

1 DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
2 Denver, Colorado 80202

3 Plaintiffs:

4 JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF
5 COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM
6 HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA
CARRERA; SUSAN MCMAHON,

7 v. Case Number: 2011CV4424
Courtroom: 259

8 Defendants:

9 COLORADO BOARD OF EDUCATION; COLORADO DEPARTMENT OF
10 EDUCATION; DOUGLAS COUNTY BOARD OF EDUCATION; DOUGLAS
COUNTY SCHOOL DISTRICT,

11 Movants:

12 FLORENCE DOYLE; DERRICK DOYLE; ALEXANDRDA DOYLE;
DONOVAN DOYLE; DIANA OAKLEY; et al.

13 and

14 Plaintiffs:

15 TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD;
16 MASON S. BARNARD,

17 v. Case Number: 2011CV4427
Courtroom: 259

18 Defendants:

19 DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY
20 SCHOOL DISTRICT RE-1 BOARD OF EDUCATION; COLORADO
DEPARTMENT OF EDUCATION; COLORADO STATE BOARD OF
21 EDUCATION.

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REPORTER'S TRANSCRIPT - VOLUME I

The preliminary injunction hearing in the above-entitled matter commenced on Tuesday, August 2, 2011, at 1437 Bannock Street, Courtroom 259, Denver, Colorado 80202, before the Honorable Michael A. Martinez.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Reported by: Sharon L. Szotak, RPR, CRR

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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 THE COURT: Good morning. Try again.

3 Good morning.

4 COLLECTIVE RESPONSE: Good morning, Your

5 Honor.

6 THE COURT: That's better. Calling

7 11CV4424, the two matters consolidated, James LaRue,

8 et al., versus Colorado Board of Education, et al.

9 We've got a full complement and roster of parties and

10 attorneys in this case.

11 Counsel, I trust that you've given your

12 names, business cards, or whatever to the court

13 reporter so that she can enter those accurately and

14 correctly and so forth. All right.

15 Just for my edification, and she can

16 stand down while you do this, an entry of appearance

17 would be nice, so I know who's here. I know we've had

18 some of the players have changed.

19 MR. DOUGLAS: Good morning, Your Honor.

20 Matt Douglas with Arnold & Porter on behalf of the

21 LaRue plaintiffs.

22 MR. McCARTHY: Good morning, Your Honor.

23 Michael McCarthy with Faegre & Benson. And present

24 here with me is my partner, Colin Deihl, appearing on

25 behalf of the plaintiffs Taxpayers for Public

1 Education, Cindra Barnard and Mason Barnard.

2 Also with us in the courtroom this
3 morning is our individual plaintiff client, Cindy
4 Barnard, and Anne Kleinkopf with Taxpayers for Public
5 Education. Thank you, Your Honor.

6 MR. MACDONALD: Good morning, Your Honor.
7 Tim Macdonald of Arnold & Porter, also on behalf of
8 the LaRue plaintiffs.

9 THE COURT: All right. For the
10 defense?

11 MR. LYONS: Good morning, Your Honor.
12 Jim Lyons and Eric Hall from Rothgerber Johnson &
13 Lyons on behalf of the Douglas County school district
14 and the Douglas County school district board. Also
15 here is our colleague, Renee Carmody, and our
16 paralegal, Michelle Hess.

17 MR. BLUE: Good morning, Your Honor.
18 Geoff Blue, deputy attorney general, here on behalf of
19 the state. With me is Tony Dyl, senior assistant
20 attorney general.

21 MR. BINDAS: Good morning, Your Honor.
22 Michael Bindas with the Institute for Justice,
23 representing the intervenor families, the Oakleys,
24 Andersons, and Doyles. And in the courtroom with me,
25 as well, is my cocounsel, Timothy Keller.

1 THE COURT: Is your cocounsel going to
2 be participating, such that we need to get him a chair
3 at the table?

4 MR. BINDAS: Likely not, Your Honor.

5 THE COURT: Anyone else?

6 All right. Before we get started, there
7 are a few preliminary matters that are pending before
8 me. We'll start with the request for the pro hac vice
9 admission by Mr. Langendorf. Is Mr. Langendorf here?

10 MR. DOUGLAS: Yes, Your Honor. George
11 Langendorf is here.

12 MR. LANGENDORF: Yes.

13 THE COURT: Good morning.

14 Mr. Langendorf, I have not yet received confirmation
15 from the Supreme Court that you've complied with the
16 rule. I've seen your affidavit that you complied with
17 the rule. I have no reason to doubt that you have.
18 But the rule requires that I receive the confirmation
19 from the Supreme Court before I can rule on any
20 request.

21 So I'll have my staff call up there this
22 morning, and it will be a perfunctory matter of ruling
23 on your request. But as of now, I'm going to ask you
24 not to participate other than informally. All right?

25 MR. LANGENDORF: Yes, Your Honor.

1 not.

2 THE COURT: So I didn't get left out of
3 the loop. It just didn't happen. All right.

4 There's a motion in limine regarding the
5 testimony of Professor Charles Glenn. It was filed
6 yesterday evening. Mr. Lyons, we can proceed one of
7 two ways. You can make a verbal response at this
8 time. Let me back up for a moment.

9 When did the defense envision calling
10 Mr. Glenn?

11 MR. LYONS: We expect to call him on
12 Thursday morning, Your Honor. We may need to call him
13 out of order. But he is coming into town tomorrow
14 afternoon and we expect to call him Thursday morning.
15 And we'd be happy to address the motion in limine
16 Thursday morning if that's suitable to the court.

17 THE COURT: That was the other thing I
18 was going to say is, you can either do it now or you
19 can file a written response by close of business
20 tomorrow and we'll pick it up on Thursday morning.

21 MR. LYONS: Right. That would be fine.
22 Thank you.

23 THE COURT: And I'll rule on the motion
24 without a reply, under rule 120.

25 Okay. Continuing on with my

1 housecleaning list here, obviously, we have a number
2 of interested parties. The case is a very -- raises
3 important issues, not just to the parties but to the
4 community at large. I recognize that.

5 We are proud in our community to have our
6 courts open to the public, and I fully intend to
7 comply with that expectation.

8 There are some reasonable caveats I am
9 going to employ for those parties, both parties'
10 counsel, and any other individuals participating in
11 this case by observing, and that is that you comply
12 with appropriate courtroom decorum. My review of the
13 pleadings in this case and general knowledge of the
14 issues presented leads me to understand that the
15 issues oftentimes are emotional and challenging and
16 people react differently to those types of
17 circumstances.

18 So if you do not believe that you can
19 present yourself here in court, either as a spectator
20 or as a party, and listen to the testimony and process
21 it without interjecting, without objecting, unless
22 you're an attorney, making improper objection, without
23 any outburst of any sort, then I'll ask you to leave
24 now. Because that type of interruption will not be
25 permitted in the court.

1 Additionally, I'm going to ask that you
2 keep your comings and goings to a minimum so as not to
3 disrupt the attorneys and the presentation. I was
4 getting to that. That's my big one. I was getting to
5 that.

6 In any event, make sure that the best
7 time to leave and come is during a break. If you
8 absolutely have to step out, by all means, do so, but
9 please do so discretely. If I find that it's becoming
10 an annoyance or a nuisance or in any other way
11 interfering with counsel's presentation or my receipt
12 of the presentation, I will enter a different order
13 requiring that there only be entry at the breaks. So
14 for now, we'll leave it to your discretion in that
15 regard.

16 PDAs, cell phones, all of that jazz. In
17 today's day and age, when we can instantly know what
18 Brittany Spears had for breakfast, I don't think you
19 need to be having those issues ongoing in the court.
20 So I'll ask you, all of us, counsel and myself and the
21 parties and anyone else spectating, please take this
22 opportunity to take your phone and turn it off. Thank
23 you.

24 There is a sequestration order in place.
25 My expectation is that counsel have -- are aware of

1 that and that you've expressed to your witnesses the
2 implications of that and what it means. If there's a
3 more specific advisement you need me to give to your
4 witnesses, please tell me now, and I will be happy to
5 do that. Okay. Sequestration order is posted on the
6 door.

7 Okay. That should complete the
8 housekeeping matters. So my intention is to go
9 forward today with our presentation, beginning with
10 opening statements. I understand there may be some
11 other preliminary matters related to those. So,
12 Mr. Douglas, do you have any preliminary matters we
13 need to address?

14 MR. DOUGLAS: Briefly, Your Honor. The
15 plaintiffs have presented the court and the parties
16 with a list of the exhibits on plaintiffs' list that
17 are fully stipulated to. And as a procedural matter,
18 we would offer into evidence all the exhibits on that
19 list at this time.

20 THE COURT: Well, my pretrial order
21 contemplates if there's a stipulation to the admission
22 of exhibits -- I think we talked about this before --
23 above and beyond the stipulation to the authenticity
24 of the exhibits, then they will be deemed admitted by
25 your stipulation. I'll accept the stipulation, and

1 you need not lay foundation for those exhibits going
2 forward. So they're already deemed admitted
3 plaintiffs' exhibits on the stipulated exhibit list.

4 MR. HALL: Your Honor, just one point on
5 that. I believe number 57 is actually a typographical
6 error. I think that should be a 56. Because what we
7 stipulated to is the day school application and
8 application materials, not the web page.

9 THE COURT: So you maintain an
10 objection to Exhibit 57?

11 MR. HALL: Well, again, I think it's a
12 typographical error. They have 57 here, web page. I
13 think it should be 56, application.

14 THE COURT: So just one, Exhibit 56,
15 including the web page?

16 MR. HALL: We're objecting to the
17 admission of the web page. We haven't stipulated to
18 that. We have stipulated to, like all the rest of the
19 schools, the application and the application
20 materials.

21 THE COURT: Okay. So there is an
22 objection to Exhibit 57.

23 MR. HALL: Yes, sir.

24 THE COURT: Mr. Douglas, as to
25 Exhibit 57, what's --

1 MR. DOUGLAS: We would simply correct. I
2 apologize for that error. But it should be Exhibit 56
3 is stipulated to. 57 should not be on this list.

4 THE COURT: So you're going to strike
5 57 from the list?

6 MR. DOUGLAS: Yes, Your Honor.

7 THE COURT: All right. 57 will be
8 stricken.

9 Anything else preliminarily regarding
10 plaintiffs' exhibit list?

11 MR. DOUGLAS: Not on exhibits, Your
12 Honor. I do believe that the defendants have some
13 objections to demonstrative exhibits that we tendered
14 to the court that we intend to use in our opening
15 statement.

16 THE COURT: Who wants to address that?

17 MR. LYONS: I will, Your Honor. We
18 received last night 35 slides from the plaintiffs that
19 they intend to use apparently in opening statement
20 this morning as demonstrative exhibits. We've looked
21 at them. Some of them, frankly, are simply excerpts
22 from the Colorado Constitution and relevant state law.
23 We don't have any objection to those. Some others,
24 however, we think are argumentative and do not
25 accurately reflect statistics or data that they

1 purport to summarize.

2 Now, we understand that they're
3 demonstrative exhibits. We understand this is a trial
4 to the court. We understand that they are not
5 evidence. So with that understanding, we do object to
6 these exhibits being used, but we understand their
7 purpose is only limited to opening statement.

8 THE COURT: All right. Well, let me
9 clarify with Mr. Douglas, is it? Or Mr. McCarthy?

10 MR. DOUGLAS: Yes, Your Honor.

11 THE COURT: All right. Mr. Douglas,
12 what are we talking about here in terms of specifics,
13 and are these exhibits overlapping with something that
14 you have admitted otherwise as a stipulated exhibit,
15 or purely demonstrative in nature?

16 MR. DOUGLAS: These are purely
17 demonstrative in nature. We would not intend to offer
18 these in evidence. Simply to emphasize that the
19 evidence during -- most of these are statutes and
20 constitutional provisions. The specific references to
21 exhibits are related to exhibits that were on the
22 stipulated list that we just offered into evidence.
23 But these demonstratives themselves are not evidence
24 and would be for demonstrative purposes.

25 THE COURT: Okay. Mr. Douglas, perhaps

1 you will recall. Did we not address the issue of time
2 limits on our presentation, so we can efficiently move
3 this case?

4 MR. DOUGLAS: Your Honor, the parties did
5 discuss that, and we believe that 30 minutes per side
6 would be able to adequately address the issues, if
7 that's acceptable with the court.

8 THE COURT: A little longer than I
9 ordinarily would provide, but in light of the number
10 of parties, I'll permit in this proceeding 30 minutes.
11 However the plaintiffs choose to divide their time is
12 up to them. And 30 minutes, however the defense would
13 choose to divide their time.

14 Okay. With the volume of people in here,
15 it's getting a little hot. So if I end up turning the
16 air-conditioning down or figure out how to do that, I
17 will.

18 Mr. Douglas, the floor is yours. You may
19 proceed.

20 MR. DOUGLAS: Thank you, Your Honor.

21 THE COURT: Let me back up. I got a
22 request on exhibits. I'm going to note the objection.
23 I'm going to permit the exhibits. The objection goes
24 to the weight. And since they're not evidence and
25 they won't be considered in my decision, if it will

1 assist Mr. Douglas in his presentation, I'll permit
2 it.

3 MR. DOUGLAS: Thank you, Your Honor.

4 Again, Matt Douglas on behalf of the
5 LaRue plaintiffs. And first I'd like to thank the
6 court for the opportunity to be here today, and for
7 the court making this significant amount of time on
8 the very busy calendar to hear this important case.

9 And I know that the court has received
10 extensive briefing in this case, but I do want to
11 briefly frame the evidence that is going to be
12 presented over the next few days in relation to the
13 central legal issues in the case.

14 At the heart of this case is the Douglas
15 County school district's Choice Scholarship Program,
16 as they call it. And that's a school voucher program
17 that would take taxpayer dollars earmarked for public
18 school students and use it to pay the division for 500
19 families who are attending private, largely religious
20 schools.

21 In fact, the evidence, the defendants'
22 own numbers, will show that 93 percent of the students
23 who are confirmed for the program are enrolled in
24 religious schools. And at the high school level,
25 there's only one student enrolled in a non-religious

1 school.

2 In the 135 years since the Colorado
3 Constitution was adopted, which at that time included
4 provisions that I'm going to talk about this morning,
5 no school district has even attempted a program such
6 as this, which takes public money and diverts it to
7 private, almost exclusively religious schools.

