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COLORADO COURT OF APPEALS 101 W. Colfax, Suite 800, Denver, CO 80203 Appeal from District Court, Denver County, Colorado District Court Judge Michael A. Martinez Case No. 2011CV4424 *consolidated with* 2011CV4427	
Defendants-Appellants: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION **and** **Defendants-Appellants:** COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION **and** **Intervenors-Appellants:** FLORENCE AND DERRICK DOYLE, on their own behalf and as next friends of their children, 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 **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 **and** **Plaintiffs-Appellees:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.	▲ COURT USE ONLY ▲ Case Number: 2011CA1856 2011CA1857
Attorneys for Defendants-Appellants: James M. Lyons, #882; Eric V. Hall, #32028 Rothgerber Johnson & Lyons LLP One Tabor Center, Suite 3000, 1200 Seventeenth Street Denver, CO 80202 Telephone: 303.623.9000; Fax: 303-623-9222 Email: lyons@rothgerber.com; ehall@rothgerber.com	

OPENING BRIEF FOR DOUGLAS COUNTY SCHOOL DISTRICT AND BOARD OF EDUCATION

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 complies with C.A.R. 28(g)

Choose one:

☑ It contains 9,464 words.

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☑ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority, and (2) a citation to the precise location in the record (R __, p __), not to an entire document, where the issues was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☑ 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/ *Eric V. Hall*
Eric V. Hall

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II. Did the trial court err in holding the Choice Scholarship Program violated the Public School Finance Act?

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Given the number and complexity of the issues presented, the Defendants-Appellants have divided briefing between them. Namely, the State Defendants are briefing Issues I-V and the District Defendants are briefing Issues VI-VII. The District Defendants incorporate by reference the other appellants' briefs.

STATEMENT OF THE CASE

This appeal arises from the Denver District Court's erroneous determination that the Choice Scholarship Program ("CSP" or "Program"), adopted unanimously by the Douglas County School Board on March 15, 2011, violates the Colorado Constitution and the Colorado School Finance Act.[1] This determination was made after a three-day preliminary injunction hearing in an action instituted by persons and groups without standing to bring the Finance Act claim and for which venue was improper. The court below entered a permanent injunction, upon less than the required notice, from which this appeal is taken.

The trial court reached its erroneous result by fundamentally misapplying *Americans United for Separation of Church and State Fund v. Colorado* and relying on obsolete legal concepts that courts have since disavowed, most explicitly in *Colorado Christian University v. Weaver*. Properly understood, *Americans United* stands for the proposition that a neutral government program of genuine private choice, like the CSP, does not amount to aid to religious organizations, even if public funds indirectly reach those organizations. This core holding of *Americans United* was later endorsed by the United States Supreme Court in *Zelman v. Simmons-Harris* and is the law of the land.

[1] The trial court's Order is attached as Addendum 1, while the CSP Policy is attached as Addendum 2.

This Court should construe *Americans United* to avoid the federal constitutional defects created by the trial court's imposition of a religious litmus test on an otherwise neutral school choice program. Faithful adherence to *Americans United* also avoids the constitutionally problematic elements of the Colorado Constitution known as the "Blaine Amendments." As the uncontroverted legislative history presented in this case demonstrates, these amendments were squarely aimed at Catholic schools and other groups deemed to be outside the nineteenth century mainstream. This Court should not breathe life into the invidious discrimination embodied by these provisions.

Furthermore, the effect of the trial court's decision is that Colorado's Religion Clauses require – rather than forbid – religious discrimination. Namely, the trial court struck down the CSP only after it concluded some partner schools offered what the trial court pejoratively called "religious indoctrination."

Imposing such a religious litmus test does violence to our most deeply held constitutional values of religious freedom. This precious freedom is protected by the twin principles that, first, government may not discriminate between religious groups – *e.g.*, preferring the less religious over the more religious – and, second, government may not inquire into the quantity or quality of religious instruction. The trial court violated both these principles, and by doing so, its Order not only

makes a mockery of Colorado's Religion Clauses, it also patently violates the First Amendment.

Finally, the trial court repeatedly ignored the manifest weight of the evidence in making key findings of fact when, in fact, the record either shows the contrary or no evidence at all.

As more fully discussed below, each of these flaws warrant reversal and dissolution of the injunction.

STATEMENT OF THE FACTS

A. Origin, Development and Implementation of the Program

Beginning in June 2010, Douglas County convened a series of regular and public meetings by its School Choice Task Force to develop a host of school choice initiatives. [Vol.2 592:8-17.] The Task Force divided into subcommittees to discuss seven discrete areas of school choice: charter schools, contract schools, home education, neighborhood schools, online education, open enrollment, and the Choice Scholarship Program. [Vol.2 592:23-593:6.] This effort aligned with the District's overarching policy of "universal choice," which means creating "multiple pathways for educational success" and then assisting families to select the best educational program for their child. [Vol.2 491:17-493:15; 591:25-592:4.]

During the winter months of 2010-11, the CSP was widely publicized, and both opponents and proponents voiced their opinions at public meetings, in the media, through email, and in formal letters. [Vol.2 595:10-596:5.] For instance, Plaintiff Cindra Barnard made several formal presentations in opposition at town hall meetings February 22-24. [Vol.1 79:19.]

On March 15, the Board formally adopted the Program and directed Superintendent Elizabeth Celania-Fagen to implement it so that it would be operational for the 2011-12 school year. [Policy ¶C.2; Vol.2 597:3; 599:20-22.] As a pilot program, the Board, the Superintendent, and her administration recognized that modifications would have to be made along the way. [Vol.1 240:1-2; Vol.2 365:16-18; 512:18-21; 516:8-10.] Accordingly, the Board expressly delegated to the Superintendent and her administration the authority to make the necessary changes so that the Program could be implemented successfully. [Vol.2 516:20-22; 624:12-22.]

B. The Choice Scholarship Program

The Choice Scholarship Program adds another educational option for Douglas County families. [Policy ¶A.2.] Any Douglas County family may continue to attend their neighborhood school, or they may choose a charter school, home education, online education, open enrollment, magnet school, or the CSP. The CSP

is but one of about 30 strategies for improving educational choice in the District. [Vol.2 494:22-495:1; Order at 2 ¶3.] If a family is eligible and receives a scholarship, then the parents have a further choice as to the partner school in which to enroll their child. [Policy ¶D.1-2; Order at 3 ¶8.] Scholarships are worth the lesser of either the private school's actual tuition or 75% of the per pupil revenue ("PPR") received by the District for each student (estimated at $6,100); thus, by the latter calculation scholarships were worth $4,575 for 2011-12. [Policy ¶C.6; Order at 3 ¶9.] The District retains the remaining 25%. [*Id.*]

Private schools also have a choice as to whether to apply for the Program. If they apply, they must meet twelve conditions of eligibility. [Policy ¶E.3.] These are safeguards to ensure private schools deliver "student achievement and growth results . . . at least as strong as what District neighborhood and charter schools produce." [Policy ¶E.3.a.] These safeguards address every aspect of school performance, such as the educational program, financial stability, safety, student discipline, assessments (*i.e.*, CSAPs or their equivalent), and non-discrimination. [Policy ¶E.3.] The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate that school's contract. [Vol.2 512:7-14.] The Policy provides for ongoing District oversight, and the District has a host of measures with which to ensure performance, including the

power to terminate the contract of any non-performing school. [Policy ¶¶C.5, E.3, E.9; Vol.2 567:3-12.]

The purposes of the Choice Scholarship Program are "to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending." [Policy ¶A.3; Order at 3 ¶8.]

The Program is neutral toward religion. "The District in no way promotes one Private School Partner over another, religious or nonreligious." [Policy ¶A.9; Vol.2 361:7; 598:10-20.] "Nonpublic schools shall be eligible without regard to religion. The focus of the Choice Scholarship is not on the character of the Private School Partner but on whether that school can meet its responsibilities under this Policy and its Contract with the District." [Policy ¶E.2.c.] The trial court found "the purpose of the program is to aid students and parents, not sectarian institutions." [Order at 39; *see also id.* at 44 (same).]

C. The CSP Fits Within the Larger Context of School Choice in Colorado

The CSP is compatible with numerous public-private partnerships throughout the Colorado education system, from pre-Kindergarten through higher education. As discussed at length in the State's Brief (at 5-13), there are dozens of such partnerships, including those whose funding source is the Public School

Finance Act and those that include both secular and religious schools and colleges. [Vol.2 458:9-462:10; 471:16-472:10.]

For instance, the College Opportunity Fund ("COF") provides stipends for Colorado undergraduate students to attend any Colorado institution of higher education, including religious ones like Colorado Christian University or Regis University. C.R.S. § 23-18-102 & -201. [Vol.3 753:24-755:23.] In addition, Colorado permits school districts to purchase educational services from private schools, including operating an entire school. C.R.S. § 22-32-122(1). [Vol.3 757:17-759:5.] These are commonly called "contract schools," and, like the CSP, contract school students can be seen as having dual enrollment – enrolled in the district for funding purposes but also enrolled in the contract school itself, where they receive day-to-day instruction. [Vol.2 459:5-10]. Moreover, charter schools are permitted to purchase services from educational service providers ("ESPs"), which are private entities that typically provide a complete educational and operational package to charter schools – curriculum, supplies, building, employees, accounting, everything (except the governing board). C.R.S. § 22-30.5-104(7)(a) & (b). [Vol.3 750:16-753:21.] Students have dual enrollment in ESP charter schools, as well; they enroll in the school for funding purposes, but they attend the

educational program provided by the ESP. [*Id.*; *see also* Vol.3 750:1-15 (describing dual enrollment at early-college charter school).]

The trial court remarked there were "significant differences" between the numerous public-private partnerships already functioning in Colorado and the CSP, but it never explained what these differences actually were. [Order at 29, 67.] The trial court's Order implicitly overrules all of them.

SUMMARY OF THE ARGUMENT

The Colorado Constitution contains three religion clauses: Article II § 4 and Article IX §§ 7 and 8.[2] The Colorado Supreme Court in *Americans United for Separation of Church and State Fund v. Colorado*, 648 P.2d 1072 (Colo. 1982), addressed two of the three, Article II § 4 and Article IX § 7, when it upheld public funds flowing indirectly to religious colleges and universities under an indistinguishable state grant program.

[2] While some put Article V § 34 under this heading, most cases and commentators refer to it as the "Anti-Appropriations Clause" because it prohibits legislative appropriations from being used for an exclusively private purpose, regardless whether the purpose is secular or religious. *See In re Interrogatory Propounded by Governor Roy Romer*, 814 P.2d 875, 883-84 (Colo. 1991); Dale A. Oesterle and Richard B. Collins, THE COLORADO STATE CONSTITUTION, A REFERENCE GUIDE 138 (2002). The State's Brief (at 35-42) explains that the CSP does not violate Article V § 34 because this provision restricts state legislative power only (and thus does not apply to school districts) and the public purpose exception applies.

In its interpretation of II § 4 and IX § 7, the trial court fundamentally erred. It misapplied the text and purposes of these provisions and failed to faithfully apply key precedent, in particular *Americans United*. It also deviated from the unbroken jurisprudential principle of following the most analogous federal precedent when interpreting Colorado's Religion Clauses. Here, that deviation meant ignoring *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which the United States Supreme Court upheld a similar scholarship program by applying the same rationale the Colorado Supreme Court used in *Americans United*. In addition, the trial court failed to properly consider *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008) and the United States Supreme Court cases on which it relied. In *Colorado Christian University*, the Tenth Circuit held that a state aid program cannot discriminate between "pervasively sectarian" institutions that "indoctrinate" and other religious institutions. Disregarding this directly-applicable federal precedent, the trial court engaged in an unconstitutional inquiry into whether religious private schools purportedly "indoctrinate" their students. In sum, the trial court's analysis of Article II § 4 and IX § 7 is deeply mistaken and must be reversed.

The trial court also erred repeatedly in its analysis of Article IX § 8. It wholly ignored long-standing Colorado law to apply the first sentence of IX § 8 to

the CSP, when that sentence applies only to state higher educational institutions. Moreover, it overlooked the controlling evidence about enrollment in the CSP being available to all students, instead focusing on one mistaken statement in an application, which the Superintendent testified she could and would fix with the stroke of her pen. Most fundamentally, the trial court completely overlooked the fact that the CSP is *a voluntary program*. By definition, there cannot be any compelled attendance at religious services or compelled religious instruction. Without compulsion, there can be no violation of Article IX § 8.

Finally, the trial court brushed aside the unrebutted evidence about the disgraceful legislative history of the portions of the Colorado Religion Clauses that expressly discriminate against religious "sects." Rather than confront the constitutional implications of this evidence, it blithely passed over it.

In sum, throughout the trial court's misguided analysis on all three Religion Clauses, it strayed both from the text and binding Colorado precedents interpreting that text. The trial court made factual findings diametrically opposed to the evidence. Its Order must be reversed.

ARGUMENT

STANDARD OF REVIEW

The interpretation of constitutional provisions is a question of law reviewed *de novo*. *Danielson v. Dennis*, 139 P.3d 688, 690-91 (Colo. 2006). A trial court's factual findings may be set aside when they are so clearly erroneous as to find no support in the record. *People ex rel. A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).

I. THE TRIAL COURT ERRED IN ITS ANALYSIS OF ARTICLE II § 4 AND *AMERICANS UNITED*

The trial court concluded the CSP violates the "no compelled support" clause of Article II § 4 by compelling taxpayers to support religious schools. [Order at 43-45.] The trial court's analysis is mistaken for three basic reasons. First, it failed to examine the text and purposes of Article II § 4. Second, it misconstrued *Americans United* and wholly failed to consider any other precedent, state or federal. Third, it violated the First Amendment by distinguishing between religious institutions based on whether or not they are purportedly "indoctrinating" students. A proper analysis of Article II § 4 mandates upholding the CSP.

A. The Text and Purposes of Article II § 4 Require Upholding the Choice Scholarship Program.

Article II § 4 provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no

> person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Article II § 4 contains six clauses. The first and third are affirmative duties, guaranteeing free religious exercise and liberty of conscience (subject to certain limitations). The other four are negative prohibitions. Together they provide the textual foundation for two of the three central purposes of Article II § 4, namely, that government must, first, affirmatively accommodate religious exercise and, second, adopt an attitude of benevolent neutrality toward religion. "The Constitution does not require complete separation of church and state: It affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Colorado v. Freedom from Religion Found.*, 898 P.2d 1013, 1020 (Colo. 1995) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)). "[T]he proper attitude of government toward religion [is] one of 'benevolent neutrality.'" *Young Life v. Div. of Employment and Training*, 650 P.2d 515, 520 (Colo. 1982).

Accordingly, Article II § 4 directs governmental bodies affirmatively to accommodate the free exercise of religion while maintaining strict constitutional neutrality, *i.e.*, government should make room for religious people and organizations to practice religion while neither favoring nor disfavoring religion generally or particular denominations. *Americans United*, 648 P.2d at 1081-82; *Conrad v. City and County of Denver*, 656 P.2d 662, 670-71 (Colo. 1982) ("*Conrad I*"). Resting on these bedrock constitutional principles, the Colorado Supreme Court upheld taxpayer funds flowing to Regis College, a private Jesuit institution, in *Americans United*, 648 P.2d at 1082; approved the placement of a monument of the Ten Commandments in Lincoln Park, *Freedom from Religion Found.*, 898 P.2d at 1025-26; and allowed Denver's purchase and display of a nativity scene on the steps of the Denver City and County Building, *Conrad v. City and County of Denver*, 724 P.2d 1309, 1317 (Colo. 1986) (*"Conrad II"*). The CSP falls squarely in this tradition: it permits families to select a religious school *if they choose*, and it permits religious private schools to participate in the CSP *if* they can satisfy the twelve neutral eligibility criteria. [*See* Policy ¶E.2.c & ¶E.3.]

The third overarching purpose of Article II § 4 is preventing the establishment of a "state church." The Colorado Supreme Court in *Americans United* explained that "the mischief at which [both the 'no compelled support' and

'no preference' clauses were] aimed" was "prevent[ing] an established church" through either government taxation or government preference. *Id.* (quoting *People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927)).[3] The CSP, created by one school district as one of many educational options for families, and with legitimate, secular educational purposes, does not in any way tend to establish a "state church." In fact, the grant program from *Americans United* – upheld by the Colorado Supreme Court – presented a *greater risk* of establishing a "state church" than the CSP does in two respects: (1) it was (and is) a statewide program, whereas the CSP is limited to Douglas County only, and (2) at the time the *Americans United* court considered it, it discriminated in favor of "merely sectarian" institutions and against "pervasively sectarian" ones.

The CSP does not violate the fourth clause – no compelled attendance. The CSP is entirely voluntary. A voluntary program never compels attendance. No students or teachers are required, against their consent, to participate in the CSP or attend the religious partner schools.

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[3] *Vollmar* permitted Bible readings in public schools. The United States Supreme Court held such a practice violated the Establishment Clause in *Abington School District v. Schempp*, 374 U.S. 203 (1963). Six months after *Americans United* was decided, *Conrad I* overruled *Vollmar* "to the extent that it is inconsistent with the Establishment Clause standards set forth in *Abington*." 656 P.2d at 670 n.6. The propositions cited in this portion of *Americans United* – regarding the purposes of the "no compelled support" and "no religious preference" clauses – remain good law.

Nor does the CSP violate the fifth clause – no compelled support. The indirect nature of the funding dispels any concerns about violating this provision. Identical to the funding mechanism in *Americans United*, the CSP was "designed for the benefit of the student, not the educational institution." 648 P.2d at 1082. The trial court recognized this, explaining that "the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools." [Order at 44.] As a result, "[a]ny benefit to the institution" is a mere "by-product" and so "remote and incidental" that it does not constitute "aid to the institution" within the meaning of the Colorado Constitution. *Americans United*, 648 P.2d at 1083-84 (explaining this rationale when discussing Article IX § 7); *see also id.* at 1082 (finding the grant program "exacts no form of support for religious institutions" within the meaning of Article II § 4).

Moreover, it is logically impossible for such "remote and incidental" indirect aid to constitute a violation of the "no compelled support" clause when the Colorado appellate courts have rejected such challenges when government support has been direct. For instance, the Colorado Supreme Court rejected a "no compelled support" challenge even though Denver used taxpayer funds to buy and display a full-size nativity scene during December for years on the steps of the City and County Building. *Conrad II*, 724 P.2d at 1312, 1317 (describing taxpayer

funds spent on nativity display and holding no violation). Likewise, the Court in *Freedom from Religion Foundation* held there was no violation despite evidence that over the decades State employees had cleaned and maintained the Ten Commandments monument in Lincoln Park. 898 P.2d at 1017. In addition, this Court rejected a "no compelled support" challenge despite evidence that public funds were spent on police, sanitation, and other public services during the Pope's 1993 visit to Denver. *Freedom from Religion Found. v. Romer*, 921 P.2d 84, 91 (Colo.App. 1996).

In sum, a proper evaluation of the text and purposes of Article II § 4 requires holding that the CSP does not violate any part of it, including the "no compelled support" clause. To the contrary, Article II § 4 mandates affirmative accommodation of religion and an attitude of benevolent neutrality, both of which commend upholding the CSP.

B. The Trial Court Erred By Improperly Interpreting *Americans United* and Reinterpreting It Contrary to State and Federal Precedent.

As demonstrated above, a proper understanding of Article II § 4 requires consideration of all six of its clauses as well as the other Colorado cases interpreting Colorado's Religion Clauses. Failing to do this, the trial court misapplied *Americans United* by giving short shrift to its core principle of private choice, while simultaneously overemphasizing parts of the case that were an

unfortunate by-product of an anachronistic and now-discredited federal constitutional doctrine. Ultimately, the trial court ended up applying a legal rule that is, at once, inconsistent with the key holding of *Americans United*, at odds with other Colorado precedent, and on a collision course with the First Amendment.

1. Colorado Appellate Courts Have Always Followed Analogous Federal Precedent When Interpreting the Religion Clauses.

As in this case, in *Americans United* only state law claims were pled. 648 P.2d at 1074, 1077. In that context, the Court engaged in a detailed review of federal precedent, noting that "First Amendment jurisprudence cannot be totally divorced from the resolution of these [state law] claims." *Id.* at 1078. *See also id.* at 1078-81. When the Court turned to analysis of Article II § 4, it noted that while the six clauses are "considerably more specific than the Establishment Clause of the First Amendment, we read them to embody the same values of free exercise and governmental noninvolvement secured by the religious clauses of the First Amendment." *Id.* at 1081-82.

Americans United is not alone in following the most analogous federal precedent. In *every case* in which the Colorado Supreme Court has interpreted Colorado's Religion Clauses, it has looked to *and followed* prevailing federal

precedent.[4] This is especially true, as here, when "striking similarities" exist between the facts of the case at hand and federal precedent. *Freedom From Religion Found.*, 898 P.2d at 1019. Indeed, the Court has warned that deviating from analogous federal precedent "should not be undertaken lightly." *Conrad II*, 724 P.2d at 1316. Even when explicitly asked to do so by the parties, the Court has consistently declined. *Id.*; *Young Life*, 650 P.2d at 526. The trial court erred when it flatly refused to follow the guidance of federal case law. [Order at 33-34.]

The federal case with "striking similarities" to this one is *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in which the United States Supreme Court upheld an Ohio scholarship program focused on Cleveland schools. In *Zelman*, 96% of participating students enrolled in religious partner schools, and 82% of the participating private schools were religious. *Id.* at 647. The U.S. Supreme Court held the program was constitutional despite the fact that public money flowed indirectly to religious schools because the program was "neutral with respect to religion, and provide[d] assistance directly to a broad class of citizens who, in turn,

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[4] *See Zavilla v. Masse*, 147 P.2d 823, 825 (Colo. 1944) (following *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)); *Conrad I*, 656 P.2d at 672-76 (following *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Conrad II*, 724 P.2d at 1314 (following *Lynch v. Donnelly*, 465 U.S. 668 (1984)); *Young Life*, 650 P.2d at 519-20, 526 (following *Larson v. Valente*, 456 U.S. 228 (1982) and *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)); *Freedom From Religion Found.*, 898 P.2d at 1019-27 (following *Allegheny County v. ACLU*, 492 U.S. 573 (1989)).

direct[ed] government aid to religious schools wholly as a result of their own genuine and independent private choice." *Id.* at 652. The Supreme Court rejected the argument that public money was impermissibly being used to aid religion, explaining that any "incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the *individual recipient, not to the government*, whose role ends with the disbursement of benefits." *Id.* (emphasis added).

