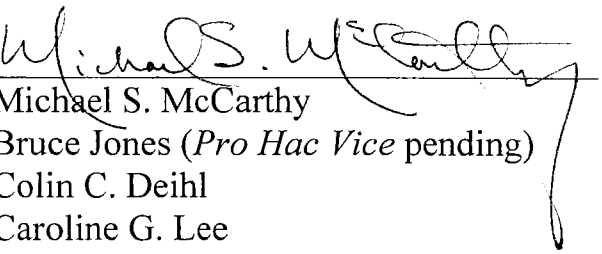
The court of appeals' substantial and erroneous expansion of the presumption's effect on both factual findings and legal principles deserves this Court's review.

CONCLUSION

The court of appeals decision presents a plethora of rulings that either contradict this Court's precedent, conflict with other court of appeals decisions, or materially impact Colorado law in issues of first impression. Most importantly, the decision erroneously deprives citizens of the opportunity to halt illegal school spending, an issue of undeniable public interest and impact. Plaintiffs urge this Court to grant further review to correct and clarify Colorado law on these important issues.

R. Prof. Cond. 1.15(b) (barring attorney commingling of client and personal funds); Black's Law Dictionary 264 (7th ed. 1999).

Respectfully submitted this 11th day of April, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2013, a true and correct copy of the foregoing **PETITION FOR A WRIT OF CERTIORARI BY THE TAXPAYER PLAINTIFFS** was served via U.S. First Class Mail, on the following:

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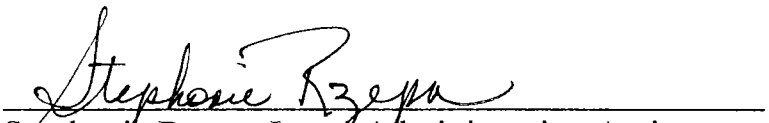

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COLORADO COURT OF APPEALS

Court of Appeals Nos. 11CA1856 & 11CA1857
City and County of Denver District Court Nos. 11CV4424 & 11CV4427
Honorable Michael A. Martinez, Judge

Taxpayers for Public Education; Cindra S. Barnard; Marson S. Barnard; James LaRue; Suzanne T. Larue; Interfaith Alliance of Colorado; Rabbi Joel R. Schwartzman; Reverend Malcolm Himschoot; Kevin Leung; Christian Moreau; Maritza Carrera; and Susan McMahon,

Plaintiffs-Appellees,

v.

Douglas County School District; Douglas County Board of Education; Colorado State Board of Education; and Colorado Department of Education,

Defendants-Appellants

and

Florence and Derrick Doyle, on their own behalf and as next friends of their children, A.D. and D.D.; Diana and Mark Oakley, on their own behalf and as next friends of their child, N.O.; Jeanette Strohm-Anderson and Mark Anderson, on their own behalf and as next friends of their child, M.A.,

Intervenors-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE J. JONES
Graham, J., concurs
Bernard, J., dissents

Announced February 28, 2013

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