

COURT OF APPEALS  
STATE OF COLORADO  
101 West Colfax Avenue, Suite 800  
Denver, CO 80202

Denver District Court County  
Honorable Michael A. Martinez, Judge  
Case No. 2011CV4424 *consolidated with* 2011CV4427

**Defendants-Appellants:** COLORADO STATE BOARD  
OF EDUCATION AND COLORADO DEPARTMENT OF  
EDUCATION,

and

**Defendants:** DOUGLAS COUNTY SCHOOL DISTRICT  
and DOUGLAS COUNTY BOARD OF EDUCATION

v.

**Plaintiffs-Appellees:** JAMES LARUE; SUZANNE T.  
LARUE; INTERFAITH ALLIANCE OF COLORADO;  
RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM  
HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU;  
MARITZA CARRERA; SUSAN MCMAHON;  
TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S.  
BARNARD; MASON S. BARNARD

**Intervenors:** FLORENCE AND DERRICK DOYLE;  
DIANA AND MARK OAKLEY; JEANETTE STROHM-  
ANDERSON AND MARK ANDERSON

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Case Nos.  
11CA1856  
11CA1857

**REPLY BRIEF OF STATE APPELLANTS**

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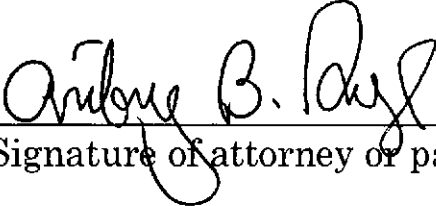
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## INTRODUCTION

Defendants-Appellants Colorado State Board of Education and Colorado Department of Education (“State Appellants”), through the Office of the Colorado Attorney General, submit this Reply Brief. The State Appellants adopt and incorporate by reference the arguments in the reply briefs by the District Defendants and Intervenor-Appellant Families.

\* \* \*

### **I. Plaintiffs Lack Standing Under the Public School Finance Act.**

#### **A. The Act does not include a private enforcement right.**

Not every statute may be privately enforced. “Whenever a plaintiff alleges that a statute implicitly creates a private right of action, the critical question is whether the legislature intended such a result.” *Colo. Ins. Guar. Ass’n v. Menor*, 166 P.3d 205, 210 (Colo. App. 2007). It is improper to “infer” a private enforcement right without “a clear legislative intent to create such a cause of action.” *Id.* And where a statute imposes on public entities “duties for the benefit of the public generally,” the legislature’s “expression of [the] intent” to create a

private civil remedy “should be loud and clear.” *Quintano v. Indus. Comm’n*, 495 P.2d 1137, 1139 (Colo. 1972).

Plaintiffs assert that they are “entitled to sue school districts for unlawful financial decisions,” citing three cases raising *constitutional* claims. Taxpayers Answer Brief (“TP Br.”) at 13. But as Plaintiffs themselves admit, “Defendants do not dispute that Plaintiffs have standing to assert their claims under the Colorado Constitution.” TP Br. at 12 n.12. Plaintiffs’ standing to bring their constitutional claims is irrelevant to whether the Public School Finance Act of 1994 (the “Act”) grants Colorado taxpayers the right to challenge the expenditure of state dollars by local school districts. No court has interpreted the Act in this way.<sup>1</sup>

Plaintiffs assert that “absent a private right of action, the statute lacks any mechanism to hold an offending school district accountable,” and they allege that “the State Board has essentially colluded with the

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<sup>1</sup> Plaintiffs claim that one case, *Cty. Comm’rs v. Bainbridge*, “implicitly” established private enforcement rights under the Act. TP Br. at 19. However, not a single claim alleged in *Bainbridge* was brought under the Act itself—every claim was constitutional, not statutory, in nature. 929 P.2d 691, 696—97 & n.6 (Colo. 1996).

offending district.” TP Br. at 14. But merely characterizing Douglas County as “offending” and “collusive” does not establish standing. Moreover, the General Assembly’s decision not to create a private enforcement right does not mean the Act lacks an enforcement mechanism. The State Board has power to police expenditure of state funds in accordance with the Act’s requirements. *See* § 22-54-120(1) (committing to the State Board the “administration and enforcement” of the Act); *see also* 1 CCR 301-39, 2254-R-1.00 (setting forth procedures “for revocation or withholding of school district accreditation for Act violations”). Plaintiffs may prefer to be the Act’s enforcers, but the legislature has not empowered them to fill that role.

