

COLORADO SUPREME COURT
2 East 14th Avenue, Denver, CO 80203

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

Petitioners: Taxpayers for Public Education, *et al.*

v.

Respondents: Douglas County School District, *et al.*

and

Intervenor-Respondents: Florence and Derrick Doyle, *et al.*

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BRIEF FOR THE COLORADO EDUCATION ASSOCIATION AND THE NATIONAL EDUCATION ASSOCIATION AS <i>AMICI CURIAE</i>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief contains 6,112 words.

C.A.R. 28(k) does not apply to *amicus curiae* briefs.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Mark Grueskin

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STATEMENT OF THE IDENTITIES AND INTERESTS OF *AMICI*

The Colorado Education Association (CEA) is a 40,000-member organization of education professionals employed in public schools throughout the State of Colorado, and its national affiliate, the National Education Association (“NEA”) is a national labor organization representing 3,000,000 education employees, the vast majority of whom are employed by public school districts, colleges, and universities. CEA and NEA believe that public education is the cornerstone of our social, economic, and political structure—and that students of all backgrounds have the right to quality public schools. CEA and NEA also believe that individuals, at their expense, should be free to choose to supplement or substitute education in privately supported, non-segregated, nonpublic schools—but that voucher plans and other funding arrangements that use tax monies to subsidize pre-K through 12 private school education can undermine public education. In keeping with these principles, CEA and NEA wish to lend their expertise on the important public policy issues raised by the Douglas County School District’s School Choice Program (“CSP” or “the Program”), showing that, rather than improving the quality of education in Douglas County, the CSP may well have a negative impact on the quality of education in Douglas County.

INTRODUCTION

The issues before this Court are whether Douglas County’s Choice Scholarship Program (“CSP”) complies with Public School Finance Act of 1994 and the Colorado Constitution, and not whether the Program has merit as a matter of education policy. That said, however, it is likely that the Respondents, Intervenor-Respondents, and/or their *amici* will—as some parties did before the Court of Appeals—attempt to color this Court’s consideration of the legal issues in this case by presenting an inaccurate and misleading picture of the effects of voucher programs in general and the likely effect of the CSP in particular. For example, in the Court of Appeals, Respondent Douglas County School District claimed that the program would “improve educational performance through competition,” Ct. App. Op. at 3, and Intervenor-Respondents asserted that research shows that voucher programs improve the academic performance of the students that remain in public schools as well as those that obtain vouchers. *See* Intervenor-Appellants’ Amended Reply at 25-26.

CEA and NEA submit this brief *amicus curiae* to show that empirical research does not support such contentions. In Part A, we respond to the notion that voucher programs improve the performance of students in public schools **by** creating a competitive environment. In Part B, we explain that empirical research

in fact supports the opposite proposition—namely, that voucher programs can harm public education systems and worsen inequality, and that the design of the CSP makes such harm especially likely.

ARGUMENT

A. RESEARCH DOES NOT SUPPORT THE CONTENTION THAT VOUCHER PROGRAMS IMPROVE EDUCATIONAL PERFORMANCE THROUGH COMPETITION

As we show in the following, the claims made by Respondents and Intervenor-Respondents in the courts below regarding the supposed positive impact on student outcomes of vouchers are not supported by rigorous research but instead rest on deeply flawed studies by voucher advocates. Indeed, those claims have not survived rigorous analysis by independent researchers.

These claims rest primarily on a 2011 meta-study prepared by voucher advocate Greg Forster (“Forster Report”)¹ and published by voucher advocacy

¹ See Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Vouchers* (Friedman Found. for Educ. Choice 2nd ed. Mar. 2011), available at <https://web.archive.org/web/20121214005626/http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/656/A-Win-Win-Solution---The-Empirical-Evidence-on-School-Vouchers.pdf>. Intervenor-Respondents cited this version of the Forster Report before the Court of Appeals; it was also published in 2009 and 2013. The 2013 version cites only two additional studies. One is merely a reanalysis of a 2003 study; the other found no significant gains in achievement among voucher participants.

organization the Friedman Foundation for Educational Choice.² Defendant-Intervenors give pride of place to this article, relying on it for the proposition that “empirical evidence overwhelmingly supports” voucher programs in that nine out of ten “random-assignment studies” found that voucher programs improve student outcomes, and that such programs “improve[] the academic achievement of students who remain in the public school system.” Intervenor-Appellants’ Amended Reply at 25. Neither of these claims withstands scrutiny.