8 Whether a program like this violates the
9 specific prohibitions in the religious clauses of the
10 Colorado Constitution is a question of first
11 impression in this state. When you look at the actual
12 language of the constitution, and the evidence about
13 this program that will be presented, the issues are
14 relatively straightforward.

15 There are a number of constitutional
16 violations discussed in the plaintiffs' complaint, and
17 what I'm going to focus on this morning is the
18 evidence you'll hear that relates to the primary
19 religion claims, and then Michael McCarthy is going to
20 address claims relating to the funding issues and some
21 of the other provisions.

22 And what the evidence is going to show is
23 that plaintiffs have established a reasonable
24 likelihood of success on the merits of their claims.
25 So now I'm going to talk about specifically why that's

1 the case under the plaintiffs' religion claims.

2 And what I have up on the screen -- and
3 could I ask, Your Honor, is that angle something you
4 could see, or should we turn that?

5 THE COURT: It's perfectly fine. I can
6 see it.

7 MR. DOUGLAS: Okay. Great. Thank you.

8 Article 9, section 7 of the Colorado
9 Constitution, entitled Aid to Private Schools,
10 Churches, Sectarian Purpose, Forbidden. "No school
11 district shall pay from any public fund or moneys
12 whatever anything in aid of any church or to help
13 support or sustain any school controlled by any church
14 or sectarian denomination whatsoever."

15 A lot of any's in that, but it's very
16 clear. And the evidence will show that many of the
17 schools in the program are either controlled by a
18 church or sectarian denomination or are in some cases
19 not even a separate entity but are part of the church
20 itself. And here are just a few examples of what the
21 evidence is going to show.

22 Cherry Hills Christian is governed by
23 Cherry Hills Community Church and the Evangelical
24 Presbyterian Church. Southeast Christian School in
25 2008 officially merged with the church to become

1 Southeast Christian Church and School.

2 Lutheran High School is part of the
3 Lutheran Church. And the Rock Academy is a ministry
4 of the Rock Church. As such, it is in every way
5 operated and directed as a part of our ministry.

6 So these schools in this program, then,
7 are trying to do exactly what is expressly forbidden
8 by this constitutional division. So what do the
9 defendants say? They say, well, when we write the
10 checks for these schools, we actually make them out in
11 the name of the parent instead of the school. But the
12 parents can only restrictively endorse the check over
13 for the sole purpose of paying tuition at those
14 schools. There's nothing else that can be done with
15 those checks. And tuition payments provide direct
16 support and aid to the schools.

17 You'll hear evidence about that, and
18 you'll also hear evidence about how this procedure of
19 writing the checks out to the parents instead of in
20 the names of the schools is simply a pretext to try to
21 get around the very constitutional language that I
22 just put up. But it's a pretext that fails.

23 Article 2, section 4 of the Colorado
24 Constitution says, "No person shall be required to
25 attend or support any ministry or place of worship,

1 religious sect, or denomination against his consent."

2 And there's really two provisions here
3 that are directly indicated. Compelled support.
4 Taxpayers required to fund a program that provides
5 support to religious schools, a number of which are
6 actually part of the church. And compelled
7 attendance.

8 Your Honor, the evidence will show that
9 students at these schools are compelled to attend
10 religious services, worship, and receive extensive
11 religious instruction. Nearly all of the 18 religious
12 schools in the program require attendance at worship
13 services.

14 So what do the defendants say about that?
15 They say, well, the program allows students to opt out
16 of religious services. But when you look at the
17 evidence on that, here's what it really is. The
18 students still have to attend the religious services
19 of these schools, but they can sit quietly, so long as
20 they don't call attention to the fact that they're not
21 actively participating in the service. And that's all
22 they can opt out of. They can't opt out of the
23 religious instruction and curriculum, which is at the
24 core of these schools.

25 Now, the evidence will show that this

1 opt-out of religious services was originally going to
2 include the ability for students to exclude themselves
3 from both religious instruction and services of these
4 schools. But in order to get the religious schools to
5 participate, they watered down the opt-out to be what
6 I just described it as now to a point where one of the
7 district officials actually said, quote, that's not
8 much of an opt-out.

9 Now, here's a few examples of the
10 religious instruction at these participating schools.
11 They're all schools that are approved in the program
12 and have students that are enrolled in them under the
13 program as of today.

14 Ambleside Academy says, "As a Christ
15 centered school, faith is the basis of all we teach.
16 Valid Christian religious classes are the backbone of
17 our educational philosophy."

18 Southeast Christian, "Academic
19 curriculum, chapels, field trips, service projects and
20 camps are all faith based. Biblical integration is
21 included in all aspects of our learning."

22 And at the Rock Academy, "Each subject is
23 predicated upon God's biblical principles."

24 Now, this evidence implicates both
25 article 2 and -- article 2, section 4, and article 9,

1 section 7, the two provisions I just put up. And also
2 these schools are -- these schools discriminate in
3 their enrollment on the basis of religious beliefs and
4 are, in fact, expressly permitted to under the
5 program.

6 But these also implicate another
7 constitutional provision, article 9, section 8, which
8 says that no religious test for qualification can be a
9 condition of admission, and that there can be no
10 requirement to attend or participate in any religious
11 service whatsoever. And very importantly, no
12 sectarian tenets or doctrines shall ever be taught in
13 the public school.

14 There's no question that religious
15 doctrines are the central focus of many of these
16 schools. So what do the defendants say about this?
17 They say, well, as to this provision, unlike the other
18 provisions, this specifically says public school.
19 They say these kids aren't going to public schools,
20 they're going to private schools.

21 But, in fact, the program students will
22 have to enroll in a public charter school that the
23 district has created, and they're going do that so
24 they can try to count them as public school students
25 to get the state money.

1 Now, the public charter school has no
2 classrooms, no books, no teachers, no curriculum, no
3 role in educating the students what so far. But if
4 these are public school students qualified for
5 taxpayer funds, then they must meet the requirements
6 of article 9, section 8. They can't have it both
7 ways. They can't say, well, for the money, these are
8 public school students, but when it comes to this
9 provision of the constitution, they're not public
10 school students. These are students attending a
11 public charter school.

12 And there's two more examples of the
13 religious programs at these schools. At Denver
14 Christian they say, "Because of the nature of our
15 Jesus is Lord of everything type of education, I would
16 try hard to determine the parents' stand on religious
17 education in the interview" -- has to do with students
18 applying for the program -- "and application process
19 and steer them in a different direction."

20 Southeast Christian says, "Our families
21 are here because they want their children's lives to
22 be molded in the likeness of Christ. And that is a
23 continuous process, not just one class a day."

24 Now, another thing the defendants point
25 to, in the face of all this evidence and these various

1 specific constitutional provisions, is the Americans
2 United decision from the Colorado Supreme Court in
3 1992. They say, oh, that case already decided this
4 issue. But the rationale of Americans United, as
5 applied to the facts of this case, demonstrates
6 exactly why this program is unconstitutional.

7 Americans United found that the college
8 grant program in that case was constitutional only
9 because it found that that particular program provided
10 funds that would be used to support the secular or
11 non-religious education functions at the school and
12 included protections, which it found reduced the risk
13 of taxpayer funds, quote, seeping over into the
14 non-secular functions, the religious functions, of an
15 institution.

16 As to this program, the evidence will
17 show that at many of these private schools there is no
18 such thing as a secular or non-religious function.
19 Religion is not only intertwined but the primary focus
20 of every aspect of many of these schools. And these
21 are some of the factors that were important to the
22 Americans United court about that program that Your
23 Honor should keep in mind when hearing the evidence in
24 this case.

25 It was very important to the court that

1 that was a college program, but it did not involve
2 elementary schools or high schools at which students
3 are much more susceptible to religious indoctrination.
4 It found that there was no sectarian bent or religious
5 bent in the curriculum intending to indoctrinate or
6 proselytize. The evidence here, very different.

7 The education at the colleges there was
8 non-religious, secular. The colleges were not
9 controlled by a church. Again, exactly the opposite
10 here. And the religious character of the college had
11 no relationship to its educational function. Here, as
12 to most of the schools, a religious character
13 dominates the education function.

14 So under the Americans United decision,
15 that actually supports a finding that the Douglas
16 County program violates the Colorado Constitution.

17 So again faced with this evidence and
18 these statutory provisions, the defendants say, well,
19 maybe it sounds like article 9, section 7 prohibits
20 exactly what we're doing here, but what they want to
21 do in addition is to try to present testimony and
22 argument about what was in the minds of the framers of
23 the Colorado Constitution 135 years ago when article
24 9, section 7 was written. They claim there was
25 anti-Catholic sentiment behind the introduction of

1 that provision.

2 So essentially they're asking this court
3 to ignore the language and repeal the constitutional
4 provision from 135 years ago based on speculation
5 about the motivation behind its passing. It's
6 improper. It's also entirely irrelevant to the issues
7 that this court has to decide. The defendants also
8 cited no authority that any court in the United States
9 has ever overturned one of these what are called
10 no-aid provisions, no aid to religious schools,
11 anywhere in the U.S. And about two-thirds of the U.S.
12 states have such a constitutional provision.

13 Even if the evidence on that is allowed,
14 and that's what our motion in limine relates to, the
15 facts and history do not support the defendants' claim
16 about the alleged bias of the constitutional framers.

17 And lastly, defendants are going to talk
18 at length about choice. Parental choice. We're not
19 saying parents don't have a choice to send their
20 children to any school they want, religious or
21 otherwise. But taxpayer dollars -- state taxpayer
22 money cannot fund some of those choices under the very
23 specific prohibitions on funding of religious schools
24 that have been part of Colorado's constitution for
25 over a century.

1 And when you look at the evidence,
2 there's not really much choice in the program other
3 than religious schooling. 18 of the 23 approved
4 schools are religious, and for high school students,
5 there is no choice at all. For high school students,
6 there is one non-religious school approved for the
7 program; that is Humanex Academy. A very small school
8 that serves only unique special needs cases. So for
9 high school students who cannot meet those special
10 needs or require those special needs, the choice is to
11 choose a religious school or don't participate in the
12 program.

13 High school students are only eligible
14 for this government benefit this they are willing to
15 attend worship services and receive religious
16 instruction. That is improper. That's not choice.

17 The numbers provided by the district
18 confirm that these voucher program students are almost
19 exclusively going to religious schools. This is taken
20 right off the Defendants' Exhibit RR. 93 percent of
21 the confirmed students have enrolled in one of the
22 religious schools under the program at the high school
23 level, which represents nearly half of the confirmed
24 participants. There is one student enrolled at a
25 non-religious school under the program. One out of

1 120 high schoolers. Less than 1 percent. And that
2 one is enrolled at Humanex Academy.

3 So under the facts that will be presented
4 to Your Honor, under the language of those provisions
5 of the Colorado Constitution, the plaintiffs will
6 establish a reasonable likelihood of success.

7 And I'm going to turn it over now to
8 Mr. McCarthy.

9 THE COURT: Thank you, Mr. Douglas.

10 MR. DOUGLAS: Thank you, Your Honor.

11 THE COURT: Mr. McCarthy, Mr. Douglas
12 left you 15 minutes.

13 MR. McCARTHY: I understand, Your Honor.
14 I'll try my best to move it along. Your Honor,
15 Michael McCarthy appearing on behalf of the Taxpayers
16 for Public Education and the Barnards.

17 Your Honor, one of the more unique
18 aspects of this evidentiary proceeding, the court will
19 see I think very quickly, is that there's very little
20 in the way of disputed factual issues that the court
21 will have to adjudicate. And instead, I think what
22 the court will see is that the case, which is in many
23 respects a case of first impression, should be decided
24 based upon the plain meaning of the Colorado
25 Constitution and the 1994 Public Finance Act.

1 There is a critical document that I would
2 emphasize, as well. And I'm going to highlight that
3 along with the constitutional provisions as I go
4 through my presentation, and that critical document,
5 Your Honor, is Exhibit 107. Exhibit 107 is the actual
6 policy that was adopted on March 15 of this year by
7 the Douglas County school board.

8 We would respectfully submit, Your Honor,
9 that this case can be adjudicated in terms of its
10 constitutional merits, and the injunction can be
11 entered based upon the face of that document and what
12 the Douglas County school board said about that
13 document, said about the program that they're adopting
14 in terms of the Choice Scholarship Program on the face
15 of Exhibit 107.

16 But in terms of the critical legal
17 precedents that will control the court's adjudication
18 here, we focus Your Honor first on the Colorado
19 Constitution, article 9, section 2. The court is
20 familiar with this provision. It's the thorough and
21 uniform public education provision. And, Your Honor,
22 the critical aspect of -- there are three critical
23 aspects of this provision: Thorough, uniform, and
24 free.

25 And what the undisputed evidence will

1 show is that this voucher program that the Douglas
2 County school board has adopted does not provide a
3 free public school education to students in Douglas
4 County in K through 12, and that it must do. And
5 because it does not, it violates article 9, section 2
6 of the Colorado Constitution.

7 The second constitutional provision that
8 we focus on, Your Honor, is article 9, section 3.
9 Article 9, section 3 relates to the public school
10 fund. This is a fund that was created when Colorado
11 was formed as a state, is a source of revenue for
12 Colorado public schools, and that revenue source shall
13 remain inviolate, and it shall not be commingled to
14 fund anything other than the schools of the state.

15 What the Douglas County program does is,
16 it takes funds that are commingled, to include the
17 public school funds -- and, Your Honor, critically
18 important here, there was a judicial admission by the
19 state of Colorado in their briefs in this case that
20 the public -- that public school funds are commingled
21 with the funds that are provided to Douglas County,
22 and indeed to all other school districts in the state.
23 Those funds flow through Douglas County to be
24 commingled with the moneys that are, in fact, provided
25 through this voucher program, because those funds,

1 which are, to use a colloquial term, Your Honor --
2 they're radioactive in terms of private schools. If
3 those funds go to private schools, the program is
4 unconstitutional and violates article 9, section 3.

5 Next, Your Honor, in terms of
6 constitutional provisions, we focus on what's often
7 been called the local control provision under the
8 Colorado Constitution. What we have here in this
9 case -- and this is in many respects why this is a
10 case of first impression -- is a situation where,
11 unlike the Owens case and really unlike many other
12 cases that have been adjudicated by the Colorado
13 courts, we have an abdication of local control. That
14 is in many respects our core theory in terms of local
15 control that what the Douglas County school board has
16 done, and the Douglas County school district has done,
17 is, they have abdicated local control. And you will
18 be able to see that, Your Honor, on the face of
19 Exhibit 107 as we proceed.