Plaintiffs further claim that only “a private cause of action” will allow them to “assert their legally protected interests under the Act.” TP Br. at 16. This assumes that Plaintiffs have a “legally protected interest” to assert. Even if Plaintiffs are within the class of persons benefited by the Act, the General Assembly is not compelled to create “legally protected interests” through every statute it passes. *Macurdy v. Faure*, 176 P.3d 880, 882–83 (Colo. App. 2007) (although plaintiffs were

within the class for whose benefit a statute was enacted, the statute “does not evince a legislative intent to create an implied private right of action”); *Cf. Olson v. City of Golden*, 53 P.3d 747, 753 (Colo. App. 2002) (because the challenged action “involve[d] public policy and political considerations about which reasonable people could disagree,” “the right of a taxpayer to litigate the question . . . is not consistent with the statutory scheme”).

Finally, Plaintiffs assert that they “may invoke taxpayer standing to assert claims of statutory violations as well as constitutional violations.” TP Br. at 20. But Plaintiffs’ status as taxpayers does not excuse them from establishing standing under the Act itself. If this were true, a court would not need to actually examine a statute to determine if the legislature intended to create a private enforcement right. *See Menor*, 166 P.3d at 210 (“[T]he *critical question* is whether the legislature intended such a result.” (emphasis added)). In any event, standing must be assessed claim-by-claim. *See Lobato v. State*, 218 P.3d 358, 368 & n.9 (Colo. 2009) (because all plaintiffs “raise[d] the same claims,” the case could proceed based on the standing of one set of

plaintiffs; but if another set of plaintiffs had attempted to raise different claims and “inject novel issues into the case,” they “would have to possess independent standing” to assert them). The fact that Plaintiffs have standing to assert constitutional claims does not import into the Act a private enforcement right that the General Assembly did not contemplate.

**B. The Act grants school districts—not individuals—a legal interest in state funds.**

Plaintiffs assert that they have suffered an “economic injury” because the CSP “remove[s] over \$3 million in public funding from the District each year.” TP Br. at 17. In fact, the CSP confers a net benefit on Plaintiffs. State Opening Br. at 22–23. In any event, Plaintiffs lack standing because they lack a legal interest in the state funds distributed to Douglas County School District (“DCSD”) under the Act.

The Act entitles each school district to a “total program” amount of funding, which “represents the financial base of support for public education in that district.” § 22-54-104(1)(a). This “total program” includes both the “district’s share” and the “state’s share.” § 22-54-

106(1)(b)(I). As the Act makes clear, this “total program” is “*available to the district*”—not to individual students, parents, or taxpayers—and “the amounts and purposes for which such moneys are budgeted and expended *shall be in the discretion of the district.*” § 22-54-104(1)(a) (emphasis added). *See School Finance Chart*, attached hereto as Exhibit A.

School districts exercise this discretion in innumerable ways. They decide how much to allocate to each school, how much should go to extracurricular programs, and how much to spend on staff. Districts are nowhere required to spend a particular amount on each student or to allocate per-pupil funding in some particular manner. Thus, Plaintiffs have no individual right to the state funds that DCSD allocates, and lack standing under the Act to challenge the district’s discretionary funding decisions. To read the Act otherwise would undermine the legislature’s decision to give districts ultimate authority to spend state funds. *See Olson*, 53 P.3d at 753 (a private enforcement right was inappropriate because the challenged action “involve[d] public policy

and political considerations about which reasonable people could disagree).

## **II. The Act Allows School Districts to Contract with Private Schools to Expand Educational Opportunity for Public School Students.**

Plaintiffs argue that the CSP violates the Act because it “effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts.” TP Br. at p. 23. As set forth above, Plaintiffs lack standing to bring this claim. This assertion also evinces a fundamental misunderstanding of both the CSP and of the Act.

Plaintiffs argument assumes that the students enrolled in the CSP are not public school students. However, the CSP states that “[t]o be eligible for a Choice Scholarship in the pilot, students shall be DCSD residents and attending a DCSD school for no less than one year. Non-resident, open-enrolled DCSD students are not eligible to participate in the Pilot Program.” See CSP, p. 4, ¶ 5. The CSP also provides that participating students “shall be deemed part of the District’s ‘pupil

enrollment' for purposes of Colo. Rev. Stat. § 22-54-103(10)..." *Id.* at ¶ 1.

Since enrollment in the CSP is limited to those DCSD students already enrolled in DCSD and being counted under the Act, without the CSP, these students would still be attending DCSD schools. Therefore, the CSP has no impact on funding for other districts.

Plaintiffs next assert that the CSP provision retaining 25% of per-pupil revenues for DCSD violates the Act's requirement that funding be based on the actual costs of educating students in each district. However, Plaintiffs can cite no statute or regulation for this novel proposition.