The Forster Report, first of all, completely ignores widespread disagreement over the impact of voucher programs—both in terms of whether such programs increase achievement among participants and whether they improve public schools through a competition effect—and glibly asserts that there is agreement among

² The Friedman Foundation for Educational Choice has long been known as “the nation’s leading advocate of vouchers.” Editorial Board, *Extra Credit*, The Wall Street Journal (Sept. 5, 2001), <http://online.wsj.com/news/articles/SB999644023712952343>. Indeed, the notion that vouchers can improve public schools originated with a 1962 book by Milton Friedman, in which he speculated that competition amongst a variety of schools might have the effect of stimulating the improvement of all schools affected. Milton Friedman, *Capitalism and Freedom* 93 (1962). Friedman later founded the Friedman Foundation for Educational Choice to “promote universal school choice,” <http://www.edchoice.org/About-Us/Mission---History>, and Greg Forster, author of the Forster Report, is a senior fellow at the Friedman Foundation.

studies that “vouchers improve outcomes for both participants and public schools.”³ There is no such consensus.

A 2007 review of the literature by the RAND Corporation undertook an “exhaustive review” of studies on vouchers and concluded that “none of the important empirical questions [on vouchers] has been answered definitively”—including the question of whether vouchers improve the academic performance of participating students.⁴ To the extent that rigorous studies have been performed on the impact of vouchers, “the evidence has been inconclusive with no clear consensus that any [voucher programs] are having strong effects on test scores.”⁵ A study of Milwaukee’s voucher program found “no difference” in performance between achievement gains of private school voucher recipients and a matched sample of public school students.⁶ Another study concluded that “the best research

³ Forster Report, *supra* note 1, at 1.

⁴ Brian P. Gill, et al., *Rhetoric Versus Reality: What We Know and Need to Know About Vouchers and Charter Schools* 217 (RAND Corporation 2d Ed. 2007), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/RAND_MR1118-1.pdf.

⁵ Brookings Institution, *3 Urban and Regional Policy and Its Effects* 5 (Nancy Pindus, et al., eds. 2008).

⁶ John F. Witte, et al., *The MPCP Longitudinal Educational Growth Study Third Year Report* 14, 15(2010), available at <http://files.eric.ed.gov/fulltext/ED511697.pdf>.

to date finds relatively small achievement gains for students offered education vouchers, most of which are not statistically different from zero.”⁷

The lack of consensus on voucher outcomes stems in part from the fact that such programs are inherently difficult to study, and that determining their effects is an exercise fraught with statistical difficulties even in the best of circumstances: Selection bias is rampant in random-assignment studies, particularly in programs designed in such a way as to attract students who are more socioeconomically advantaged or have parents who are more involved in their children’s education; longitudinal studies that attempt to follow individual students over time are often disrupted by the tendency of students not to stay in one school for the entire study; eligibility for programs may change over time;⁸ peer effects, defined as the impact that classmates have on one another’s achievement—are poorly understood;⁹

⁷ Cecilia E. Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions 20-24* (Federal Reserve Bank of Chicago 2008), available at http://www.ncspe.org/publications_files/OP163.pdf.

⁸ This occurred in Milwaukee, which is not only the longest-running voucher program in the country but one of the most extensively-studied. Patrick J. Wolf, *The Comprehensive Longitudinal Evaluation of the Milwaukee Parental Choice Program: Summary of Final Reports 1* (Feb. 2012), available at <http://www.uaedreform.org/downloads/2012/02/report-36-the-comprehensive-longitudinal-evaluation-of-the-milwaukee-parental-choice-program.pdf>.

⁹ Angela K. Dills, *Does Cream-Skimming Curdle the Milk? A Study of Peer Effects*, 24 *Econ. Educ. Rev.* 19 (2005) (“[N]o one has been able to isolate the

students receiving vouchers are usually not subject to the same testing requirements as students in public schools; and there is simply an overall lack of rigor in existing studies, many of which are not peer-reviewed.¹⁰

Rather than acknowledge these complexities, the Forster Report “selectively reads the evidence” in many of the studies that it cites, many of which were themselves carefully selected and disproportionately “produced by voucher advocacy organizations.”¹¹ Indeed, many of the studies cited in the Forster Report were undertaken by voucher advocacy organizations and lack “methodology, interpretation, and generalizability.”¹² For example, the Foster Report cites articles from voucher advocate Jay Greene that have been thoroughly debunked by academic studies.¹³

effect of the quality of a student's peers on achievement.”), *available at* http://www.angeladills.com/EER_2005_dills.pdf.

¹⁰ Gill, *supra* note 3, at 75-79.

¹¹ Christopher Lubienski, National Education Policy Center, *Review of a Win-Win Solution* (2009) (summary), *available at* <http://nepc.colorado.edu/thinktank/review-win-win-solution>. Dr. Lubienski’s paper reviews the 2009 version of Dr. Forster’s meta-study rather than the 2011 version. However, the 2011 and 2013 papers commit substantially all of the same flaws in methodology and analysis as the 2009 paper.

¹² *Id.* at 5.