20 And then, Your Honor, we have a
21 statute -- the controlling statute here, which
22 implements the article 9 provisions, which is the
23 Public School Finance Act. The public school finance
24 act mirrors the constitutional provisions. It
25 provides for the implementation of a thorough and

1 uniform system of public schools.

2 Again, what the court will be able to see
3 on the face of Exhibit 107 is that this scholarship
4 program, this voucher program allows for money to go
5 to private schools that are anything but thorough and
6 uniform. And it allows those moneys to go into a
7 program where the parents that receive the funds are
8 going to be responsible for the difference between the
9 amount of the scholarship money, which is \$4,575, the
10 voucher money, and the actual amount of tuition if
11 that's higher. So for those students, it's not a free
12 education. And that is one of the core principles in
13 our state, in our constitution, that children K
14 through 12 are entitled to have a free public
15 education. And this voucher program does not provide
16 that to them. And in that respect, what it does is,
17 it violates 22.54.201 and many other provisions under
18 the statute.

19 Similarly, Your Honor, 22.54.104 provides
20 that the districts -- in this case Douglas County's
21 total program -- shall be available to the district to
22 fund the cost of providing public education. In many
23 respects, Your Honor, this case is a plain meaning
24 case. It is a case that asks the court to enjoin this
25 program, because what it does is, it violates the

1 plain meaning of the Public School Finance Act.

2 And this is one of the statutory
3 provisions that the Douglas County school board and,
4 to a degree, the state seek to rely upon to justify
5 this. This is the so-called contracting act provision
6 of the Colorado statutes. And what this provision
7 does not do is authorize what they are doing here,
8 because what it does -- what it requires for the
9 contracting statute to be applicable is that the
10 programs meet -- as you will see, Your Honor, in both
11 of the highlighted sections -- the same requirements
12 and standards as would be necessary if performed by
13 the school district. And that this program does not
14 do.

15 Your Honor, we also emphasize in terms
16 of, in many respects, the status quo issues here that
17 will be considered by the court as part of rule 65's
18 direction regarding preliminary injunction, that this
19 is from the state, this is from their brief, where
20 they note that many of the aspects of this program are
21 still in flux, and that a final determination
22 regarding whether or not students enrolled in the
23 pilot program are even eligible remains to be
24 determined.

25 And the state then say they have not made

1 any determination whether, as ultimately
2 implemented -- ultimately implemented by Douglas
3 County, the public school students will be eligible to
4 be counted. And that's because many aspects of that
5 remain in flux. And this relates directly to the
6 timing of the case, the fact that in many respects
7 this was a shape-shifting program as it evolved over
8 the course of the spring and the early summer.

9 And then similarly, Your Honor, the --
10 their brief in opposition -- this is again the
11 judicial admission that I referred to earlier. This
12 relates back to the state public school trust, the
13 public school fund. The state has said that in this
14 language -- this is the judicial admission in which
15 they say that the public school funds money are
16 commingled with that, which is provided to the school
17 districts. And in that respect, it is -- it violates
18 the Colorado Constitution.

19 Now, Your Honor, we turn quickly to
20 Exhibit 107. And we measure -- Exhibit 107; you will
21 see that this is the program. This is the Choice
22 Scholarship Program document that was adopted by
23 Douglas County on March 15. It was subsequently
24 implemented by the creation of a charter school. That
25 wasn't done until June and July of this year. Again,

1 speaking to the status quo element of rule 65.

2 But this goes, Your Honor, to the
3 thorough and uniform requirement under the statute.
4 Private school partners -- those are the private
5 schools that are involved here -- need not modify
6 their admission criteria or education programs to
7 participate in the Choice Program. It's not thorough.
8 It's not uniform, Your Honor.

9 Private school partner means a nonpublic
10 school that meets the conditions of eligibility. On
11 the face of this program, it applies only to private
12 schools. The Choice Scholarship Program shall pay to
13 the parent, student -- pay to the parent of Choice
14 Scholarship student one-quarter of the value of the
15 Choice Scholarship Program in September, November,
16 February, and May.

17 Your Honor, this part of Exhibit 107 goes
18 to the issue of status quo. What we saw when we
19 looked at this document was that the first payment
20 under this program was going to be made in September.
21 What we see now and hear from the defendants is,
22 they've accelerated. They accelerated the payments
23 and they make payments on July 1st, as we understand
24 it, coincidentally, the same date that we advised them
25 that we are moving forward with a motion for

1 preliminary injunction.

2 What they did here, Your Honor, is what
3 we said when we were last in front of the court. The
4 defendants here have attempted to change the facts on
5 the ground. The status quo has attempted to be
6 accelerated by these defendants, and that just
7 underscores the importance of moving forward with the
8 preliminary injunction.

9 This again relates to what Mr. Douglas --
10 this is from section C, paragraph 4 of Exhibit 104,
11 and it relates to what Mr. Douglas referred to as the
12 perpetual nature. That they are using the parent of
13 the student and the student as a conduit by which to
14 provide the moneys directly to the private schools.
15 This relates, Your Honor -- this is the section 107,
16 section D -- Exhibit 107, section D, paragraph 2.
17 "Choice Scholarship students shall independently
18 satisfy all admission requirements of the private
19 school partner. Scholarship recipients are encouraged
20 to learn about private school partners' admission
21 criteria, dress codes, and expectations of
22 participation in school systems, be they religious or
23 non-religious."

24 It's not uniform, Your Honor. It's not
25 thorough. And it violates that provision of the

1 Colorado Constitution.

2 This again, from Exhibit 107, section D,
3 paragraph 7-C, it relates to how much of a conduit
4 these payments are. The checks are issued with a
5 restricted endorsement. There is no dispute about the
6 fact that the checks are sent directly to the private
7 school partners, and the obligation on the parent
8 would be to restrictively endorse that check over to
9 the private school partner. And that's an agreement
10 that has to be entered into by the student and the
11 student's parents to timely restrictively endorse a
12 check to the private school.

13 And this, Your Honor, goes to what is
14 really one of the core points. This is -- this is
15 Exhibit 107. It's section D, paragraph 7-H.
16 Financial responsibility. The parent of a Choice
17 Scholarship student shall be responsible for all
18 tuition costs and fees in excess of the amount
19 provided by the Choice Scholarship and may be assessed
20 by the private school partner.

21 The evidence is undisputed that a number
22 of the private schools that have been selected to
23 participate in the Douglas County program have annual
24 tuition amounts that exceed the \$4,575 that are going
25 to be provided under the voucher program. In that

1 respect, Your Honor, this education is not free to
2 those Douglas County students. And because it is not
3 a free public education for students K through 12 in
4 Douglas County, because those students and their
5 parents are responsible to make up the delta, the
6 difference between the Choice Scholarship amount and
7 the actual tuition, it violates the constitution.

8 This, again, Your Honor, from
9 Exhibit 107, section D, paragraph 7-I, no specialized
10 programs. If a parent has a student that has special
11 needs, it is our understanding, Your Honor -- and we
12 believe that the evidence will show -- that only
13 Humanex provides the special needs programs that those
14 children can use. And these private school partners
15 can reject students who have special needs. And in
16 that respect, Your Honor, it is not thorough, it is
17 not uniform, and under the contracting statute, it
18 doesn't meet the same standards that Douglas County
19 has to use in their neighborhood schools and in their
20 charter schools.

21 Non-discrimination, section 107 --
22 Exhibit 107, section E, 3-F. A specific exception is
23 provided that religious school partners may make
24 employment and enrollment decisions based upon
25 religious beliefs. So the private school partners can

1 make decisions based upon religious beliefs with
2 respect to what teachers they hire, what faculty they
3 hire. Douglas County can't do that, Your Honor. In
4 that respect, it's not thorough, it's not uniform, and
5 it impermissibly entangles religion with the -- with
6 the private scholarship program here, with the Choice
7 Scholarship Program.

8 Similarly, private school partners, under
9 Exhibit 107, can make admission decisions based upon
10 religious beliefs. Mr. Douglas showed you some of the
11 excerpts from e-mails which say -- in which some of
12 the religious school administrators said that they
13 would try to steer people away. That is something
14 that the religious schools are perfectly entitled to
15 do in this state and in this country, but they can't
16 do it when they accept public tax dollars to this
17 degree and under this program. Again, non-thorough,
18 non-uniform.

19 Student conduct and discipline; a
20 critical issue, Your Honor, in our schools today. And
21 what Exhibit 107 says again is that private school
22 partners, the policies and procedures on discipline,
23 suspension, and expulsion need not replicate the
24 requirements for a traditional district school. They
25 can have their own disciplinary procedures. Not

1 thorough, not uniform, violative of the constitution,
2 Your Honor.

3 And finally what we point here is the
4 opt-out religious service. Again, Mr. Douglas
5 addressed that with the court. And religious services
6 is the key to focus on here. The religious services
7 can be opted out, but not religious education. And
8 that's made clear through Exhibit 2, which is a Q and
9 A from the Douglas County website in which the Douglas
10 County school board made it clear that it is not their
11 intention to change any school's application process.
12 Can students opt out of religion classes? We
13 recognize that many schools can bend religious studies
14 in all areas of their curriculum. Students may opt
15 out of participation in services but may be required
16 to respectfully attend if that's the school's policy.
17 And they are going to be required, Your Honor, to
18 participate in religious education is made clear here.

19 What about graduation requirements? This
20 is again Exhibit 2, from the Douglas County website.
21 What about current graduation requirements that
22 include theology classes? Families must perform at
23 graduate requirements and private school partners,
24 including minimum course selection that include a
25 variety of subject areas. In other words, theology

1 classes have to be participated in. Perfectly
2 acceptable for religious schools to pursue, so long as
3 they don't accept public tax dollars, as they are
4 going to be given under this program.

5 Your Honor, the leading Colorado case on
6 the entry of a preliminary injunction is Rathke
7 against Macfarland. I think the court has probably
8 administered that standard many times.

9 THE COURT: Couple times.

10 MR. MCCARTHY: Very familiar with the
11 requirements there.

12 In conclusion, Your Honor, we submit that
13 we -- we will show, and the exhibits that have been
14 admitted into evidence do show, that the plaintiffs
15 have a reasonable probability of success on the
16 merits, and that all the other factors under rule 65,
17 including the non-disturbance of the status quo, are
18 satisfied.

19 We would respectfully ask the court to
20 grant plaintiffs' motion for preliminary injunction.
21 Thank you, Your Honor.

22 THE COURT: Thank you.

23 All right. For the defense, Mr. Lyons.
24 You have a method as to how you want to divide the 30
25 minutes?

1 MR. LYONS: Well, I'm going to take
2 probably the lion's share of it, Your Honor -- no pun
3 intended -- but leave some time for the attorney
4 general and Mr. Bindas.

5 THE COURT: Fair enough. You can keep
6 your own clock. I'll tell you if you're at 30
7 minutes. You may proceed.

8 MR. LYONS: Thank you.

9 Your Honor, I do agree with counsel that
10 the central issue here is the Choice Scholarship
11 Program and whether or not plaintiffs can demonstrate
12 a probability of success that it does not meet
13 Colorado and U.S. constitutional standards. They
14 cannot do that.

15 The evidence, facts, and law will
16 establish three critical features of this Choice
17 Scholarship Program. First, it is religion neutral.
18 It is the parents and the students who make the choice
19 here, not the school board, not the school district,
20 or any other agency of government. The type of
21 school, consequently, that the parents and the
22 students select is irrelevant to this case.

23 Second, local control as required by law
24 is maintained. The partnership schools that
25 participate in this program are held to the same

1 standards of quality that Douglas County expects of
2 its own schools. Scholarship students will be tracked
3 and will be measured. The mechanism for that is an
4 internal charter school, which has been approved by
5 the Colorado Department of Education. It now becomes
6 the 11th charter school in the Douglas County school
7 system.

8 And third, there is zero revenue effect
9 from this program to the school district of Douglas
10 County or any other school district in the state. The
11 students, in order to participate in this program,
12 must have been in the Douglas County school system
13 last year. They, therefore, are counted as they are
14 part of the Douglas County school system.

15 In fact, the evidence will show that by
16 instituting this program, about \$350,000 will be saved
17 by the Douglas County school system at a time when --
18 and we all know -- K through 12 funding in this state
19 has been dramatically reduced.

20 Mr. McCarthy made much in his opening
21 about the status quo, but unfortunately that's not
22 where we are. What the plaintiffs are asking for here
23 is a mandatory injunction to dismantle this program,
24 which has been in the process of implementation since
25 March the 16th of this year.

1 I know, as we all do, that the court is
2 familiar with the Rathke standards. I want to touch
3 on them briefly. Although, I do want to focus a bit
4 on the probability of success on the merits.

5 In order to do this, the evidence and
6 facts will show, from Douglas County, that this
7 program was the result of an open, inclusive and
8 public process which began last summer, 2010. A
9 citizen professional task force was formed with seven
10 subcommittees that at one point had as many as 80
11 members, including, by the way, plaintiffs in this
12 case.

13 Over the course of 2010, from basically
14 July to December, numerous meetings and discussions
15 were held among these task forces, with and without
16 the school board and the senior management of the
17 school district. Recommendations were presented in
18 November to the board at its retreat with the task
19 force. As a result of that, staff and school district
20 was directed to craft a program, which then went out
21 for public comment to three different public events
22 that were held around the Douglas County school system
23 in essentially February of this year.

24 The program was adopted by the board on
25 March 15th, unanimously I might add, and the staff was

1 directed to begin to implement it, which they did. In
2 crafting this program, the Douglas County school board
3 and school district carefully considered applicable
4 Colorado law and precedent as well as the applicable
5 law of the United States Supreme Court, conspicuous by
6 its absence from the opening statement of either of my
7 learned colleagues.

8 This is not a case of first impression.
9 The principles by which a program such as this can be
10 conducted have been addressed in this state by the
11 Americans United case, by Colorado Christian
12 University versus Weaver in the 10th Circuit, by the
13 Lujan case and the Young Life cases of the Colorado
14 Supreme Court, and most particularly by the Zelman
15 case of the United States Supreme Court, which held
16 constitutional a virtually identical program in Ohio.