Two decades earlier, the Colorado Supreme Court had already applied precisely the same rationale in upholding the scholarship program in *Americans United*. That is, when a neutral government program distributes benefits even-handedly to families, who then make an independent choice to direct those funds to private schools, secular or religious, the advancement of any school's religious mission is too "remote and incidental" to offend Colorado's Religion Clauses. *See Americans United*, 648 P.2d at 1082, 1083-84. The trial court erred when it ignored this holding to wrongfully conclude Douglas County was compelling taxpayer support of religion.

2. The Trial Court Misconstrued *Americans United.*

The core principle in *Americans United* – the principle that permeates the opinion, forms the primary basis for its holding on each of Colorado's Religion

Clauses, and is wholly consistent with federal constitutional doctrine – is that scholarship money directed to religious institutions by the independent choice of individual students is not "constitutionally significant aid" or "support" of those institutions. 648 P.2d at 1081-85. Had the trial court properly applied this principle from *Americans United*, instead of getting caught up with now-discarded and unconstitutional inquiries about "indoctrination," it would have upheld the CSP.

The Court in *Americans United* upheld the grant program after applying several factors, *i.e.*, that the program (1) was "designed for the benefit of the student, not the educational institution," (2) was "non-restrictive in the sense it [was] available to [all] students," and (3) had adequate safeguards. *Id.* at 1082. The trial court found the CSP's purpose is to benefit students, not private religious schools. [Order at 44.] As to the second factor, there was no evidence that the CSP was off-limits to any Douglas County students – it was "available to all students" just as much as the grant program was under *Americans United*. As to the third, the trial court also acknowledged the "significant language" about safeguards in the CSP, designed "to alleviate concerns regarding how public finances are to be used, *e.g.*, an annual audit [and other safeguards]." [*Id.*; *see also id.* at 40 (discussing the Program's "checks and balances").]

The *Americans United* Court concluded its analysis of Article II § 4 by summarizing the basis for its holding – a basis that is equally applicable to the CSP here:

> For constitutional purposes we view the statutory grant program as a governmental attempt to alleviate some of the financial barriers confronting Colorado students in their quest for a higher educational experience. As such, it falls within the area of legitimate legislative discretion. It holds out no threat to the autonomy of free religious choice and poses no risk of governmental control of churches. Being essentially neutral in character, it advances no religious cause and exacts no form of support for religious institutions. Nor does it bestow preferential treatment to religion in general or to any denomination in particular. Finally, there is no risk of governmental entanglement to any constitutionally significant degree.

648 P.2d at 1082.

Indeed, these rationales apply with even more force here. The *Americans United* Court noted that *not* upholding the grant program would burden the "principle of voluntarism underlying the Free Exercise Clause," and thus, by extension, Article II § 4. 648 P.2d at 1082 (citing *Note, Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV.L.REV. 696, 709-712 (1979) The Court recognized that the value of religious free exercise mandates that government affirmatively accommodate private religious choices, especially in an area where the "government becomes the dominant provider of a particular service," such as K-12 public education. *Note, Government Neutrality*, 92 HARV.

L.REV. at 699. In short, the trial court's interpretation of *Americans United* was erroneous; a proper interpretation would uphold the CSP.

C. The Trial Court Engaged in an Unconstitutional Analysis of Whether Public Funds Are Being Used for "Religious Indoctrination."

The trial court's primary concern – specifically under Article II § 4 but also throughout its entire Order – is that public funds are subsidizing the "indoctrination" of CSP students enrolled in religious schools. [Opinion at 38, 40, 42-43, 45, 51.] This approach brings the Order into direct conflict with the First Amendment and *Colorado Christian University*. Just a small sampling of the trial court's findings illustrates its improper fixation on this irrelevant and unconstitutional concern:

- "The curricula at most participating schools is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize." [Order at 12 (¶45).]

- "The primary missions of most of the Private School Partners, and of the religious entities that own, operate, sponsor, or control them, is to provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization." [*Id.* at 11 (¶44).]

- "The governing entities of many participating Private School Partners reflect, and are often limited to, persons of the schools' particular faith." [*Id.* at 9 (¶39).]

- "Many of the participating Private School Partners are funded primarily or predominantly by sources that promote and are affiliated with a particular religion." [*Id.* at 10 (¶40).]

- "Most of the Private School Partners that have been approved to participate in the Scholarship Program require students to attend religious services." [*Id.* at 10 (¶41).]

These findings, intended to support the trial court's conclusions about "indoctrination," are indistinguishable from past concerns about whether a religious institution is "pervasively sectarian." The First Amendment no longer permits such an inquiry into a school's religiousness. Indeed, the "Supreme Court has recently criticized" the pervasively sectarian exclusion and it is "now-discarded doctrine." *Colorado Christian University*, 534 F.3d at 1258 (citing cases). *See also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) ("the application of the 'pervasively sectarian' factor collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity"); *Columbia Union College v. Oliver*, 254 F.3d 496, 502-04 (4th Cir. 2001) (holding that the pervasively sectarian test is unconstitutionally discriminatory); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("[A]n exemption solely for 'pervasively sectarian' schools would itself raise First Amendment concerns – discriminating between kinds of religious schools.").

While the Colorado Supreme Court in *Americans United* did discuss whether institutions were "pervasively sectarian" or engaged in "indoctrination," even the trial court acknowledged that those parts of *Americans United* were a vestige of a by-gone era and that it could "not analyze the religiousness of a particular institution." [Order at 37, 39 & n.4.] Yet, that is precisely what it did. The court sought to distinguish this case on the basis that, in contrast to the "merely sectarian" religious school in *Americans United*, some of the partner schools here are *so* religious or *so* sectarian that they "indoctrinate" students.

The Tenth Circuit identified such an "indoctrination analysis" as the "potentially most intrusive element" of the "pervasively sectarian" inquiry, which has "long been condemned by the Supreme Court." *Colorado Christian University*, 543 F.3d at 1261-62 (citing cases). As the Tenth Circuit explained at some length, "The First Amendment does not permit government officials to sit as judges of the 'indoctrination' quotient of theology classes." *Id.* at 1263. Yet the trial court sat precisely as such a judge.

Part of the trial court's discomfort with "indoctrination" appears to be that the CSP did not contain enough safeguards to, in its view, limit public funds to "mere education" rather than "religious indoctrination." [Order at 44-45.] But no such safeguards were present in *Americans United*. 648 P.2d at 1084 (noting that

"the statute does not expressly limit the purpose for which the institutions may spend the funds distributed under the grant program"). In any event, this attempted distinction is not constitutionally tenable, as explained by the Tenth Circuit:

> The line drawn . . . between 'indoctrination' and mere education[] is highly subjective and susceptible to abuse. Educators impart information and perspectives to students because they regard them as true or valuable. Whether an outsider will deem their efforts to be 'indoctrination' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity. . . . Many courses in secular universities are regarded by their critics as excessively indoctrinating, and are as vehemently defended by those who think the content is beneficial.

Colorado Christian University, 534 F.3d at 1262-63. *See also Lanner v. Wimmer*, 662 F.2d 1349, 1352 (10th Cir. 1981) (discussing as inevitable the conflict of world views between public and religious education and rejecting the trial court's distinction as a "shallow definitional approach").

Equally problematic is the trial court's distinction between "indoctrination" in higher education and in K-12 schools, as if the inquiry becomes less unconstitutional depending on grade level. It does not. Consider how much religious instruction was at issue in *Colorado Christian University*. As described by the Tenth Circuit, CCU requires its undergraduates to attend chapel weekly, pledge to "emulate the example of Jesus Christ and the teachings of the Bible," and take four courses in theology or Biblical studies. *Colorado Christian University*,

534 F.3d at 1252. It requires its faculty and trustees to sign a statement of faith which affirms, among other things, "the Bible as the infallible Word of God, the existence of God in the Father, Son and Holy Spirit, the divinity of Jesus Christ, and principles of salvation, present ministry, resurrection, and the spiritual unity of believers in our Lord Jesus Christ." *Id.* In short, "[i]t offers education framed by a Christian world view." *Id.* (internal quotes omitted). Whether this sort of higher education "indoctrinates" was precisely the question raised in *Colorado Christian University*. The Tenth Circuit held squarely that *the very inquiry* to try to answer that question *itself* violated the First Amendment. *Id.* at 1261-66.

Zelman further confirms these conclusions. In that case, the U.S. Supreme Court spent not a word trying to divine "how religious" these schools were or how many public dollars would be spent on "indoctrination" versus "education." 536 U.S. at 643-63. Justice Thomas, in his concurring opinion, warned against "indoctrination" inquiries: "The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised." *Id.* at 680 (Thomas, J., concurring). The same is true about the CSP.

The CSP does not violate any part of Article II § 4. The trial court's decision must be reversed and the CSP upheld.

II. THE CSP DOES NOT VIOLATE ARTICLE IX § 7

Article IX § 7 provides,

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

The trial court erroneously concluded that the CSP violated this provision. [Order at 36-43.] The overarching thrust of the trial court's analysis, as with Article II § 4, was a concern that public funds might be used to subsidize "indoctrination." [*Id.*] The trial court was especially concerned given that the CSP is for primary students, not those in higher education. [*Id.*] This analysis, which prefers some religious institutions over others based on the content and intensity of their religious message, plainly violates the First Amendment for the reasons already explained. It is also contrary to the "no preference" clause of Article II § 4 in that it gives preference to "less sectarian" religious institutions that do not

purport to "indoctrinate." For many of the same reasons discussed above, the trial court erred in concluding the CSP violates Article IX § 7.

The trial court initially recognized that the CSP satisfied the textual core of Article IX § 7, namely, that CSP funds are not "in aid of" any church or sectarian purpose. The court "agree[d] with Defendants" that "the purpose of the program is to aid students and parents, not sectarian institutions." [Order at 39.] Accordingly, the trial court acknowledged that, as in *Americans United*, the indirect nature of the aid makes it too "remote and incidental" to violate Article IX § 7. *Americans United*, 648 P.2d at 1083-84. The trial court also found the CSP had an appropriate "check and balance system." [*Id.* at 40.] These key factors weighed in favor of constitutionality under *Americans United*. [*Id.* at 38 (citing 648 P.2d at 1083-84).]

Ultimately, however, the trial court gave little emphasis to these important similarities between this case and *Americans United*, focusing instead on an impermissible inquiry into "indoctrination." Again, the trial court faulted the CSP for not having an "express provision . . . that prevents the Private School Partners from using public funding in furtherance of a sectarian purpose." [*Id.* at 40.] As noted, however, the grant program in *Americans United* did not have any such "express provision" either. 648 P.2d at 1084. Even today, neither the grant program at issue in *Americans United* nor the College Opportunity Fund ("COF")

has such an "express provision," even though "pervasively sectarian" institutions like CCU now participate in these programs.

The trial court also sought to distinguish *Americans United* on the ground that one of the participating CSP schools allegedly "reduced its aid award" in the amount of the scholarship. [Order at 41 (noting that *Americans United* disapproved this, 648 P.2d at 1084).] However, Assistant Superintendent Dr. Christian Cutter testified that Douglas County prohibited this, just like the grant program in *Americans United*. The trial court should not have faulted the CSP or Douglas County for an action by one school in violation of the Program. [*Id.*] Such a factual finding – which is diametrically opposed to the evidence – must be set aside as clearly erroneous. *People ex rel. A.J.L.*, 243 P.3d 244, 250 (Colo. 2010).[5]

[5] The trial court made another factual finding directly contrary to the evidence when it found that partner schools could "engage in other forms of discrimination." [Order at 13 ¶50; *see also id.* at 6 ¶30.] However, under Policy ¶E.3.f, the CSP specifically prohibits discrimination "on any basis protected under applicable federal or state law." The Superintendent testified that if a partner school were to discriminate against a protected class, the District would terminate that school's contract. [Vol.2 512:7-13.] The Policy's sole exception permits religious schools to make decisions based upon religious beliefs, accommodating religion in accord with constitutional principles of religious liberty. *See Hosanna-Tabor v. EEOC*, 565 U.S. __ (Jan. 11, 2012) (religious schools have constitutional right to select teachers free from governmental interference); 42 U.S.C. § 2000e-1(a), § 2000e-2(e)(2) (exception for religious schools under Title VII); C.R.S. § 24-34-402(6) (same under Colorado Anti-Discrimination Act). It is clear error to ascribe illegal discrimination to the District when the CSP expressly forbids it.

The trial court also briefly criticized the CSP's "opt out" on the ground that it "does not include [religious] instruction." [*Id.* at 42 (brackets in original).] Here again, however, the trial court, by trying to distinguish *Americans United* on this basis, launched itself back into constitutionally forbidden territory. The court's criticism seemed to be that the opt out should have been broader, extending to religious instruction as well. The trial court's reason for this was "religious instruction [at religious partner schools] is the foundation of their core educational curriculum and religious theology is embedded in many of their classes." [*Id.* at 42.] But these very conclusions – about whether religion is "embedded" at the "foundation" and "core" of their curricula, and whether a broader opt out would ameliorate this – are precisely the sort of inquiry the Establishment Clause forbids. *Colorado Christian University*, 534 F.3d at 1262 ("Such inquiries [into whether CCU courses tended to indoctrinate or proselytize] have long been condemned by the Supreme Court.") (citing cases). Indeed, the Tenth Circuit remarked how constitutionally "troublesome" it was for the State of Colorado to try to determine whether CCU, or any school, mandated attendance at religious services. *Id.* at 1265. As part of a series of rhetorical questions demonstrating the troubles involved, the Tenth Circuit asked, "Does it matter if the student is required to attend [a religious service], but not required to partake of the sacrament?" *Id.* The

trial court's concern with the substantive answer to that question for the CSP is exactly why its Order transgresses constitutional boundaries. Instead, the trial court should have taken its own advice and avoided this entangling inquiry into how "embedded" religion is in the curricula of the partner schools and whether a broader opt out would have lessened the "indoctrination quotient." *Id.* at 1263.

Following the Colorado Supreme Court's lead in *Americans United*, and consistent with the limits imposed by the First Amendment, this Court should uphold the CSP against the Article IX § 7 challenge on the ground that it is not "in aid of" religious schools or purposes, but rather "the aid is designed to assist the student, not the institution." *Americans United*, 648 P.2d at 1083. The indirect nature of the aid makes it too "remote and incidental" to be a violation of Article IX § 7. *Id.* at 1083-84. As explained by *Zelman*, "The incidental advancement of a religious mission . . . is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits." 536 U.S. at 652. The trial court's misapplication of Article IX § 7 must be reversed.

III. THE CSP DOES NOT VIOLATE ARTICLE IX § 8

Article IX § 8 has two sentences:

> No religious test or qualification shall ever be required of any person as a condition of admission into any public educational institution of the state, either as a teacher or student; and no teacher or student of any such institution shall ever be required to attend or participate in

> any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

A. The First Sentence of Article IX § 8 Applies to State Institutions of Higher Education, Not Douglas County and the CSP.

The trial court found the CSP violated Article IX § 8. [Order at 46-51.] The trial court began its analysis by citing *Vollmar v. Stanley*, 255 P.610, 615 (Colo. 1927), properly noting that *Vollmar* had been "reversed on other grounds" by *Conrad I*.[6] [Order at 46.] The trial court's first error occurred at this point, when it failed to recognize that *Vollmar*, like a host of other Colorado cases, expressly distinguishes between the first sentence of IX § 8 which applies to "public educational institutions *of the state*," *i.e.*, "state institutions, *e.g.*, University of Colorado, School of Mines, or State Teachers' College," and "the last sentence of [IX § 8] that refers to *public schools*." 255 P. at 615 (emphasis added).

This distinction between the first and second sentences of IX § 8 has been drawn by Colorado courts for decades, based on the plain language of IX § 8 itself and the principle that "a word repeatedly used in a constitution will generally be given the same meaning throughout the instrument." *Wilmore v. Annear*, 65 P.2d 1433, 1435 (Colo. 1937). In *Wilmore*, for instance, the court drew this distinction

[6] *Vollmar*'s limited reversal is discussed above at page 15 n.3.

based upon the fact that Article VIII § 1 "of the Constitution uses the term 'educational . . . institutions' in referring to schools other than the constitutionally required public schools. . . . [Whereas] 'Public Schools' is the term used in sections 2 and 15 of article 9 and as so used . . . clearly applies there to schools that serve only those between the ages of 6 and 21 residing in the district." *Id.* at 1434-35. *Cf. Jones v. Newlon*, 253 P. 386 (Colo. 1927) (racial discrimination occurring at a junior high and high school held to violate the second sentence of IX § 8); *Bd. of Educ. v. Spurlin*, 349 P.2d 357, 365 (Colo. 1960) (Frantz, J., dissenting) ("Beside the several sections [of the Constitution] cited, other sections lucidly recognize the distinction between 'educational institutions' and 'public schools.'") (citing *Vollmar*, *Wilmore*, and numerous constitutional provisions). In the case cited by *Vollmar* as "analogous," 255 P. at 615, *People ex rel. Walker v. Higgins*, 184 P. 365 (Colo. 1919), the Court interpreted the term "civil service of the state" to mean "officers and employees of the state only." *Id.* at 365.

Thus, the first sentence of Article IX § 8 is simply irrelevant to this case. It was error for the trial court to ignore the clear and unbroken line of Colorado precedent.

B. The CSP Does Not Violate Article IX § 8.

Even if one wrongly assumes, as the trial court did, that both sentences of IX § 8 apply to the CSP, there is still no violation. The trial court appears to have concluded that there were two violations of the first sentence (regarding admission qualifications and compelled attendance at religious services) and one of the second (regarding teaching sectarian doctrines). [Order at 47-51.] There were none.

1. The CSP Does Not Require A Religious Test For Admission.

The trial court erroneously concluded the CSP violated IX § 8 on the basis that enrollment in the CSP is "predicated on a student's admittance into one of the Private School Partners." [Order at 47-48.] This was incorrect and contrary to the record.

The trial court, *sua sponte*, asked the Superintendent this question directly at the close of her testimony. [Vol.2 571:11-572:2.] She answered it clearly and unequivocally:

> THE COURT: "[I]s [enrollment in the CSP] predicated on gaining admission into one of the private partner schools . . . ?"
>
> THE WITNESS: "No."

[Vol.2 571:13-15.] She explained that just because a student might enroll in the CSP and receive a scholarship does not mean the student will decide to enroll in or

be accepted by a partner school; enrollment in the CSP and enrollment in a partner school are independent. [Vol.2 571:18-572:13.] In a similar way, a student might apply to a charter school but not be able to enroll because it is over-subscribed, and so end up on the school's waiting list. [Vol.2 502:5-11.] The Superintendent testified that given the high demand for the CSP, many families rushed to enroll, were enrolled, received scholarships, but then decided they did not like any of the partner schools, and so dropped out again. [Vol.2 506:19-23.]

While the trial court expressly noted Dr. Fagen's testimony, it disregarded it and instead relied on a single, incorrect statement in the student application. [Order at 48; *see also id.* at 5 ¶20.] However, the testimony was undisputed that the Superintendent had express authority to make changes to the Program to ensure it was implemented properly. [Vol.2 512:21; 516:20-22; 624:12-13, 22.] Further, the evidence was uncontested that the Board could, if necessary, change anything about the Policy to ensure it was successful and legally compliant. [Vol.2 569:23; *see also* Policy H (severability clause).] To seize upon a single mistaken statement, which the Superintendent testified she could and would fix with the stroke of her

pen, is manifest error which cannot be sustained on appeal. *People ex rel. A.J.L.*, 243 P.3d at 250 (clearly erroneous factual findings must be set aside).[7]

2. The CSP Does Not Compel Attendance At Religious Services.

The trial court erroneously found a violation of the following clause of IX § 8: "no teacher or student of any [public educational institution of the state] shall ever be required to attend or participate in any religious service whatsoever." [Order at 49-51.] As discussed above, this provision applies only to state higher education institutions, not public school districts. Even if it did apply to the CSP, Douglas County does not require attendance at any religious services. The CSP is a choice. Parents must affirmatively choose to participate in the CSP at all, and then, if their child receives a scholarship, parents independently choose where to enroll their child. If a CSP family elects a religious partner school, it is because they *want* their child educated there, not because Douglas County or the CSP requires it. As in *Americans United* and *Zelman*, the CSP is absolutely neutral with regard to religion.

The absurdity of any conclusion to the contrary is illustrated by considering the public schools themselves. When public schools offer religious options, they

[7] The trial court erred in a similar way when it cited a statute that has been repealed since 2003. [Order at 47 (citing C.R.S. § 22-30.5-204(2)(a)).]

are not compelling religious choices. For instance, public schools are permitted to offer release time programs, in which public schools release students during the school day to receive religious instruction or participate in worship services. *Zorach v. Clauson*, 343 U.S. 306 (1952); *Lanner v. Wimmer*, 662 F.2d 1349 (10th Cir. 1981). Further, public schools may open their buildings during lunch or after school to religious groups, who may use the space for religious teaching or worship. *Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (upholding the Equal Access Act, 20 U.S.C. § 4071 *et seq.*); *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (Free Speech Clause requires equal use by religious groups). In both circumstances, it is the parents who choose whether they want their children to participate in any religious activity – just like the CSP.

In its analysis, the trial court focused almost exclusively on the religious opt out. [Order 49-50.] This misses the point entirely. The opt out is an *additional* protection, which attempts to strike a balance between a student's liberty of conscience and a school's rights of association and religious exercise. Moreover, as described above, the trial court may not attempt to evaluate how much "indoctrination" occurs at a religious school and prescribe what sort of opt out would properly remedy that invented illness.

3. The CSP Does Not Violate the "No Sectarian Doctrines" Clause.

It appears the trial court may also have found a violation of that part of IX § 8 that reads: "No sectarian tenets or doctrines shall ever be taught in the public school . . . ." [Order at 49-51.] The CSP does not violate this provision either.

First, nothing about the CSP requires the public schools of Douglas County to start teaching religious doctrine. Further, no one in this case, including the trial court and the Plaintiffs, has ever contended that the private partner schools are "public schools." The Policy specifically defines them as "private school partners" which are "nonpublic schools." [Policy ¶B.6.] Thus, they have as much freedom to teach religious doctrine as any other private school in Colorado.

Second, the CSP is neutral toward religion. In no way has Douglas County encouraged or discouraged the teaching of any "sectarian tenets" at any partner school. Rather, it has left to the partner schools what tenets and doctrines they teach, as it must under our constitutional system. Douglas County evaluates which private schools may participate in the CSP based upon neutral, educational criteria that have nothing to do with religion. *See Freedom from Religion Found. v. Cherry Creek Sch. Dist.*, 2008 WL 4197618 *5 n.6 (D. Colo.) (holding a program does not violate the "no sectarian doctrines" clause because it was "entirely neutral as to what type of religious instruction children should receive").

Third, the trial court seems concerned that "public school students" are receiving religious instruction. But, as discussed above, parents may elect to have public school students receive religious instruction in release time or after school programs. Just because students are "counted" for funding purposes does not mean they are prohibited from receiving religious instruction *voluntarily*.