¹³ See Forster Report, *supra* note 1, at 18-19 (citing Winters & Greene, *infra* note 34; and Jay Greene, Manhattan Institute, *An Evaluation of the Florida A-Plus Accountability and School Choice Program*, (2001), *available at*

Rutgers researchers Gregory Camilli and Katrina Bulkley catalogued serious flaws in the study design and conclusions in Greene's work on Florida's A+ Program. As Camilli and Bulkley explained, Greene vastly overstated the competition effect because he computed aggregate school gains rather than individual gains, failed to account for an average trend in score growth that has nothing to do with the competition effect, and declined to account for the regression to the mean¹⁴ that one statistically expects when observing the extreme low end of the distribution.¹⁵ Offering an alternative reading of the evidence that takes those factors into account, Camilli and Bulkley concluded that Greene's

http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/greene_01_florida.pdf).

¹⁴ "Regression to the mean" is a statistical phenomenon whereby natural variations in repeated measurements look like real change because the initial measurement was at one extreme of the bell curve. Adrian Barnett, et al., *Regression to the Mean: What it is and How to Deal with It*, 34 Int'l J. of Epidemiology 215 (2004), available at <http://ije.oxfordjournals.org/content/34/1/215.full.pdf+html>. In such situations, subsequent measurements are likely to be relatively less extreme, regardless of causative factors. *Id.* This effect can be minimized by good sampling methods and by determining the "true mean" of the subject by performing control studies before the real "intervention" study takes place. The effect of regression to the mean also tends to dissipate with repeated measurements, as the subject's "true mean" becomes apparent. This is one reason why positive effects may be observed in the first year or two of voucher programs but then disappear the longer that the program is in place. See CEP Meta-Study, *infra* note 22 at 9.

¹⁵ See Gregory Camilli & Katrina Bulkley, *Critique of "An Evaluation of the Florida A-Plus Accountability and School Choice Program"*, Educ. Pol'y Analysis Vol. 9 No. 7 (2001), available at <http://epaa.asu.edu/ojs/article/view/336/462>.

results “were implausible and should have been submitted to additional methodological scrutiny.”¹⁶ Indeed, even the Forster Report acknowledges that the Greene study was “methodologically simple” and did not account for other possible causes of improvement for low-performing public schools that are part of voucher programs.¹⁷

In those instances in which the Forster Report does cite more rigorous independent studies, it often distorts or misrepresents the findings of those studies.¹⁸ For example, the Report misrepresents a 2007 case study of the Milwaukee voucher program. That report, written by Martin Carnoy and his colleagues, actually describes two analyses undertaken by the researchers.¹⁹ The first analysis was a replica of an earlier study by Caroline Hoxby. Such replicas are often done by researchers in order to check a study’s data and methods. The replica study essentially confirmed the short-term gains seen in the first two years of the program among public school students, and is the portion of the Carnoy study that the Forster Report quotes. However, the Carnoy paper also noted a lack of student

¹⁶ *Id.* at 13.

¹⁷ Forster Report, *supra* note 1 at 18-19.

¹⁸ *See* Lubienski, *supra* note 11, at 5-6.

¹⁹ Martin Carnoy, et al., Economic Policy Institute, *Vouchers and Public School Performance: A Case Study of the Milwaukee Parental Choice Program* (2007), available at http://www.epi.org/publication/book_vouchers/.

progress in subsequent years, even while the number of voucher students increased, and it raised questions about “whether traditional notions of competition among schools explain these increased scores in the two years immediately after the voucher plan was expanded.”²⁰ In addition, the second Carnoy analysis consisted of an independent—and more sophisticated—original analysis of the program, which revealed that “test score gains are generally *not* significantly related to various indicators of direct competition associated with families’ increased potential choice of schools.”²¹ The Forster Report essentially glosses over these latter two findings.²²

A recent review of voucher studies by the Center on Education Policy (“CEP Meta-Study”) that was much more rigorous than the Forster Report again found that the empirical evidence on vouchers is inconclusive, and further found that any gains in student achievement are modest if they exist at all.²³ The CEP Meta-Study was exceedingly thorough, having reviewed 21 studies of voucher programs and 6

²⁰ *Id.* (executive summary).

²¹ *Id.* (emphasis in original).

²² See Forster Report, *supra* note 1 at 17.

²³ Alexandra Usher & Nancy Kober, *Keeping Informed about School Vouchers: A Review of Major Developments and Research*, Center on Education Policy (2011), available at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=369>.

reviews and critiques of such studies, including the Forster Report.²⁴ It examined the findings of each study, critiqued its methodology, and offered suggestions as to how future studies can ensure that research is high-quality and objective.