17 The U.S. Supreme Court jurisprudence is
18 relevant here because of the express language found in
19 Americans United, Your Honor, where the supreme court
20 of our state particularly determined that the
21 constitutional provisions in issue in this case must
22 be read in harmony with those of the constitution of
23 the United States Supreme Court, and in particular the
24 establishment clause and the du process clause. And
25 that is precisely what has happened here.

1 Now, we submit the plaintiffs would have
2 you ignore this law and these facts and read the
3 constitutional provisions of our state in a vacuum.
4 Even if you were to do so, Your Honor, we will present
5 the evidence and facts which support the legislative
6 history of these amendments, which are known
7 generically as the blame amendments. They come from a
8 movement not well regarded in American history in the
9 19th century, and found their way into the legislative
10 history of Colorado convention, and we submit infected
11 our constitution with their anti-Catholic and
12 anti-immigrant bias.

13 These provisions, now some 135 years
14 later, would not stand the light of day in this court,
15 in this state, or in this country.

16 Now, let me turn briefly to the other
17 Rathke standards, because, as the court knows, every
18 one of these standards must be satisfied, not just
19 one, not just four. There are five. This injunction
20 is not in the public interest. It will cause
21 collateral damage to 16 existing similar public
22 private partnership programs around the state. I
23 understand that the attorney general will present
24 witnesses specific to these points, but I would simply
25 illustrate the Colorado Opportunity Fund, which is the

1 lifeblood of higher education in this state, allows a
2 parent and a student to take the stipend and go to any
3 school of his or her choice, religious or not. That
4 program, among others, would be called into jeopardy.
5 And that's not in the public interest.

6 Next, the plaintiffs have pointed to no
7 irreparable injury to them or the organizations which
8 are supporting it. It's generally held that a
9 taxpayer's interest in not having funds spent
10 allegedly unlawfully, including alleged violation of
11 the constitution, does not ordinarily warrant the
12 grant of a preliminary injunction in terms of
13 establishing irreparable harm. We briefed that, Your
14 Honor, and I don't propose to go into it at this
15 point.

16 They had an adequate remedy at law. The
17 state gives them that. The system here of fund
18 allocation calls for a true-up of enrollment that was
19 based on projection about six months into the school
20 year. That will happen here if, in fact, there is
21 something wrong with this program. They have an
22 adequate remedy at law.

23 And last, but certainly not least, the
24 court is required to balance the hardships here. This
25 case was not brought until June 21st. No injunction

1 was sought until July 5th. And yet, I understood
2 Mr. McCarthy to say, and I'm inclined to agree with
3 him, that this case could have been, and can be,
4 determined simply on the policy that was adopted on
5 March 15th, Exhibit 107.

6 No lawsuit was filed in March while the
7 program began to be implemented, while contracts were
8 negotiated with 23 schools, while an application form
9 was put out to parents and students within the Douglas
10 County system who might want to participate in this
11 program. The school district itself made significant
12 internal changes during this period of time. No
13 lawsuits filed in April. No lawsuits filed in May.
14 It's not till the end of June, and it's not till July
15 5th that a preliminary injunction is filed.

16 So what happened is, they now, by sitting
17 on their own rights, allowed the status quo to change,
18 and come before the court now seeking a mandatory
19 injunction to dismantle this program. And the law
20 there is very clear. In order to get a mandatory
21 injunction at a preliminary stage, which is, quote, a
22 rare, unquote, remedy, your right to it has to be,
23 quote, clear and certain, unquote. That's the Allen
24 case that we cited in our papers.

25 We will present the testimony of two

1 schools, by way of illustration, as to the hardship
2 they now face as of this late date. Valor High
3 School, which is one of the larger schools
4 participating in the program, will testify that
5 disenrollment at this point would cost them revenues
6 in excess of a quarter of a million dollars.

7 Woodlands School, a small non-sectarian
8 school, by the way, with 30 students, will testify
9 that they have 10 students in this program; that they
10 hired two new teachers to deal with this growth that
11 they will now have to fire; that they built new
12 classrooms all in reliance on this program.

13 And finally, and not by any means least,
14 is the disruption to the families that are in this
15 program. Mr. Bindas represents a group of those
16 families who we believe with are representative and
17 typical of the hundreds of families that rearranged
18 their lives to participate in this program. The
19 evidence will show, as of yesterday, that's 271
20 families who paid well over a quarter of a million
21 dollars to the school of their choice to participate
22 in this program. They have been involved in all kinds
23 of orientation, summer sports programs, and other
24 activities in reliance on this program for which these
25 plaintiffs now seek a mandatory injunction.

1 Whether that's balancing of the
2 hardships, Your Honor, or considering the public
3 interest, or both, we urge the court not to use its
4 extraordinary equitable power to disrupt their lives
5 and their plans at this late date.

6 In summary, we do not believe these
7 plaintiffs can establish each and every one of the
8 Rathke factors, nor can they meet their burden of
9 sustaining a request for mandatory injunction. We
10 will ask these motions be denied.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Lyons.
13 Mr. Bindas.

14 MR. BINDAS: Thank you, Your Honor.

15 Nearly a century ago, the United States
16 Supreme Court recognized the fundamental right of
17 parents to direct the education of children under
18 their control. Just two years later, Colorado Supreme
19 Court also recognized what it call the constitutional
20 right of parents to have their children taught where,
21 when, how, what, and by whom they may judge best. The
22 Choice Scholarship Program simply empowers parents to
23 exercise this preexisting fundamental right.

24 Now, in seeking to preliminarily enjoin
25 the program, plaintiffs disparage the critical role

1 that parents play under the program in choosing the
2 schools that are best for their children, and they
3 disparage that role in two ways. First, they suggest
4 that parents' choices are not truly private, that it
5 is government rather than parents directing where
6 scholarship moneys flow, thus, they argue government
7 is aiding or supporting or sustaining religious
8 schools.

9 Second, they claim that parents' choices
10 are not truly independent, thus their argument that
11 the Choice Scholarship Program compels support of
12 religious by parents and taxpayers.

13 Your Honor, plaintiffs may have little
14 faith in the ability of parents to make private and
15 independent choices concerning their children's
16 education, but the families who have applied for and
17 received scholarships under the program know better.
18 As the evidence will show, they know what school will
19 best meet their children's educational needs. And the
20 Choice Scholarship Program simply empowers them to
21 make that choice privately and independently from a
22 wide array of educational options.

23 The fact is, under the program, not a
24 penny flows to any school, religious or non-religious,
25 but for that private and independent choice of

1 parents.

2 As we've discussed in our briefs, and as
3 Mr. Lyons mentioned, under controlling Colorado
4 Supreme Court precedent, Americans United, as well as
5 authority from other state supreme courts and most
6 significantly the United States Supreme Court, Zelman
7 versus Simmons Harris, which upheld a Colorado
8 elementary school Choice Program in which the large
9 majority of participating private schools were
10 religious and the overwhelming majority of students
11 selected those schools. Under these cases, Your
12 Honor, the private and independent choices of
13 parents -- the private, independent choice of parents
14 is precisely what makes this scholarship program
15 constitutional, what breaks any connection between
16 church and state.

17 In light of this case law, the plaintiffs
18 will not be able to satisfy the first right hearing
19 necessary for a preliminary injunction: Probability
20 of success on the merits.

21 Now, Your Honor, before I discuss what
22 the evidence will show regarding the balance of
23 equities, I'd like to briefly discuss how the
24 scholarship program has enabled three particular
25 families to make that private and independent choice

1 of the school that will best meet the unique
2 educational needs of their children. Of course, I'm
3 talking about the three intervenor families.

4 THE COURT: Let me stop you for just a
5 second, Mr. Bindas. A moment ago, you referenced the
6 Zelman decision as dealing with Colorado. You
7 meant --

8 MR. BINDAS: I misspoke, Your Honor.
9 It's an Ohio scholarship program for children in the
10 Cleveland public school system. I apologize.

11 THE COURT: Okay. You may proceed.

12 MR. BINDAS: I'm speaking, of course, of
13 the three intervenor families, the Oakleys, Andersons,
14 and Doyles. As Your Honor was aware from having read
15 the affidavits of these three families, each has a
16 child, or in the Doyles' case two children, who have
17 received a scholarship under the program, and each has
18 selected a different private school that the parents
19 feel will best meet their children's educational
20 needs.

21 Two of the families have selected
22 non-religious schools, one has selected a religious
23 school. And their choices reflect the vast diversity
24 of educational needs that exists from one child to
25 another.

1 As explained in the affidavit of Jeanette
2 Anderson, her third grade son Max is particularly keen
3 on it, particularly good at science and math, so
4 Jeanette and Mark -- her husband Mark -- have
5 therefore selected or chosen to use Max's scholarship
6 to send him to Woodlands Academy, a small
7 non-religious school in Castle Rock, precisely because
8 it has a strong math and science curriculum.

9 As explained in their affidavit, Florence
10 and Derrick Doyle want a high school with a strong
11 college prep curriculum and strict discipline for
12 their twins, Donovan and Alexandra. They also want
13 Donovan and Ali to receive a strong spiritual
14 foundation before going off to college. For these
15 reasons, they've chosen to use their scholarships to
16 send Donovan and Ali to Regis Jesuit.

17 In fact, Donovan and Ali have been taking
18 summer classes at Regis all summer, and Donovan has
19 been participating in the school's football team since
20 early June.

21 Then, Your Honor, there's the Oakley
22 family. You've seen Diana Oakley's affidavit. You'll
23 also hear her testify later in this hearing. The
24 Oakleys have three children: Seventh grader Nate,
25 fifth grader Amber, and second grader Joshua.

1 As Diana will testify, Amber and Joshua
2 are doing great in the public school system. They're
3 thriving. Nate, however, is not. Diana will testify
4 regarding the difficulties that Nate faces as a result
5 of his Asperger's syndrome diagnosis, as well as some
6 of the struggles he's having.

7 She'll testify as to how the Choice
8 Scholarship Program has been a Godsend to her family,
9 enabling her and her husband Mark to send Nate to
10 Humanex Academy, a small non-religious school in
11 Englewood that focuses on children with special needs.
12 As you'll hear from Diana, she and Mark are confident
13 in Nate's ability to thrive in this new environment.

14 So as you can see, Your Honor, three very
15 different reasons for selecting three very different
16 schools. A strong math and science curriculum in one
17 case; rigorous college prep curriculum, strict
18 discipline, Jesuit approach to education in another
19 case; and in a third, a school with teachers committed
20 to serving children with special needs. All vastly
21 different but equally valid reasons for selecting a
22 school.

23 And that is precisely what the Choice
24 Scholarship Program is designed to accomplish. Our
25 parents, who know their children's educational needs

1 better than anyone, to privately and independently
2 choose the school that will best serve those needs.
3 And the harm that would befall these three families if
4 the Choice Program is enjoined is overwhelming. And,
5 Your Honor, as you'll see from the evidence, it will
6 be particularly heavily against an injunction.

7 For example, Humanex, the Oakleys have
8 found a perfect school to address Nate's special
9 needs. But as you'll hear from Diana when she
10 testifies later in the hearing, if the program is
11 enjoined, she and Mark will be forced to withdraw Nate
12 from Humanex. And because of their dissatisfaction
13 with the progress Nate has made in the public school
14 system, as well as the bullying that he's endured
15 there, they'll have to home school him. And that will
16 be a tremendous burden, not just on the family, but it
17 will severely aggravate the very difficult anxiety
18 problems that Nate already suffers as a result of
19 Asperger's syndrome.

20 Now, the Doyles and Andersons, they may
21 be able to keep their children in the respective
22 private schools, but it will be a burden, particularly
23 for the Doyles. As Florence Doyle testified in her
24 affidavit, they will have three children attending
25 Regis this year. The school's tuition is over \$11,000

1 per child. And if the program is enjoined, they will
2 have to draw from family savings or use credit to
3 cover the combined \$9,150 they would have received
4 from Donovan and Ali's scholarships.

5 Now, balance these very real concrete
6 harms against the purported harms that plaintiffs
7 claim will befall them if the program is not enjoined.
8 Your Honor, they claim harm as taxpayers. That may be
9 sufficient to establish standing for some claims
10 challenging the Choice Scholarship Program, but it's
11 not sufficient to preliminarily enjoin the program.

12 In a case that Mr. Lyons referenced, the
13 California Supreme Court recently put it this way: A
14 taxpayer's general interest in not having public funds
15 spent unlawfully, including not having such funds
16 spent in alleged contravention of fundamental
17 constitutional restrictions, ordinarily does not, in
18 itself, constitute the type of irreparable harm that
19 warrants the granting of preliminary injunctive
20 relief.

21 Finally, Your Honor, the purpose of a
22 preliminary injunction is to preserve the status quo.
23 Here an injunction would destroy it. As the evidence
24 will show, Your Honor, families have relied on the
25 program, they've applied for and received

1 scholarships, schools have applied and been accepted
2 to participate in the program, parents have enrolled
3 their children in their new schools, the district has
4 sent scholarship checks in the parents' names to the
5 schools, students have begun taking summer classes,
6 students have participated in sports, students have
7 participated in activities over the summer, and the
8 academic year begins in days. That is the status quo,
9 Your Honor. And as the evidence will demonstrate, an
10 injunction would upend it.

11 THE COURT: Thank you, Mr. Bindas.

12 Mr. Blue.

13 MR. BLUE: Thank you, Your Honor. I note
14 that I probably have about 30 seconds in our 30
15 minutes of opening statements, so I will be brief. I
16 will not reiterate --

17 THE COURT: I have you down for 10
18 minutes.

19 MR. BLUE: Thank you. I will not
20 reiterate what you've heard already to any big degree.
21 The reality is that both Mr. Lyons and Mr. Bindas have
22 adequately explained the facts of this case and the
23 fact that the plaintiffs will not be able to show a
24 reasonable success on the merits, nor have they met
25 the rest of the Rathke factors.

1 I want to reiterate a few quick points
2 that I think I are very important on this case and to
3 be kept in mind as we go through the evidence over the
4 next few days.

5 First, that this case is about choice.
6 Plaintiffs' counsel has tried to take the idea of
7 choice out of it. But as Mr. Bindas eloquently
8 stated, this is about the ability of parents to choose
9 a better education for their children. This country
10 for years has identified the parents as the people who
11 have the role, the authority, the obligation to make
12 decisions for their children and how their children
13 will be educated. This program merely continues that
14 tradition in America.