Finally, the trial court claimed it was "protect[ing] the religious liberty of [CSP] students" by holding that the Program violated IX § 8. [Order at 47.] The reverse is true. The CSP *increases* religious liberty because it assists families, if they so choose, to attend a religious school of their choice. The trial court's ruling *decreases* their religious liberty and contravenes the benevolent neutrality that Colorado governmental bodies, like Douglas County, are required to embody under our Religion Clauses. *Conrad I*, 656 P.2d at 671. The trial court's misapplication of Article IX § 8 must be reversed.

IV. THE TRIAL COURT WRONGLY IGNORED THE UNCONTESTED LEGISLATIVE HISTORY ABOUT COLORADO'S BLAINE PROVISIONS.

The Colorado Constitution includes several provisions whose legislative history shows were intended to discriminate against Catholics. These so-called

"Blaine" provisions[8] were born of religious bigotry and anti-Catholic nativism in particular. [Vol.3 697:15-698:17.] The U.S. Supreme Court has described similar state constitutional provisions as having "a shameful pedigree" that "should be buried now." *Mitchell v. Helms*, 530 U.S. 739, 828-29 (2000) (plurality opinion). Using expert testimony, the Defendants put on extensive and unchallenged evidence of the Colorado Blaine provisions' shameful, discriminatory legislative history. These provisions are unconstitutional vestiges of a bygone and disgraceful era. The trial court erred when it dismissed this evidence as irrelevant history, apparently drawing a specious distinction between history and legislative history. [Order at 35.] This Court may interpret these provisions to avoid the constitutional problems they present or it must confront their facial unconstitutionality. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo.App. 2008) (courts should construe constitutional provisions to avoid conflict with the federal Constitution). They cannot be ignored.

The overwhelming and uncontroverted evidence at trial demonstrated the discriminatory anti-Catholic motivation behind the Colorado Blaine provisions. [Vol.3 686:8-687:11.] The unrebutted testimony of Defendants' expert witness

[8] Article IX § 7 and the second sentence of Article IX § 8 are classic Blaine provisions. If Articles V § 34 and IX § 3 are not interpreted in the light of their plain meaning and the doctrine of constitutional avoidance, they could be misinterpreted to have Blaine-like effect. [*See* Vol.3 704:9-711:6.]

Professor Charles Glenn confirmed how Colorado's Blaine provisions were enacted to "knowingly discriminat[e] against Roman Catholics" and to discriminate among different religious groups. [Vol.3 698:12-15.]

Moreover, after enactment, Colorado's Blaine provisions were applied in a discriminatory fashion. One of the Blaine movement's discriminatory goals was to preserve generic Protestant culture in the public schools, including the reading of the King James Bible, while barring Catholic schools from receiving government funds. *See* Phillip Hamburger, *Separation of Church and State* 298 n.30 (2002). Colorado followed this practice, as affirmed in 1927 by the Colorado Supreme Court. *Vollmar*, 255 P. at 618.

The evidence at trial chronicling the Blaine movement's discriminatory animus and invidious objectives was fully consistent with the U.S. Supreme Court's discussion of Blaine amendments. *See Mitchell*, 530 U.S. at 828 (plurality) ("it was an open secret that 'sectarian' was code for 'Catholic'"*)*; *Zelman*, 536 U.S. at 720-21 (Breyer, J., dissenting) (discussing Blaine amendment history); *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004). Many scholarly books and articles document this dark history of anti-Catholicism and discriminatory laws. *See, e.g.*, Hamburger, *Separation of Church and State* 322-23; Meir Katz, *The State of*

Blaine: A Closer Look at the Blaine Amendments and their Modern Application, 12 Engage 111, 112 (June 2011).

Faced with this uncontroverted evidence, the trial court simply refused to consider the origins and discriminatory intent of the Blaine provisions, claiming there was "no legal authority" making that history relevant. [Order at 35.] This was clear error. The Colorado Constitution cannot violate the First and Fourteenth Amendments, either facially or as applied. In *Hunter v. Underwood*, 471 U.S. 222, 233 (1985), the U.S. Supreme Court expressly rejected the notion that the discriminatory origins of a state constitutional provision are irrelevant. The Supreme Court struck down a racially discriminatory portion of the Alabama Constitution on the basis of its discriminatory genesis, even though at least 80 years had passed since the provision had been enacted, and one of the parties challenging the facially neutral provision was white. *Id.* Rather, it held that when the historical motive in enacting a facially neutral law was "a desire to discriminate against blacks on account of race and the section continues . . . to have that effect[, the state constitutional provision] violates equal protection. . . ." *Id.* The provisions were unconstitutional based on their origin, not modern application. Mere passage of time does not cure a constitutional violation.

Compounding this legal error, the trial court ignored the substantial evidence of anti-Catholic bias and instead commented on one snippet of Professor Glenn's testimony about a Catholic "pro-Constitution rally" to draw the completely unwarranted conclusion that, in the court's view, there must have been "at least some Catholic support of the [Blaine] provisions." [Order at 35.] This is legally irrelevant. Moreover, nothing in the record supports this conclusion, especially not the one-line exchange that the trial court referenced. [Vol.3 741:9-17.] Rather, the overwhelming evidence in the record speaks loudly of anti-Catholic bigotry permeating the legislative history of these provisions – and the record made by Defendants here stands unchallenged.

In short, the trial court erred both legally and factually. Any interpretation of these Blaine provisions that breathes life into their facial distinction between, on the one hand, "sectarian" doctrine and "sects," and, on the other, "general" or "mainstream" religious doctrine or denominations violates the First Amendment. *Larson v. Valente*, 456 U.S. 228, 244 (1982) (holding the Establishment Clause forbids denominational preference). Alternatively, instead of interpreting the Colorado Constitution to discriminate against Catholic and "sectarian" schools, this Court should avoid the constitutional conflict – just as the Colorado Supreme Court has done consistently – by following *Americans United* interpreted in light

of *Zelman* as the most closely analogous federal case. This offers the dual benefit of conforming to the unbroken jurisprudential practice by Colorado appellate courts when interpreting Colorado's Religion Clauses and avoiding this deeply-rooted constitutional problem.

CONCLUSION

For the reasons stated herein and in the Opening Briefs of the other appellants and supporting *amici*, the trial court's Order must be reversed and the permanent injunction against implementation of the CSP must be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, I electronically filed the foregoing with the Clerk of Court using Lexis/Nexis File and Serve and caused an electronic copy of the foregoing to be served upon the following:

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DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	▲ **COURT USE ONLY** ▲
Plaintiffs: JAMES LARUE, et al., v. **Defendants:** COLORADO BOARD OF EDUCATION, et al., **Intervenors:** FLORENCE DOYLE, et al., **AND** **Plaintiffs**: TAXPAYERS FOR PUBLIC EDUCATION, et al., v. **Defendants**: DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al.	Case No.: 11cv4424 Combined with: Case No.: 11CV4427 Courtroom: 259
ORDER	

THIS MATTER is before the Court on Motions for Preliminary Injunction filed separately by Plaintiffs James Larue, *et al.* and Taxpayers for Public Education, *et al*. (collectively, "Plaintiffs").[1] Defendants Douglas County Board of Education and Douglas County School District, Colorado Board of Education and Colorado Department of Education (collectively, "Defendants"), and Intervenors Florence and Derrick Doyle, *et al.* (collectively, "Intervenors") filed their respective Responses on July 22, 2011. Plaintiffs filed their respective Replies on July 25, 2011. A three day hearing was held beginning on August 2, 2011. Testimony was taken and exhibits were received. Also ripe for the Court's consideration is Defendants' Motion to Dismiss filed on July 22, 2011 and joined by Intervenors on July 26,

[1] On July 11, 2011, Case No. 11cv4427 was consolidated into Case No. 11cv4424.

2011. Having reviewed the briefs, the exhibits, the relevant authorities, and considered the credibility of the witnesses, the Court now makes the following findings of fact and conclusions of law:

I.
FINDINGS OF FACT

A. THE CREATION OF THE CHOICE SCHOLARSHIP PROGRAM

1. Beginning in June 2010, the Douglas County School District assembled a School Choice Task Force ("Task Force") consisting of seven subcommittees and approximately 80 members, including members of Plaintiffs in this case. The Task Force held a series of public meetings to discuss a range of school choice options for the Douglas County School District.

2. In approximately November 2010, the Task Force produced the *Blueprint for Choice* which was subsumed into the Douglas County School District's Strategic Plan.

3. In December 2010, the Task Force presented plans for the Choice Scholarship Pilot Program ("Scholarship Program") to the Douglas County Board of Education. *See* Oversight Comm. Mtg., Feb. 10, 2011 (Ex. 76). Dr. Elizabeth Celania-Fagen ("Dr. Fagen"), the Superintendent of Douglas County School District, testified during the injunction hearing that the Scholarship Program is one of approximately 30 strategies subsumed into the *Blueprint for Choice* to ultimately improve choice for parents and students in the district.

4. On March 15, 2011, the Douglas County School Board approved the Scholarship Program for the 2011-2012 school year as part of the larger *Blueprint for Choice* and Strategic Plan. *See* Choice Scholarship Program ("Policy") (Ex. 1).

5. Prior to approval of the Scholarship Program on March 15, 2011, the staff of the Colorado Department of Education met on multiple occasions with Douglas County School District staff regarding the structure of the Scholarship Program. *See*, *e.g.*, Jan. 5, 2011 mtg. notes (Ex. 69); February 10, 2011 mtg. minutes (Ex. 76); March 7, 2011 mtg. notes (Ex. 90).

6. At these meetings, the Colorado Department of Education advised the Douglas County School District on the legality of the Scholarship Program and how to structure the Scholarship Program so as to receive "per pupil" funding under the Public School Finance Act. *See*, *e.g.*, Jan. 5, 2011 notes (Ex. 69) (discussing funding and other issues including "church/state" problems, "excessive entanglement," and legal challenges associated with forming a charter school to administer the Program); March 7, 2011 notes (Ex. 90) (discussing use of charter school structure, special education, geographic

limitations, and other issues). At the injunction hearing, Robert Hammond ("Mr. Hammond"), the Colorado Commissioner of Education, confirmed that, at the January 5, 2011 meeting, the Colorado Department of Education did not intend to block the implementation of the Scholarship Program. He additionally acknowledged that at the time he made this statement, he had no documents outlining the Scholarship Program.

7. Dr. Fagen and her administration began implementing the Scholarship Program on Wednesday, March 16, as directed by the Douglas County School Board for the 2011-2012 school year.

B. THE CHOICE SCHOLARSHIP PROGRAM

8. The purposes of the Scholarship Program are "to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of [Douglas County School District] educational spending." *See* Policy § A ¶ 3 (Ex. 1). The Scholarship Program allows qualified scholarship students to attend the private school (also referred to as "Private School Partner") of his or her choice, with scholarship funds provided to reduce the overall cost of tuition.

9. If a student is selected to participate in the Scholarship Program and is accepted at a participating Private School Partner, the Douglas County School District pays the private school, via a restrictively-endorsed check to the recipient's parents, 75% of the "per pupil revenue" that it receives from the state of Colorado, currently estimated at $4,575 for 2011-2012, or the private school's actual tuition fee, whichever is less. *See* Executive Summary to the Choice Scholarship Program ("Exec. Summary"), at 2 (Ex. 1). Dr. Fagen, Dr. Christian Cutter ("Dr. Cutter"), the Assistant Superintendent of Elementary Education of the Douglas County School District, and John Carson ("Mr. Carson"), the President of the Douglas County School District Board of Education, corroborated the amount of the tuition payments at the hearing and testified that the Douglas County School District will retain the other 25% as "administrative costs."

10. Under the Scholarship Program, Douglas County School District pays participating Private School Partners by check in four equal installments throughout the school year. For each payment, Douglas County School District issues a check payable to the order of the parent or guardian of each scholarship student and sends that check directly to the Private School Partner at which the student is enrolled. The parent or guardian of the student is required to endorse the check for the sole use of paying tuition at the Private School Partner. *See* Policy §§ B ¶ 8, C ¶ 4, D ¶ 7.c (Ex. 1).

11. The parent or guardian of a student participating in the Scholarship Program is responsible for all tuition, costs and fees in excess of the amount provided by the Choice Scholarship that may be assessed by the Private School Partner. *See* Policy § D ¶ 7.h (Ex.1).

12. Dr. Cutter and Mr. Carson testified that the Scholarship Program is described as a "pilot" for the 2011-2012 school year, and the number of students that can receive public funds to attend private schools under the Scholarship Program is set at 500. *See, e.g.*, Policy § F; Exec. Summary, at 1 (Ex. 1). To date, Douglas County School District has offered 500 such "scholarships" to students to use as full or partial payment of tuition at designated Private School Partners for the 2011-2012 school year. As of the date of the injunction hearing, Dr. Cutter testified that 271 of the 500 students admitted under the Scholarship Program had been accepted to a Private School Partner. Leanne Emm ("Ms. Emm"), the Assistant Commissioner of Public School Finance for the Colorado Department of Education, further testified that approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

13. The Scholarship Program does not prohibit participating private schools from raising tuition after being approved to participate in the Scholarship Program, or from reducing financial aid for students who participate in the Scholarship Program. Thus far, at least one school, Valor Christian High School, has cut financial aid for a scholarship recipient in the amount of the tuition awarded under the Scholarship Program. *See* July 24, 2011 email to Tamra Taylor et al. (Ex. 102) ("[o]nce we got the voucher, Valor [Christian] adjusted our financial aid to reduce it by the amount of the voucher.").

14. Dr. Cutter testified during the injunction hearing that he was not aware that Ms. Taylor, his administrative assistant, had received this email. He additionally stated that was not aware of any other situation in which a participating family under the Scholarship Program suffered a loss of financial aid as a result of their participation in the Scholarship Program. Dr. Cutter further acknowledged that he believed if a Private School Partner under the Scholarship Program reduced financial aid for a scholarship student participating in the program, it would "go against the intended contract" with the Douglas County School District.

15. To be eligible to participate in the Scholarship Program, students must be Douglas County School District residents who were enrolled in a Douglas County School District school for the 2010-2011 academic year and have resided in the Douglas County School District for no less than one year. Non-resident, open-enrolled Douglas County School District students are not eligible to participate. *See* Policy § D ¶ 5 (Ex. 1). Dr. Fagen testified that there is no policy provision precluding out of district students from moving into Douglas County, and enrolling in a Douglas County District public school, for one year and then applying to the Scholarship Program.

16. Students seeking to participate in the Scholarship Program must complete a Scholarship Program application and agree to take Colorado's statewide assessment tests. *See* Policy § D ¶ 7.g (Ex. 1). There are no income limitations or requirements to apply for a scholarship under the Scholarship Program.

17. The Scholarship Program "encourages" students to research a Private School Partner's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious." Policy § D ¶ 2 (Ex. 1).

18. A student selected to receive public funds under the Scholarship Program must also apply for and be granted admission to a Private School Partner. *See, e.g.*, Policy § D ¶ 6; Charter Sch. App., p.3.

19. Scholarship Program students must also enroll in the Douglas County School District's Choice Scholarship Charter School ("Choice Scholarship School").

20. At the injunction hearing, Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, in the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the [Choice Scholarship School], a student must . . . be accepted and attend a qualified Private School Partner School." *See* Charter Sch. App., p.8 (Ex. 5, at 8).

C. THE CHOICE SCHOLARSHIP CHARTER SCHOOL

21. Plaintiffs filed suit to enjoin the Scholarship Program on June 21, 2011. Later that day, the Douglas County School Board conditionally approved the creation of the Choice Scholarship Charter School." *See* Douglas County School District's Resolution of June 21 (Ex. 6, at p. 27). The Choice Scholarship Charter School application had been submitted to the Douglas County School Board on the same day, June 21, 2011. *See* Charter Sch. App., p.1 (Ex. 5, at 1). Dr. Cutter testified that the Scholarship Program was being implemented at the same time the Choice Scholarship School was being developed.

22. The Douglas County School Board gave final approval to the creation of the Choice Scholarship School on July 20, 2011. This was corroborated by testimony of Dr. Cutter, Dr. Fagen, and Mr. Carson.

23. The purpose of the Choice Scholarship School is to administer the Scholarship Program. *See, e.g.*, Charter Sch. Cont. § 4.2 (Ex. 6); Policy § A (Ex. 1). The Choice Scholarship School purports to contract with the Private School Partners for all educational services provided to students participating in the Scholarship Program. *See* Charter Sch. Cont. § 4.5 and § 7.4 (Ex. 6).

24. One of the major tasks of the Choice Scholarship School is to "gather all information and report to the Colorado Department of Education . . . so that Choice Scholarship students will be included in the Douglas County School District's pupil count and receive per-pupil revenue from the state for the Choice Scholarship students." *See* Policy § C ¶ 10 (Ex. 1). The Choice Scholarship School also monitors students' class schedules and attendance at the Private School Partners. In addition, the Private School Partners may be

charged with disciplining students for engaging in certain types of misconduct at the private schools. Choice Scholarship Sch. App. (Ex. 5).

25. School officials testifying during the hearing conceded that the Choice Scholarship School exists only on paper. The same school officials concurred with the fact that the Choice Scholarship School has no buildings, employs no teachers, requires no supplies or books, and has no curriculum. The Choice Scholarship School is merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program. *See generally* Charter Sch. Cont. (Ex. 6).

26. Douglas County School District claims all students "enrolled" at the Choice Scholarship School as part of the Douglas County School District's "pupil enrollment" for the purposes of C.R.S. § 22-54-103(10). *See* Policy § D ¶ 1. Douglas County School Districts provides 100% of the "per pupil revenues" (less deductions for administrative overhead or purchased services) for each of the 500 scholarship participants directly to the Choice Scholarship School. *See* Charter Sch. Cont. §8.1.A (Ex. 6).

27. Dr. Cutter testified that the sole source of funding for the Choice Scholarship Schools is the "per pupil revenue" received from the state pursuant to C.R.S. §22-30.5-112(2)(a.5). *See also* Charter Sch. Cont. § 8.1.A, B (Ex. 6) ("The parties agree that the [Choice Scholarship] School is not entitled to any other funding . . . Consistent with Policy JCB, the [Choice Scholarship] School shall receive only PPR").

D. THE PRIVATE SCHOOL PARTNERS

28. To participate in the Scholarship Program, Private School Partners must apply, and disclose information related to enrollment, employment, financial stability, and other matters. *See* Policy § E ¶ 3 (Ex. 1). They need not be located within the boundaries of, or proximate to, the Douglas County School District. *See* Policy § E ¶ 1 (Ex. 1)

29. As part of the application, Private School Partners must agree to satisfy certain requirements, such as meeting the "minimum number of teacher-pupil instruction hours." Policy § C ¶ 10 (Ex. 1). Private School Partner applicants must also agree to allow Douglas County to administer assessment tests to the students in the Scholarship Program. *See* Policy § E ¶ 3.g (Ex. 1).

30. In order to participate in the Scholarship Program, however, a private school need not modify its admissions or hiring criteria, even if they involve religious or other discrimination. In fact, the Scholarship Program authorizes participating schools to "make employment and enrollment decisions based upon religious beliefs." Policy § E ¶ 3.f (Ex. 1). This was undisputed by the school officials during the injunction hearing.

31. In the spring of 2011, the Douglas County School District accepted applications from 34 Private School Partners for participation in the Scholarship Program. *See* Partner List

(Ex. 3). As of July 31, 2011, the Douglas County School District has contracted with 23 of those private schools to participate in the Scholarship Program. *Id.*

i. Identities of Private School Partners

32. The following Private School Partners have signed contracts to participate in the Scholarship Program:

- Ambleside School is a private school currently located at 345 E. Wildcat Reserve Pkwy, Highlands Ranch, Colorado 80126 but scheduled to relocate to 1510 East Phillips Ave., Centennial, Colorado 80122 for the 2011-2012 school year;

- Aspen Academy is a private school located at 5859 S. University Blvd., Greenwood Village, Colorado 80121;

- Ave Maria Catholic School is a private school located at 9056 East Parker Road, Parker, Colorado 80138;

- Beacon Country Day School is a private school located at 6100 E. Belleview, Greenwood Village, Colorado 80111;

- Cherry Hills Christian is a private school located at 3900 Grace Boulevard, Highlands Ranch, Colorado 80126;

- Denver Christian Schools-Highlands Ranch Campus is a private school located at 1733 E. Dad Clark Drive, Highlands Ranch, Colorado 80126;

- Denver Christian Schools-Van Dellen Campus is a private school located at 4200 E. Warren Ave., Denver, Colorado 80222;

- Denver Christian Schools-High School Campus is a private school located at 2135 S. Pearl Street, Denver, Colorado 80210;

- Evangelical Christian Academy is a private school located at 4190 Nonchalant Circle South, Colorado Springs, Colorado 80917;

- Front Range Christian School is a private school located at 6657 W. Ottawa Ave., A-17, Littleton, Colorado, 80128;

- Hillel Academy of Denver is a private school located at 450 Hudson, Denver, Colorado 80246;

- Humanex Academy is a private school located at 2700 S. Zuni Street, Englewood, Colorado 80110;

- Lutheran High School is a private school located at 11249 Newlin Gulch Blvd., Parker, Colorado 80134;

- Mackintosh Academy is a private school located at 7018 S. Prince Street, Littleton, Colorado 80120;

- Mullen High School is a private school located at 3601 Lowell Blvd., Denver, Colorado 80236;

- Regis Jesuit High School is a private school located at 6300 S. Lewiston Way, Aurora, Colorado 80016;

- Shepherd of the Hills Lutheran is a private school located at 7691 S. University Blvd., Centennial, Colorado 80122;

- Southeast Christian School is a private school located at 9650 Jordan Road, Parker, Colorado 80134;

- St. Peter Catholic School is a private school located at 124 First Street, Monument, Colorado 80132;

- The Rock Academy is a private school located at 4881 Cherokee Drive, Castle Rock, Colorado 80109;

- Trinity Lutheran is a private school located at 4740 North Highway 83, Franktown, Colorado 80116;

- Valor Christian High School is a private school located at 3775 Grace Blvd., Highlands Ranch, Colorado 80126;

- Woodlands Academy is a private school located at 1057 Park Street, Castle Rock, Colorado 80109.

33. Fourteen of the twenty-three participating private schools are located outside of the Douglas County School District: Aspen Academy, Beacon Country Day School, Front Range Christian School, Humanex Academy, Mackintosh Academy, Regis Jesuit High School, and Shepherd of the Hills Lutheran School are located in Arapahoe County; Denver Christian Schools (multiple campuses), Hillel Academy, and Mullen Hugh School are located in Denver County; and Evangelical Christian Academy and St. Peter Catholic School are located in El Paso County.

ii. Religious Affiliation of Private School Partners

34. The Scholarship Program does not limit participation to private schools that are nonsectarian. *See* Policy § E ¶ 2.c (Ex. 1).