Among other things, the CEP Meta-Study found that “achievement gains for voucher students are similar to those of their public school peers” among students with similar prior achievement, mobility, and minority status.²⁵ With respect to the supposed competitive effect of voucher programs, the CEP Meta-Study noted modest gains in public school student achievement in a few cases, but also warned that “it is difficult, if not impossible to decisively attribute the causes of achievement gains” to voucher programs—particularly since other policy changes tend to run concurrently with any given voucher program.²⁶ In other words, causation for the marginal improvements seen, where they occurred at all, could not be determined. Overall, the CEP Meta-Study concluded that “[w]hile some studies have found limited test score gains for voucher students in certain subject areas or grade levels, these findings are inconsistent among studies, and the gains

²⁴ The CEP Meta-Study’s Appendix contains a summary of each study. *Id.* at 49-55.

²⁵ *Id.* at 9.

²⁶ *Id.* at 11.

are either not statistically significant, not clearly caused by vouchers, or not sustained in the long run.”²⁷

As we have already alluded to in discussing the studies above, if there is any consensus on the competition effect touted by the Forster Report, it is that no such effect exists. A 2009 RAND study on charter schools examined data from eight different geographic areas and found a “near-complete absence of positive competitive effects” on traditional public schools.²⁸ The 2009 RAND study noted that this finding was “consistent with the predictions of political scientist Frederick Hess . . . , who has extensively chronicled the inability of local school districts to respond productively to competitive pressure.”²⁹ Studies of voucher programs have likewise found no reliable evidence of the competitive effect that the Forster Report insists is widespread. Indeed, even the libertarian-leaning Cato Institute, upon examining the existing literature on the supposed competitive effect of

²⁷ *Id.* at 9.

²⁸ Ron Zimmer, *et al.*, *Charter Schools in Eight States: Effects on Achievement, Attainment, Integration, and Competition* 90-91 (RAND Corporation 2009), available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG869.pdf

²⁹ *Id.* at 91.

voucher programs on public schools, and concluded that “no one theory appears to be predominant among the research community.”³⁰

Rather than addressing the flaws in the studies that it cites or the lack of reliable evidence for its conclusions, the Forster Report downplays these factors and cavalierly insists—without citing any research in support—that the lack of empirical support for voucher programs is in fact evidence of a need for more *expansive* voucher programs.³¹ This bizarre conclusion is premised, in part, on the notion that voucher programs at least do not *hurt* our system of public education.³² Like many of the other glib assertions in the Forster Report, this point is hotly debated among scholars not on the payroll of voucher advocacy organizations. And in any event, the notion that transferring public education funds to private schools

³⁰ Matthew Carr, *The Impact of Ohio’s Ed Choice on Traditional Public School Performance*, 31 *Cato Journal* 257, 260 (2011), available at <http://object.cato.org/sites/cato.org/files/serials/files/cato-journal/2011/5/cj31n2-5.pdf>. See also Clive R. Belfield & Henry M. Levin, *The Effects of Competition on Educational Outcomes: A Review of U.S. Evidence*, 72 *Rev. Educ. Res.* 279 (2002), available at http://ncspe.org/publications_files/688_OP35V2.pdf; Christopher Jepsen, *The Effects of Private School Competition on Student Achievement* (1999) (reviewing available research on school competition and finding no consistent effect on academic performance); Gregory Elacqua, *School Choice in Chile: An Analysis of Parental Preferences and Search Behavior* (Teachers College, Columbia University 2004) (finding that data from Chile do not support the claim that school competition results in improved academic performance), available at http://www.ncspe.org/publications_files/OP97.pdf.

³¹ Forster Report, *supra* note 1, at 27-29.

(with all the administrative costs involved) on the ground that doing so at least does no harm—even if true—is hardly a sound basis for good public policy.

Beyond the Forster Report, Intervenor-Respondents cited two sources before the Court of Appeals, both of which discuss Florida’s A+ program,³³ and neither of which is sound. The first is essentially an adaptation of the same study that the Forster Report considered “methodologically simple,” written by Marcus Winters and Jay Greene.³⁴

³² *Id.* at 8.

³³ As explained in these two sources, the A+ program assigned A-F letter grades to public schools and then used a system of carrots and sticks—giving \$100 per pupil to schools that improved their ratings by a full letter grade while allowing students attending “F” schools to switch to private school via vouchers—in an attempt to provide incentives for school administrators to improve test scores.

³⁴ Marcus A. Winters & Jay P. Greene, *Competition Passes the Test*, Education Next (Summer 2004), available at <http://educationnext.org/competition-passes-the-test/>.

As it turns out, describing it as “methodologically simple is generous. In essence, the authors of the article compared Florida test scores on the 2002-03 administrations of the FCAT and Stanford-9 to scores from the prior school year, and noted that “F” schools under threat of losing students to vouchers made the greatest test score gains. The authors then conclude that these gains must be attributable to the competitive effects of the A+ program. It is hardly necessary to point out that one year of test score data is virtually meaningless for purposes of drawing any statistical conclusions.