Plaintiffs' argument is based upon the false assumption that per-pupil revenues for each student must be spent at the school where that student physically attends class. But under the Act, once the total amounts of funding are determined, the funding flows from the State to the school district, not to the pupil or the individual school. Consistent with local control of instruction, the school district has discretion to

allocate that state-level funding among the district's educational programs.

For instance, high schools cost more to operate than elementary schools, yet the per pupil revenues a district receives for these pupils are identical. The district determines how it allocates those revenues across the spectrum of district schools. This discretion, founded in the school districts' constitutionally guaranteed "substantial discretion regarding the character of instruction that students will receive at the district's expense," *Board of Educ. v. Booth*, 984 P.2d 639, 648 (Colo. 1999), is recognized by the Act, which provides that "the amounts and purposes for which such moneys are budgeted and expended shall be in the discretion of the district." § 22-54-104(1)(a).

The chief benefit of local control is the ability of local districts to innovate, creating a vibrant, responsive public school system. *Cf.* (noting that local control permits tailoring of educational programs to local needs). Here, DCSD has chosen to exercise its constitutional and statutory discretion by creating a program that reduces educational expenses while increasing educational choices for its students. Tr.

374:2-375:20 (CSP will benefit DCSD's other educational programs by approximately \$350,000). Indeed, alleviating the recent funding cutbacks in public education was one of the specific goals of DCSD in creating the CSP. Tr. 375:25-379:22.

The Plaintiffs next argue that the CSP violates the Act by “diverting monies that the legislature intended for public education to private and religious schools.” TP Br. at p. 26. However, the Act allows districts to provide a public education to its students through contractual arrangements with private schools. § 22-32-122(1) (school districts may contract directly with private schools to provide educational services); § 22-30.5-104(7)(b) (public charter schools may contract with private corporations to provide educational services).

The enforcement of the Act is statutorily committed to the State Board through enactment of reasonable rules and regulations. § 22-54-120(1). These rules are presumed valid and a party bears “a heavy burden” to establish their invalidity. *Colo. Ground Water Comm'n v. Eagle Peak Farms*, 919 P.2d 212, 217 (Colo. 1996). Here, those rules expressly allow school districts to count students for school finance

purposes when they are enrolled in a private school under a contractual arrangement with the district.

Specifically, the rules provide that a pupil is “enrolled in the district and in attendance in the district,” 1 CCR 301-39, Rule 2254-R-5.01, under the following circumstances:

A pupil shall be “enrolled” if such pupil attends school at any time in the school year of the pupil enrollment count date or of the alternative count date on or prior to the pupil enrollment count date or the alternative count date in a district which has met the minimum hours of opportunity requirement in Section 22-32-109, C.R.S., *or which purchases comparable instructional services for such pupil.*”

1 CCR 301-39, Rule 2254-R-5.02 (emphasis added). Thus, a student can be counted as both “enrolled” and “in attendance” in the school district if they are actually receiving their education pursuant to a purchase agreement with a private school.

Similarly, a school district may count a student enrolled in a private institution of higher education under the High School Fast Track Program or the Postsecondary Enrollment Options Act, 1 CCR 301-39, Rule 2254-R-5.14, or who is attending a private facility school.

1 CCR 301-39, Rule 2254-R-5.14(2). The rules also allow a school district to count students “receiving educational services from another entity through a purchase agreement,” 1 CCR 301-39, Rule 2254-R-5.14(1), or “[a] pupil for whom a district either pays or receives any amount of tuition.” 1 CCR 301-39, Rule 2254-R-5.14(3). Thus, contrary to Plaintiffs assertions, the Act specifically contemplates counting public school students receiving their education at a private school through an agreement with the public school district.

The CSP requires just such a contract, with the proviso that actual selection of the school be left to the private individual choice of each student or their parents. The CSP states that “[t]o be eligible to participate in the Choice Scholarship, a Private School Partner shall sign a Choice Scholarship Contract with the District describing the rights and obligations of the school and those of the District.” CSP Policy, p. 8 at ¶ 7.