35. Sixteen of the twenty-three private partner schools approved to participate in the Scholarship Program are sectarian or religious, as those terms are used in Article II, Section 4; Article V, Section 34; and Article IX, Section 7, of the Colorado Constitution. They teach "sectarian tenets or doctrines" as that term is used in Article IX, Section 8 of the Colorado Constitution.

36. For virtually all high school students participating in the Scholarship Program, the only options are religious schools. Of the five participating schools that are non-religious, one is for gifted students only (Mackintosh Academy), another (Humanex Academy) is for special needs students, and the remaining three run through eighth grade only. *See, e.g.*, Humanex Academy App. (Ex. 58); Woodlands App. (Ex. 62); Mackintosh App. (Ex. 60); Aspen App. (Ex. 54); Beacon App. (Ex. 56). The school officials testifying confirmed these facts during the injunction hearing.

37. As of the time of the injunction hearing, approximately 93% of the confirmed private school enrollment was attending religious schools. At the high school level, there are 120 students, and only *one* of them will attend a non-religious school (Humanex Academy).

38. Most of the Private School Partners that have been approved to participate in the Scholarship Program are owned and controlled by private religious institutions. *See, e.g.*, Ave Maria App., at 6 (Ex. 18) (controlled by Diocese of Colorado Springs); Cherry Hills Christian App. at 1 (Ex. 19, p.10, 15) (controlled by Cherry Hills Community Church.); Evangelical Christian App., at 1 (Ex. 25 p.16) (controlled by Village Seven Presbyterian Church); Lutheran High School App., at 1, 2 (Ex. 37 p. 10, 11) (controlled by Lutheran Church - Missouri Synod); Mullen High School App., Faculty Handbook, at 1 (Ex. 40 p. 6) (owned and controlled by "Christian Brothers of New Orleans/Santa Fe Province"); Shepherd of the Hills App., at 1 (Ex. 42 p.10) (owned and operated by Shepherd of the Hills Lutheran Church); Southeast Christian School App., at 1,2 (Ex. 44 p. 10, 11) (controlled by Southeast Christian Church); Rock Academy App., Parent Handbook (Ex. 47 p. 44); Trinity Lutheran App., Handbook (Ex. 48 at p.11, 18) (controlled by Trinity Lutheran Church). Dan Gehrke ("Mr. Gehrke"), Executive Director of the Lutheran High School Association, testified at the injunction that all of the members that makeup the Colorado Lutheran High School Association, which runs and has a vested interest in the high school, are churches.

39. The governing entities of many participating Private School Partners reflect, and are often limited to, persons of the schools' particular faith. *See, e.g.*, Ave Maria App., at 6) (Ex. 18); Cherry Hills App., at 1 (Ex. 19 p. 10) (stating that school superintendent reports to pastor of Cherry Hill Church, and Board of Elders); Evangelical Christian App. Bylaws at IV. B (Ex. 25 p. 17) (stating that each member of the Board shall be from "a

reformed denomination subject to the approval of the Sessions of the Founding Churches"); Lutheran High School App., Diploma of Vocation (Ex. 37 p. 23) (appointing Dan Gehrke as Director "in the name of the Triune God"); Shepherd of the Hills App., at 1 (Ex. 42 p. 10) (stating that the Board serves as a trustee for the congregation); Southeast Christian App., at 1 (Ex. 44 p.10) (stating that "Southeast's Elder Board provides oversight to the School Board. The church is staff directed and elder protected."); Trinity Lutheran App., at 1 (Ex. 48 p. 10) (stating that the Trinity congregation is the "ultimate governing authority"). Mr. Gehrke and Robert Bignell ("Mr. Bignell"), Superintendent at Cherry Hills Christian, both confirmed this at the injunction hearing.

40. Many of the participating Private School Partners are funded primarily or predominantly by sources that promote and are affiliated with a particular religion. *See, e.g.*, Lutheran High School App., Promissory Note (Ex. 37 p. 15) (evidencing loan from Lutheran Church Extension Fund—Missouri Synod); Mullen High School App., at 1 (Ex. 40 p.6) (stating school is "owned and operated" by "Christian Brothers of New Orleans . . . in cooperation with the Archdiocese's Catholic School Office of the Catholic Archdiocese of Denver"); Shepherd of the Hills App., Enrollment Policies (Ex. 42 p. 14) (stating that Shepherd of the Hills is "sponsored and maintained by Shepherd of the Hills Lutheran Church"); Trinity Lutheran App., Accreditation Report (Ex. 48 p. 192) (stating that "school and church operate under a unified budget with the church financing a portion of the total school costs"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

41. Most of the Private School Partners that have been approved to participate in the Scholarship Program require students to attend religious services. *See, e.g.*, Ave Maria App. at 3, 7, 8) (Ex. 18); Cherry Hills App., at 3 (Ex. 19); Evangelical Christian App., at 2 (Ex. 25); Front Range Christian App., at 6,7 (Ex. 29 p. 15, 16); Denver Christian School App., at 4 (Ex. 23); Hillel Academy App., at 5 (Ex. 31 p.14); Lutheran High School App., at 3 (Ex. 37 p.12); Mullen High School App., at 2 (Ex. 40 p. 2); Regis Jesuit App., at 6 (Ex. 41 p. 15); Southeast Christian App., at 5 (Ex. 44 p. 14); The Rock Academy App., at 2 (Ex. 47 p. 11); Trinity Lutheran App., at 4 (Ex. 48 p. 13); Valor Christian App., at 4 (Ex. 49 at p. 13). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

42. Most participating Private School Partners discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and their parents, and some even give preference to members of particular churches. *See*, e.g., Ave Maria App., at 8, 27 (Ex. 18) (discriminating in admissions and hiring); Denver Christian at 100-1, 100-5 (Ex. 23 p. 16-17, 20) (discriminating in favor of "children of parents who are members of a Reformed church); Evangelical Christian App., Doctrinal Statement (Ex. 25 p. 101) ("Evangelical Christian Academy shall admit only students of parents who give evidence of regeneration, who affirm this doctrinal statement"); Front Range App., Student Enrollment Info. (Ex. 29 p. 18) (acceptance contingent on attestation of parent); Lutheran High School App., Employee Handbook (Ex. 37 p. 65) (discriminating in favor of

Lutherans in hiring); Shepherd of the Hills App., Enrollment Policies 6.1.2.1, and Employee Resource Guide 1.40, and Enrollment Paragraphs (Ex. 42 pp. 14, 22, 27, 28-29) (discriminating on the basis of religion in admissions and employment by, for example, categorizing workers as "called" vs. "non-called.") The Rock Academy App., Parent Handbook (Ex. 47 p. 47, 87) (giving preference for admission to members of the Rock Church); Valor Christian App., Employee Handbook (Ex. 49 p. 81) (requiring teachers to be 'authentic and committed believers in Jesus Christ'"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

43. Most of the participating Private School Partners subject students, parents, and faculty to religious tests and qualifications. *See, e.g.*, Cherry Hills App., Family Commitment Policy (Ex. 19 p. 36) (requiring students and Parents to execute "Family Commitment Statement" that includes commitment to pray); Denver Christian App., Policy Manual (Ex. 23 p. 16-17) (requiring faculty to sign religious attestation); Evangelical Christian App., Handbook at 15, Employment Policy at 1, Doctrinal Statement (Ex. 25 p. 46, 94 101) (requiring parents to attest to faith in Jesus Christ and sign "doctrinal statements", and requiring faculty to attend church that agrees with "statement of faith"); Front Range App. (Ex. 20 p. 18, 58, 64, 70) (requiring parent to profess a "personal relationship with God," and requiring teachers to execute Statement of Faith and Declaration of Moral Authority); Shepherd of the Hills App., Enrollment Policies 6.1.2.1 (Ex. 42 p. 14) (requiring students to attest that they "will accept training in the teachings in the Christian faith."); Southeast Christian App., Family Commitment Agreement (Ex. 44 p. 27-29) (requiring parents and students to sign "commitment agreement" and "give your Christian testimony."); Valor Christian App., Employee Handbook (Ex. 49 p. 81, 117) (requiring faculty to agree to the Statement of Faith as a condition of employment). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

44. The primary missions of most of the Private School Partners, and of the religious entities that own, operate, sponsor, or control them, is to provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization. *See, e.g.*, Ave Maria App., at 3, 7 (Ex. 18) (mission statement); Cherry Hills App., at 1 (Ex. 19) (mission statement); Denver Christian App., Policy Manual 100-7 (Ex. 23 p. 22) (describing educational philosophy as preparing students for service in the Kingdom of God); Evangelical Christian App., Philosophy Statement (Ex. 25 p. 14) (describing education as founded on the centrality and preeminence of Christ in all things); Front Range App., at 2 (Ex. 29 p. 11) (stating that school exists to equip students to "impact the world for Christ"); Hillel Academy App., at 2 (Ex. 31 p. 11) (describing educational goals, in part, as "to provide a Judaic education that allows students to act as fully functioning Orthodox Jews."); Lutheran App., at 2 (Ex. 37 p. 11) ("Christian principles guide all of student life; classes, sporting and special events, and relationships."); Mullen App., Faculty Handbook at 1 (Ex. 40 p. 18) (preparing graduates to "embrace God's gift of learning [and] devote their lives ceaselessly for His learning"); Regis App., at 3 (Ex. 41 p. 12) (stating that Regis

graduates "will come to know and experience God"); Shepherd Hills' App., at 2 (Ex. 42 p. 11) (Mission statement: "Through the Gospel of Jesus Christ, Shepherd of the Hills Christian School seeks to strengthen families by helping parents to train their children in a Christian way of life …"); Southeast Christian App., at 2 (Ex. 44 p.12) (" The Christian school is an arm of the Christian home in the total education of children." . . . "Train up a child in the way he should go, and even when he is old he will not depart from it.") (quoting Proverbs 22:6); The Rock Academy App., Parent Handbook (Ex. 47 p. 45) ("The Rock Academy exists to partner with parents in training the next generation through discipleship in God's word . . ."); Trinity Lutheran App., Parent/Student Handbook (Ex. 48 p. 18, 32) ("The "primary objective of Trinity Lutheran School is to support parents in the spiritual training of their children."); Valor Christian App., Mission Statement (Ex. 49 p. 18) (school's "vision" is to "prepar[e] tomorrow's leaders to transform the world for Christ"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

45. The curricula at most participating schools is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize. The participating schools additionally require theology classes as a component for graduation eligibility. *See, e.g.*, Cherry Hills App. (Ex. 19 p. 18); Denver Christian App., Policy Manual at 100-7 (Ex. 23 p. 22) (describing pillar of the curriculum as "Religion: Knowledge of religions, church history, Christian doctrine, and Christian ethics; always involving a challenge to respond in faith and obedience to the Lord."); Evangelical Christian App. (Ex. 25 pp. 19, 52) (requiring "Bible classes for graduation" and stating that "all materials are taught from a Christian Reformed worldview."); Front Range App., at 3 (Ex. 29 p. 12) ("We believe that all truth is God's truth. Therefore, all academic disciplines are taught and integrated within a Christian worldview."); Hillel Academy App. at 3 (ex. 31 p. 12) ("Our Judaic Program adheres to a traditional (Halakha) interpretation of laws and customs."); Lutheran High School App., Employee Handbook at 44 (Ex. 37 p. 104) (stating that religious instruction is an "integral part of every subject area"); Southeast Christian App., at 2 (Ex. 44 p. 11, 14) ("Biblical integration is included in all aspects of our learning. Bible class is considered a core academic class."); The Rock App., (Ex. 47 p. 31) (curriculum description); Trinity Lutheran App., Parent Student Handbook (Ex. 48 p. 21) ("describing "in-classroom time given to devotions and worship"); Valor Christian App., Student Handbook (Ex. 49 p. 60) (requiring 3.5 semesters of required courses in religion or theology). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

E. THE RESTRICTIONS ON RELIGIOUS AND OTHER DISCRIMINATION, RELIGIOUS EDUCATION, AND MANDATORY PARTICIPATION IN RELIGIOUS SERVICES

46. The Scholarship Program provides no meaningful limitations on the use of taxpayer funds to support or promote religion, and no meaningful protections for the religious liberty of participating students. The Scholarship Program permits participating Private

School Partners to discriminate on the basis of religion in both admission and in employment. *See* Policy § E ¶ 2, 3.f) (Ex. 1). Douglas County School District "recognize[s] that many schools embed religious studies in all areas of the curriculum." FAQ (Ex. 2).

47. There are no restrictions on how participating Private School Partners may spend the taxpayer funds that they receive under the Scholarship Program. The participating private schools are free to use these funds for sectarian purposes, including, for example, religious instruction, worship services, clergy salaries, the purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer. *See* FAQ (Ex. 2).

48. Mr. Bignell explained in a letter on April 15, 2011, to Dr. Cutter, "My summary of our two-hour interview is that the district wants *no control* over Cherry Hills Christian or any other partner school." (Ex. 101) (emphasis added). This was additionally confirmed by the testimony of Dr. Cutter.

49. The Scholarship Program permits participating private schools to discriminate against students with disabilities. This was confirmed by the testimony of Dr. Cutter. Douglas County School District categorizes students with disabilities who participate in the Scholarship Program as "parentally-placed students with disabilities" and includes a disclaimer in its form application stating that the "[d]istrict-provided services to parentally placed students with disabilities are limited." (Ex. 5 p. 10). Further, parents opting to have their children participate in the Scholarship Program essentially waive their rights under the Individuals with Disabilities Education Act. *See* Policy JCB (Ex. 107 at p. 5).

50. Participating Private School Partners may also engage in other forms of discrimination. For example, Denver Christian's application sets forth its "AIDS policy," under which it can refuse to admit, or expel, HIV-positive students. (Ex. 23 p. 28.) The "Teacher Contract" at Front Range lists homosexuality as "a cause for termination." (Ex. 29 p. 71).

F. THE "OPT OUT" PROVISION AGAINST RELIGIOUS INSTRUCTION OR PARTICIPATION IN RELIGIOUS EXERCISES

51. The Scholarship Program purports to afford participating students the right to "receive a waiver from any required religious services at the [Private School Partner]." *See* Policy § E ¶ 3.l (Ex. 1). But this "opt out" right is illusory. Dr. Cutter confirmed that scholarship students may still be required to attend religious services, so long as they are permitted to remain silent. *See* FAQ (Ex. 2). Many participating private religious schools require such attendance. *See supra*, at ¶ 54.

52. Scholarship students have no right to opt-out of religious instruction, even if the religious instruction would conflict with their own religious beliefs. *Id.* Scholarship students also

have no right to sit silent during other religious exercises that does not occur in the context of formal religious worship services and chapel, such as prayer recitations, scriptural readings, etc, which many schools mandate throughout the day. *Id.* This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

53. Douglas County School District officials collaborated with religious Private School Partners to ameliorate their concerns regarding the initial waiver language which provided a complete right to opt out of religious services and instruction. Further, District Officials intentionally weakened the waiver language to encourage private religious schools to participate in the Scholarship Program. Shortly before the Douglas County School Board voted on the Scholarship Program, Dr. Cutter explained to a group of private religious schools that he had received "mixed responses" to a waiver policy that would have required participating private schools students in the Scholarship Program to "*remove themselves* from faith-based classes and/or activities" March 5, 2011 Email (Ex. 86) (emphasis added). Dr. Cutter also asked a group of private religious schools whether the waiver provision was a "deal-breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88). The testimony of Dr. Cutter confirmed that these facts were accurate. Dr. Cutter further acknowledged that a large number of the private schools were sectarian and that it was imperative to get their participation. Dr. Cutter confirmed that without the religious schools' participation, there would not be much of a Scholarship Program.

54. The limited opt-out right is subject to even further reduction—or outright elimination—based on the opinion and testimony of Mr. Cutter. For example, Mr. Cutter assured Ken Palmreuter of Trinity Lutheran that "because services vary between faiths and institutions, the waiver will include unique specifics for each individual school. It's not a 'one waiver fits all.' you and I can work together to make sure it is comprehensive after your application is submitted." April 17, 2011 Email (Ex. 96).

G. THE EDUCATION PROVIDED BY THE PARTICIPATING RELIGIOUS PRIVATE SCHOOL PARTNERS

55. A "uniform standard" for public education in Colorado is set forth in the criteria created by the state legislature and is implemented by and under the continued supervision of the local school boards. Douglas County School District has adopted Colorado State Standards, as promulgated by the Colorado Department of Education, to create learning targets for the District. Douglas County School District's Standards Website (Ex. 10). These standards describe the learning goals in each area of instruction for each academic grade level. *Id.*

56. Douglas County School District also issues its own learning goals for each school year, outlining the key academic objectives to be achieved for that year. Douglas County

Student Learning Goals (Ex. 9). Teachers in Douglas County School District are subject to licensing criteria as set forth by the Colorado State Board of Education.

57. The Scholarship Program's Private School Partners, however, are not subject to these standards. Participating Private School Partners are not required to use the Douglas County School District's content standards or curriculum, comply with its State accreditation contract or otherwise meet State accountability mandates, adopt its educational goals, use its assigned textbooks and materials, or adhere to student-teacher ratios and other pedagogical policies established by the District. *See* FAQ (Ex. 2). Teachers employed by the private schools participating in the Scholarship Program are not required to hold current Colorado Department of Education Teachers Licenses with appropriate endorsements and experience for the courses that they teach. *Id.* This was confirmed by the testimony of Dr. Cutter.

H. THE COLORADO DEPARTMENT OF EDUCATION HAS NOT DECIDED WHETHER TO FUND THE PROGRAM

58. The Scholarship Program is premised on the assumption that the Colorado Department of Education will pay Douglas County School District the "per pupil revenue" for students that attend participating private schools under the Scholarship Program. *See* Policy § C ¶ 6, 10 (Ex. 1)

59. Douglas County School District has already begun distributing money to participating private schools. As of the date of the injunction hearing, 271 of the 500 students admitted under the Scholarship Program had been accepted to Private School Partners and approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

60. Mr. Hammond testified at the injunction hearing that the state has not determined whether or not it will fund the Scholarship Program.

61. Mr. Hammond testified at the injunction hearing that, if the Colorado Department of Education determines that students participating in the Scholarship Program should not be part of the pupil count for Douglas County School District, the state may seek reimbursement from the Douglas County School District of any state aid used to finance the Scholarship Program. Specifically, Mr. Hammond testified that the state could "claw back" the moneys spent towards the Scholarship Program if the Scholarship Program is determined to be improper.

62. Additionally, the Scholarship Program could be abruptly terminated when the State conducts its audit sometime in 2012, when students are already enrolled and immersed in the private schools. Students in the Scholarship Program would need to be reintegrated into public schools, or parents would be forced to pay the remaining private tuition on their own. Public school curricula would be disrupted, classes might need to be added or reallocated to accommodate hundreds of unplanned students, and additional textbooks

and supplies that were not budgeted or planned for would need to be quickly procured. Furthermore, the Douglas County School District could face the obligation to return millions of education dollars to the State. Many, if not all, of these circumstances could likewise occur in the event injunctive relief is granted.

63. Although the state has not committed to fund the Scholarship Program, the Douglas County School District nonetheless intends to forego investments in Douglas County public schools, which are necessary to keep pace with increased student enrollment, on the assumption that the Scholarship Program will alleviate this increased enrollment. Specifically, Dr. Fagen testified that the Scholarship Program will alleviate additional cost, such as classroom materials and facilities, associated with an increasing student enrollment.

64. Mr. Carson testified at the hearing that if the Scholarship Program is successful, he hopes to expand the Scholarship Program beyond the initial 500 students. *See also* December 12, 2010 Email (Ex. 126). Mr. Carson further stated that his viewpoint on expanding the Scholarship Program generally reflected the thoughts of the other Douglas County School Board members.

65. Mr. Carson testified that, under the state education funding system, more students equaled more money to the school district. Mr. Carson elaborated that part of his job responsibility is to devise ways to increase money and students to the Douglas County School District. Mr. Carson testified that the Douglas County School District has suffered tens of million dollars in budget reductions, and because the Douglas School District "does not have a finite pot of money, [the Douglas County School District's] budget is dependent upon pupil growth." Therefore, if the Scholarship Program grows in size, Douglas County School District's budget grows in size. Dr. Cutter testified that after running a financial analysis on the Scholarship Program, the Scholarship Program was forecasted to "break even" at 200 scholarship students. If these scholarship students are counted in the Douglas County School District's per pupil revenue, as the school officials testified that they will be, the funds directed to the Douglas County School District will be at the cost to other school districts around the state.

II.
STANDARD OF REVIEW

A. C.R.C.P. 12(B)(1) – LACK OF STANDING

A motion to dismiss for lack of standing is governed by C.R.C.P. 12(b)(1). "Subject matter jurisdiction is defined as a court's power to resolve a dispute in which it renders judgment." *Levine v. Katz,* 192 P.3d 1008, 1011 (Colo. App. 2006). In order for a court to have

proper jurisdiction over a dispute, "the plaintiff must have standing to bring the case." *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (en banc). Furthermore, "[s]tanding is a threshold issue that must be satisfied in order to decide a case on the merits. *Id.*

A trial court may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion. *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. *Id.* at 594.

B. C.R.C.P. 12(5) – FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In addressing a C.R.C.P. 12(b)(5) motion, the court must view the allegations in the light most favorable to the non-moving party, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992) (en banc), and accept all averments of material fact contained in the complaint as true. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (en banc) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992) (en banc)). Whether a claim is stated must be determined solely from the complaint. *Dunlap,* 829 P.2d at 1290.

Under C.R.C.P. 8(a)(2), all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." *Henderson v. Gunther*, 931 P.2d 1150, 1168 (Colo. 1997) (en banc). Thus, dismissal of claims under C.R.C.P. 12(b)(5) is proper only "where a complaint fails to give defendants notice of the claims asserted." *Shockley v. Georgetown Valley Water & Sanitation Dist.*, 548 P.2d 928, 929 (Colo. App. 1976). Unless it appears beyond doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief, the motion will be denied. *Dunlap*, 829 P.2d at 1290.

C. C.R.C.P. 65 - INJUNCTION

Colorado law is clear on the requirements to enter an injunction. Courts are permitted to enter an injunction pursuant to C.R.C.P. 65. In order for a preliminary injunction to enter, a plaintiff must demonstrate the following elements:

> (1) a reasonable probability of success on the merits;
> (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
> (3) that there is no plain, speedy, and adequate remedy at law;
> (4) that the granting of a preliminary injunction will not disserve the public interest;
> (5) that the balance of equities favors the injunction; and
> (6) that the injunction will preserve the status quo pending a trial on the merits.

See Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982) (internal citations omitted).