Moreover, the authors also fail even to mention the possibility that scores of other factors—including other reform measures underway at the time, not least of these being the state’s implementation of the landmark No Child Left Behind legislation—could have accounted for the changes. Indeed, one factor is especially likely to have done so: the State of Florida undertook an aggressive effort to end “social promotion” beginning in the late 1990’s,³⁵ which culminated in a statute passed in 2002. Fla. Sess. Law Serv. Ch. 2002-387. As retention rates increased due to these policies, Florida ensured that increasing numbers of underperforming

³⁵ U.S. Department of Education, *Taking Responsibility for Ending Social Promotion: A Guide for Educators and State and Local Leaders* 13 (1999) (describing how several states, including Florida, had “stepped up their efforts to end social promotion”), available at <http://www.dys-add.com/resources/SpecialEd/EndingSocialPromotion.pdf>.

students would retake standardized tests rather than advancing to more challenging material on which they were more likely to perform poorly.

Aside from these glaring problems with *Competition Passes the Test*, one would expect the schools with nowhere to go but up to make the largest gains due to the basic statistical principle of regression to the mean.³⁶ Indeed, the authors vaguely admitted that “regression to the mean could be influencing our results”, but attempt to brush off this possibility by comparing dissimilar schools.³⁷ The second source cited by Intervenor-Respondents suffers from similar deficits, and nevertheless found only miniscule gains for African-American students and students receiving free and reduced lunches, and no statistically significant gains for other students.³⁸ Both of these sources minimize the possible impact of new retention policies.

³⁶ Barnett, *supra* note 14.

³⁷ Winters & Greene, *supra* note 34 (“To test for this possibility, we compared the gains made by F schools with the performance of an even smaller subset of schools whose 2002 test scores were similar but had never received an F”).

³⁸ Martin R. West & Paul E. Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 Econ. J. C46, C54 (2006) (“Impacts of the 'F' grade on African Americans and those eligible for the federal free lunch programme were about 6% of a standard deviation.”) available at <http://www.jstor.org/stable/pdfplus/3590412.pdf?acceptTC=true&jpdConfirm=true>

In short, the “studies” relied upon by the Defendants before the Court of Appeals do not establish that vouchers, as a general matter, “improve educational performance through competition.” Rather, as we will explain in the next section, these programs can cause considerable harm to the quality of education, and certain design features of the CSP make harm especially likely.

B. THE CHOICE SCHOLARSHIP PROGRAM HAS GREAT POTENTIAL TO HARM THE SYSTEM OF EDUCATION IN DOUGLAS COUNTY BY WEAKENING THE COMMON SCHOOLS AND FOSTERING FURTHER INEQUALITY AMONG STUDENTS

Due to the underlying educational and socioeconomic environment in Douglas County—and, critically, due to the design of the CSP—the program is unlikely to provide any widespread benefits either to participating students or to students who remain in public schools; in fact, it is far more likely to cause harm. As we detail below, Douglas County’s public schools are already of high quality, and eligibility requirements for the Program are likely to encourage voucher use predominantly by higher-income, higher-achieving students. At the same time, the screening procedures employed by participating schools will result in few voucher options for at-risk students. Thus, the Program is likely to leave participating students no better off than they were in the public schools from which they departed, while harder-to-educate students become more concentrated in public schools.

Even if the prospect of “improv[ing] education through competition” were not a dubious proposition in general, the quality of public education in Douglas County is such that drastic intervention measures are not needed. According to the U.S. Department of Education, the Douglas County School District “consistently exceeds Colorado state averages in every grade and subject tested on the CSAP (Colorado Student Assessment Program)” and “[i]n 2010, DCSD students exceeded the state average by 13 to 20 percentage points.”³⁹ Given that Douglas County is one of the wealthiest counties in the United States,⁴⁰ it thus unsurprising that the School District is the highest-performing district in the Denver metro area as well as one of the highest-performing in the state.⁴¹ Certainly even the highest-performing school districts can find ways to improve, but implementing an extreme program that is not verified as effective—one that will most likely send hundreds of students to schools that are no more effective than their public schools—is an irrational way to do so.

³⁹ U.S. Department of Education, Labor-Management Collaboration: Douglas County School District, <http://www.ed.gov/labor-management-collaboration/conference/douglas-county-school-district>.

⁴⁰ Douglas County Department of Community Development, Douglas County Demographic Summary (2014), <http://www.douglas.co.us/documents/douglas-county-demographics-summary.pdf> (identifying the county as the 9th wealthiest in the country based on Census data).