Thus, the CSP is no different from the host of other public-private partnerships that currently exist and receive public school funds. *See* Amended Opening Brief of State Appellants, pp. 5-13. The very

existence of these public-private programs belies the core assertion of the Taxpayer Plaintiffs that no public school funds may ever be spent at a private school, yet the Taxpayer Plaintiffs fail to address this inconvenient fact in any meaningful way. *See* TP Br. at pp. 26–27.<sup>2</sup>

Finally, the Taxpayer Plaintiffs argue that this issue is ripe for determination, on the grounds that the State Board “colluded” with DCSD to begin spending money on the CSP. TP Br. at p. 29. However,

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<sup>2</sup> The American Federation of Teachers and American Association of School Administrators (AFT) also attempt to distinguish these programs, but their argument fares no better. AFT asserts that these programs are not funded under the Act. AFT Brief at 31. In fact, all of these programs use state funds. Specifically, per pupil revenue distributed under the Act funds the following: private facility schools; private special education placements; concurrent enrollment programs in private institutions; and placements in private schools for English language proficiency, career and technical education, and expelled student services. 1 CCR 301-39, Rules 2254-R-5.02, 5.14, 5.15; *see also* *Testimony of School Finance Director Leanne Emm* [Tr. 487:15-488:2] and *Commissioner Robert Hammond* [Tr. at 226:2-22.]; § 22-20-114 (disabled students attending an eligible facility school funded under the Act); § 22-28-104(3) (preschool program funded under the Act); § 22-35-105(2)(a) (concurrent enrollment funded under the Act). Any time a district contracts to provide these programs, the district utilizes state public school funds to provide public education in partnership with a private entity.

the record in this case is clear that the State Appellants have not determined whether the CSP would be eligible for funding, or in what amounts. Order at 15, ¶ 60, R. at 2495.

Indeed, no mechanism exists in law for the State Appellants to pre-approve the CSP. The first payment of state money to school districts each year is based on the projected student count prepared by the Legislative Council. These estimates are recalculated in December after the school districts conduct their formal pupil counts on October 1 and certify them to the state. R. at 1336; 1 CCR 301-39, 2254-R-3.00. The state then applies the official pupil count to the school funding formula to determine the state share of the payments. *Id.* Since the students enrolled in the CSP were already DCSD students, *infra* at p. 8, both the amounts DCSD received as determined by Legislative Council, and the adjusted December estimates after certification of the October 1 pupil counts, are the same whether or not the CSP exists.

The regulatory mechanism for determining whether money was inappropriately distributed is an annual audit and an administrative process for recovering improperly paid funds. Exhibit T; 1 CCR 301-39,

2254-R-8.00. Prior to the annual audit taking place, the Department has no procedure for challenging the pupil count provided by the school district, and it has no discretion in its initial payments to deviate from the mathematical formula provided by the Act. *Id.* Consequently, the Taxpayer Plaintiffs claim under the Act is premature.

**III. Taxpayer Plaintiffs Cannot Pursue Claims Under Article IX, §§ 2 and 15, Since Their Failure to Cross-Appeal These Claims Deprives the Court of Jurisdiction.**

Plaintiffs improperly ask this Court to consider two stand-alone constitutional claims under article IX, §§ 2 and 15, which the Trial Court denied and Plaintiffs elected not to cross-appeal. TP Br. at pp. 47-58. The Court should not address these claims because of Plaintiffs' failure to raise them in a cross-appeal. *D.E.B. Adjustment Co. v. Cawthorne*, 623 P.2d 82, 84 (Colo. App. 1981). Plaintiffs were required to cross-appeal the adverse decisions under article IX §§ 2 and 15, and their failure to cross-appeal constitutes a waiver. *See* C.A.R. 3(h), 4.

The general rule is that an appellee must file a cross-appeal in order for an appellate court to consider an alleged error of the trial

court which prejudiced the appellee. *City of Delta v. Thompson*, 37 Colo. App. 205, 207, 548 P.2d 1292, 1294 (1975). Although Colorado has recognized a limitation on this rule, allowing an appellee to raise *arguments* in support of his judgment that would not increase his rights under the judgment, *Blocker Exploration Company v. Frontier Exploration, Inc.*, 740 P.2d 983, 989 (Colo. 1987), that limited exception is not available to the Taxpayer Plaintiffs here. Taxpayer Plaintiffs pleaded their article IX, §§ 2 and 15 claims as independent claims. According to Plaintiffs, a favorable judgment on these claims would preclude a school district from ever contracting with a private school for educational services, regardless of the whether the private school in question is religiously affiliated. *See* Taxpayers Complaint, p. 12, ¶ 61, p. 14, ¶79. By attempting to raise these issues here, Taxpayer Plaintiffs seek to enlarge their rights under the judgment below, since these claims seek an independent constitutional prohibition on a school district or even the general assembly from ever authorizing a scholarship program to place public school students in private schools. As such, the exception to the general rule is not available here.