C.R.C.P. 65(f) additionally contemplates that injunctions can be mandatory or permanent and that the court can require a party to take affirmative action "if merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled[.]" "It is generally held that if a preliminary mandatory injunction will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, it should not be issued. Only in rare cases if the complainant's right to the relief is *clear and certain* will an injunction issue under such circumstances as involved here." *Allen v. Denver*, 351 P.2d 390, 391 (Colo. 1960) (emphasis in original).

III.
CONCLUSIONS OF LAW

The Court now addresses Defendants' Motion to Dismiss and Plaintiffs' Motions for Preliminary Injunction, in turn:

A. MOTION TO DISMISS

Defendants allege that Plaintiffs' claims for violations of C.R.S. § 22-54-101 *et seq.* and violation of Article IX, Section 3 of the Colorado Constitution should be dismissed, pursuant to C.R.C.P. 12(b)(1), because Plaintiffs lack standing to bring these claims. Furthermore, Defendants contend that Plaintiffs' remaining claims for violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 should be dismissed for failure to state a claim upon which relief can be granted, pursuant to C.R.C.P. 12(b)(5). In response, Plaintiffs argue that standing is proper for all claims alleged and that all claims are viable and properly alleged. The Court addresses each of Defendants' arguments, in turn, below.

i. Lack of Standing for Statutory Claims

Defendants allege that Plaintiffs lack standing to bring their statutory violation claims because Plaintiffs lack a legally protected interest to enforce the statutes and have not suffered an injury in fact. Plaintiffs argue that they have suffered both economic and non-economic losses and they have a protected legal interest in their constitutional and statutory claims.

In *Wimberly v. Ettenberg*, the Colorado Supreme Court outlined a two-step test for determining standing. 570 P.2d 535, 539 (Colo. 1977) (en banc). A plaintiff has standing if he or she (1) incurred an injury-in-fact (2) to a legally protected interest, as contemplated by statutory or constitutional provisions. *See id.* This test, because of its application in a variety of different contexts, has become the general test for standing in Colorado. *See Brotman v. East*

Lake Creek Ranch, LLC, 31 P.3d 886, 890 (Colo. 2001) (en banc). "In Colorado, parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough*, 90 P.3d at 855.

The first prong of the test has been interpreted to require "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (en banc) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). An injury that is "indirect and incidental" is insufficient to confer standing. *Brotman*, 31 P.3d at 891. "In the context of administrative action, this element of standing does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action 'threatens to cause' an injury." *Bd. of County Comm'rs v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003). "However, an injury must be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution." *Id.*

The second prong of the test "requires that the plaintiff have a legal interest protecting against the alleged injury." *Ainscough*, 90 P.3d at 856. There are three factors that courts use to determine whether a statute reflects a legislative purpose to confer a legal interest that entitles plaintiff to judicial redress: "(1) whether the statute specifically creates such a right in the plaintiff; (2) whether there is any indication of legislative intent to create or deny such a right; and (3) whether it is consistent with the statutory scheme to imply such a right." *Olsen v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002) (citing *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1057 (Colo. 1981) (en banc)).

Here, Plaintiffs have alleged a direct economic injury on the grounds that the Scholarship Program will result in over $3 million in public funding being removed from the Douglas County

School District. Plaintiffs further claim that because this action is based upon an administrative action, the threat of diverting money intended to further their children's education is sufficient to establish standing. Finally, Plaintiffs assert that they have a legal interest in protecting against the injury, both as taxpayers opposing the unconstitutional and unlawful expenditure of funds, and as parents and students protecting their interest in public education.

Defendants argue that any injury alleged is not sufficiently direct to establish standing for Plaintiffs. Furthermore, Defendants argue that the statutes upon which Plaintiffs base these claims lack the express language to establish standing for taxpayer enforcement, lack any indication of legislative intent to create a taxpayer right of enforcement, and lack the implication that a general right of taxpayer right of judicial redress exists.

The Court finds that the injuries asserted by Plaintiffs, both economic and non-economic, are sufficient in quality and directness to establish standing. The prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds, in accordance with the Public School Finance Act. Similarly, these same circumstances are sufficient to establish standing for students, and the parents of students, seeking to protect public school education.

With respect to legal interest, the Court notes that Defendants' argument focuses, almost exclusively, on a lack of legislative purpose to confer a legal interest on taxpayers. Although this argument has some merit, the argument ignores the fact that Plaintiffs are comprised of not only taxpayers, but parents and students as well. Plaintiffs have successfully argued that their status

as students in the Douglas County School District, as well as parents to these students, confers a legal interest in the enforcement of the statutes enumerated in their claims.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims against Defendants' alleged statutory violations.

ii. Lack of Standing for Article IX, Section 3 Claim

Defendants next challenge Plaintiffs' standing on their constitutional claim for the violation of Article IX, Section 3 of the Colorado Constitution. As with the statutory claims, Defendants allege that Plaintiffs lack standing because Plaintiffs lack a legally protected interest and have not suffered an injury in fact. Plaintiffs argue that they have suffered economic and non-economic losses and that they have a protected legal interest in their constitutional and statutory claims.

While the *Wimberly* test outlined above applies equally to constitutional claims, it bears noting that additional deference is given to plaintiffs asserting claims based on constitutional violations. *See, e.g.*, *Ainscough*, 90 P.3d at 856; *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 627 (Colo. 1968) (en banc). The Supreme Court has interpreted *Wimberly* to confer standing when a plaintiff argues that a governmental action that harms him is unconstitutional. *Ainscough*, 90 P.3d at 856. "[A] precept of constitutional law is that a self-executing constitutional provision ipso facto affords the means of protecting the right given and of enforcing the duty imposed." *Love*, 448 P.2d at 627. Although citizens may generally sue to protect a "great public concern" regarding the constitutionality of a law, the jurisprudence on this particular section of the Colorado Constitution indicates otherwise. *Compare Love*, 448 P.2d at 627 *with Brotman*, 31 P.3d at 891-92. In *Brotman*, although the Court held that taxpayers lack

standing to bring claims under this Section of the Constitution, the Court expressly noted that this decision "does not preclude a determination like that in Branson that plaintiff schools and schoolchildren might have such standing." *Brotman*, 31 P.3d at 892.

In the present case, Plaintiffs are comprised not only of taxpayers, but also of parents and students in the Douglas County School District. While the Colorado Supreme Court's holding in *Brotman* expressly precludes taxpayer standing to assert claims based on the violation of Article IX, Section 3 of the Colorado Constitution, the Supreme Court clearly articulates that this holding is not sufficient to preclude standing of schools and students affected by the disbursement of funds generated from school lands. As outlined in the statutory claims section, *supra*, Plaintiffs have successfully asserted economic and non-economic injuries and have argued that their status as students and parents in the Douglas County School District confers a legal interest in the enforcement of the statutes enumerated in their claims. In evaluating Plaintiffs' standing, the Court reads the Supreme Court's language in *Brotman* in conjunction with its "relatively broad definition of standing" in Colorado and general conferral of standing upon a plaintiff arguing that an unconstitutional governmental action has injured the plaintiff.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims for the violation of Article IX, Section 3 of the Colorado Constitution.

iii. Failure to State a Claim Upon Which Relief Can Be Granted

Next, the Court turns to Defendants' challenge of the remaining constitutional claims. Defendants contend that, because Plaintiffs' remaining claims lack merit and fail to show a probability of success, these claims should be dismissed pursuant to C.R.C.P. 12(b)(5).

Conversely, Plaintiffs argue that all claims asserted are viable claims for constitutional violations and, furthermore, are likely to succeed on the merits.

Colorado jurisprudence is clear that C.R.C.P. 12(b)(5) motions are generally disfavored and are designed to allow a defendant to test the formal sufficiency of a complaint. *See, e.g.*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999) (en banc); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996) (en banc). Thus, "a complaint is not to be dismissed [under a C.R.C.P. 12(b)(5) motion to dismiss] unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Dorman*, 914 P.2d at 911. Under the Colorado Rules of Civil Procedure, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," therefore a complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief. C.R.C.P. 8(a)(2); *Shapiro & Meinhold*, 823 P.2d at 122-23.

Here, in their remaining constitutional claims, Plaintiffs' Complaints allege violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 of the Colorado Constitution. Generally, these claims allege that the Choice Scholarship Program, as currently constituted, requires students to "attend or support [a] ministry or place of worship, religious sect or denomination against [their] consent," fails to provide a "thorough and uniform system of free public schools," provides aid to churches and religious institutions, utilizes religious tests or qualifications for admission into public educational institutions, fails to maintain school board and school board director control of instruction in local schools, and provides appropriations to a "denominational or sectarian institution or association." In addition, Plaintiffs' Complaints include factual allegations which support the assertion of these claims.

While these claims have been hotly contested by Defendants, pursuant to the C.R.C.P. 12(b)(5) jurisprudence, the Court views these allegations in the light most favorable to Plaintiffs, the non-moving parties with respect to the Motion to Dismiss. Accordingly, taking the allegations in the complaints as true, the Court finds that the Plaintiffs' allegations are sufficiently pled to put Defendants on notice of the claims asserted. Furthermore, the Court finds that, despite Defendants' argument, Plaintiffs' claims are not precluded by Colorado substantive law. Finally, the Court affords a more detailed assessment of the merits of these claims below.

In conclusion, the Court finds that Plaintiffs have sufficiently alleged their remaining claims for constitutional violations.

WHEREFORE, in light of the reasoning above, Defendants' Motion to Dismiss is **DENIED**.

B. INJUNCTION

Plaintiffs request the Court to enter an injunction preventing Defendants from funding or otherwise implementing the Scholarship Program. A heightened standard is compelled in this case because, as the Court stated during the injunction hearing, Plaintiffs' request for preliminary injunction, if granted, would provide Plaintiffs with all of the relief sought in their respective complaints. Further, a trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. *See Colo. Springs Bd. of Realtors v State*, 780 P.2d 494 (Colo. 1989). Certainly the totality of the circumstances in this case warrants the modification of typical injunction proceedings from the norm.

Because the Court has determined that the higher standard of proof of a permanent or mandatory injunction applies here, *see supra*, the Court addresses the *Rathke* criteria in the

following manner: the initial analysis will be directed to an assessment of the six *Rathke* elements and the degree to which Plaintiffs have met their burden for preliminary injunctive relief. The Court will dedicate a more detailed analysis of the constitutional and statutory provisions, with respect to the question of whether Plaintiffs have established by clear and certain evidence their entitlement to mandatory or permanent injunctive relief. The purpose in addressing the *Rathke* criteria in this fashion is to augment the Court's conclusion that, not only have Plaintiffs proven the six *Rathke* criteria by a preponderance of the evidence such that a preliminary injunction would be warranted, but that Plaintiffs additionally provided clear and certain evidence entitling them to mandatory or permanent injunctive relief.

i. Danger of Real, Immediate, and Irreparable Injury

Plaintiffs are in danger of real, immediate, and irreparable injury. An injunction is warranted where property rights or fundamental constitutional rights are being destroyed or threatened with destruction. *Rathke*, 648 P.2d at 652. The injuries to Plaintiffs' constitutional rights are irreparable and, without enjoining the Scholarship Program, Plaintiffs' injury cannot be undone. *See Kikimura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (holding that a violation of an individual's religious rights is not adequately redressed by monetary compensation and is therefore irreparable, and explaining that "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

Here, as more fully detailed below, the undisputed evidence before the Court reflects that the Scholarship Program continues to move forward in preparation for the 2011-2012 school year and Defendants continue to enroll students and make payments to Private School Partners. Further, Dr. Fagen and other Douglas County School District officials testified that school has

already started in most Douglas County public schools. Plaintiffs have established, by a preponderance of the evidence, that the Scholarship Program violates both financial and religious provisions set forth in the Colorado Constitution. This evidence includes testimony from parents who reside in Douglas County, administrators from the Private School Partners, and employees of the Douglas County School District, confirming that the Scholarship Program, among others things: (1) requires participating students to attend religious services and receive religious instruction; (2) provides aid to churches and religious institutions; and, (3) utilizes religious tests or qualifications for admission into partner schools and, consequently, into the Choice Scholarship School. Allowing the program to continue to move forward with students attending the Private School Partners and Defendants distributing taxpayer funds to support the Scholarship Program violates Plaintiffs' constitutional rights and, therefore, presents a danger that is real, immediate, and irreparable to Plaintiffs.

In conclusion, the Court finds that Plaintiffs' danger is real, immediate, irreparable, and ongoing. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

ii. No Plain, Speedy, and Adequate Remedy at Law

Because injunctive relief falls within the Court's equitable authority, and because the Plaintiffs' request for an injunction presents the only adequate remedy for the alleged statutory and constitutional violations, there is no plain, speedy or adequate remedy at law available to

Plaintiffs. *See Pinson v. Pacheco*, 397 Fed.Appx. 488, 492 (10th Cir. 2010) (stating that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief). This *Rathke* element, a lack of plain, speedy or adequate remedy at law, is highly correlated to the "danger of real, immediate, and irreparable injury" element outlined above because a finding of irreparable injury is consistent with the finding that a plaintiff lacks an adequate remedy at law. *See Rathke*, 648 P.2d at 653-54. As outlined below, by not enjoining the Scholarship Program, Plaintiffs' constitutional rights will be irreparably violated and, necessarily, this constitutional injury cannot be undone or remedied by monetary or any other compensation. *See Kikimura*, 242 F.3d at 963.

In conclusion, the Court finds that Plaintiffs have proven, by a preponderance of the evidence, that no plain, speedy, and adequate remedy exists at law. Accordingly, the Court finds that this *Rathke* element supports a decision to enjoin the program.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

iii. Granting of a Preliminary Injunction Will Not Disserve the Public Interest

Enjoining Defendants' implementation of the Scholarship Program does not disserve the public interest. Although Defendants assert that the interests of participating students and the Douglas County School District in the educational process would be enhanced by the implementation of the Scholarship Program, this interest is outweighed by the substantial disservice to the public interest that would result from the implementation of an unconstitutional

program affecting approximately 58,000 students and the taxpaying residents of Douglas County.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that the public interest ultimately favors, and is served, in upholding the requirements established by the Colorado Constitution. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

iv. Balance of Equities Favors the Injunction

As articulated by both Plaintiffs and Defendants during the proceedings, this factor is, in many ways, the most difficult for this Court to determine. With respect to Plaintiffs, a denial of the request for injunction presents significant injury in the form of continued constitutional and statutory violations of Plaintiffs' rights. Conversely, with respect to Defendants, granting the Plaintiffs' request for injunctive relief will undoubtedly result in significant hardships for the families already selected for enrollment in the Scholarship Program, as well as the Private School Partners (for instance, the Woodlands Academy) that have relied on the Scholarship Program's implementation.

Defendants assert that a finding against the Scholarship Program will result in the potential disruption of other statutory-based programs that are already in place. As the Court describes in greater detail below, the evidence presented demonstrates that there are significant differences between the Scholarship Program and other statutorily-based programs discussed at

the injunction hearing. Accordingly, the Court finds that the theoretical impact on other statutorily-based programs does not weigh into its decision on the merits of the injunction.

While the Court recognizes the difficulty in deciding the balance of equities, ultimately, the Court finds that the balance of equities element of *Rathke* favors the enjoining of the Scholarship Program. Specifically, the Court finds that the threatened constitutional injuries to Plaintiffs, and the other residents of Douglas County they represent, outweighs the threatened harm the injunction may inflict on Defendants, Intervenors, and the students and families selected for participation in the Scholarship Program. Plaintiffs have demonstrated by a preponderance of the evidence that the Scholarship Program, through the aforementioned constitutional violations and the suspect transfer of public funds to support private schools, will cause Plaintiffs' substantial and irreparable harm. Moreover, Plaintiffs' injury would be amplified for every additional student enrolled in the Scholarship Program and on each additional day the Program operates. As Dr. Carson and Dr. Fagen testified, this expansion is a circumstance that is likely to occur. Because Plaintiffs have shown that it is not only probable, but clear and certain, that they will succeed on the merits, as discussed, *infra*, and because Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted, the balance of the equities favors an injunction. *See Keller Corp. v. Kelley*, 187 P.3d 1133, 1137 (Colo. App. 2008).

The Court, in arriving at its decision, in no way diminishes the impact an injunction will have on the Defendant families and those in similar situations. However, in balancing the degree of impact and the number of families involved, the Court concludes that the balance of equities

compels granting Plaintiffs' request for preliminary injunctive relief. Accordingly, the Court finds that this *Rathke* element supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

v. Injunction Will Preserve the Status Quo

The issuance of an injunction will preserve the status quo. Generally, the status quo to be preserved is the "the last peaceable uncontested status existing between the parties before the dispute developed." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004) *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *see also Arapahoe Cnty. Pub. Airport Auth. V. Centennial Express Airlines, Inc.*, 956 P.2d 587, 598 (Colo. 1998); *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006).

Here, the last peaceable status before the dispute was the absence of the Scholarship Program. The undisputed evidence before the Court demonstrates that when Plaintiffs first filed suit, the Choice Scholarship School had not been implemented or introduced, the list of schools participating had not been finalized, public funds had not been distributed, and the 2011-12 academic year had not begun. The Court is not persuaded that the status quo changed as a result of the summertime involvement of a few scholarship participants with their new Private School Partner, by the distribution of funds to Private School Partners after the lawsuit was filed, or by the investments of some Private School Partners in the hiring of new teachers or remodeling of classrooms. Ultimately, the enjoining of the Scholarship Program will preserve the status quo as

the former students participating in the Scholarship Program will continue to receive their education from a Douglas County public school as before the Scholarship Program was implemented. The Court heard testimony of the possibility that some students may potentially face the unfortunate difficulty of returning to the school they attended before enrolling in the Scholarship Program, however, while this scenario is possible, nothing was presented to the Court beyond speculation that such a scenario might occur. Plaintiffs have expressly not asked the Court to direct the disenrollment of scholarship recipients already attending Private Partner Schools or the return of funds already expended.

Finally, the Court is not persuaded by Defendants' contention that Plaintiffs "sat on their hands" or engaged in undue delay in the filing of this lawsuit. The Court finds that there is sufficient evidence in the record to establish that during the time between the Scholarship Program was officially created and the filing of this lawsuit, Plaintiffs were involved in pre-trial investigatory procedures relating to the implementation and creation of the Scholarship Program.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that enjoining the Scholarship Program will preserve the status quo. Accordingly, the Court finds that the status quo is maintained by the issuance of a preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

vi. Reasonable Probability of Success on the Merits

In conducting its analysis of the present case under the first Rathke element, the Court reviews the following constitutional and statutory provisions: Article II, Section 4, Article V,

Section 34, and Article IX, Sections 2, 3, 4, 7, 8, and 15 of the Colorado Constitution and Sections 22-54-101 et seq. and 22-32-122 of the Colorado Revised Statutes. The Court addresses each of these arguments below.

a. The Historical Significance of the United States Constitution and the Colorado Constitution

In response to Plaintiffs' claims that the Scholarship Program violates various funding and religious provisions of the Colorado Constitution, Defendants essentially claim that, while the religious provisions of the Colorado Constitution are "considerably more specific" than the federal Establishment Clause, *Americans United for Separation of Church and State Fund, Inc. v. State of Colo.*, 648 p.2d 1072, 1082 (Colo. 1982), the Colorado Constitution's different religious provisions are no different nor impose no greater restriction than the federal Establishment Clause.

The Court is not persuaded by this assertion because it is premised on the idea that the framers of the Colorado Constitution must have debated, drafted, and ratified these provisions without purpose. Further, ignoring the detailed language of Colorado's religious constitutional provisions and labeling them "no broader than the federal Establishment Clause" would render them of no value. *See Cain v. Horne*, 202 P.3d 1178, 1182 (Ariz. 2009)(evaluating the constitutionality of a similar "scholarship" program and declining to interpret the Arizona Constitution's "Aid Clause as no broader than the federal Establishment Clause.").

Defendants have provided no legal authority supporting a limitation on the scope of the religious provisions of the Colorado Constitution and this Court declines the invitation to craft one now.

While, as pointed out in Defendants' briefing, the Court in *Americans United* may have stated that the religious provisions of the Colorado Constitution "embody the same values of free-exercise and governmental non-involvement secured by the religious clauses of the First Amendment," 648 p.2d at 1081-82, the Court in *Americans United* also stated that the Establishment Clause is "not necessarily determinative of state constitutional claims." *Id.* at 1078. Had the Court in *Americans United* agreed with Defendants' position in this case, the Court would have abandoned the specific analysis of the religious provisions in the Colorado Constitution and focused strictly on the federal Establishment Clause and the underlying interpretations from federal courts. However, the Colorado Supreme Court did not. Further, Defendants provide no authority, and the Court is aware of none, to suggest that the federal Establishment Clause precludes this Court's consideration of the religious provisions of the Colorado Constitution.

Since Plaintiffs make no claim here with respect to the federal Establishment Clause, and because the federal Establishment Clause does not subsume the Colorado Constitution, the Court narrows its focus to the provisions of the Colorado Constitution rightly at issue.

Defendants next argue that the First Amendment, through the Free Exercise Clause, requires states to aid religious schools. However, Defendants direct the Court to no legal authority to support this contention. To the contrary, in *Locke v. Davey*, the U.S. Supreme Court rejected a Free Exercise challenge to a scholarship program enacted in Washington State that forbids students to use state scholarship funds to pay for a degree in theology. *See* 540 U.S. 712, 725 (2004). In doing so the Court held that the Free Exercise clause *does not* require a state to

fund theology students. *Id.* (emphasis added). Accordingly, in this case, this Court is not prepared to mandate that Colorado taxpayers fund private religious education.

Similarly, Defendants' argument that the Court should ignore the language of the Colorado Constitution because the provisions were written and ratified under the guise of "Catholic bigotry" is unpersuasive. First, Defendants provide no legal authority that would allow this Court to undertake such an endeavor. In fact, this exact argument has been rejected by various other state courts. *See Cain*, 202 P.3d at 1184; *Bush v. Holmes*, 886 So. 2d 392, 412-413 (Fla. 2006). Second, even if there were such authority, there is a genuine dispute as to the historical relevance of the "Blaine amendments" in the context of the Colorado Constitution. To begin, Colorado's "no aid" provision is nearly identical to a provision in the Illinois Constitution, Article VIII, Section 3, which was enacted prior to the proposal of the Blaine amendments. *See Education in Colorado 1861-1885*, Colorado State Teacher's Association, 37-38 (1885). Further, as acknowledged by Dr. Charles Glenn, an expert witness for Defendants in this case, Catholics even conducted a "pro-constitution" rally in Denver just days before ratification, signifying at least some Catholic support of the provisions of the Colorado Constitution. Therefore, as Defendants have provided no legal authority to suggest that the Court may disregard certain constitutional provisions because they "may have been tainted by questionable motives," the historical nature of the Blaine Amendments does not factor into the Court's decision in this Order. *See Cain*, 183 P.3d at 1278 n.2.