15 This case is not about religion, despite
16 what you may hear. There is no evidence that the
17 district is trying to fund money into religious
18 education or to support religious sects. There's no
19 evidence that the state is trying to do the same
20 thing.

21 The fact that there are mostly religious
22 schools is merely a function of which schools applied
23 and how the criteria were met. It is clearly a
24 program that is meant to be very equally based and not
25 to be focused on religion but to whichever schools

1 apply and provide the best education to the children
2 in Douglas County.

3 Ultimately, the evidence will show that
4 Douglas County school district is trying to expand
5 choice to more families that are given the same
6 opportunities to improve the education of their
7 children that other, more wealthy, families have.

8 The evidence in this case will show that
9 the state has not made any decisions in creating the
10 program; that they just consulted. The state has
11 tried to consult on this before the program starts, so
12 the stakes will not be made to try to prevent the need
13 to have the money paid back to the state by Douglas
14 County in the future.

15 This is a normal process the state goes
16 through. If another district were to bring a program
17 to the state, the state would attempt to create the
18 same type of consultation to help those districts
19 create their programs in such a way to comply with the
20 School Finance Act and to ensure that at the end of
21 the year money doesn't have to paid back. Paying back
22 money to the state by the district is not in either
23 the district's interest or the state's interest, and
24 the state tries to prevent that by working at the
25 front end to help the schools. It does not matter

1 what kind of program it is. And they try to do it
2 with all programs.

3 Ultimately, the state has made no
4 decision whether the students in this Choice Program
5 should be counted under the School Finance Act, and
6 that decision will come next spring after the annual
7 audit that Douglas County goes through.

8 And finally, you'll hear about numerous
9 programs that Colorado has used to fund education for
10 students in private schools, including religious
11 schools, and including the entire educational program
12 for some students, and not just merely a portion of
13 it.

14 Ultimately, Your Honor, you'll find today
15 and over the course of these few days that the
16 plaintiffs have not met the Rathke factors and that
17 you should deny the motion for preliminary injunction.

18 THE COURT: Thank you, Mr. Blue.

19 All right. I'm sure the court reporter
20 will be happy to hear that we're going to be taking a
21 break here momentarily.

22 Before we do that, I do want to address
23 the issue of the burden of proof, because I think it's
24 important going forward as you all present your case
25 that you have a clear understanding of at least my

1 perception of the relief that's being requested and
2 the burden of proof that has to be established here.

3 The parties are before me seeking
4 injunctive relief, no doubt, under rule 65. The
5 plaintiffs have endeavored to couch the relief
6 requested as that only requested by way of a
7 preliminary injunction. Obviously, the Rathke
8 standards would apply in any event.

9 Defense has asked me to consider the
10 extent to which the higher burdens of Allen would
11 apply, given the nature of the relief requested and
12 the practical effect being that the plaintiffs -- a
13 determination by the court that the plaintiffs are
14 seeking a mandatory injunction, although they have not
15 described it as such.

16 And my assessment, from what I've
17 reviewed in the wealth of pleadings that have been
18 presented in great length and detail, is that the
19 relief requested is consistent with the request for a
20 mandatory injunction. Specifically, the relief
21 requested today and in this proceeding and my rulings
22 upon it, there's nothing beyond that, from what I've
23 reviewed, that I would be able to expand upon in a
24 hearing on mandatory injunction. There's no relief
25 that -- even if the court were inclined to find at the

1 conclusion of the evidence that the plaintiff has met
2 their burden, or -- excuse me -- has presented
3 sufficient evidence to comply with the Rathke
4 criteria, there's no relief requested that I will not
5 later -- requested that wouldn't be addressed in this
6 case. There's nothing more than I can grant you at a
7 later date in an injunction hearing that I can't grant
8 or aren't being asked to grant in this proceeding.

9 So my assessment is that the action that
10 plaintiff has initiated here indeed seeks a mandatory
11 injunction. On that assessment, I'm going to direct
12 the plaintiffs and the parties that I'm assessing and
13 asking them to adhere to the burden of proof as
14 established under Allen for the mandatory injunction.

15 So obviously, Mr. Douglas, you want to
16 chew on that for a minute and make a record briefly
17 when we come back as to any objections you may have,
18 but that's my assessment. And I think I get to make
19 that determination, and I don't make it lightly. I
20 understand it is to some degree the burden of proof
21 that plaintiff would have in this case. But I think
22 it's consistent with what I've reviewed and the nature
23 of the law as I understand it. So that's my ruling.
24 Plaintiffs will be held to a higher burden on request
25 for injunctive relief.

1 Let's take 15 minutes.

2 (Recess taken, 10:18 a.m. to 10:42 a.m.)

3 THE COURT: Mr. McCarthy, you want to
4 be heard on the court's ruling a moment ago?

5 MR. McCARTHY: Your Honor, let me say I'm
6 never entirely comfortable when I have to preface my
7 remarks when I say I'm going to make a record on this.
8 But I know the court understands. And let us say,
9 with all deference, and recognizing that at least at
10 this stage in the proceeding you're probably not going
11 to change your mind, but that the plaintiffs, in terms
12 of the relief that we seek, Your Honor, do not see the
13 injunction that we're asking you to enter as being
14 mandatory. We see our injunction -- and let me just
15 make absolutely clear for the record, we see it as a
16 prohibitory injunction.

17 And to be very specific, we are not
18 asking the court to order that any money that's been
19 distributed be repaid. We're not asking the court, I
20 think, in the broad sense, as far as money flow,
21 anyway, to undo something that has been done.

22 What we are asking the court to do is to
23 prohibit any further funding and to prohibit any
24 further implementation of the program. Stop the
25 program. To enjoin it. And in that sense, we see it

1 as a prohibitory injunction.

2 We ask for declaratory relief. We seek
3 the program to be declared as an unconstitutional
4 violation and to not allow it to go forward, to not
5 allow any further moneys to be paid, to not allow any
6 further implementation to occur. But in terms of
7 any -- to the extent that the defendants are saying
8 we're asking you to order the parents to repay money,
9 we want to make it clear that we are not asking for
10 that relief.

11 And so in that respect, Your Honor, we do
12 respectfully submit that it is a prohibitory
13 injunction, and it is that standard. But you've been
14 very clear about your views, and we believe that we do
15 meet the standard for mandatory injunction. And we
16 will take what you say to heart, and we will -- we
17 believe that we can meet that standard going forward,
18 in any event, Your Honor, and we'll proceed to do so.

19 THE COURT: Spoken like a man with
20 confidence, and one that brings his own barrista to
21 court. So good for you. Mr. Macdonald?

22 MR. MACDONALD: Your Honor, I don't need
23 to hear it on this issue, but I just want to let the
24 court know that Mr. Leung has joined us as our client
25 representative.

1 THE COURT: All right. Thank you.
2 Anything else, Mr. McCarthy?

3 MR. McCARTHY: Nothing further, Your
4 Honor.

5 THE COURT: Thank you very much.
6 Plaintiff will call your first witness.

7 MR. McCARTHY: Your Honor, plaintiffs
8 call Cindra Barnard.

9 THE COURT: Please come forward and be
10 sworn.

11 CINDRA BARNARD,
12 having been first duly sworn to state the whole truth,
13 testified as follows:

14 THE COURT: Please be seated.
15 Ms. Barnard, my clerk is going to move those notebooks
16 around a little bit, so I can actually see you between
17 my computer and this. It's hard for me to do that. I
18 want you to keep in mind a couple of things as we go
19 forward.

20 It's very difficult to hear in this
21 courtroom. The acoustics are lacking, and sometimes
22 our audio system is lacking, as well. I'm going to
23 ask you to do your best to speak up at an audible
24 level so that I can hear you, and the participants can
25 also hear you. The microphone in front of you is

1 adjustable; adjust it to your comfort. You won't
2 break it. Please use it.

3 Our proceedings are being recorded by
4 this fine court reporter in front of us. She has 10
5 fingers; I checked this morning. She can only take
6 down the questions that you're asked and answers you
7 give, not two people speaking at the same time.

8 THE WITNESS: Okay.

9 THE COURT: Although, Mr. Bindas came
10 close. So just do your best to listen to the question
11 they're asking you, and then start your answer. All
12 right?

13 THE DEPONENT: Okay. Thank you.

14 THE COURT: Mr. McCarthy, the floor is
15 yours.

16 MR. McCARTHY: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 BY MR. McCARTHY:

19 Q. Please state your name.

20 A. Cindra Barnard.

21 Q. What's your residence address?

22 A. 1984 Platte River Court, Highlands Ranch,
23 Colorado.

24 Q. What county do you live in, Ms. Barnard?

25 A. Douglas County.

- 1 Q. What's your marital status?
- 2 A. I'm married.
- 3 Q. Are you a property owner in Douglas
4 County?
- 5 A. Yes, I am. Is it residential property
6 that you own?
- 7 A. Yes, it is.
- 8 Q. Do you pay real estate taxes in Douglas
9 County?
- 10 A. Yes, I do.
- 11 Q. How much do you pay in real estate taxes?
- 12 A. \$1,000 -- total real estate taxes?
- 13 Q. Total.
- 14 A. Gosh. Around \$2,034 a year.
- 15 Q. And a thousand of that is paid to what?
- 16 A. It Douglas County public schools.
- 17 Q. Are you a parent?
- 18 A. Yes, I am.
- 19 Q. How many children do you have?
- 20 A. I have two children.
- 21 Q. And what are their names?
- 22 A. Carley and Mason.
- 23 Q. And what are their ages?
- 24 A. Carley is 19. Mason is 17.
- 25 Q. Are you a plaintiff in this case, ma'am?

1 A. Yes, I am.

2 Q. And is your son Mason a plaintiff in this
3 case?

4 A. Yes, he is also.

5 Q. Where does Mason go to school?

6 A. Mason goes to school in Highlands Ranch
7 High School in Douglas County.

8 Q. And what level is he at at Highlands
9 Ranch High School?

10 A. He's a senior.

11 Q. Ma'am, have you ever testified in court
12 before?

13 A. No, I have not.

14 Q. What's your educational background,
15 Ms. Barnard?

16 A. My first degree is an associate degree in
17 dental hygiene. I supported myself through school
18 again with a degree in business and a master's, MBA,
19 with an emphasis in finance.

20 Q. And from what institutions were those
21 degrees awarded, and when were they awarded?

22 A. My associate degree was from the
23 University of New Mexico. I finished there in '77.
24 My undergraduate degree at Metro State College. I
25 finished there in, I believe, 1986. And I finished my

1 master's at the University of Denver in 1988.

2 Q. Ms. Barnard, could you please describe
3 what your involvement has been with the Douglas County
4 schools in the recent past.

5 A. I have volunteered at the schools in the
6 classrooms as well as on school -- local school
7 committees, at the school building committee, as a
8 liaison to the district accountability committee, and
9 the -- my children's elementary school, their middle
10 school, and their high school.

11 I served on the district's policy review
12 committee and currently I am chair of the school
13 accountability committee for Highlands Ranch High
14 School. I'm the liaison to the district
15 accountability committee, and I currently serve on the
16 long-range planning committee.

17 Q. And the long-range planning committee for
18 what, ma'am?

19 A. The long-range planning committee is a
20 Douglas County board committee that looks at capacity
21 planning and resources -- capital resources for our
22 school district.

23 Q. And what are the responsibilities of the
24 school accountability committee on which you sit for
25 Highlands Ranch High School?

1 A. The school accountability committee looks
2 at school improvement plans. We look at funding and
3 budget. And one of our main tasks is to look at
4 site-based budgeting and understand how the dollars
5 for the school will be used.

6 Q. And what are your responsibilities as a
7 liaison to the district accountability committee?

8 A. I take information that's happening in
9 our local school and report that to the district
10 accountability committee. From the district
11 accountability, I bring information from them, which
12 is a board committee, down back to our school, to keep
13 them informed of actions of the district.

14 Q. What are the responsibilities of the
15 district accountability committee?

16 A. The district accountability committee is
17 also a board committee, and I view it as sort of a
18 liaison to help the local schools understand what's
19 happening at the district level and also help the
20 district understand what's happening at the schools.

21 Q. Could you describe what involvement you
22 have had in the observation of the Douglas County
23 school district and school board's pursuit of a
24 voucher initiative over the course of the past -- in
25 the recent past, ma'am.

1 I became very concerned about --

2 Q. And I'm sorry to interrupt you, but let
3 me just go back and clarify for the record and for the
4 court.

5 You referred to October. October of what
6 year?

7 A. October 2010.

8 Q. Okay. And you referred to a Mr. Hall.
9 Is that Mr. Eric Hall sitting at the counsel table?

10 A. Yes, it is.

11 Q. And that was a presentation that he made
12 to the Douglas County school board?

13 A. He made that presentation to the task
14 force. There were several more members in the room.

15 Q. And what was the task force that you're
16 referring to?

17 A. The Option Certificate Program.

18 Q. Was that one of the names that Douglas
19 County used to refer to the initiative for payment of
20 tuition to private schools?

21 A. Yes, it is. It was initially called the
22 option certificate. Later I heard it talked to as a
23 contract. And in February, March, it became known as
24 scholarship.

25 Q. The Choice Scholarship Program?

1 A. Yes. The initial term I just heard was
2 scholarship. And there were times when in a
3 conversation that I had with Mr. Benevento that he
4 told me he preferred to call it voucher.

5 MR. LYONS: Objection. Hearsay. Move to
6 strike.

7 THE COURT: Sustained.

8 Q. (BY MR. McCARTHY) Who is Mr. Benevento?

9 A. He's a school board member.

10 Q. And was he a school board member at the
11 time he made that comment to you?

12 A. Yes, he was.

13 Q. And did Mr. Benevento, as a member of the
14 school board, refer to the Choice Scholarship Program
15 as a voucher program?

16 A. He did on that night. That was at one of
17 the district accountability --

18 MR. McCARTHY: Admission of a party
19 opponent, Your Honor.

20 THE COURT: It's overruled.

21 Q. (BY MR. McCARTHY) I'm sorry. Ma'am,
22 could you please finish.

23 A. It was a conversation I had with him at
24 the district accountability forum that was held in
25 February to give information on the -- at that time,

1 it was still an options certificate program to school
2 leaders.