In an attempt to excuse this failure, Plaintiffs cite two cases that address the Court's ability to affirm a judgment on other grounds. *See* TP Br. fn.6 (*citing Barnett v. Elite Properties of Am.*, 252 P.3d 14, 23 (Colo. App. 2010); *and Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 254 (Colo. App. 2006)). But neither case even discusses a failure to cross-appeal. Also, neither case addresses the waiver of free-standing, substantive claims akin to Plaintiffs' intentional decision to not cross-appeal a written, adverse decision under two sections of the Colorado Constitution. *See* Order at 51-56, 63-65, R. at 2531-2536, 2543-2545 (rejecting claims). In these circumstances, allowing Plaintiffs to circumvent the well-known requirement to file a cross-appeal would defeat the very purpose of requiring parties to timely file cross-appeals.

#### **IV. The Trial Court Correctly Rejected Plaintiffs Article IX, § 15 Argument.**

As explained above, the Court should not rule upon Plaintiffs art. IX, § 15 claim. However, even if the Court considers this issue, the Plaintiffs' claims still fail. Plaintiffs argue that the CSP violates Colo. Const. art. IX, § 15 because it "abdicates control over instruction of

students ostensibly enrolled in the public schools ... ." TP Br. at p. 54. The Trial Court rejected this argument, finding that it was "unsupported by any case law in Colorado." Order at pp. 64-65, R. at 2544-2545.

Indeed, the CSP is the very essence of local control. Section 15 provides that school districts "shall have control of instruction in the public schools of their respective districts". This language is clearly intended to empower the authority of local school boards, not to place limitations upon that authority. Yet Plaintiffs argue that art. IX, § 15 should be read to limit the local school district's authority to government-run schools.

The Colorado Supreme Court, however, has interpreted § 15 as a limitation not on districts, but on the *State*, preventing the State from interfering with how local districts operate schools funded with locally-raised revenue. Only where a law has the effect of "usurping the local board's decision-making authority or its ability to implement, guide, or manage the educational programs *for which it is ultimately responsible*" does a state law violate § 15. *Booth*, 984 P.2d at 649 (emphasis added).

Since the CSP is a discretionary exercise of DCSD's authority, no violation of § 15 is involved.

Local control “distribute[s] decision making authority ... to each district” and thereby serves as “a means of guarding against excessive state involvement in education policy.” *Owens v. Colo. Congress of Parents, Teachers and Students*, 92 P.3d 933, 939 (Colo. 2004) (internal quotation marks omitted); *id.* at 941 n. 8. In *Owens*, the Supreme Court held that a state-mandated school voucher program violated § 15 because funding for the program included local tax revenues, and the district had *no authority* in connection with the payments. *Id.* at 937. Thus, the program violated § 15 because *it deprived school districts of control of locally-raised funds*: “Control over locally-raised funds allows local electors to tailor educational policy to suit the needs of the individual districts, free from state intrusion. Without control over locally raised funds, the representative body mandated by our state constitution loses any power over the management of public education.” *Id.* at 935-36. Indeed, “local control” challenges have always involved challenges to state laws that allegedly usurp local decision-making

authority—not district programs supposedly “abdicating” that authority. *See* TP Br. at 54-55.

In this case, DCSD has exercised its constitutional authority in a manner that, true to the *Owens* case, “allows local electors to tailor educational policy to suit the needs of the individual districts, free from state intrusion.” *Owens*, 92 P.3d. at 935. This, in turn, allows local school districts to function as educational innovators and pioneers to create educational programs for the benefit of Colorado’s children.

**V. The Trial Court Properly Found that the Scholarship Program is Consistent with Colo. Const. Art. IX, § 2.**

Taxpayer Plaintiffs next argue that the CSP violates art. IX, § 2, which mandates that the general assembly “provide for the establishment and maintenance of a *thorough and uniform system of free public schools throughout the state...*” (emphasis added) (the “Education Clause”). Taxpayer Plaintiffs allege that the CSP violates the Education Clause by allowing a publically-funded education to be provided by schools that have divergent instruction, employment, and enrollment policies. TP Br. at p. 50. The Trial Court rejected Plaintiffs

art. IX, §2 argument, finding that the Plaintiffs had “not provided sufficient evidence that the Scholarship Program prevents students from otherwise obtaining a free public education in Douglas County.” Order at p. 53, R. at 2533. As explained in Section III, *infra* at 15, Plaintiffs failure to cross-appeal this claim is fatal.