Accordingly, the Court turns its attention to focus on each of the alleged violations of the Colorado Constitution at issue in the present case, in turn below.

b. Article IX, Section 7 of the Colorado Constitution

First, Plaintiffs claim that the Scholarship Program violates Article IX, Section 7 of the Colorado Constitution because the Scholarship Program takes public funds intended to support public schools and uses them instead to help support or sustain the Private School Partners controlled by churches or religious denominations.

Article IX, Section 7 of the Colorado Constitution directs that:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatsoever, anything *in aid of* any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant of land, money, or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, Section 7 (emphasis added).

To determine whether there is "aid" to a sectarian or religious school within the meaning of the Colorado Constitution, "[t]he answer to the question must be sought by consideration of the entire program measured against the constitutional proscription." *See Americans United*, 648 P.2d at 1083.[2]

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[2] The Court noted that:

> We do not confine ourselves to the statutory criteria for a "pervasively sectarian" institution . . . in determining whether there is aid to a 'sectarian' institution within the meaning of the Colorado Constitution. These statutory criteria reflect a legislative effort to comply with the standards which evolved under Establishment Clause doctrine for aid to private institutions and although relevant to our analysis, they do not by themselves answer the question whether the statutory program violates the proscription of Article IX, Section 7.
>
> *Id.*

Since the Colorado Supreme Court's holding in *Americans United*, the U.S. Supreme Court has reversed course with respect to the analysis of "pervasively sectarian" institutions.[3] Specifically, the U.S. Supreme Court has determined that any inquiry into the religiousness of a particular institution, including religious schools, is improper. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008). In *Mitchell*, the Court stated, "[t]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive." 530 U.S. at 828. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs . . . [t]he application of 'pervasively sectarian' factors collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.*

Accordingly, the Court will not analyze the religiousness of a particular institution. However, because an institution's status as "pervasively sectarian" was but one factor addressed by the *Americans United* Court, the fact that this Court declines to address that factor is not dispositive of the constitutionality of the Scholarship Program.

In *Americans United*, the Court determined that a college tuition-assistance program, as passed by the General Assembly, did not violate the Colorado Constitution's no aid provision based on five factors.

[3] The *Americans United* Court based its holding, in part, on whether the public aid was permitted to "pervasively sectarian" institutions, as defined by statutory criteria which have since been repealed. *See* C.R.S. 23-3.5-105(1) (repealed 2009).

First, the aid was designed to assist the student, not the institution, and any benefit to the institution appeared to be an unavoidable byproduct of an administrative role relegated to it by the statutory scheme or program. *See* 648 P.2d at 1083.

Second, the aid was only available for students attending institutions of higher education. *Id.* The court stated, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id.* at 1084.

Third, aid is available to students attending both public and private institutions, thereby dispelling any notion that the aid was calculated to enhance the ideological ends of the sectarian institution. *Id.*

Fourth, although the statute enabling the funding did not expressly limit the purpose for which the institutions could spend the funds distributed to them by the grant program, the statute directed a bi-annual audit of payment procedures and other practices. These statutory provisions were expressly designed to insure that the grant program was being administered properly. The college-tuition assistance program also included a statutory provision which provided that, "upon commencement of participation in the program, no institution shall decrease the amount of its own funds spent for student aid below the amount spent prior to participation in the program." This prohibition, the Court concluded, "create[d] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id.*

Lastly, the Court used the statutory "pervasively sectarian" criteria, as referenced above, finding that the subject institutions did not rise to the level of "pervasively sectarian" and therefore the program did not constitute impermissible aid to sectarian institutions.[4]

Here, applying the same factors set forth in *Americans United*, with the exclusion of the statutory criteria for what constitutes a "pervasively sectarian" institution, the Court finds a stark disparity in the overall substance of the Scholarship Program at issue in the present case and the college-tuition assistance program at issue in *Americans United*.

First, the Court in *Americans United* was concerned with the purpose of the aid provided by the state to the sectarian institution. The Court concluded that because the purpose was to aid the students and not the institution itself, the public funds did not constitute impermissible aid within the meaning of Article IX, Section 7. *Id.* at 1083. Here, like the college-tuition assistance program at issue in *Americans United*, the Scholarship Program appears to be a well-intentioned effort to assist students in Douglas County. As Defendants have stated, the purpose of the program is to aid students and parents, not sectarian institutions. The Court agrees with Defendants on this point.

Additionally, the Court in *Americans United* considered the fact that the college tuition-assistance program had a bi-annual audit to ensure that state funds being paid to the sectarian institution were being used in a constitutionally permissive manner. *Id*. at 1084. Further, there was a provision in the college tuition-assistance program requiring that the sectarian institution maintain the amount of its own funds spent for student aid prior to participation in the program,

[4] As stated above, this Court declines an invitation to address whether the Private Partner Schools in this case constitute "pervasively sectarian" institutions. *See Mitchell*, 530 U.S. at 828.

thereby "creat[ing] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id.*

Here, like the college tuition-assistance program in *Americans United*, the Scholarship Program appears to have a check and balance system whereby Douglas County retains a right to periodically review the records, including the financial records of the Private School Partners participating in the program. Section 3.1(A) of the agreement between the Douglas County School District and the Choice Scholarship Charter School sets forth the Douglas County School District's rights and responsibilities and requires that records be open to inspection and review by Douglas County School District officials. *See* Charter Sch. Cont. (Ex. 6). Similarly, Section 3.2 (A) requires that financial records be posted and reconciled "at least monthly." *Id.* Section 3.2(D)(ii) further requires that, in addition to the general posting of financial information, the Private School Partners must provide a proposed balanced budget, a projected enrollment, a charter board approved budget, quarterly financial reports, an annual audit, and an end of year trial balance. *Id.*

However, this is where the similarities between the college tuition-assistance program in *Americans United* and the present case end. Specifically, there is no express provision within the Scholarship Program that prevents the Private School Partners from using public funding in furtherance of a sectarian purpose. In fact, because of the interplay between the participating Private School Partners' curriculum and religious teachings, any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools educational teachings and not the secular educational needs of the students. This was corroborated by the testimony of Mr. Gehrke. Mr. Gehrke testified that

tuition, including the tuition from students participating in the Scholarship Program, is the largest source of revenue for the high school. Mr. Gehrke also testified that the tuition received from the Scholarship Program supports the operation of the school, teacher salaries, chapel facilities, and aids in carrying out the mission of the school, which is to "nurture academic excellence and encourage growth in Christ." Among the benefits Lutheran High School seeks to gain out of the school's participation in the Scholarship Program is increased enrollment. An increase in enrollment would result in more tuition to aid in payment of Lutheran High School's financial debt and mortgage payments. Mr. Gehrke specifically testified during the hearing that the school's mortgage payments are paid directly to the Lutheran Church Extension Fund, a bank that is a "dual ministry in partnership" with the Lutheran Church.

Further, there is evidence that at least one school, Valor Christian High School, has reduced its financial aid award to a scholarship recipient in the same amount awarded through the Scholarship Program. *See* July 24, 2011 Email (Ex. 102). In his testimony, Dr. Cutter stated that he was not aware of this action, but believed that a Private School Partner that reduced financial aid for students participating in the Scholarship Program would "go against the intended contract" with the Douglas County School District.

This identical scenario was expressly disapproved in *Americans United*. Allowing Valor Christian High School to reduce a scholarship participant's financial aid in the amount of the tuition provided through the Scholarship Program would essentially directly hand over public funds to Valor, for Valor's use in any manner it sees fit, including the promotion of sectarian purposes. Moreover, these public funds would otherwise have been used for the needs of public school students in Douglas County.

The next item deemed important by the *Americans United* Court was the fact that the aid was only available for students attending institutions of higher education. "Because as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id.* at 1084.

Here, unlike the college tuition-assistance program in *Americans United*, the Scholarship Program is not designed for students attending an institution of higher education. Rather, the Scholarship Program is intentionally directed to students attending elementary and secondary schools. This fact alone is cause for constitutional alarm because, as the Court in *Americans United* explicitly warned, the "risk of indoctrination" is substantially higher when associated with a voucher program designed to aid primary and secondary institutions. *Id.* Further, while the Scholarship Program purports to provide students participating in the program an "opt out" or "waiver" from any required religious services at the Private School Partner, the "waiver" "does not include [religious] instruction." *See* FAQ (Ex. 2). In fact, for many of the Private School Partners, religious instruction is the foundation of their core educational curriculum and religious theology is embedded in many of their classes. This was confirmed by Messrs. Gehrke and Bignell. The materials and applications for the Private School Partners confirm that their curriculum is premised on the basis of religious education and teaching in the classroom. *See*, *supra*, ¶¶ 44-45.

Because the scholarship aid is available to students attending elementary and secondary institutions, and because the religious Private School Partners infuse religious tenets into their educational curriculum, any funds provided to the schools, even if strictly limited to the cost of

education, will result in the impermissible aid to Private School Partners to further their missions of religious indoctrination to purportedly "pubic" school students. Therefore, the Scholarship Program is subject to the heightened risks described in *Americans United*. *See* 648 P.2d at 1083-84.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article IX, Section 7 of the Colorado State Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

c. Article II, Section 4 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article II, Section 4 of the Colorado Constitution because it compels taxpayers, through the use of funds provided by the Public School Finance Act, to support the churches and religious organizations that own, operate, and control many of the private religious schools that are participating in the Scholarship Program.

Article II, Section 4 of the Colorado Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Colo. Const. art. II, Section 4.

In *Americans United*, the Colorado Supreme Court also addressed a challenge to the college tuition-assistance program as being in violation of Article II, Section 4 of the Colorado Constitution. Similar to the Court's analysis of whether the program violated Article IX, Section 7, the Court did not view the college tuition-assistance program as constitutionally flawed under Article II, Section 4 as providing "compelled support" from Colorado taxpayers. In reaching that determination, the Court in *Americans United* based its conclusion on the following factors: (1) the program was designed for the benefit of the students, not the institution; (2) the program was available to all students at institutions of higher learning; and, (3) the financial assistance was distributed under statutory conditions calculated to significantly reduce any risk of fallout assistance to the participating institution. *See* 648 P.2d 1072, 1082.

Here, as discussed above with respect to Article IX, Section 7, the Court agrees, and the testimony of the school officials reflect, that the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools. However, the Court is still faced with the glaring discrepancy between the college tuition-assistance program in *Americans United* and the Scholarship Program at hand. While there is significant language in the policy enacting the Scholarship Program intended to alleviate concerns regarding how public finances are to be used, e.g., an annual audit and the required production of financial records at the request of Douglas County School District officials, neither the Scholarship Program nor the contracts between the Choice Scholarship School and Private School Partners contain any express language that limits or conditions the use of the state funds received by the partner schools for the strict purpose of secular student education.

To the contrary, as discussed above in regard to Article IX, Section 7, the public funds in this case are *not* limited to those seeking an education at an institution of higher learning, but rather to primary elementary and secondary educational schools. Additionally, the mission statements and described purposes of the participating Private School Partners are to infuse religious teachings into the curriculum. It necessarily follows that any public taxpayer funding provided to the partner schools, even for the sole purpose of education, would inherently result in compulsory financial support to a sectarian institution to further its goals of indoctrination and religious education. Further, as discussed above, as the Scholarship program is presently constituted, Private School Partners are allowed to, and, as the evidence reflects, undoubtedly will use public funds to further their respective religious missions.

The conclusion that necessarily follows is that, under the Scholarship Program any "compelled support" by way of taxpayer funding to a Private School Partner whose mission is to provide an education based on theological and religious principles is a violation of Article II, Section 4 of the Colorado Constitution. As the Court stated in *Americans United*, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id.* at 1084.

Accordingly, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

d. Article IX, Section 8 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article IX, Section 8 because the Scholarship Program: (1) subjects scholarship recipients to religious admission criteria; (2) requires scholarship recipients to attend religious services if the Private School Partner directs its own students to attend ; and, (3) subjects scholarship recipients to the teachings of religious tenets and doctrines. Defendants argue that this Article IX, Section 8 does not apply to the Scholarship Program because the Private School Partners are not "public" institutions.

Article IX, Section 8 requires that:

> [1] No religious test or qualification shall ever be required of any person as a condition of *admission* into any public institution of the state, either as a teacher or student; and [2] no teacher or student of any such institution shall ever be required to *attend* or participate in any religious service whatsoever. [3] No sectarian tenets or doctrines shall ever be *taught* in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Colo. Const. Art IX, Section 8 (emphasis added).

A fundamental principle of Colorado law is that any person of any religion or no religion may become a student of a public institution. *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), *rev'd on other grounds*, *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1982). On their face, the following two provisions in Article IX, Section 8 protect students enrolled in public schools from forced attendance at religious services and forced exposure to religious teachings. *See* Colo. Const. art. IX, Section 8.

All of the students participating in the Scholarship Program are "enrolled" at the newly developed Choice Scholarship Charter School. Charter schools are defined as "public schools" "for any purpose under Colorado law." *See* C.R.S. § 22-30.5-104(4). Similarly, charter schools

are public entities for purposes of constitutional and statutory liability. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010). Charter schools may not discriminate on the basis of religion, sexual orientation, or disability among others. C.R.S. § 22-30.5-104(b)(3). Finally, charter schools are required to "[o]perate . . . pursuant to . . . article IX of the state constitution." C.R.S. § 22-30.5-204(2)(a).

The Choice Scholarship School was specifically enacted as a public charter school for the purposes of implementing the Scholarship Program. During the hearing, the witnesses testifying on behalf of Defendants conceded that the Choice Scholarship School was designed for pupil "counting" purposes in order to qualify for state public funding.

Accordingly, because students participating in the Scholarship Program are still "counted" for purposes of receiving their per pupil revenue, the treatment of scholarship recipients must comport with Article IX of the Colorado Constitution requiring the Douglas County School District to protect the religious liberty of the scholarship recipients that are enrolled in the Choice Scholarship School. Specifically, public school students participating in the Scholarship Program should not be subject to: (1) religious qualifications for admission; or (2) compelled attendance at religious services and mandatory religious instruction.

i. Qualifications for Admission

First, Article IX, Section 8 of the Colorado Constitution forbids the use of religious qualifications or standards for admission into the public schools. Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, the evidence and other testimony presented at the hearing makes it clear that *enrollment* in the Choice Scholarship School is predicated on a student's

admittance into one of the Private School Partners. In the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the CCS [Choice Scholarship School], a student must … be *accepted* and attend a qualified Private School Partner all as defined and described in DCSD Board Policy JCB." *See* Charter Sch. App. (Ex. 5) (emphasis added).

The enrollment policy carries significant constitutional ramifications because under the Scholarship Program, Private School Partners will *not* be required to change their admission criteria to accept students participating in the program. This was confirmed by both Dr. Cutter and Dr. Fagen. The Choice Scholarship School Application specifically states that: "Choice Scholarship recipients shall satisfy all admission requirements of the Private School Partner on their own." Further, the policy enacting the Scholarship Program states, in the section entitled, "Private School Partner's Conditions of Eligibility," that "religious Private School Partners may make enrollment decisions based upon religious beliefs." *See* Policy JCB (Ex. 107). Further, in Scholarship Program's "Frequently Asked Questions," the Douglas County School District states, "[i]t is not our intention in this program to change any school's application process." *See* FAQ (Ex. 2). This fact is also corroborated by testimony from Dr. Fagen, Dr. Cutter, and Messrs. Gehrke and Bignell.

Since admission into the Choice Scholarship School rests on whether or not a student meets the sectarian and faith based qualifications of the participating religious Private Partner Schools participating in the Scholarship Program, a student may not qualify under the Scholarship Program unless the student meets the faith based qualifications of a participating private school. *See*, *supra*, ¶¶ 42-43.

These admission qualifications violate Article IX, Section 8 of the Colorado Constitution. Because admission into the Scholarship Program, a "public program," is predicated on acceptance into one of the Private School Partners, the vast majority of which have faith based admission requirements, the Court concludes, based on the overwhelming evidence, that the Scholarship Program imposes a "religious test or qualification . . . as a condition of admission" into a public school, in violation of Article IX, Section 8 of the Colorado Constitution.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

ii. Compelled attendance at religious services and mandatory religious instruction

The undisputed evidence reflects that the Scholarship Program, in theory, provides scholarship recipients participating in the Scholarship program with an "opt out" or "waiver" from any required religious services at a Private School Partner. The policy enacting the Scholarship Program states in the section entitled, "Private School Partner's Conditions of Eligibility," that "[a] religious Private School Partner shall provide Choice Scholarship parents the option of having their child receive a waiver from any required religious services at the Private Partner School." *See* Charter Sch. App. (Ex. 5).

However, upon review, the undisputed evidence clearly reflects that any such "opt out" or "waiver" fails to pass muster under Article IX, Section 8. For example, as set forth in the Scholarship Program's "Frequently Asked Questions," the waiver "does not include instruction" and although "[s]tudents may opt-out of participation" in worship service, students may nevertheless "be required to respectfully attend, if that is the school's policy." *See* FAQ (Ex. 2).

This fact is not disputed by Defendants and was corroborated by the individual Private School Partner Applications, *see*, *supra*, ¶¶ 51-54, as well as the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell. Moreover, some Private Partner Schools considered a total and complete opt out of religious services and instruction to be a "deal breaker." (*See*, *supra*, ¶ 53). Similarly, in an email exchange between Robert Ross, legal counsel for the Douglas County School District, and School District officials, Mr. Ross described the waiver from religious services as "[n]ot much of an opt out" because the waiver did not cover attendance at worship services or instruction. *See* March 28, 2011 Email (Ex. 97). Dr. Fagen, Dr. Cutter, and Mr. Carson testified in unanimity concerning the distinction between religious services and religious instruction. Further each corroborated in their testimony that the opt out waiver was limited to religious services only, and that Private Partner Schools were entitled to compel attendance but not participation in religious services by scholarship recipients.

The fact that students may be required to attend religious services "if that is the school's policy" disregards the plain language of Article IX, Section 8. Furthermore, the Scholarship Program, as discussed in great detail above, not only allows for religious teaching, but that is precisely the mission of the religious Private School Partners participating in the program.

Defendants' argument that the prohibitions of Article IX, Section 8 do not apply to the Scholarship Program because the Private School Partners are not public is not persuasive. Defendants enroll students into a public charter school for the benefit of "counting" in order to receive public funds. Student admission into the charter school is predicated on the students' admission into one of the Private School Partners and once the students begin attending classes, they may be subject to mandatory attendance at religious services and religious teachings and

indoctrination within the educational curriculum. Defendants' assertion that the Private School Partners are not "public," thereby availing themselves from the requirements of Article IX, Section 8 of the Colorado Constitution, is unavailing in light of the weight of the evidence and applicable law here.

In Colorado, *Americans United* remains the benchmark by which the constitutionality of public funding of private schools is judged. Defendants' well intentioned effort at providing choice in schools simply misses that mark.

Accordingly, because of the Scholarship Program's provisions allowing for faith based admission standards, compelled attendance at religious services, and teaching of religious tenets to students enrolled in a public charter school are violations of art. IX, § 8, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

e. The Public School Finance Act, Colorado Revised Statutes, Section 22-54-101 et seq. *& Article IX, Section 2 of the Colorado Constitution*

Plaintiffs contend that the Douglas County School District intends to use funds distributed by the Colorado Department of Education under the Public School Finance Act to pay tuition at private schools, in direct contravention of both Article IX, Section 2 of the Colorado Constitution and the Public School Finance Act, C.R.S. § 22-54-101 *et seq*. Specifically, Plaintiffs allege that the Scholarship Program contradicts the plain language of the "thorough and uniform" clause in Article X, Section 2 and undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

Article IX, Section 2 of the Colorado Constitution requires that public funds be used "for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state," where all K-12 students "may be educated gratuitously." *See* Colo. Const., art. IX, Section 2. The Colorado General Assembly enacted the Public School Finance Act "in furtherance of the general assembly's duty in correlation of section 2 of Article IX to provide for a thorough and uniform system of public schools throughout the state." *See* C.R.S. § 22-54-102(1).[5] [6] Taken together, Article IX, Section 2 and the Public School Finance Act establish a clear intent and explicit directive that funds distributed to school districts under the Public School Finance Act must be used only to support free public education at public schools.

Plaintiffs first argue that the Scholarship Program runs contrary to the framers' intent of the "thorough and uniform" clause because participants of the Scholarship Program will not be enrolled in, be in attendance at, or receive instruction in a Douglas County public school. Plaintiffs further allege that the Scholarship Programs violates the requirement of Article IX, Section 2 that each child of school age has the opportunity to receive a free education. *See Lujan*, 649 P.2d at 1017.

The drafters of the Colorado Constitution charged the General Assembly with "the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one

[5] The Public School Finance Act is also the legislative means by which Colorado public schools are funded and explicitly and exclusively sets aside education funding for "public education" and "public schools." C.R.S. §§ 22-54-101, -102, -104(1)(a), §§ 22-55-101(1), -106(1)(b), § 22-1-101.

[6] A "public school" is defined as "a school that derives its support, in whole or in part, from moneys raised by a general state, county, or district tax." C.R.S. § 22-1-1-1(1). Conversely, a "private school" is a school that "does not receive state funding through the 'Public School Finance Act of 1994,' article 54 of this title, and that is supported in whole or in part by tuition payments or private donations." C.R.S. § 22-30.5-103(6.5).

years, may be educated gratuitously." Colo. Const. art. IX, Section 2. According to the drafters, it is the "system of free public education" that must be thorough and uniform. *Id.* The Colorado Supreme Court affirmed this notion in *Lujan* by stating that "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. *See id.* at 1025 (emphasis added).

Here, the Court is not persuaded that Plaintiffs have presented the Court with sufficient evidence to support their argument that the Scholarship Program is constitutionally invalid under Article IX, Section 2. While the Scholarship Program fails to comport with other Constitutional provisions, the Court finds that Plaintiffs have not provided sufficient evidence that the Scholarship Program prevents students from otherwise obtaining a free public education in Douglas County. Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive.

However, Plaintiffs also urge the Court to conclude that the Scholarship Program undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

The Public School Finance Act establishes a finance formula for "all school districts" in the state. C.R.S. § 22-54-102(1). Under the Act, the first step in Colorado public school funding is the determination of the "Total Program" amount for each school district. The amount "represents the financial base of support for public education in that district." C.R.S. § 22-54-104(1)(a). A district's Total Program is made available to the district by the state "to fund the costs of providing public education." *Id.* The Act directs that the formula "be used to calculate for each district an amount that represents the financial base of support for public education in

that district" and that the monies "shall be available to the district to fund the costs of providing public education." C.R.S. § 22-54-104(1)(b).