3 Q. And I'm sorry. Before I interrupted you,
4 you were testifying with respect to your concern
5 regarding the direction and the speed of that
6 direction by the school board.

7 What did you observe in that respect in
8 terms of the school board's moving forward with this
9 program for payment of private school tuition?

10 A. At that October meeting -- at this time,
11 I thought this task force was a group of volunteers
12 that were brainstorming on possible choices for kids.

13 When I realized that this program was on
14 file format, this had to move forward faster. And the
15 board wanted to make a decision on moving forward with
16 this as early as December. And I felt like this was
17 something the public really didn't know about.

18 Q. And what did you do in response to your
19 perception regarding a lack of public knowledge
20 regarding the board's intentions?

21 A. I initially spoke with -- well,
22 initially, I asked Mr. Hall if I could have an
23 additional copy of the program, which he thankfully
24 gave to me the next morning. I chatted with people I
25 respect, friends, and people whose opinion on

1 education I respect.

2 And after much consideration, I sent the
3 information to the press. And at that time I also
4 sent information out to my personal e-mail address to
5 help to begin to inform the public.

6 We organized very quickly, and early
7 November, a group of friends basically got together
8 and said, what are we going to do to put a stop to
9 this program. We were concerned about our public
10 schools.

11 Q. What was your intent in speaking to
12 friends with respect to your concern as far as -- as
13 far as the program and its progress in consideration
14 by the Douglas County school board?

15 A. I felt like the school board was going to
16 make this happen without the public knowing.

17 Q. And what did you intend to do about that,
18 ma'am?

19 A. I believe the public engagement and the
20 public needed to understand where the direction of our
21 school went.

22 Q. Then focusing your attention on the
23 period of time after December of 2010, what took place
24 with respect to the progress of this potential
25 initiative for payment of tuition to private schools,

1 as far as the actions of the Douglas County school
2 board that you could observe?

3 A. It seemed to me at that time that the
4 school board was looking for more public engagement.
5 They held a meeting with the district accountability
6 committee, held a forum to educate school leaders; the
7 school accountability folks.

8 They also held three public engagement
9 sessions in different parts of Douglas County. I was
10 asked to speak in opposition to the Option Certificate
11 Program at all three of those meetings. And at this
12 point in time, I really felt that the board was
13 listening to the public.

14 As as it went on, toward the end of those
15 meetings, I realized that this is an agenda that the
16 board really wanted to push through.

17 Q. And when did those meetings occur?

18 A. The February meetings? They were
19 February 22nd, 23rd, and 24th.

20 Q. And you did, in fact, speak in
21 opposition?

22 A. Yes, I did.

23 Q. And was it your intent to raise public
24 support to oppose the program by Douglas County?

25 A. My intent was certainly to educate as

1 well as oppose the program.

2 Q. Did you believe at that point in time --
3 or had you had any intention that litigation at that
4 point in time would be necessary, ma'am?

5 A. Absolutely not. I've given my heart and
6 soul to Douglas County school district, and I
7 appreciate the education my children have received.
8 Filing suit was absolutely a last resort.

9 Q. Okay. And did there come a time, then,
10 when the Douglas County school board, in fact, adopted
11 a program for the payment of tuition to private
12 schools for Douglas County students?

13 A. Yes, they did. There's a presentation to
14 the board at an early -- I believe it's March -- I
15 don't know. The first board meeting in March where
16 Dr. Cutter presented the program. And at that time,
17 director -- excuse me. The president of our school
18 board had stated that he really thought it was going
19 to be a financial boon to the school district. And
20 then the program was voted on on March 15th at the
21 second school board meeting.

22 Q. Is it your understanding that as things
23 stand it at this point in time, that the program
24 functions so as to employ as part of it what counsel
25 for the school board referred to as an internal

1 charter school?

2 MR. LYONS: Objection, Your Honor. It's
3 leading.

4 THE COURT: Overruled.

5 Q. (BY MR. McCARTHY) You can answer, ma'am.

6 A. Thank you.

7 I had a private meeting with Mr. Carson,
8 and he made the mention of, we really don't know the
9 formation of this thing yet, but we might do it under
10 a virtual charter. There was nothing public.

11 When the vote was made on March 15th to
12 move ahead with the program, they still talked about
13 the structure wasn't -- wasn't completed. There were
14 a lot of open-ended questions. They didn't understand
15 the structure. They still talked about an office to
16 administer the program. And at that time, there just
17 wasn't a lot of structure to it other than to move
18 ahead.

19 Q. Did the Choice Charter School that now
20 exists, the internal charter school, as the defendants
21 have called it -- did that exist on March 15, 2011,
22 when the Choice Scholarship Program was approved by
23 Douglas County?

24 A. No, it did not. The first time that the
25 charter application was read was in a board meeting in

1 June.

2 Q. And when was the final approval for the
3 charter school application -- I'm sorry -- for the
4 internal charter school that is to administer this
5 program granted by Douglas County?

6 A. That was in a board meeting on July 19th.
7 And between that first meeting in June to July 19th, I
8 believe the charter application changed three times.

9 Q. You have personal knowledge of that.

10 A. Yes, I do.

11 Q. What is your understanding, Ms. Barnard,
12 of the impact that the Choice Scholarship Program will
13 have on your son Mason?

14 A. Douglas County school district has had
15 its budget slashed by over a hundred million dollars
16 in the previous four years. We're looking at another
17 20, 25 million dollars in cuts for this coming school
18 year.

19 I understand the budget process that each
20 individual school does, and taking 3 million dollars
21 out of the revenues of our public schools, it has to
22 hurt. The district has recognized, in their contract,
23 that they want to try to mitigate some of that loss.

24 When you look at the budgets that these
25 schools work with, there simply isn't any wiggle room,

1 and it will hurt.

2 Q. You refer to a 3 million dollar figure.
3 What is the 3 million dollars that you referenced in
4 your testimony a moment ago?

5 A. The board has said that they will give --
6 they go typically give a hundred percent per pupil
7 revenue to charter schools. So that is the 500
8 students times the \$6100.

9 Q. Do you have any understanding that the
10 Choice Charter School that has been approved by
11 Douglas County has any physical existence?

12 A. It does not.

13 Q. What impact will the Choice Scholarship
14 Program have on you?

15 A. First of all, as a mom, I'm very
16 concerned about my son's senior year. As a Douglas
17 County property owner and taxpayer, I look at this
18 program as a slippery slope. This has been
19 mentioned -- started as a pilot program, which, to me,
20 says there's something that comes next.

21 And the way the program is currently
22 written, it can expand its numbers by 10 percent every
23 year all on its own. Yet it's a charter school. They
24 can also go to the school board and ask for an
25 increase. They can approve 20 percent, 30 percent.

1 It's just up to the charter school and the board for
2 this program to grow.

3 I certainly see it has the possibility of
4 truly strangling public education. Rather than
5 helping the public schools, it hurts.

6 Q. Is that what you find objectionable about
7 this program, ma'am?

8 A. Absolutely.

9 Q. What were the factors that impacted the
10 timing for the filing of this case by you and Mason
11 and Taxpayers for Public Education?

12 A. I personally worked very hard, as well as
13 once the organization formed, we worked very hard to
14 talk to school board members and to try to stop this
15 program. We put pressure on -- we had our members
16 send letters to our school board.

17 As it moved on, we felt like they weren't
18 listening. We sent letters, we had petitions signed.
19 We did everything we really thought we could to
20 educate and try to get our board to stop it.

21 When that March 15th vote came, of
22 course -- before that point, we really thought they
23 might be listening and this might go away. And as I
24 stated before, filing suit was certainly a last
25 resort.

1 When the program was voted on in March,
2 it had no structure. They were still talking about
3 needing waivers from the state Board of Education that
4 wouldn't come until August. It was basically only a
5 target to truly understand what -- to get our arms
6 around what we were suing against to stop. It was
7 difficult to do. And as late as July, they were still
8 forming the program.

9 Q. Did you understand -- what understanding
10 did you have concerning when the first payments could
11 be made by the state to Douglas County with respect to
12 this program?

13 A. Their documents say September.

14 Q. And do you understand that typically the
15 state makes payments -- apart from what Douglas County
16 said about when it would make payments to parents,
17 does the state typically make payments to Douglas
18 County at what point in time in a month?

19 MR. LYONS: Objection. Foundation.

20 THE COURT: Sustained.

21 Q. (BY MR. McCARTHY) Ma'am, do you have any
22 personal knowledge as to when the state of Colorado
23 makes payments to Douglas County with respect to per
24 pupil revenue or otherwise?

25 A. I asked the school district's chief

1 financial officer that question. I asked her when the
2 school district receives money from the state, and her
3 answer was they receive money monthly, and that for
4 the new school year, '11-'12, they will receive their
5 payment from the state on the 20th.

6 Q. Of what month, ma'am?

7 A. July 20th of this year.

8 MR. McCARTHY: Your Honor, no further
9 questions at this time.

10 THE COURT: Cross-examination.

11 MR. LYONS: Thank you, Your Honor.

12 CROSS-EXAMINATION

13 BY MR. LYONS:

14 Q. Ms. Barnard, if I got this right, you
15 seem to have been serving on three different
16 committees or task forces at the same time. The
17 school advisory committee at the high school, as
18 liaison to the district advisory committee, and on the
19 long-range planning committee. Did I get those right?

20 A. Sort of. My position as liaison to the
21 district accountability committee is one of my tasks
22 from the school accountability committee. It's really
23 two things.

24 Q. And when did you first become involved in
25 these activities involving the Douglas County school

1 is system?

2 A. The minute my daughter stepped foot in
3 her kindergarten class.

4 Q. So when the Douglas County school board
5 began its task force operation in the summer of last
6 year, you were involved with that?

7 A. I was invited to the second meeting in
8 July.

9 Q. Did you make an effort, as that
10 progressed -- I believe you said you did -- to inform
11 other citizens of what was being discussed within the
12 task forces and its subcommittees?

13 A. I attended the July task force meeting,
14 the first one that I was invited to by the district
15 accountability committee as a liaison. At that time,
16 at that meeting, there were about -- I don't know --
17 30, 40 people in the room, and the meeting was kind of
18 a free-for-all. There was no agenda posted. There
19 was no agenda at the meeting.

20 At one point, I -- people were
21 brainstorming. I asked the committee what the purpose
22 and the goals of task force was, and at that time
23 Mr. Carson said, gosh, we haven't gotten there yet.

24 At the end of that meeting, he had
25 everybody sign up on slips of paper as to what

1 committee you might be wanting to serve on. I signed
2 up for the neighborhood committee. Then --

3 Q. Excuse me. When did that meet? When did
4 the neighborhood committee meet?

5 A. I signed up on July 15th.

6 Q. When was its first meeting, if you
7 recall?

8 A. It was, I believe, sometime end of July,
9 early August.

10 Q. Can you give the court an estimate of how
11 many meetings you attended on either your behalf or on
12 behalf of the committees you were serving between,
13 say, July of 2010 and December of 2010?

14 A. For the general task force meetings, they
15 were typically held the same night I had a conflict.
16 I was unable to attend the August and September
17 meeting, so the general meetings I attended was July
18 and October.

19 Q. Did you consult the district website to
20 find out what happened at those meetings when you
21 didn't attend?

22 A. I did try to, but there were no minutes
23 taken at those meetings.

24 Q. Did you receive, or are you familiar
25 with, a monthly publication from the Douglas County

1 school system called Newslines?

2 A. I'm very familiar with that. And the
3 first time that Newslines --

4 Q. Let me ask you a question about it, if
5 you don't mind.

6 A. Certainly.

7 Q. How often do you receive it?

8 A. I receive that online weekly.

9 Q. And it's true, is it not, that beginning
10 in the fall of 2010, the activities of the task force
11 and its various subcommittees were the subject of a
12 number of Newslines reports?

13 A. Those Newslines reports --

14 Q. Excuse me, ma'am. That's a yes or a no,
15 please.

16 A. It's difficult to answer yes or no,
17 because the information was very minimal.

18 Q. But there was information in these
19 Newslines publications on a weekly basis about what was
20 being done in the task force and these subcommittees?

21 A. What was being done, no. That was not
22 explained on the Newslines.

23 Q. Could you go to the website and find that
24 out?

25 A. I am not -- I don't believe so.

1 Q. But you certainly could attend the
2 meeting and find out, couldn't you?

3 A. I was unable to attend the August and
4 September meetings.

5 Q. Let's talk about November and December.
6 Did you attend those meetings?

7 A. The task force did not meet in November
8 and December.

9 Q. In November, did you send an e-mail out
10 to Douglas County citizens entitled "A Very Important
11 Message About Douglas County Schools"? That would be
12 Exhibit XX, which is in that last binder away from
13 you. Defendants' Exhibit XX.

14 THE COURT: Has this been admitted,
15 Mr. Lyons?

16 MR. LYONS: Yes, Your Honor.

17 A. Yes. I sent that letter out to my list
18 of e-mail friends.

19 Q. (BY MR. LYONS) And did you encourage them
20 to become better informed on the direction the Board
21 of Education was taking and the issues facing Douglas
22 County schools?

23 A. Yes, I did.

24 Q. And did you ask them to share this e-mail
25 with friends and neighbors?

1 A. Yes, I did.

2 Q. And encourage them to attend the November
3 16th, December 7th, and December 21st board meetings?

4 A. Yes, I did.

5 Q. In December -- and I direct your
6 attention now to the next exhibit, which is also
7 admitted, Your Honor. Exhibit YY. Did you send out
8 an e-mail to concerned citizens of Douglas County?

9 A. Am I looking --

10 Q. It should be the next exhibit. YY.

11 A. YY?

12 Q. Yes, ma'am.

13 A. I sent an e-mail out. I'm looking for my
14 subject line here. Yes, it does say concerned
15 citizens of Douglas County. Absolutely.

16 Q. And if you'll look at the second page of
17 that e-mail, didn't you say, "Share this with your
18 friends and neighbors. I hope to see you at the board
19 meetings December 7th and December 21st"?

20 A. Yes, I did.

21 Q. And at both of those board meetings, this
22 option certificate or Choice Scholarship Program was
23 discussed, was it not?

24 A. There was a lot of public comment on this
25 program, yes.

1 Q. Now, are you part of an organization
2 called the Highlands Ranch High School accountability
3 committee? Is that what you referred to earlier?