As discussed in detail above, there is broad disagreement about the impact of voucher programs as a general matter. If there is one area on which even scholars at opposite ends of the ideological spectrum agree, however, it is that design of a voucher program is “critical to predicting [its]empirical effects”, and that “[s]pecific variations in the details of voucher/charter policies are likely to make a big difference in many of the empirical outcomes.”⁴²

Where design is concerned, the CSP differs from most other programs that have been implemented to date in the United States, which tend to be geared towards at-risk students.⁴³ Therefore, while reliable research on voucher programs is somewhat scarce, research on programs similar to Douglas County’s—which is *not* geared towards at-risk students and does not impose income restrictions on recipients—is even thinner. However, there is some research predicting the impact

⁴¹ Colorado Department of Education, CSAP/TCAP Data and Results (2013), <http://www.cde.state.co.us/assessment/coassess-dataandresults>.

⁴² Gill, *supra* note 3, at 74; xviii. See also Rajashri Chakrabarti, Federal Reserve Bank of New York, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs* 32 (2004) (“[U]nderstanding the effect of different voucher designs is essential to the formulation of effective voucher policies.”), available at http://www.newyorkfed.org/research/economists/chakrabarti/BEJEAP_cond_accep.pdf.

⁴³ Gill, *supra* note 3, at xxiii.

of programs with similar features as well as direct evidence from a handful of international programs.

The 2007 RAND study identified a number of factors that would give voucher programs the best possible chance of increasing student achievement and avoiding harm to the overall system of education. Chief among these, for purposes of analyzing the CSP, is the requirement that participating schools practice open admissions.⁴⁴ Open admissions are critical to ensuring that voucher schools serve low-income and special needs students, and to mitigating—where possible—any harmful systemic effects on students who remain in public schools.⁴⁵ Absent the open admissions requirement, participating schools can “choose their students” and admit only those with superior test scores or other indicators of academic ability.

But the CSP does not require open admissions. Consequently, it is very likely that higher-achieving students will find it much easier to take advantage of the program than will less advantaged students. Indeed, this is precisely what has taken place in other programs that permit screening of voucher students. In the early 1980’s, Chile implemented a large-scale voucher program that allowed private schools to receive per-pupil public funds for students in the same manner as

⁴⁴ *Id.* at 235-36, 242-43.

⁴⁵ *Id.*

public schools.⁴⁶ As in Douglas County, admission to private schools was not open, and schools were permitted to—and did—reject students whom they viewed as potentially low-performing.⁴⁷ Moreover, contrary to the expectations of voucher proponents, the program did not improve academic performance. Instead, the “cream skimming” practiced by the private schools resulted in middle-class flight from public schools and a more socially stratified school system; Chile thus saw an overall decline in student achievement following the implementation of the program.⁴⁸ This outcome is consistent with the 2007 RAND study’s prediction that “removing high-achieving students will reduce the achievement of those left behind.”⁴⁹ Similarly, when a universal school choice program was implemented in New Zealand in the 1990s, the best schools declined to serve at-risk students and

⁴⁶ Chang-Tai Hsieh and Miguel Urquiola, *The Effects of Generalized School Choice on Achievement and Stratification: Evidence from Chile’s Voucher Program*, 90 J. Pub. Econ. 90, 1477 (2006), available at [http://www.columbia.edu/~msu2101/HsiehUrquiola\(2006\).pdf](http://www.columbia.edu/~msu2101/HsiehUrquiola(2006).pdf).

⁴⁷ *Id.* at 1498-99.

⁴⁸ *Id.* at 1488, 1498-99.

⁴⁹ Gill, *supra* note 3 at 236. See also Robert Bifulco, et al., *The Effects of Public School Choice on Those Left Behind: Evidence from Durham, NC*, 84 Peabody J. of Educ. 130 (2008) (finding that a cream-skimming effect resulted from North Carolina’s school choice programs).

instead “did everything they could to maintain the mix of students that made them attractive to parents and students in the first place.”⁵⁰

While there is some disagreement about whether and to what extent cream-skimming takes place in voucher programs generally, experts agree that school choice programs that focus on serving at-risk students will be most effective at mitigating the cream-skimming effect.⁵¹ Conversely, there is broad agreement and substantial evidence that programs which allow participating schools to choose their students are most likely to see widespread stratification.⁵²

In theory, the CSP requires participating schools to refrain from discriminating against prospective students “on any basis protected by federal or state law, except that religious Private School Partners may make employment and enrollment decisions based upon religious beliefs.”⁵³ But the CSP imposes neither any requirement that participating schools be open to all students nor any

⁵⁰ Helen F. Ladd, *School Vouchers: A Critical View*, 16 *Journal of Economic Perspectives* 3, 7-8 (2002), available at <http://fds.duke.edu/db/attachment/265>.