The formula calculates the per pupil funding amount for each school district based on a statewide base funding amount adjusted by "factors" intended to address certain characteristics of each school district. *See* C.R.S. § 22-54-104. A district's Total Program funding is determined by multiplying the district's per pupil funding amount by the district's funded pupil count, and adjusting by specific statutory factors. *Id.*

"Funded pupil counts" are self-administered by school districts each year. Pursuant to Colorado regulations, "[a] district's pupil membership shall include only pupils enrolled in the district and in attendance in the district." 1 CCR § 301-39:2254-R-5.00. Local districts perform this pupil count each October 1 and report the numbers to the State Board and the Department of Education by November 10. 1 CCR § 301-391:2254-R-3.01.

A school district's funding under the Act depends on its pupil enrollment, which is generally defined as the number of pupils enrolled in the school district on October 1 of the applicable budget year. *See* C.R.S. §§ 22-54-103(7)(e) and (10)(a)(1); 1 CCR § 301-391:2254-R-3.01. For instance, the number of pupils enrolled on October 1, 2010, determines funding for the budget year beginning July 1, 2010. Because the fiscal year begins before the count date, funding under the Act is distributed based on estimated pupil counts. After October 1, once all enrolled pupils have been counted, funding under the Act is adjusted to reflect the actual count. *See* 1 CCR § 301-391:2254-R-3.01. This formula was corroborated by Ms. Emm at the injunction hearing.

Each school district's Total Program funding under the Act is composed of the "local share," which is mainly comprised of the proceeds of property taxes levied on the real property within the district's boundaries and the "state share," which is state funding and provides the difference between a district's Total Program and its local share. C.R.S. § 22-54-106. State aid provides the difference between a district's total program funding and the district's local share. *Id.* The state share is funded from state personal income, corporate, sales, and use taxes, as well as monies from the public school fund established by Article IX, Section 3 of the Colorado Constitution. *Id.*

The Colorado Department of Education distributes money to school districts in twelve approximately equal monthly payments beginning on July 1. Because the "funded pupil count" is not determined until October 1 and reported until November 10, in the first half of the fiscal year, the payments are based upon pupil count and assessed value estimates. *See* 1 CCR § 301-391:2254-R-3.01. For the 2011-2012 school year, Douglas County School District estimates that the local share of these funds will account for 33.14% of the per pupil funding for the Douglas County School District, while state sources will account for the remaining 66.86%. The school district estimates that the per pupil revenue from the state for the 2011-2012 school year will be roughly $6,100. This amount was confirmed by witnesses testifying on behalf of Defendants at the injunction hearing. Even though the scholarship recipients will not spend any amount of time in an instructional setting in a Douglas County public school, the witnesses testifying on behalf of Defendants confirmed that the Douglas County School District intends to obtain the full per pupil funding amount from the state for each scholarship student.

Here, the Court is persuaded by the overwhelming evidence in the record that the Scholarship Program fails to comport with the Public School Finance Act provisions which promote "uniform" funding of education across the state. The formula under the Act is predicated on each district counting the students it has enrolled in the "schools of the state," and then allocating state funding based on that public school count. The Scholarship Program, as presently constituted, effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts. The undisputed evidence and the testimony of Mr. Hammond, Dr. Cutter, Dr. Fagen, and Mr. Carson, all confirmed that the development of the Choice Charter School was devised specifically as a mechanism to obtain funding from the state and to circumvent any legal impediments the Scholarship Program might encounter. Dr. Cutter, Dr. Fagen, and Mr. Carson additionally acknowledged that the Choice Scholarship School has no building, no curriculum, and no books. Thus, the Court finds that the enactment of the Choice Scholarship School violates the Public School Finance Act funding balance and inappropriately taps resources from other Colorado school districts.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive. However, the Court does find that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits on their claim regarding the Public School Finance Act, Plaintiffs have demonstrated that the Scholarship Program violates the Public School Finance Act, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

f. Article V, Section 34 of the Colorado Constitution

Plaintiffs argue that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution because the Scholarship Program provides taxpayer funds to sectarian institutions and to institutions not under absolute control of the state for nonpublic purposes. To the contrary, Defendants maintain that Article V, Section 34 is not applicable as the Scholarship Program does not utilize General Assembly appropriations and, even if the Scholarship Program did use General Assembly appropriations, the Scholarship Program would withstand constitutional challenge because it falls under the public purpose exception to the absolute control provision.

Article V, Section 34 of the Colorado Constitution states, in pertinent part, that:

> No appropriation shall be made for . . . educational . . . purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

Colo. Const., art. IX, Section 34.

Defendants first argue that Article V, Section 34 does not use General Assembly appropriations, a proposition that is unsustained by the factual record before the Court. Despite Defendants' assertion, the undisputed evidence and testimony presented to the Court in this matter demonstrates that the Scholarship Program is indeed funded by state appropriations. During the injunction hearing, multiple witnesses testifying on behalf of Defendants admitted the Douglas County School District's intention to direct state funds to the participating Private School Partners. That the payment of state funds is made directly to the Private School Partners on behalf of the students does not change the character or origin of the funds. In fact, the uncontroverted evidence before the Court was that the parents of the participating scholarship recipient are required to sign over the check provided to the particular school by restrictive

endorsement, thereby completing the somewhat circular process of paying state funds to the participating Private School Partners. Upon receiving the tuition payments, both Messrs. Gehrke and Bignell testified that their schools would use the payments to, among other things, support the school, carry out the school's mission, enhance chapel facilities, and pay down loans funded from other sectarian institutions. Unlike *Americans United,* where the college tuition-assistance program had preventative safeguards to monitor where the funds ultimately wind up, the Scholarship Program has no procedures or safeguards in place to prevent the tuition funds from being used to promote a Private School Partner's sectarian agenda.

In the alternative, Defendants contend that, even if General Assembly appropriations were utilized, the Scholarship Program falls within the "public purpose" exception to the absolute control provision set forth in *Americans United,* 648 P.2d at 1085 (quoting *Bedford v. White*, 106 P.2d 469, 476 (Colo. 1940)). The public purpose exception renders perceived constitutional infirmities a nullity if the asserted public purpose is "discrete and particularized" and clearly outweighs "any individual interests incidentally served by the statutory program" when measured against the proscription of Article V, Section 34. *See id.* at 1086.

However, the Scholarship Program at issue here is factually inapposite to the principles enunciated in *Americans United*. Through the testimony of Mr. Hammond, and the various school officials, the Scholarship Program appropriates taxpayer funds for private schools that are not under state control. The Scholarship Program, moreover, does not contain any of the prophylactic measures that led the Court in *Americans United* to find that the college tuition-assistance program satisfied the public purpose exception. In contrast to the college tuition-assistance program that was found to satisfy the public purpose exception in *Americans United*,

the Scholarship Program here applies directly to "elementary and secondary education" and thus the risk of religion "intruding into the secular educational function" is significantly higher. *See id.* at 1084 (citations omitted).

The overwhelming undisputed evidence and testimony in the record, most notably the testimony of Messrs. Gehrke and Bignell, confirms that, not only is the risk of religion intruding into the secular educational function great, that risk is inevitable and unavoidable due to the very structure of the Scholarship Program. *See, e.g.,* March 7, 2011 (Ex. 87) ("[I]f a family wanted to opt out of religious instruction, they would have to prepare their child to bolt out of any class and I suspect that would occur frequently."). Students attending a sectarian Private School Partner under the Scholarship Program have no choice but to receive their education with the school's religious theories and theology embedded therein. This factual reality was corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke, Bignell, and Carson, as well as the Private School Partners' Scholarship Program applications. *See, supra,* ¶ 45. As detailed above, Dr. Cutter testified that the original plan for the Scholarship Program envisioned an "opt out" provision which would allow students to remove themselves from both religious services and instruction. However, Mr. Cutter testified, and the evidence reflects, that the Private School Partners thought that such a comprehensive "opt out" provision would be a "deal breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88).

Thus, the totality of the evidence in the record dictates the Court's determination that the core principles implanted in the Scholarship Program are fundamentally at odds with the college tuition-assistance program and the Colorado Supreme Court's holding in *Americans United.* On

that basis, the Court finds that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution.

Moreover, and perhaps more importantly, the Scholarship Program violates the blanket prohibition enumerated in Article V, Section 34 that forbids state funds from being provided to any denominational or sectarian institution or association. This clause, which was not considered in *Americans United*, reflects the conviction that sectarian interests are inherently private. The Court finds, and the record is unquestioned, that 19 of the 23 Private School Partners participating in the Scholarship Program are "denominational or sectarian institutions or associations" for the purposes of Article V, Section 34.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

g. Article IX, Section 3 of the Colorado Constitution

Plaintiffs contend that the Scholarship Program violates Article IX, Section 3 of the Colorado Constitution because the Scholarship "funnels" monies from the "public school fund" to private schools, rather than to "schools of the state."

Article IX, Section 3 directs, in pertinent part, that:

> The public school fund of the state shall . . . forever remain inviolate and intact and the interest and other income theron, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such a manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX.

Colo. Const., art. IX, Section 3.[7]

Article IX, Sections 3, 5, 9 and 10 of the Colorado Constitution established the "public school fund," which consists of the proceeds of lands granted to the state by the federal government upon statehood. In 1875, the United States Congress passed the Colorado Enabling Act authorizing the admission of Colorado as a state. *See* 18 Stat. 474 (7); *see also Lujan*, 649 P.2d at 1011. Section 7 of the Enabling Act granted the state title to two sections in every township within its boundaries "for the support of common schools." *Id.* This property is referred to as the "state school lands." Section 14 of the Enabling Act further specified that the state school lands: "[S]hall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools." 18 Stat. 474 (14). These provisions of the Enabling Act create a federal trust (the "school lands trust") for the sole and exclusive benefit of the Colorado state public schools.

The legislature additionally created the "public school fund" within the State Treasurer's office which, among other things, consists of the proceeds of the public school lands. Colo. Const. art. IX, Section 17(2)(a); C.R.S. § 22-41-101(2). Income held in the public school fund is transferred "periodically" to the "state public school fund" together with, *inter alia*, moneys appropriated by the General Assembly from the general fund to meet the state's share of the total program funding for all school districts under the Public School Finance Act. C.R.S. § 22-54-114(1).

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[7] Article IX, Section 3 was amended in 1996 by ballot initiative ("Amendment 16") to add, *inter alia*¸ the following language: Distributions of interest and other income for the benefit of public schools; provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes. Thus, Article IX, Section 3 defines "schools of the state" specifically as "public schools."

The Colorado Supreme Court has previously noted that "income from the public school fund is owned by the state and is distributed as a gratuity to the various counties and school districts to supplement local taxation for school purposes" but such funds cannot be distributed in "contravention of constitutional mandates." *See Craig v. People*, 299 P. 1064, 1067 (Colo. 1931).

Generally, when interpreting constitutional and statutory provisions, courts seek to ascertain intent, starting with the plain language of the provision and giving the words their ordinary meaning. *See, e.g., Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005); *Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1121 (Colo. App. 2009. Courts additionally interpret constitutional and statutory provisions as a whole and attempt to harmonize all of the contained provisions. *See id.*

According to H.B. 10-1376 (the "2010 Long Bill"), moneys from the "public school fund" account for more than $100 million in public school funding each year in Colorado. *See* H.B. 10-1376 (Ex. R.); *see also* State Def. Resp. at 19. By judicial admission, Defendants acknowledge that interest derived from the investment of the "public school fund" is credited to the "state public school fund," which provides an ongoing source of revenue for the state's share of the districts' total program funding and other educational programs. *Id.* As a result, the "public school fund" is, as Defendants noted, "one component" of public school funding in Colorado. *See id.* at 20. Mr. Hammond additionally testified at the injunction hearing that the state could "claw back" moneys that the state provides to Douglas County for the Scholarship Program students if the Scholarship Program were found to be improper.

Although Defendants allege that income for the "public school fund" accounts makeup an insignificant amount of public school funding, Defendants' argument misses the mark. Giving Article IX, Section 3 its plain and ordinary meaning, funds from the "public school fund," regardless of amount, must "forever remain inviolate" and can be disbursed only to public "schools of the state." Based on the 2010 Long Bill, the judicial admission by Defendants, and the testimony of Mr. Hammond, the undisputed facts confirm that, under the Scholarship Program, money from the "public school fund," which flows into total public school funding, will ultimately end up being disbursed to non-public schools in "contravention of constitutional mandate" as part of the Scholarship Program tuition payments. *See Craig*, 299 P. at 1067.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that that funds from the "public school fund" will be used, in part, to pay tuition to private schools, in violation of Article IX, Section 3 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

h. Article IX, Section 15 of the Colorado Constitution

Plaintiffs allege that under the Scholarship Program, Defendants will violate the local control provision, Article IX, Section 15 of the Colorado Constitution by abdicating control over the instruction of participating students and sending locally raised funds and state funds outside the district.

Article IX, Section 15 of the Colorado Constitution provides

> The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the

> district. Said directors shall have control of instruction in the public schools of their respective districts.

Colo. Const. Art IX, Section 15.

Plaintiffs' argument that Defendants' alleged abdication of control over instruction of students in the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution is an issue of first impression in Colorado. Plaintiffs ask the Court to distinguish the facts in this case to the other Colorado cases having already previously adjudicated this same provision.

Relying on *Owens v. Colo. Cong. of Parents,* where the Colorado Supreme Court rejected an unconstitutional state-wide school voucher program because the program directed school districts to turn over a portion of their locally-raised funds to nonpublic schools over whose instruction the districts had no control, Plaintiffs contend that the "local control" provision contained in Article IX, Section 15 of the Colorado Constitution requires that local school boards "have control of instruction in the public schools of their respective districts" and the "responsibility for the instruction of their students." *See* 92 P.3d 933, 938 (Colo. 2004). Relying on this statement, Plaintiffs contend that Defendants in this action have violated Article IX, Section 15 because the Douglas County School District exercises no control over the curricula, educational goals, hiring policies, or enrollment procedures of the Private School Partners.

As argued by Defendants, the primary case law in this area focuses on interactions between local districts and the state. These cases generally discuss whether the state has excessively encroached into the local control of a district. In light of the Scholarship Program's inability to overcome constitutional muster on other grounds, the Court is not now inclined to undertake Plaintiffs' position that is unsupported by any case law in Colorado.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution as it is not dispositive of the issues in dispute.

i. The Contracting Statute, Colorado Revised Statute, Section 22-32-122

Finally, Defendants contend that the Scholarship Program is authorized under C.R.S. § 22-32-122 (the "Contracting Statute") which allows school districts to contract for "educational services." *See* C.R.S. § 22-32-122. More specifically, Defendants assert that the Contracting Statute grants school districts the broad authority to contract with private schools for the provision of a public education to public school students. The Court finds that this interpretation is exceedingly broad and inconsistent with the underlying legislative intent of this statute.

The Contracting Statute states, in pertinent part, that:

> Any school district has the power to contract with another district or with the governing body of a state college or university, with the tribal corporation of any Indian tribe or nation, with any federal agency or officer or any county, city, or city and county, or with any natural person, body corporate, or association for the performance of any service, including educational service, activity, or undertaking which any school may be authorized by law to perform or undertake . . . . Any state or federal financial assistance which shall accrue to a contracting school district, if said district were to perform such service, including educational service, activity, or undertaking individually, shall, if the state board finds the service, including educational service, activity, or undertaking is of comparable quality and meets the same requirements and standards as would be necessary if performed by a school district, be apportioned by the state board of education on the basis of the contractual obligations and paid separately to each contracting school district in the manner prescribed by law.

C.R.S. § 22-32-122.

If a statute is ambiguous, courts may determine the intent of the General Assembly by considering the statute's legislative history and the problem intended to be addressed by the

legislation. *See Rowe v. People,* 856 P.2d 486 (Colo. 1993). Here, Defendants argue that the General Assembly amended the Contracting Statute to specifically authorize local school boards to contract with private schools to provide educational services. *See* H.B. 93-1118. Defendants contend that H.B. 93-1118 was drafted by the Colorado House of Representatives to overturn an opinion of the Attorney General's Office that prohibited state funding of public school students who attended private schools.

A review of the legislative history provides clarity on this issue. Although the original House version of H.B. 93-1118 sought to allow such outsourcing to private schools for educational services, the Senate felt that the House bill had "really taken a wrong turn" and revised its language significantly. *See* Trans. of Senate 2nd Reading, 46:13-19; Versions of H.B. 1193. When asked if the revised bill would allow a school district to enroll public school students in private schools and "count them" in the school district's enrolled student count for funding, Senator Dottie Wham (R-Denver), the sponsor of the bill, stated: "It does not do that anymore. Or allow it. *As the language in the law does not allow it*." *Id.* at 47:22-23 (emphasis added). Senator Wham additionally affirmed Senator Tebedo's (R-Colorado Springs) comment that "if the kids want to go to the private school, they can, but [the school districts are] not going to get to keep their enrollment count." *Id.* at 48:3-4.

Thus, the legislative history of the Contracting Statute compels the conclusion, and the Court finds, that the final version of the Contracting Statute does not confer upon a public school or school board the broad authority, as Defendants suggest, to exclusively contract with a private school to provide *all* educational services rendered to select students. Rather, the legislative history confirms that the General Assembly intended that the Contracting Statute implemented

into law would merely allow school districts to contract for particular educational services not offered by the public schools, such as foreign-language instruction. *See* Trans. of Senate 2nd Reading, 47:8-13.

In a further effort to bolster its viability, Defendants attempt to align the Scholarship Program with other statutory schemes that appropriately apply the provisions of the Contracting Statute, e.g., *inter alia*, the Colorado Preschool Program, C.R.S. §§ 22-28-101, *et. seq*; the Exceptional Children's Educational Act, C.R.S. §§ 22-20-101, *et. seq*; the Gifted and Talented Students Act, C.R.S. § 22-26-101, *et. seq*, and the Concurrent Enrollment Programs, C.R.S. §§ 22-35-101, *et. seq*. Each of these unique or specialized programs, however, are factually disparate from the Scholarship Program Defendants have implemented here. Each of these comparative programs is limited in scope and narrowly tailored to a specific educational issue or concern thereby comporting with the Contracting Statute which grants school district's the authority to contract with private entities for educational services.

The Court is not persuaded by Defendants' sweeping generalization that enjoining the Scholarship Program will put these programs in jeopardy. The Court finds that these statutorily enacted programs are factually and legally dissimilar to the Scholarship Program at issue here. Accordingly, the Court will not delve into the merits of Defendants' argument comparing the Scholarship Program to other statutorily created programs. The Court finds that the dissimilarities between these programs and the Scholarship Program are sufficiently significant so as not to place these other statutory schemes at risk of legal challenge or rendering them constitutionally infirm.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Contracting Statute does not permit school districts the broad authority to contract with private schools for the provision of a public education to public school students, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

WHEREFORE, in light of the reasoning above, Plaintiffs' Motions for Preliminary Injunction are **GRANTED**.

IV.
ORDER

WHEREFORE, based on the above findings of fact and conclusions of law, Defendants' Motion to Dismiss is **DENIED** and Plaintiffs' Motions for Preliminary Injunction are hereby **GRANTED** and hereby made permanent.

Dated this 12th day of August, 2011.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge

DCSD CHOICE SCHOLARSHIPS EXECUTIVE SUMMARY*

The Douglas County School District is interested in providing each Douglas County student the maximum opportunity for success. The District believes that helping parents match students to the best possible learning environment is critical for the success of some students and highly beneficial to others. Therefore, DCSD offers our families the opportunity to choose from the following menu of educational options that will best meet their needs: neighborhood schools, charter schools, magnet schools, a new home education program, contract schools, and scholarships to Private School Partners as described below.

Pilot Choice Scholarship Program

- DCSD will establish a pilot Choice Scholarship program for up to 500 students choosing to attend one of our Private School Partners in the fall of 2011.
- DCSD will annually report and review the program to measure its success in meeting the needs of the students. The academic performance of Choice Scholarship students will be compared to those choosing other DCSD learning options.

Private School Partnerships

- DCSD will seek partnerships with private schools both inside and outside Douglas County.
- Private school partners will not be required to change their admission criteria to accept Choice Scholarship students.
- Private school partners will be subject to the following Conditions of Eligibility in order to accept Choice Scholarship students, including:
    - Providing to the District attendance data, and qualifications of teaching staff.
    - Accreditation by recognized state or national accreditation organization(s), which include review of academic standards, curriculum, employment, student enrollment, and student conduct policies.
    - Producing student achievement and growth results for Choice Scholarship students at least as strong as what DCSD neighborhood and charter schools produce.
    - Religious Private School Partners will provide the option of a waiver to DCSD students for any required religious services.
    - Private school partners will not discriminate in admission of 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, so long as such employment and enrollment decisions are not otherwise prohibited by law.
    - Evidence of stability such that Choice Scholarship students will be reasonably assured of the school's continued operation.
    - DCSD students may withdraw from the Private School Partner and enroll in a DCSD school at any time without further obligation to the Private School Partner. If a Choice Scholarship student does not remain enrolled

* This Executive Summary is intended as an overview only. If there is any conflict between this summary and the Policy, the language of the Policy shall be controlling.

in the Private School Partner, the school may receive only the *pro rata* amount of the Choice Scholarship for that period in which the student was enrolled.

- Private School Partners will provide evidence of insurance and/or indemnify DCSD against any injuries to DCSD students attending the Private School Partner.

Choice Scholarship Participants

- To be eligible for the DCSD Choice Scholarship, 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.
- Choice Scholarship participants will continue to be eligible if they remain Douglas County residents.
- DCSD students wishing to receive a Choice Scholarship to attend one of the Private School Partners will complete a Choice Scholarship application.
- If the number of Choice Scholarship applicants exceeds the 500 Choice Scholarships available in the pilot, a lottery will be used to select Choice Scholarship recipients.
- Choice Scholarship recipients shall satisfy all admission requirements of the Private School Partner on their own. Eligibility for a Choice Scholarship does not guarantee admission to any Private School Partner. Choice Scholarship recipients are encouraged to learn about the Private School Partners' admission criteria before applying for a Choice Scholarship.
- Choice Scholarship recipients are eligible for consecutive yearly participation for the duration of the program.
- Siblings of Choice Scholarship participants shall have no priority to receive Choice Scholarships.
- If a private school fails to meet the Conditions of Eligibility, the Choice Scholarship students enrolled in that school may to apply to another Private School Partner.
- Choice Scholarship students will be required to attend CSAP testing (or other statewide or district assessments) at the time and place designated by DCSD. This testing compliance is mandatory for participation in the Choice Scholarship program.
- DCSD will provide Choice Scholarships in the amount equal to 75% of the per pupil revenue (**$4,575** in the 2011-2012 school year) or the actual cost of the Private School Partner's tuition, whichever is less. Parents/guardians will be responsible for any additional fees assessed by the Private School Partner.
- Parents/guardians of Choice Scholarship recipients will receive 4 equal scholarship payments each year. Choice Scholarship checks will be made out to the parents/guardians of Choice Scholarship recipient and sent to the Private School Partner that the student chooses to attend. Parents will be required to restrictively endorse the check for the sole use of the Private School Partner.
- DCSD will not create specialized programs in Private School Partners.
- Participation in the Choice Scholarship program will be viewed as a voluntary parental placement in the private school for purposes of special education services. District-provided services to parentally-placed students with disabilities are limited.