4 A. The school accountability committee, yes.
5 Every school in the district has one.

6 Q. Did you send -- or cosign, I should say,
7 a letter on February 9th, with other members of that
8 committee, to Mr. Carson at the school district? That
9 would be Defendants' Exhibit GGG, which is also in
10 that binder.

11 A. Yes, I did.

12 Q. And did you attend -- I believe you said
13 you attended the three meetings that the school
14 district board held around the school district in
15 February?

16 A. I spoke at those three meetings, yes, and
17 attended the DAC forums earlier in the month.

18 Q. And weren't you invited by the board to
19 state the case against the proposed program at each
20 those three?

21 A. That's correct.

22 Q. Did you receive any assistance from
23 anyone at the school district in putting together your
24 presentation?

25 A. Putting together my presentation, no.

1 The communications folks helped me get things set up
2 once I was there. But the presentation was the work
3 of myself and my board members on Taxpayers for Public
4 Education.

5 Q. Did you have any conversations with
6 Dr. Christian Cutter to seek information to include in
7 the presentations?

8 A. Yes, I did.

9 Q. How many?

10 A. Gosh. I believe it was an e-mail chain.
11 I can't give you an exact number.

12 Q. And he provided the information you asked
13 for?

14 A. He provided some of the information. Not
15 all.

16 Q. But enough for you to make these three
17 presentations in February.

18 A. Along with my opinion, yes.

19 Q. Now, Mr. McCarthy asked you about the
20 commencement of litigation in this case. Do you
21 recall your first contact -- and I'm not asking the
22 subject matter of that contact. Do you recall your
23 first contact with Mr. McCarthy about this case?

24 A. Do I recall that? Yes.

25 Q. And do you recall when it was?

1 A. It was in March.

2 Q. March 30th?

3 A. I don't remember the exact date.

4 Q. Let me direct your attention to what's
5 been marked as Defendants' Exhibit WW.

6 MR. LYONS: This has been stipulated as
7 to authenticity but not admissibility, Your Honor.

8 THE COURT: Okay.

9 MR. McCARTHY:

10 MR. LYONS: At this point, I will offer
11 Exhibit WW.

12 THE COURT: Why don't we give some
13 foundation to it.

14 MR. LYONS: The document is a privilege
15 and redaction log provided to us by plaintiffs'
16 counsel, and lists matters over which an
17 attorney-client privilege has been asserted, by date,
18 by persons initiating the contact, by persons
19 receiving the contact, and a general description of
20 the contact, which does not compromise the privilege.

21 MR. McCARTHY: Your Honor, I would object
22 as inadequate foundation for this exhibit to come in
23 through this witness.

24 The court -- the privilege log is what it
25 is. The court has a discovery protocol on privilege

1 logs. To the extent that the court believes that it
2 should consider it, the court can consider it. It is
3 what it is. But in terms of this witness having any
4 knowledge that would allow it to come in through her
5 testimony or for her to be examined about it, it would
6 be inappropriate, and I object.

7 THE COURT: Well, she's indicated that
8 she didn't remember the specific date that she had
9 contact with counsel other than it was in March of
10 2011. He's entitled to refresh her memory. And it
11 seems to me that's what he's trying to do. You don't
12 need to admit the exhibit, however, Mr. Lyons, to do
13 that. So if you want to refresh her memory with it,
14 you're more than free to do that.

15 MR. LYONS: Thank you, Your Honor.

16 Q. (BY MR. LYONS) Ms. Barnard, would you
17 look at the first entry. Excuse me. The second entry
18 is March 30th, 2011. And it indicates a contact
19 between you and Anne Kleinkopf. Ms. Kleinkopf is also
20 a plaintiff in this case. Is that true?

21 A. Ms. Kleinkopf is a member of Taxpayers
22 for Public Education.

23 Q. And that's a plaintiff in this case.

24 A. Yes.

25 Q. This indicates a contact between the two

1 of you, and the description is, communication between
2 clients regarding research gathered in anticipation of
3 litigation. Does that refresh your recollection as to
4 what happened on the 30th of March?

5 A. Well, we certainly had a reason for
6 hiring an attorney. I'm not quite understanding the
7 question.

8 Q. Does it refresh your recollection as to
9 the date, ma'am?

10 A. As I said, I don't remember that it was
11 exactly March 30th. But, yes.

12 Q. Do you recall a contact on April the 8th
13 between you and Ms. Kleinkopf apparently with regard
14 to the same subject?

15 A. Ms. Kleinkopf and I are dear friends, and
16 we probably talk every day.

17 Q. Do you recall a discussion with Sue
18 Catterall and you on April the 27th, again regarding
19 the litigation?

20 A. Sue Catterall is a friend of mine.

21 Q. Do you recall any conversation with her
22 on this date?

23 A. The exact date I don't remember.

24 Q. I'm not asking what happened in this
25 meeting, so listen to me very carefully.

1 Did you meet with your lawyers in
2 connection with the preparation of this privilege log?

3 A. In connection with developing this piece
4 of paper?

5 Q. Yes.

6 A. I -- I'm just -- I don't know, you know.

7 Q. When is the first time you recall meeting
8 with Mr. McCarthy about this case?

9 A. As I said, in March. Apparently, it was
10 March 30th.

11 Q. Could it have been March 15th?

12 A. I do not believe I met Mr. McCarthy on
13 March 15th. One of my colleagues, I believe, made the
14 phone call at that time to try to find --

15 Q. And would that have been Anne Kleinkopf
16 or Candace Whittaker?

17 A. It was probably Anne Kleinkopf.

18 MR. LYONS: No further questions, Your
19 Honor.

20 THE COURT: Redirect, limited in scope
21 to cross-examination.

22 MR. McCARTHY: Nothing further, Your
23 Honor. No further questions of this witness.

24 THE COURT: All right. If there's no
25 objections, the witness may step down. Is there any

1 potential to recall this witness at a later date? If
2 there's not, I'm going to excuse her. And she may
3 remain -- she's a party, anyway. Never mind.

4 Call your next witness.

5 MR. MACDONALD: Your Honor, the
6 plaintiffs call Kevin Leung.

7 KEVIN LEUNG,
8 having been first duly sworn to state the whole truth,
9 testified as follows:

10 THE COURT: Please be seated.

11 Sir, before we get started, I'm going to
12 need to remind you -- you're already adjusting the
13 microphone -- and that's great -- to where it's
14 comfortable for you. But make sure that you use it.

15 It's important to remember to permit your
16 questioner, whomever it is, to complete the question
17 they're asking you before you start to answer it, so
18 that we have a clear record of these proceedings. All
19 right?

20 THE WITNESS: Yes, Your Honor.

21 THE COURT: Thank you.

22 THE WITNESS: Is it on?

23 THE COURT: I think so.

24

25

1 DIRECT EXAMINATION

2 BY MR. MACDONALD:

3 Q. Good morning, Mr. Leung. Could you state
4 your name for the record, please.

5 A. Good morning. My name is Kevin Leung.

6 Q. Could you spell your last name, please.

7 A. L-e-u-n-g.

8 Q. And where do you live, Mr. Leung?

9 A. I live at 890 Good Hope Drive, Castle
10 Rock.

11 Q. And is that in Douglas County?

12 A. It is in Douglas County.

13 Q. Have you ever testified as a witness
14 before, Mr. Leung?

15 A. Well, this is the first time I see all of
16 you here.

17 Q. Do you own a home in Douglas County?

18 A. Yes, sir, I do. And also a couple of
19 commercial property in Douglas County.

20 Q. How long have you lived in Douglas
21 County, Mr. Leung?

22 A. I live at Douglas County since 1991. So
23 it has been almost 20 years.

24 Q. And do you have any children?

25 A. Yes, sir. I have three wonderful

1 daughter. And one of them is 18 years old, a senior
2 at Rock Canyon High School. My second child is 13
3 years old, a seventh grader at Rocky Heights Middle
4 School. And my last, but not the least, wonderful
5 child is a first grader at Buffalo Ridge Elementary
6 School.

7 Q. And are those Douglas County public
8 schools?

9 A. Yes, sir. All of them are.

10 Q. Do you believe your children are
11 receiving a quality education in the Douglas County
12 public schools?

13 A. Douglas County's school district is
14 always one of the top three school districts in our
15 state. And the high school that my daughter is at is
16 ran second by the 5280 Magazine as one of the best
17 high school. We have wonderful programs in our
18 county. Our school education is excellent.

19 Q. And yourself, Mr. Leung, what type of
20 education do you have?

21 A. I have higher diploma from a college, a
22 christian college in Hong Kong. And I got my bachelor
23 degree from University of Utah at the computer science
24 program. I have an MBA from University of Colorado
25 and a master's degree in computer science from

1 University of Colorado.

2 Q. And where did you grow up, Mr. Leung?

3 A. I grew up from Hong Kong. At that time,
4 it was still a British colony.

5 Q. And when did you first come to this
6 country?

7 A. I came here to the United States at 1988,
8 attending college at University of Utah.

9 Q. Why did you come to this country?

10 A. The United States is one of the greatest
11 country on earth. And most of the people like me are
12 foreigners, would love to be a citizen of this country
13 and enjoy the greatest educations in this country.

14 I came here for the purpose of the
15 educations. I come here because the people and our
16 form of governments is one of the best in the world.
17 I come here because of the principle and ideology of
18 this country is what I always dream of. And I would
19 love to be a part of this great nation.

20 Q. And are you an American citizen?

21 A. Yes, sir. I elected to become an
22 American citizen since 1993.

23 Q. And why did you become an American
24 citizen?

25 A. As I mentioned a while ago, America is a

1 great country. All of us is found under the
2 constitutions, and all of us -- unlike most of the
3 country that we grow up in the Far East, you know, the
4 majority rules, one-party system. Whoever is in power
5 can dictate any single things that happen in that
6 society. But not in our country. Our country is
7 based on a set of constitutional law and the principle
8 that everybody is fall under. And that is one of the
9 most attractive things that got me here to be an
10 American citizen, because no one is rise above the
11 law.

12 Q. And I think you mentioned a minute ago,
13 for your own elementary, middle, and high school
14 education in Hong Kong. What type of education was
15 that, sir?

16 A. Yes. I'm a good old Catholic boy,
17 literally. I spent six years in educations in a
18 Catholic school. And I spent seven years on my
19 secondary educations in another Catholic school. So I
20 grew up in a Catholic educations. And religious
21 school, they are great school, but I just don't
22 believe that we should follow using the public's
23 money.

24 Q. Do you have any animosity towards
25 religion or religious schools?

1 A. Oh, no. For heaven's sake, I told you I
2 graduated from elementary school and my secondary
3 school is a Catholic school. I finished two years
4 high diplomas from a christian college. My wife and I
5 married at a church. And my -- one of my daughters is
6 baptized. And I would call -- you know, I would
7 like -- you know, we are so-called those easy
8 christian. You know, we go to church at Easter and
9 Christmas, but that's it.

10 Q. And what's your occupation, sir?

11 A. I have been information technology area
12 for the past 21 years. And currently I am an IT
13 consultant for a big bank to manage the financial
14 system. And besides of that, I own two successful car
15 wash in Douglas County, one at Highlands Ranch and one
16 at Parker, since 2005.

17 Q. And are these car washes successful?

18 A. Yes, sir. My car wash in 2007 was named
19 as the Moriary Enterprise Award for Colorado retail
20 firm of the year. It was also earned an award from
21 Western Car Wash Associations, which represent 13
22 states in our country. And this year, we are the
23 founders for the Channel 7's award for the best car
24 wash.

25 Q. And do you pay taxes in Douglas County

1 and the state of Colorado?

2 A. Yes, sir. I pay my home property tax. I
3 pay two commercials property tax. And I pay the
4 business personal tax. I collect sales tax for the
5 county. And I pay workmens comp, workers, you know,
6 tax for my employee.

7 Q. And have you been active in Douglas
8 County public schools while your children have been in
9 those schools?

10 A. Yes, sir. Education is one of the most
11 important things, you know, for my culture. And I
12 have been active in the educations in Douglas County
13 since my first daughter entered elementary school. I
14 was helping to organize the third charter school, DCS
15 Montessori at that time. I am firm believer of
16 charter school.

17 And for this year, I served in the school
18 advisory committee for Buffalo Ridge, Rocky Heights
19 Middle School, and I was the vice chair of the school
20 accountability in Rock Canyon High School. And I am
21 also currently a member of the Douglas County district
22 accountability committee.

23 Q. So for how long have you served on
24 committees in the Douglas County public schools,
25 approximately?

1 A. I have been on and off working on the
2 educational arena and serving on this type of
3 committee or council for the past 10 or 11 years. And
4 I also used to teach at a Catholic university called
5 Regis University, so I am very familiar with the
6 educational setting from the elementary school to
7 university in our country.

8 Q. And have you been involved -- I think you
9 mentioned in your testimony a minute ago, but just to
10 be clear. Have you ever been involved in the setting
11 up of any charter schools in Douglas County?

12 A. I was helping, you know, in the charter
13 school, the DCS Montessori. And as a role of being a
14 district advisory committee member, one of our main
15 role is to be filled charter school applications
16 before -- before. These applications is something for
17 consideration, and it is in Colorado statutes. And
18 because of that, I have been personally revealed three
19 or four charter school applications. And I was also
20 attending the Stan Charter School formations. And
21 Stan Charter School is the science theology charter
22 school in Highlands Ranch.

23 Q. And did you run for the Douglas County
24 school board in 2009?

25 A. Yes, sir, I did.

1 Q. And were vouchers an issue in that
2 election?

3 A. No. Voucher was not --

4 MR. LYONS: Excuse me. Same objection as
5 earlier, Your Honor, to the form of the question.

6 THE COURT: The objection is to the
7 characterization of the program. And I want to
8 sustain the form of the question. So just rephrase
9 it.

10 Q. (BY MR. MACDONALD) Mr. Leung, when you
11 ran for the school board, was one of the issues in the
12 case -- excuse me. Was one of the issues in that
13 election whether Douglas County could use private
14 money -- excuse me. Let me start all over again.

15 In the election, was one of the issues
16 whether Douglas County could use public money to fund
17 private schools? Was that an issue in the case?