⁵¹ *Id.* at 19-21. See also Caroline M. Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 *Swedish Econ. Pol’y Rev.* 9, 60 (2003), available at <http://www.government.se/content/1/c6/09/54/30/66cbb4f6.pdf>.

⁵² *Id.*

⁵³ DCSD Choice Scholarships Executive Summary, available at <https://eboardsecure.dcsdk12.org/attachments/7432a5fd-dc5f-43fb-b456-39183197465e.pdf>.

prohibition on discrimination against students due to past behavior problems, academic ability as measured by standardized test performance, or sexual orientation. Indeed, a review of the informational materials of the schools participating in the Program clearly shows that virtually all of the participating CSP schools discriminate on the basis of disability,⁵⁴ behavior problems,⁵⁵

⁵⁴ For example, Trinity Lutheran School’s materials state that the school is not staffed to serve children with identified special needs. Trinity Lutheran Parent Student Handbook 11, <http://www.tlcas.com/School/documents/Parent-Student%20Handbook%202013-14.pdf>. Southeast Christian School is “not equipped to educate children with severe disabilities or disciplinary problems.”<http://www.sechristianschool.org/ENROLLMENT/tabid/57/Default.aspx>. Evangelical Christian Academy “does not have the resources to meet the needs of all students” http://www.ecaeagles.org/files/2011/01/2013-14_Student_Parent_Handbook_1013FINAL.pdf p.15. Denver Christian Schools, which at first blush appears to be one of the most progressive participating schools on this front, still only provides limited support to special needs students through its “Extend” program, <http://www.denver-christian.org/cms/One.aspx?portalId=2498058&pageId=16610233#Classroom%20accommodations>, and has an “AIDS policy,” under which it can refuse to admit, or expel, HIV-positive students. Aspen Academy “does not provide special education services.” <http://www.aspenacademy.org/Family%20and%20Student%20Guidebook%202013%202014%20Rev%201%2023%202014.pdf>. p.7. Mullen High School “does not offer Special Education programs, courses or services.” <http://www.mullenhigh.com/netcommunity/document.doc?id=6339> p.21.

⁵⁵ For example, “Children who have had serious difficulties at other schools (conduct, grades, attendance) may not be admitted to Trinity Lutheran School.” <http://www.tlcas.com/School/documents/Parent-Student%20Handbook%202013-14.pdf> p.11. The Rock Academy reserves the right to “disenroll” students with behavioral problems. <http://therock.org/academy/pdfs/Elementary%20FAQ%202012.pdf>. St. Peter

religion,⁵⁶ sexual orientation,⁵⁷ or academic ability⁵⁸—and more often than not they engage in discriminate on the basis of several of these categories in their

Catholic School “reserves the right to dismiss any student whose conduct or effort is unsatisfactory.” <http://www.petertherock.org/main/wp-content/uploads/2013/10/2013-2014-SPCS-Handbook.pdf>. Lutheran High School may refuse admission to students who have “a learning, behavioral, or emotional disability or disorder for which the school is not prepared to provide special services.”

<http://www.lhsparker.com/ourpages/auto/2012/4/27/55352329/LHS%20Student-Parent%20Handbook%202013-2014.pdf> p.10.

⁵⁶ For example, Southeast Christian School requires families to agree with a statement of faith.

<http://www.sechristianschool.org/LinkClick.aspx?fileticket=s4tDaWnI204%3d&tabid=75>. Shepherd of the Hills monitors families’ Sunday church attendance, <http://shepherdhills-school.org/wp-content/uploads/2012/11/Parent-Student-Handbook-2013-2014.pdf> p.7, and further provides that “[i]n the event that the student refuses to accept the ministry offered concerning his/her Christian life at Shepherd of the Hills, the student. . . disqualifies himself/herself from continued enrollment.” *Id.* p.12. Front Range Christian School requires a pastor recommendation for admission. <http://www.frccs.org/admissions/apply/7-12-application-process>. Evangelical Christian Academy screens applicants based on “Christian character and commitment,” “Church attendance”, and a “Pastor’s recommendation,” and requires applicants to agree to a doctrinal statement and statement of faith. <http://www.ecaeagles.org/admissions/>; http://www.ecaeagles.org/files/2011/01/2013-14_Student_Parent_Handbook_1013FINAL.pdf pp.15-16.