Even had Plaintiffs cross-appealed, the Trial Court’s decision should be affirmed. The Education Clause does not require that every public school in Colorado be absolutely identical in form and structure. Rather, the Education Clause “requires the General Assembly to establish and maintain a school system.” *Skipworth v. Bd. of Educ.* RE-2, 874 P.2d 487, 488 (Colo. App. 1994); *Cline v. Knight*, 137 P.2d 680, 684 (1943) (the Education Clause mandates an opportunity for a free education). As the Colorado Supreme Court held in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1025 (Colo. 1982), “Article IX, section 2 of the Colorado Constitution is satisfied if thorough and uniform educational opportunities are available through state action in each school district.” The Education Clause is not a mandate for absolute uniformity in educational services, but rather a mandate that

the General Assembly ensure each school age child the opportunity to receive a free education. *Id.* at 1018. Beyond the provision of educational opportunities in each district, *Lujan* held that the Education Clause allows districts to create programs exceeding this requirement: “While each school district must be given the control necessary to implement this mandate at the local level, this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard.” *Id.* at 1025. Thus, the Education Clause represents the floor of public education in Colorado – it does not provide a specific method of how each school district is to provide a public education. *See In re Kindergarten Schools*, 32 P. 422, 423 (1893) (the Education Clause is “in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so”).

Other states have reached the same conclusion. In *Simmons-Harris v. Goff*, 711 N.E.2d 203 (1999), the Ohio Supreme Court considered whether Ohio’s school choice program (which is similar to

the CSP) violated art. VI, § 2 of the Ohio Constitution, which required the Ohio General Assembly to provide for “a thorough and efficient system of common schools throughout the state.” Plaintiffs in the Ohio case argued that this provision prohibited the establishment of a system of nonpublic schools financed by the state.

The Ohio Supreme Court rejected this argument, finding that the school choice program was consistent with the state’s obligation to public education: “We fail to see how the School Voucher Program, at the current funding level, undermines the state’s obligation to public education. The School Voucher Program does not violate this clause of Section 2, Article VI of the Ohio Constitution.” *Id.* at 212.

Similarly, the Wisconsin Supreme Court rejected a challenge under the Wisconsin version of the Education Clause in *Davis v. Grover*, 480 N.W.2d 460 (1992). There the Court held that the Milwaukee Parental Choice Program, which permitted children from low-income families to attend private schools with public monies, did not violate art. X, § 3 of the Wisconsin Constitution, which obligates the legislature to provide for the establishment of free public schools which shall be “as nearly uniform as

practicable.” *Id.* at 473. The plaintiffs in that case argued that, by offering instruction that differed from that of public schools, the Milwaukee program violated the “uniformity” clause.

The Wisconsin Supreme Court disagreed, holding that the Milwaukee program:

[I]n no way deprives any student the opportunity to attend a public school with a uniform character of education. Even these students participating in the program may withdraw at any time and return to public school. The uniformity clause clearly was intended to assure certain minimal educational opportunities for the children of Wisconsin. It does not require the legislature to ensure that all of the children in Wisconsin receive a free uniform basic education. Rather, the uniformity clause requires the legislature to provide the opportunity for all children in Wisconsin to receive a free uniform basic education. The legislature has done so. The MCPC merely reflects a legislative desire to do more than that which is constitutionally mandated.

*Id.* at 474. *See also Jackson v. Benson*, 578 N.W.2d 602, 628 (1998) (the School Choice Program “has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by the State under art. X, § 3”).

Likewise, the CSP merely allows children access to alternative educational opportunities, effectively expanding the educational opportunity of Colorado's children. It does not deprive any child of the opportunity to attend a public school, should he or she choose to do so. The CSP is thus fully consistent with the spirit of Colorado's constitution.

#### **VI. The Contract Schools Statute Authorizes Contracts with Private Schools.**

Section 22-32-122 (the "Statute"), unambiguously authorizes school districts to enter into contracts with private schools to provide any educational service. Despite this, the Trial Court erroneously concluded that the Statute "merely allow[s] school districts to contract for particular educational services not offered by the public schools, such as foreign-language instruction." Order at 66-67, R. at 2546-2547. This conclusion is contrary to well-established rules of statutory construction, the plain and ordinary meaning of Statute's text, and the Statute's legislative history.

The Statute is unambiguous; it allows school districts to contract “for the performance of *any* service, including educational service . . .” § 22-32-122(1) (emphasis added). By limiting the Statute’s scope to only those services not already offered by public schools, the trial court effectively rewrote the Statute and failed to heed the intent of the Legislature. *See People v. Goodale*, 78 P.3d 1103, 1107 (Colo. 2003).