Board File: JCB

CHOICE SCHOLARSHIP PROGRAM (PILOT)

A. Purposes and Findings

1. Douglas County School District seeks to expand its education system that maximizes choice, celebrates freedom, improves quality through competition, promotes excellence, and recognizes that the interests of students and parents are paramount.

2. DCSD provides school choice to students and parents through numerous programs, including open enrollment, option schools, magnet schools, charter schools, on-line programs, home-education programs and partnerships, and contract schools. The Choice Scholarship Program is another way in which DCSD seeks to maximize school choice for students and parents to meet the individualized needs of each student.

3. The purposes of the Choice Scholarship Program are to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending.

4. The District finds that the Choice Scholarship Program furthers the requirements of nondiscrimination on account of religion with respect to civil rights as set forth in Section 4 of Article II of the Colorado Constitution.

5. The District finds that the Choice Scholarship Program does not violate Section 7 of Article IX, and that it fulfills the local control principle of Section 15 of Article IX, of the Colorado Constitution.

6. The District further finds that the Choice Scholarship Program is consistent with the legal principles contained in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933 (Colo. 2004); and *Americans United for Separation of Church and State Fund, Inc. v. State of Colorado*, 648 P.2d 1072 (Colo. 1982).

7. The District finds that, while great care has been taken to develop the Choice Scholarship Program and to measure its effects on the District and its various stakeholders, it is in the best interests of the students, parents, employees, and community that a pilot program with limited participation be established until a record of its effects on student performance and financial viability can be reviewed and reported.

8. The District further finds that, in order to properly fund and to minimize negative effects on the District and state education funding, certain conditions of eligibility for participation by students in the Choice Scholarship Pilot Program, including residency and enrollment status, shall be established.

9. It is the intention of the District not to discriminate among nonpublic schools participating as Private School Partners. So long as the Private School Partners meet the Conditions of Eligibility in Section E.3 below, Private School Partners need not modify their admission criteria or education programs to participate in the DCSD Choice Scholarship Program. The District in no way promotes one Private School Partner over another, religious or nonreligious.

B. Definitions

1. "Board of Education" or "Board" means the Board of Education for Douglas County School District Re-1.

2. "Conditions of Eligibility" means the standards required of Private School Partners as set forth in Section E.3 of this Policy.

3. "District" or "DCSD" means Douglas County School District Re-1.

4. A "Choice Scholarship" is a check, payable by the District to the parent of a Choice Scholarship student, which can be used exclusively pursuant to the terms of this Policy and any associated administrative policies and procedures for the sole purpose of paying the tuition at a Private School Partner.

5. "Choice Scholarship Program" means the District's educational program described in this Policy.

6. "Private School Partner" means a nonpublic school that meets the Conditions of Eligibility set forth in subsection E and participates in the Choice Scholarship Program. It may be religious or non-religious. A Private School Partner shall not include on-line education programs as defined by Colo. Rev. Stat. § 22-30.7-102 or a nonpublic home-based educational program as defined by Colo. Rev. Stat. § 22-33-104.5.

7. "Choice Scholarship Office" is that part of District administration created by this Policy and charged with administering the Choice Scholarship.

8. "Choice Scholarship student" means a child of school age who meets the standards set forth in subpart D and participates in the Choice Scholarship Program.

9. "Parent" means a child's parent(s) or legal guardian(s).

C. Choice Scholarship Program and Office Created

1. The Board hereby creates the Choice Scholarship Program as an additional educational choice offered by DCSD. The Choice Scholarship Office is also created to administer the Choice Scholarship Program. The Superintendent shall select those persons necessary to carry out the functions of the Choice Scholarship Office. The Superintendent has the discretion to integrate the duties of the Choice Scholarship Office into existing District administration so that it functions as efficiently and effectively as possible.

2. The Board directs the Superintendent and Choice Scholarship Office to make the Choice Scholarship Program operational as a Pilot as set forth in Section F for the 2011-2012 school year.

3. On behalf of the District, the Choice Scholarship Office shall pay to the parent of a Choice Scholarship student one-quarter of the value of a Choice Scholarship in September, November, February, and May, subject to adjustments as described herein. The Choice Scholarship Office shall calculate and make adjustments to Choice Scholarship payments to ensure that each parent of a Choice Scholarship student is receiving the appropriate amount based on the Choice Scholarship student's actual enrollment in the Choice Scholarship Program, and that payments are sent to the appropriate Private School Partner(s) as chosen by the parent, including making *pro rata* payments as necessary.

4. To make the Choice Scholarship payments, the Choice Scholarship Office shall issue, on behalf of the District, a Choice Scholarship check in the name of the Choice Scholarship student's parent. The Choice Scholarship Office shall send the check to the Private School Partner in which the Choice Scholarship student is enrolled, and the parent shall restrictively endorse the Choice Scholarship check for the sole purpose of paying for tuition at the Private School Partner.

5. The Choice Scholarship Office may delay or withhold payments of a Choice Scholarship if it determines that either (i) the Choice Scholarship student or his/her parent or (ii) the Private School Partner has violated a material provision of the Choice Scholarship Program. This decision may be appealed pursuant to the Choice Scholarship appeal process described in subsection C.8, but the Choice Scholarship Office has the discretion to delay or withhold payments pending resolution on appeal.

6. A Choice Scholarship shall be worth the lesser of:

a. The actual tuition cost charged per pupil at the Private School Partner, or

b. Seventy-five percent of per pupil revenue, as defined by Colo. Rev. Stat. § 22-54-103(9.3) ("PPR"), of the Choice Scholarship student enrolled in grades one through twelve.

7. Private School Partners shall submit to the Choice Scholarship Office the financial information necessary to permit the calculation of the "actual tuition cost per pupil" for all the students at the Private School Partner, both Choice Scholarship and non-Choice Scholarship students. Private School Partners shall submit this information in a format determined by the Choice Scholarship Office, with supporting documentation. The "actual tuition cost per pupil" for all Private School Partners shall be made available for review by parents and the public by the Choice Scholarship Office as prescribed by subsection E.3.k of this Policy.

8. *Appeal process*. A student, parent, or Private School Partner may appeal a decision of the Choice Scholarship Office. The student, parent, or school shall notify the Choice Scholarship Office of the intention to appeal within 14 days of receipt of a written adverse decision. Pursuant to procedures drafted by the Choice Scholarship Office but ultimately approved by the Board of Education, the student, parent, or school may appeal the decision to the Superintendent or his/her designee whose decision shall be final and not subject to any further appeals.

9. The Choice Scholarship Office shall make arrangements for the administration of any statewide and/or District assessments to Choice Scholarship students so that the academic performance of Choice Scholarship students can be reported as may be required by law, and can be compared to the performance of students in other District schools and programs.

10. The Choice Scholarship Office shall gather all information and report to the Colorado Department of Education and/or the US Department of Education as necessary to comply with the NCLB Act, the School Finance Act of 1994 (Colo. Rev. Stat. § 22-54-101 *et seq*) and all applicable non-waivable laws so that Choice Scholarship students will be included in the District's pupil count and receive per pupil revenue from the state for the Choice Scholarship students. The Choice Scholarship Office shall ensure that each Choice Scholarship student is offered at least the minimum number of teacher-pupil instruction hours to comply with the School Finance Act.

11. *Annual report.* At least annually, the Superintendent shall give a report to the Board on the Choice Scholarship Program, including but not limited to (i) a comparison of student performance between Choice Scholarship students and non-Choice Scholarship District students; (ii) the financial effect of the Choice Scholarship Program on the District; (iii) the number and grade levels of students participating in

the Choice Scholarship Program; and (iv) the number and type of Private School Partners participating in the Choice Scholarship Program.

D. Participation by Students and Families

1. To enroll in the District's Choice Scholarship Program, a student or his/her parent shall complete the application and any other informational forms required by the Choice Scholarship Office. A student shall be deemed part of the District's "pupil enrollment" for purposes of Colo. Rev. Stat. § 22-54-103(10), if that student remains enrolled in the Choice Scholarship Program as of October 1, or the school day nearest that date. The Choice Scholarship Office shall verify that each Choice Scholarship student is properly enrolled and participating in the Choice Scholarship Program as of that date.

2. Choice Scholarship Students shall independently satisfy all admission requirements of the Private School Partner. Eligibility for a Choice Scholarship under this Policy does not guarantee admission to any Private School Partner. Scholarship recipients are encouraged to learn about the Private School Partners' admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious, before applying for a Choice Scholarship and exercising their choice of a Private School Partner.

3. If the number of Choice Scholarship applicants exceeds the scholarships available, a lottery will be conducted by the Choice Scholarship Office to select Choice Scholarship recipients. Subject to subsection F.3, below, there will be no priority given in the lottery to prior Choice Scholarship participation or siblings of Choice Scholarship students.

4. A student may disenroll from the Choice Scholarship Program by completing the necessary forms required by the Choice Scholarship Office, or by not remaining enrolled and/or actively participating in a Private School Partner.

5. To 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.

6. Subject to the other eligibility requirements contained in this Policy, Choice Scholarship participants will continue to be eligible for as long as the pilot remains in operation so long as they remain Douglas County residents and enrolled in a Private School Partner. Continued enrollment at a Private School Partner is governed, in part, by subsection F.3, below.

7. No student shall be eligible to participate in the Choice Scholarship Program unless that student's parent signs a Choice Scholarship Contract describing the rights and obligations of the parent and student, on the one hand, and the District, on the other. The form of this Contract shall be prepared and updated from time to time by the Choice Scholarship Office. The Contract shall contain at least the following terms:

a. *Student attendance*. If a Choice Scholarship student fails to attend school in compliance with existing District Student Attendance Policy (JH) then that student shall be deemed to no longer be "actively participating" in the Choice Scholarship Program and thus shall become automatically disenrolled from the Choice Scholarship Program.

b. *Pro rata payment of funds.* If the Choice Scholarship student moves from one Choice Scholarship Private School Partner to any other school or educational program, then the parent agrees that Private School Partner is entitled to only those funds due for the period in which the

Choice Scholarship student was enrolled. Payments shall be made and adjusted on a *pro rata* basis. *See* subsection C.3.

c. *Restricted endorsement.* The parent of the Choice Scholarship student shall agree to timely and restrictively endorse the Choice Scholarship for the sole purpose of paying tuition at a Private School Partner.

d. *Option to disenroll at any time.* An Choice Scholarship student may disenroll from a Private School Partner or from the Choice Scholarship Program at any time without penalty.

e. *Involuntary disenrollment.* The District, through the Choice Scholarship Office, may disenroll a Choice Scholarship student from the Choice Scholarship Program if it determines, by a preponderance of the evidence, that the student or his/her parent has violated a material provision of the Choice Scholarship Program or the Choice Scholarship Contract between the parent and the District described by this subsection D.7.

f. *No liability to District.* The parent of a Choice Scholarship student shall release the District from any liability arising from participation in the Choice Scholarship Program, including liability arising from any conduct by, omission by, or other occurrence at a Private School Partner.

g. *Assessment.* The parent of a Choice Scholarship student shall agree that the student shall take any statewide or District assessments to be administered at the time and place designated by the Choice Scholarship Office.

h. *Financial Responsibility.* The parent of a Choice Scholarship student shall be responsible for all tuition, costs and fees in excess of the amount provided by the Choice Scholarship that may be assessed by the Private School Partner that they choose.

i. *No Specialized Programs.* The parent of a Choice Scholarship student shall acknowledge that the District will not create specialized programs in Private School Partners. Participation in the Choice Scholarship program will be viewed as a voluntary parental placement in the private school for purposes of special education services, and students will receive the level of services provided by the Private School Partner.

j. *Waiver and Release.* The parent of a Choice Scholarship student shall release the District from liability for injuries or claims arising out the student's attendance at the Private School Partner.

8. Once a student receives a Choice Scholarship, that student shall remain eligible to participate until the student disenrolls from the Choice Scholarship Program, either voluntarily (*e.g.*, by withdrawal from the Choice Scholarship Program) or involuntarily (*e.g.*, termination of the Choice Scholarship Program by the Board, or for violations of Choice Scholarship Policy, *see* subsection D.7.e).

9. If a Private School Partner fails to meet the Conditions of Eligibility, the Choice Scholarship students enrolled in that school may return to a District school, or may apply to another Private School Partner. If accepted at another Private School Partner, the remainder of their Choice Scholarship shall be applied to the new school.

E. Private School Partners' Conditions of Eligibility

1. Nonpublic schools located within and outside the boundaries of Douglas County School District may participate in the Choice Scholarship Program.

2. The Choice Scholarship Office shall determine whether a Private School Partner qualifies to participate in the Choice Scholarship, subject to the Choice Scholarship appeal process described in subsection C.8.

a. A Private School Partner may be denied participation only if (i) its application is not complete by the deadline or (ii) it fails to demonstrate that it meets the Conditions of Eligibility for participation, as described in subsection E.

b. The Choice Scholarship Office shall describe in writing the specific reason(s) for denying an application.

c. Nonpublic schools shall be eligible without regard to religion. The focus of the Choice Scholarship is not on the character of the Private School Partner but on whether that school can meet its responsibilities under this Policy and its Contract with the District.

3. To be eligible to participate in the Choice Scholarship Program, a Private School Partner shall demonstrate that it meets the following standards. The school shall provide the necessary information as part of its initial Choice Scholarship application and all renewal applications. The Private School Partner may demonstrate that it meets the following standards through evidence of accreditation by a recognized state or national accrediting organization that considers these standards. The District retains control over ensuring that Private School Partners are delivering quality educational instruction to Choice Scholarship students, regardless whether the District accomplishes this directly or by working with accrediting organizations.

a. *Quality educational program.* A Private School Partner shall demonstrate that its educational program produces student achievement and growth results for Choice Scholarship students at least as strong as what District neighborhood and charter schools produce. One component of a school's educational program shall include how the school intervenes to improve a student's performance to ensure that all students are making satisfactory progress towards achieving the District's End Statements. Evaluation of Private School Partners shall examine the educational program over time and by many academic measures.

b. *Financial stability.* To demonstrate financial stability, a Private School Partner shall disclose the school's financial history, including at minimum the past three years of audited financial statements; evidence of bank accounts for use solely by the school; financial policies; documentation showing adequate insurance policies; and any other financial documents the Choice Scholarship Office reasonably determines are relevant to this inquiry. Private School Partners that have been operating for fewer than three years at the time of filing the application ("new school applicants") shall demonstrate the ability to indemnify the District – through the purchase of a surety bond or any other means the Choice Scholarship Office deems satisfactory – for any loss to the District if the Private School Partner ceases operations. New school applicants shall also provide evidence that their operations, or plan for operations, are economically sound, including providing budgets, financial policies, insurance policies, and contracts regarding financial services.

c. *Safety.* A Private School Partner shall demonstrate that its facilities are in compliance with building codes, and that it has a safe school plan consistent with Colo. Rev. Stat. § 22-32-109.1(2)(a).

d. *Employees.* A Private School Partner shall provide a copy of its employment policies; a sample copy of its teacher/administrator contract(s), if any; a list of its teachers/administrators as of the date of its application, including their qualifications for the positions they hold; job descriptions for all positions; evidence of background checks on all teachers/administrators; and sample application materials used for hiring employees. A school shall have sound employment policies, including conducting thorough criminal background checks to ensure school employees are safe to work with children.

e. *Facilities.* A Private School Partner shall provide a description and map of the building(s) and land used for school purposes; if leased, a copy of the lease agreement; and if owned, a copy of the documents demonstrating ownership, including financial documents related to any purchase (such as mortgage documents).

f. *Nondiscrimination.* A Private School Partner is prohibited from discriminating in its employment or enrollment decisions on any basis protected under applicable federal or state law, except that religious Private School Partners may make employment and enrollment decisions based upon religious beliefs, so long as such employment and enrollment decisions are not otherwise prohibited by applicable law.

g. *Student assessments.* A Private School Partner shall describe how it assesses student performance. Private School Partners shall agree to release Choice Scholarship students without academic penalty so that the District can administer statewide or District assessments (*e.g.*, CSAP) to the Choice Scholarship students enrolled at the school. The Choice Scholarship Office may determine what statewide or District assessments are appropriate, but it shall do so in such a way that the District may compare student performance of Choice Scholarship students with other District students.

h. *Enrollment.* A Private School Partner shall provide its enrollment policies, including any enrollment agreement the school requires students or parents sign. As described above in subsection E.3.f, to be eligible to participate in the Choice Scholarship Program, a Private School Partner shall not discriminate when enrolling students on any basis protected under applicable federal or state law, except that religious Private School Partners may make enrollment decisions based upon religious beliefs. A Private School Partner shall apply its admission requirements to Choice Scholarship students in the same manner as it does with non-Choice Scholarship students, so long as these requirements do not discriminate in violation of this subsection E.3.h. *See also* subsection D.2.

i. *Student conduct and discipline policies.* A Private School Partner shall provide its policies on student conduct and discipline, including its policies on suspension and expulsion. To be eligible to participate in the Choice Scholarship, a Private School Partner's policies and procedures on discipline, suspension, and expulsion need not replicate the requirements for a traditional District school (*cf.* Colo. Rev. Stat. §§ 22-33-105 & -106), but they shall provide for an environment where *all* students can gain the benefit of the school's educational program without harassment, disruption, or bullying.

j. *Governance and operations.* A Private School Partner shall provide a description of its governance and operations, including identifying the members of its governing

board and its senior administration.

k. *School information.* A Private School Partner shall describe the school's mission, educational goals, history, organizational structure, curriculum, and educational philosophy as well as provide information to calculate the actual tuition cost per pupil, as described by subsection C.7 of this Policy. The Private School Partner shall describe how the school serves the educational needs of exceptional children, as defined by Colo. Rev. Stat. § 22-20-103(12). The Choice Scholarship Office may prescribe the format in which this information is provided such that the Office may readily compile the information on a website or other information clearinghouse so that parents and the public may compare one Choice Scholarship Private School Partner to another, and to other District schools and programs.

l. *Opt Out of Religious Services.* A religious Private School Partner shall provide Choice Scholarship parents the option of having their child receive a waiver from any required religious services at the Private School Partner.

4. *Appeal process*. A Private School Partner whose application (initial or renewal) is denied by the Choice Scholarship Office may appeal that decision as provided in the appeal process described in subsection C.8.

5. *Pro rata sharing of funds.* As necessary, Choice Scholarship funds shall be shared on a *pro rata* basis. Thus, a Private School Partner is entitled to receive Choice Scholarship funds due to the parent's choice of that school only for that period when a Choice Scholarship student was actually enrolled and receiving educational services from the school. Private School Partners shall agree that adjustments shall be made to the quarterly payments in order to account for student enrollments and disenrollments during the school year. Private School Partners shall further agree that under certain circumstances they may be required to repay the District for overpayments.

6. *Term of participation.* The District, through the Choice Scholarship Office, shall grant a Private School Partner the opportunity of participating in the Choice Scholarship for a term one to five years, subject to annual renewal. Unless renewed, participation in the Choice Scholarship shall automatically expire at the end of the term.

7. *Contract.* To 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. The form of this Contract shall be prepared and updated from time to time by the Choice Scholarship Office. The Contract shall address the Conditions of Eligibility in E.3, and shall contain at least the following:

a. the term of participation granted to the Private School Partner;

b. provisions to allocate risk, *e.g.*, purchasing insurance against risks of injury to DCSD students attending the Private School Partner;

c. the information the Private School Partner shall regularly provide to the District to comply with reporting requirements under the NCLB Act, the School Finance Act of 1994 (Colo. Rev. Stat. § 22-54-101 *et seq*), and for the District to report on school performance (Colo. Rev. Stat. § 22-11-503), including but not limited to, the qualifications of its instructional staff, the number of school hours of teacher-pupil instruction offered by the Private School Partner, student enrollment, daily student attendance, student performance, student discipline, financial statements, and a schedule for providing that information;

d. a provision recognizing that the school is a separate entity from the District, and therefore, any debt or financial obligations of the Private School Partner shall not constitute debt or financial obligations of the District unless the District specifically assumes such obligations in writing; and

e. that a Choice Scholarship student may disenroll from the Private School Partner at any time without penalty. If the Choice Scholarship student moves from a Private School Partner to any other school or educational program, then the Private Partner School agrees that it is entitled to only those funds due for the period in which the Choice Scholarship student was enrolled. Payments shall be made and adjusted on a *pro rata* basis. *See* subsection C.3.

8. *Purchasing Services.* Private School Partner may elect to purchase services from the District. The District shall provide those services to the Private School Partner under the same terms, including at the same cost, as those services are provided to other DCSD schools.

9. *Termination from the Choice Scholarship Program.* The District, through the Choice Scholarship Office, may terminate a Private School Partner's participation in the Choice Scholarship Program if it determines, by a preponderance of the evidence, that the Private School Partner has violated a material provision of the Choice Scholarship Program or the Choice Scholarship Contract between the school and the District. This decision may be appealed pursuant to the Choice Scholarship appeal process described in subsection C.8, but the Choice Scholarship Office has the discretion to include or exclude the Private School Partner from the Choice Scholarship Program pending resolution on appeal.

F. Pilot

1. The Choice Scholarship Program is hereby established as a pilot program for up to 500 students for a period of one year beginning in the 2011-2012 school year, annually renewable at the discretion of the Board and subject to non-appropriation of funds by the Board as permitted by law. Participation in the program by students or Private School Partners shall in no way be construed as creating a continuing right to the Choice Scholarship beyond the period of the pilot authorized by the Board.

2. If the number of Choice Scholarship applicants exceeds the 500 scholarships available in the pilot, a lottery will be conducted by the Choice Scholarship Office to select Choice Scholarship recipients.

3. Choice Scholarship recipients are eligible for consecutive yearly participation for the duration of the program, so long as they remain continuously enrolled in a Private School Partner(s) and comply with the other eligibility criteria of this Policy. Siblings of Choice Scholarship participants shall have no priority to receive Choice Scholarships.

G. Administrative Policies and Procedures

The Superintendent is authorized to create administrative policies and procedures necessary to carry out the purposes of this Policy.

H. Severability

If any provision of this Policy or the application thereof is held invalid, such invalidity shall not affect other provisions or applications of this Policy that can be given effect without the invalid provision or application, and to this end the provisions of this Policy are declared to be severable.