⁵⁷ For example, at Lutheran High School “genuine displays of homosexual affection” not only result in discipline, they automatically advance the student to the third step of the five-step disciplinary process—the same as if the student was involved in fighting, using tobacco, or possessing gang paraphernalia. www.lhsparker.com/ourpages/auto/2012/4/27/55352329/LHS_Student-Parent_Handbook_2013-2014.pdf p.14. With respect to staff, Front Range lists homosexuality as “a cause for termination.” D Ct Opp at p 13 ¶ 50.

admissions. Under these policies, particularly given some participating schools' practice of discrimination against special needs students,⁵⁹ the most difficult-to-educate students will likely find it impossible as a practical matter to take advantage of the CSP. This effect will be magnified at the high school level. Only one high school, Humanex Academy, is equipped to serve a wide variety special needs students—but its tuition is roughly four times the amount of the maximum CSP award: \$18,900 per year. The other seven participating high schools are all religious and may practice religious discrimination in admissions in addition to denying admissions to students based on past academic performance. Thus, in Douglas County, “school choice” will not mean that families choose schools—instead, it will be precisely the reverse. And this is the outcome that the research cautions against.

⁵⁸ Most CSP schools require submission of test scores and existing grades as part of a student's admissions package. *See, e.g.* Regis Jesuit High School <https://www.regisjesuit.com/page.aspx?pid=275>; Mullen High School <http://www.mullenhigh.com/netcommunity/document.doc?id=6339> p.13. Mackintosh Academy “generally look[s] for children who fall in the gifted range in at least one domain.” <http://mackintoshacademy.com/admissions/admissions-process/>. Aspen Academy requires cognitive testing. <http://www.aspenacademy.org/admissions/admissions-process.cfm>.

⁵⁹ The application of participating schools' admissions policies to voucher applicants may raise numerous questions under the Colorado Constitution and Colorado anti-discrimination laws—questions that will likely have to be resolved through litigation.

The “cream-skimming” effect in Douglas County will likely be further aggravated by the fact that, unlike even the failed voucher program in Chile, CSP vouchers typically do not even cover the total cost of education at participating schools.⁶⁰ Nineteen of the twenty-one schools now participating in the program publicize their tuition amounts. Not one of the nineteen schools charges tuition at levels that would fully be covered by a CSP voucher beyond kindergarten. A handful of participating schools charge less than \$1,000 beyond the full amount of the voucher, but these are all elementary schools. In the high school grades, seven of the eight participating high schools charge tuition that is more than double the maximum CSP award. Furthermore, there is nothing in the CSP policy prohibiting schools from raising tuition levels for voucher students, charging them additional fees, or declining to grant them financial aid on equal footing with non-voucher students. Finally, private schools typically do not provide transportation to

⁶⁰ Dr. Ladd’s conclusions, based on a review of existing programs, merit quotation at some length:

[V]oucher programs would [] contribute to stratification to the extent that they placed low income families in a less favorable position to exercise choice than higher income families. For example, low-income families would be disproportionately affected if the government did not pay for transportation to the chosen schools, if voucher schools were allowed to charge fees and tuition in addition to the amount of the voucher, if schools were allowed to select their

students, adding an additional logistical barrier for low-income students—and a well-nigh insuperable barrier for students who are mobility-impaired.⁶¹

The “cream-skimming” effect that will likely take place in Douglas County could be seriously detrimental to public schools. Voucher proponents frequently argue that, since “the funding follows the student” under programs like the CSP, public and private schools are on equal footing and need only compete to attract more students. This is not necessarily the case. Each student requires somewhat different funding and resources, but when a student enrolls in the CSP the public school will lose funding based on the average per-pupil cost to educate one student. At the same time, public schools are open to all students—including children whose special needs require greater-than-average resources. Furthermore, public schools are required to provide a much wider range of services than private schools such as special education, transportation, food services, and vocational education—and costs for these programs may remain relatively constant even if

students or if low-income families have less access to information than did high-income families. Ladd, *supra* note 48, at 13.

⁶¹ A recent study of North Carolina’s charter school system by the state’s Department of Education found that a lack of transportation “coincides with lower enrollment of low-income students.” Shelby Dawkins-Law and Azaria Verdin, North Carolina State Board of Education *Public Charter Schools with Transportation: Increasing Access to Learning Opportunities for All Students* (2013), <http://www.dpi.state.nc.us/docs/intern-research/reports/cstransport.pdf>.

there is a small to moderate decline in enrollment due to the CSP. And many of schools' fixed overhead costs remain the same regardless of enrollment levels. Thus, when the funding assigned to one student leaves a public school, an equal reduction cannot necessarily be made in the school's budget.

Due to the program's design, the students most likely to leave public schools via the CSP are also those most likely to take more funding from the district than it costs to educate them. There is a very real risk that this will increase the ratio of special needs students in the public schools while reducing the funding needed to provide them—and all public school students—with a quality education. If this underfunding occurs on a significant scale, a general decline in educational services in public schools, including increased class sizes and fewer educational offerings, may result. The high quality of Douglas County's public schools may then become a thing of the past.

CONCLUSION

For the foregoing reasons, we submit that the Court's consideration of the constitutional issues before it should not be tainted by the unsupported and inaccurate claims about the educational merits of voucher programs advanced by the Respondents and the Intervenor-Respondents.

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