Since the Statute is unambiguous, delving into its legislative history is unnecessary. *Goodale*, 78 P.3d at 1107 (only when the statute is unclear or ambiguous may courts look beyond the words of the statute to legislative history). However, the legislative history of the Statute also supports the DCSD’s authority to contract with private schools. As to legislative history, the trial court rooted its erroneous interpretation on language in a version of H.B. 93-1118 that was ultimately rejected. R. at 1756, House Bill 93-118, Am. 3d House Reading, p. 2, ln. 15-19. The rejection of this language by the

legislature indicates an intent to permit school districts to contract with private schools to provide *all* educational services.<sup>3</sup>

The Taxpayer Plaintiffs also contend that other programs enacted under the Statute are distinguishable from the CSP because they are statutory programs. However, the existence of these programs indicates that the Statute does not restrict the ability of local districts to create the type of public-private partnership created by the CSP.

The Record below is replete with examples of programs involving contracts between school districts and private schools for a “complete package” of education services. For example, Senator King agreed that private schools, through a contract school program, can provide complete education packages to schools. Tr. at 758:20-25.

Commissioner of Education Robert Hammond testified that school districts do, in fact, contract with private schools to provide complete educational services, and that the students in those schools are counted as public school students for the purpose of the Act. Tr. at 226:2-22.

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<sup>3</sup> Taxpayer Plaintiffs’ contention that the CSP is not authorized by the Statute because it is neither “free” nor “public” is addressed in Section V, *infra*.

Finally, the Taxpayer Plaintiffs suggest that the CSP impermissibly exempts private school participants from certain state requirements. While the CSP, like all charter schools, is eligible to receive waivers of certain state requirements pursuant to § 22-30.5-104(6)(b), participating private school partners are still subject to twelve separate conditions of eligibility, as well as the terms and conditions set forth in the Partner Participation Agreement. For example, a private school partner must be accredited by a recognized state or national accreditation organization and demonstrate that its educational program produces student achievement and growth results at least as strong as what DCSD schools produce. R. at 2018, 1774-76; CSP Executive Summary, at i; CSP Private School Partner Participation Agreement, at 2-4.

**VII. The Scholarship Program Does Not Violate Article IX, Section 3.**

It is undisputed that less than two percent of public school funding comes from the public school land trust (the “Trust Fund”) established by art. IX, § 3. *See School Finance Chart*, Exhibit A. The

CSP is not funded directly out of the Trust Fund, but from monies distributed to DCSD from the state public school fund set as set forth in § 22-54-114. Art. IX, § 3 places no restraints on the use of such funds after they have been transferred to the school districts. Because the interest income generated by the Trust Fund does, in fact, come from a trust, it is entirely appropriate to evaluate the distribution of that income in reference to well-established principles of trust law.

Moreover, the conditions of the Trust Fund are satisfied when Trust monies are transferred to school districts. At that point, principles of local control allow school districts to decide the manner in which they will provide education to their district students. *See* art. IX, § 15; § 22-54-104(1) (“the amounts and purposes for which such moneys are budgeted and expended shall be in the discretion of the district”).

The Taxpayer Plaintiffs make the far-reaching argument that anytime a single penny of money from the Trust Fund is distributed to school districts and then used to pay for educational services provided by a private school, art. IX, §3 is violated. Taking this argument to its logical conclusion would mean that it is unconstitutional for a school

district to pay to send a disabled student to Humanex Academy or another facility school, or provide tuition assistance for students to earn college credit at a private institution through a concurrent enrollment program. *See* § 22-20-114 (school district may pay the tuition of a disabled student who attends an eligible facility school); § 22-35-105(2)(a) (concurrent enrollment tuition benefit funded by per pupil operating revenue).

The Taxpayer Plaintiffs misstate the testimony of Assistant Commissioner for Public School Finance Leanne Emm, who testified that funding for special education placement programs at facility schools comes from the state public school fund. Tr. 487:15-488:2. In fact, anytime a school district sends a special education student to a special education or facility school, it is utilizing monies from the state public school fund to provide public education through a private entity. If the Taxpayer Plaintiffs are correct, then none of these arrangements are constitutionally permissible.

Finally, there was no basis for the district court to conclude that the small amount of interest income generated by the Trust “will be

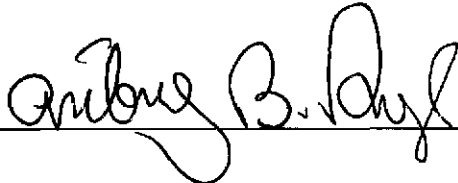
used, in part, to pay tuition to private schools,” in violation of art. IX, §3. Order at 63, R. at 2543. The undisputed evidence established that the DCSC retains 25% of the state-level funds for each pupil. The Taxpayer Plaintiffs attempt to rebut this fact by noting that the 25% per-pupil funds held back by DCSD will be used by the Choice Scholarship Charter School. However, the Taxpayer Plaintiffs fail to explain why or how the 2% of public school funding contributed by the Trust will go directly to Private School partners.

### **CONCLUSION**

The Court should reverse the Trial Court’s judgment and remand for dismissal of Plaintiffs’ claims.

DATED this 3rd day of August, 2012.

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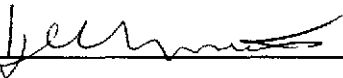
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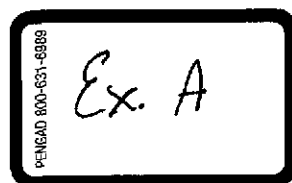
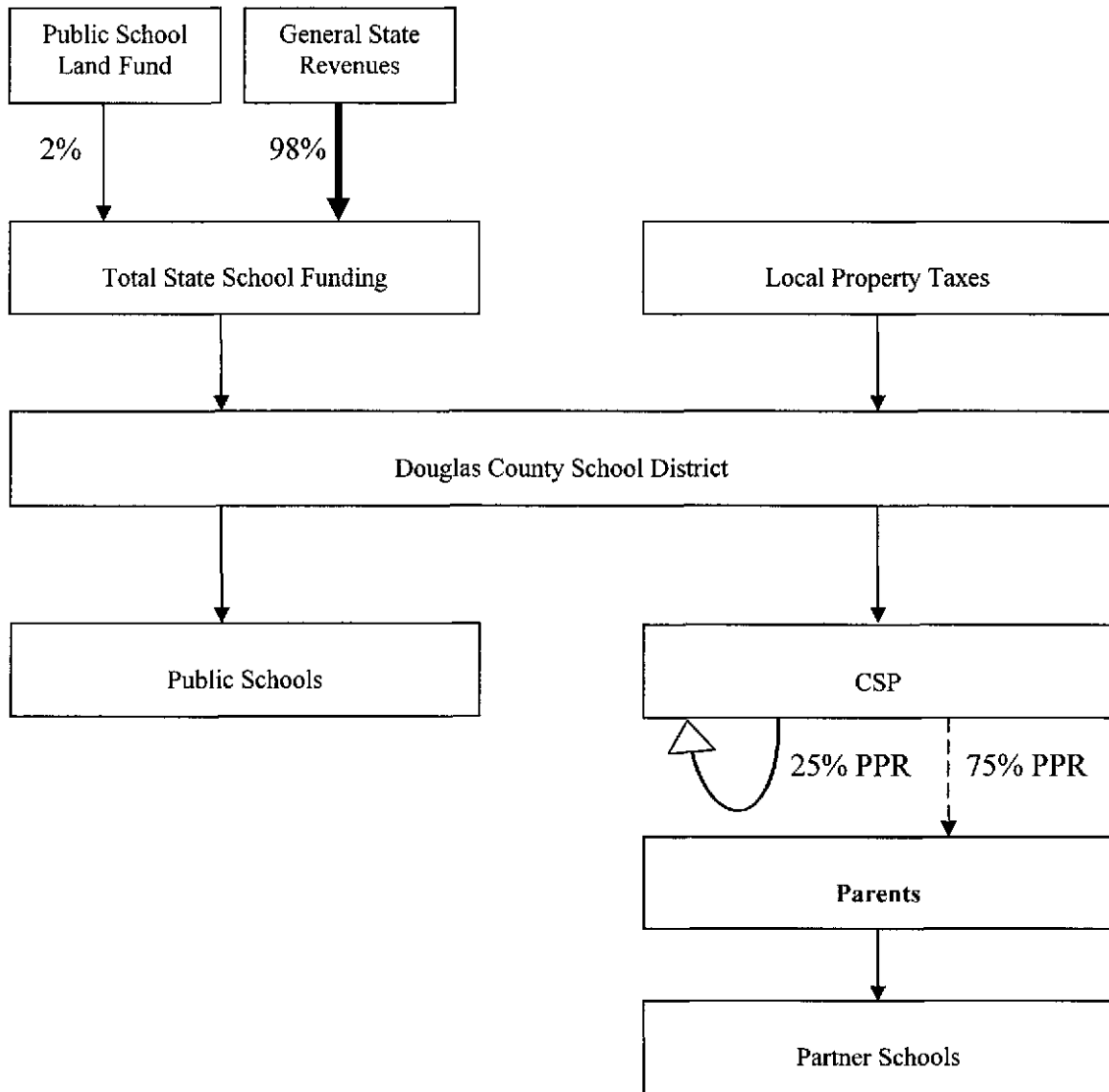
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### The Flow of Money under the Choice Scholarship Program



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