18 A. No, sir. The literature supplied by the
19 slate of the four candidate, supported by the
20 republican party at that time, is --

21 MR. LYONS: Excuse me. Your Honor, his
22 answer is not responsive. Move to strike it.

23 THE COURT: Overruled.

24 Q. (BY MR. MACDONALD) You can continue,
25 Mr. Leung.

1 A. The campaign literature in 2009 where the
2 republican party sent out the slate of the four
3 candidates at that time clearly do not include
4 anything mentions about giving public money to private
5 school or religious school, nor does it mention
6 anything that they are trying to implement any
7 programs similar to voucher or things like that.

8 Those lit tours are online and anybody
9 can feel free to look at that and verify that.

10 Q. And you mentioned the republican party in
11 that answer. What's your political affiliation?

12 A. I'm a republican since 1993. For the
13 past 20 years, I -- ever since I become an American
14 citizen, I'm a registered republican.

15 Q. What was the outcome of your run for the
16 Douglas County school board?

17 A. I lost the elections with 18,000 votes in
18 that elections.

19 Q. In your prior answer, you mentioned you
20 serve on the Douglas County district accountability
21 committee. Is that right?

22 A. Yes, sir. Since 2008.

23 Q. And how did you get that position?

24 A. It was appointed by the school board. I
25 was in -- there's a new state law in 2007 changing the

1 characteristic of the district accountability and the
2 school accountability. And because of this new state
3 law and the law mandated every single school district
4 has to have a district accountability committee and
5 then performing a school accountability committee.

6 Because of that law, the school board in
7 the field at that time, Kennedy, to participate and be
8 a member of that. And I was so honored to be chosen
9 at that time to be a parent representative of the
10 Highlands Ranch area.

11 Q. And have you devoted significant time in
12 your responsibilities on the district accountability
13 committee?

14 A. Yes, sir. When we were in the view at
15 that time, they are telling us, you know, how much
16 time, and really to be familiar with the state law and
17 what is our responsibility. In fact, in the Colorado
18 State statutes, this is the only mandatory committee
19 for the district. And there are a lot of
20 responsibility associated with this particular board.

21 Q. And what type of power, if any, does the
22 district accountability committee have to stop the
23 school board from enacting a particular program?

24 A. Nobody can stop the school board from
25 doing anything in -- you know, not us. You guys are

1 probably the only one who could do that using the
2 state statutes of law.

3 For our body, we were tasked to give the
4 advice to the school board. And again, in their --
5 one of the very, very peer mandate for us is to
6 evaluate any charter school applications -- any
7 charter school applications -- before this is
8 suggested to the boards and considerations of the
9 school board. That is one of the main things in the
10 state law.

11 And the other thing is related to the
12 financial aspect. We have one of the tasks to look --
13 go through the financial -- the use of the public
14 money. And that's the second one.

15 And the third one is looking to the
16 school performance. So that is another major area
17 that we need to look at data. Because of the bond
18 passed in the Douglas County in 2006, we were also
19 added the responsibility to verify the memberships of
20 the school accountability council, so that they can
21 receive that additional \$60 or the funding for that
22 particular bond initiative.

23 Q. I think you mentioned that it was the job
24 of the district accountant committee to review
25 applications of charter schools before they went to

1 the school board. Is that right?

2 A. Absolutely. In fact, if you look at the
3 charter school formations website and look at the past
4 practice of Douglas County school board, all of the
5 charter school applications submitted October 1st of
6 the previous years for the considerations. And this
7 particular one that they give to us in June, which
8 also came along that we have to finish the
9 applications within 48 hours, is the one and only one
10 that I am aware of in the last -- in all of the 13
11 charter schools that we have that was submitted in
12 June and asked us to review it and approve it in 48
13 hours. And all of the previous ones is October 1st or
14 before, of the previous school years.

15 Q. When did you first learn that the Douglas
16 County school district might be considering some type
17 of option certificate for using public money to fund
18 private schools?

19 A. As I mentioned, of the duty of the
20 district accountability committee, and one of them is
21 related to, you know, the finance and the charter
22 school and things like that. One of my colleagues
23 from the charter school, Tracy, she was in a June
24 meeting of that particular, you know, meetings. And
25 she sent an e-mail out to all of us, and also our then

1 chair, John Carson. He was there also. He sent an
2 e-mail to all of us and said, hey, you know, you guys
3 aware of the district sort of initiative going on and,
4 you know, they suddenly -- get a whole bunch of
5 people --

6 MR. LYONS: Excuse me, Mr. Leung. We are
7 deep into hearsay. I object.

8 THE COURT: I'll sustain it. Try to
9 rephrase your question so we don't have the narrative
10 response.

11 MR. MACDONALD: Certainly, Your Honor.

12 Q. (BY MR. MACDONALD) Mr. Leung, could you
13 just describe when you first heard that the school
14 district might be considering the use of public money
15 for private schools? Just the timing without, for
16 now, describing how you learned of that.
17 Approximately is fine.

18 A. Well, if you say that, you know, when is
19 the first time I heard about the public money would be
20 used for private school, I have to say that, you know,
21 it will be the latter part of 2010. That is when we
22 heard about this option certificate initiative and
23 things like that, and what it's all about.

24 Before that, there's no minutes, no
25 confirmed things from anybody and said that what they

1 talking about. In fact, I don't believe we were
2 actively involved -- the district advisory committee
3 is what I meant -- actively involved in looking at
4 this until the latter part of 2010.

5 Q. Once you heard that the district was
6 considering some type of option certificate or
7 otherwise using public money for private schools, did
8 you voice any opposition to that?

9 A. As a role of the district accountability
10 committee member and also serving the school
11 accountability council, it is my duty and job to make
12 sure that our public school students are fairly
13 represented and would be able to enjoy every single
14 dollars of the tight funding.

15 And, yes, I looked into the issues. In
16 fact, I even asked to participate in those meetings
17 and become a member. But unfortunately, by the time I
18 asked them in October, they told me that there's no
19 more meeting. Their job is done, you know. And so I
20 was never able to participate in that particular
21 meeting as a district accountability member.

22 And so -- and I look into these issues
23 from strictly, you know, the point of view of
24 financial impact to the district, which I'm expert of,
25 based on my job and I'm a small business owner. I

1 raised several questions in several meetings to the
2 CFO about how much would this cost, how come this
3 initiative was never included in the 2011 to 2012
4 budget. As far as, you know, April of this year, they
5 have never mentioned about what's the financial
6 impact.

7 And I talked to Dan, which is our
8 assistant superintendent -- he represent the school
9 administrator in the district accountability. I
10 talked to Meghann Silverthorn. She is the --

11 Q. The reference you said, was that to Dan
12 McMinimee?

13 A. I apologize to that. I can't pronounce
14 anything.

15 Q. Dan McMinimee.

16 A. Yes.

17 Q. And he's the Douglas County assistant
18 superintendent?

19 A. Absolutely, sir. He is also a member of
20 the district accountability committee, in addition to
21 Meghann Silverthorn, which is a school board member.

22 Q. And did you attend any public forums held
23 by the district in late February of 2011?

24 A. I attend almost all the forums, plus all
25 the three in February. As a district accountability

1 member, I virtually attend all those things. And also
2 I in charge of the Rock Canyon area. And I also
3 consulted with the school accountability council of
4 those schools that I represent, and give them
5 informations and ask them for the feedback.

6 And, in fact, I believe at least three of
7 the school accountability council has sent e-mail or
8 letter to the school board and voiced their objections
9 to use public money to fund religious school or
10 private school.

11 Q. And I just want to focus for a minute on
12 the public forums on February 22nd, 23rd, and 24th of
13 2011.

14 A. Yes, sir.

15 Q. Did you voice your opposition to the
16 possibility of using public money for private schools
17 and private religious schools at any of those forums?

18 MR. BINDAS: Your Honor, I object to the
19 form of the question, specifically the
20 characterization of the program as public funding of
21 private schools, which assumes a direct public funding
22 of religious schools.

23 THE COURT: Well, to the extent that
24 the format of the question overlays into the legal
25 arguments in this case, there's some inherent nature

1 to that in all questions. So to expedite the
2 proceedings, I'm going to permit the inquiry. So the
3 objection is overruled.

4 As long as the witness understand the
5 question, he can answer it.

6 THE WITNESS: Yes, Your Honor.

7 A. Those -- as the role of the district
8 accountability member, my role is to facilitate public
9 input and trying to, you know, give the best advice
10 that I have, you know, to the board.

11 I participate in those three -- all three
12 legs of the meeting. And I get the public input and I
13 talk to them. I do ask them to give me some sort of
14 financial impact to the district.

15 Because at that point -- from that point
16 onwards, the board member -- and always say that this
17 is a money-earning initiative for the district. Okay?
18 We are going to save 25 percent of the money. We are
19 going to, you know, get so much more money and things
20 like that, you know, by sending them to private school
21 using public money.

22 And, you know, being a financial person,
23 I'm always doubting of those calculations. So at
24 those three meetings, and the amount of e-mail, I
25 actually write down the figure that they present to

1 the public and say how are we going to earn millions
2 of dollars, you know. We are 500 students, you know,
3 in there, and things like that. I directly ask the
4 CFO about those calculations and -- and, you know, my
5 job is trying to make sure that I get the facts.
6 Okay? Not trying to, you know, disapprove or approve
7 a program based on nothing.

8 And the figure that the district giving
9 out does not add up from what they're telling the
10 public. Even in those three meetings. Okay. In the
11 e-mail I'm sure that they have sent to them, it lists
12 out the entire things that had been said. They are
13 assuming that they can keep those 25 percent of the
14 money and give it back to the school district, which,
15 based on the charter school formations that they have,
16 by law, all the money has to stay in the charter
17 school.

18 But then it has the overhead costs -- the
19 state -- I mean, the district need to be incurred,
20 including have administrative keep check of the
21 compliance, of the testing. You know, they're now
22 using the school district, which cost money,
23 electricity and things like that.

24 And, of course, you know, they have a
25 whole bunch of things; like, they need to have at

1 least 1.5 FTD to manage this program. They list out
2 all of those things in the February 26th -- those
3 forms -- consultations. In order to, you know,
4 compensate those costs, they said, oh, we're going to
5 get 25 percent of the money, and then if we have more
6 than 255 students attending -- that's based on the
7 district's own calculations. Okay -- we will be fine.

8 But now we know that's -- that ain't
9 going to happen, because we're using the charter
10 school format, which, by law, those money has to stay
11 with the charter school. And that means that we are
12 going to have several million dollars of deficit --
13 deficit -- cost to our school district.

14 Q. (BY MR. MACDONALD) Let me just ask,
15 Mr. Leung -- you're a plaintiff in this case; is that
16 right?

17 A. Yes, sir.

18 Q. Why are you a plaintiff in this case?
19 Why do you want the court to stop the implementation
20 of this program?

21 A. As I mentioned a while ago, in the first
22 one, that the more I look into this program, the more
23 I can see that this taking money from the public
24 school and fund religious and private school is going
25 to cost our school district precious resources. The

1 money that we do not have. The money that we do not
2 have.

3 We are running deficit in the last four
4 or five years. My personal, you know, situation is, I
5 can see -- I pay, you know, more than 5, 6 hundred
6 dollars, you know, in terms of costs, for my three
7 kids, because we are cutting a lot of money. I see
8 administrator get laid off. I see school staff
9 getting laid off. I see teachers, the good one, are
10 gone, because we don't have the money. We don't have
11 the money.

12 There is no nothing to back this up
13 whatsoever what this could improve, help. But I can
14 see the drawback. I can see, you know, we can
15 afford -- we cannot afford to take those money that we
16 do not have to fund a private school, outrageous
17 school, which those parents clearly have the
18 resources, if they choose to send them over there, and
19 it will hurt my children to even have the larger class
20 size. Because for every single student that get taken
21 out from a public school, we are going to have to lay
22 off teacher because we have less students. We are
23 going to probably increase more fee. How many fee
24 have we increased in the past years? Transportation
25 free. The money that we don't have. Okay.

1 And this is the real issues that is
2 impacting my children, my three precious children,
3 personally. Okay? Okay?

4 And not only that. Not only my three
5 children. The rest of 60,000 Douglas County students,
6 who is in this terrible economic situations, we're all
7 struggling to make a living, unemployment, higher gas
8 price. And yet the school district is trying to take
9 money out and fund the private school and hurting us.

10 I mean -- and then the second reason I'm
11 doing this is, I'm coming from Far East. I taught my
12 children the importance about honor and standing up
13 against, you know, people that has power for good of
14 the public.

15 Just because you have the authority, just
16 because, you know, the county, you know, is all power
17 behind something, that does not make it right. That
18 does not make it constitutional.

19 When I sworn to be an American citizen, I
20 sworn to uphold the Colorado Constitution. I
21 understand that, you know, there is a great power
22 behind that. All the support by the county delegated,
23 with the money on the other side and things like that.
24 But I taught my children to do what's right despite
25 the long odds. And I'm patting on myself, even though

1 it may cost me -- you know, I have business in Douglas
2 County and things like that. But it doesn't matter.
3 Do what's right. And that's why our country is so
4 great. We have people that stand up to do what's
5 right.

6 Q. Let me just ask you a question about --
7 we've heard a discussion this morning about choice,
8 and choice amongst the private schools and choice
9 amongst religious schools. What type of choice
10 amongst religious schools do you see in the program?

11 A. From what I can tell, from the 15 out of
12 the 19 participants right now, they all favor only one
13 religious. And for grade 9 to grade 12, they can only
14 pick a particular religious school of a particular,
15 you know, religion.

16 This year, I am the president of the
17 Colorado Chinese Federation Association. I have a lot
18 of member and friends. They are either Buddhist, you
19 know, Chinese Muslim. Okay. And studying the Dao
20 religions, Confucius, and things like that. I don't
21 see any choice for them.

22 And what our choice in all this going to
23 be if this is a choice of one religions. You know,
24 people belongs to different faith. Okay? This
25 religion I agree upon, but what happen to the other

1 people? The other people -- the other taxpayer -- we
2 have 4 percent of our student populations in Douglas
3 County are Asians. What happen to them? What kind of
4 choice do they have? What kind of choice do they
5 have?

6 Q. Let me ask you why you didn't file the
7 lawsuit, Mr. Leung, or seek to file the lawsuit after
8 Douglas County passed the policy on March 15th of
9 2011?

10 A. As a member of the district advisory
11 committee, as I said, my job is trying to get the best
12 advice for the school board. I do not agree with
13 this, but I also think that the school district, the
14 board members, are genuinely trying to get input from
15 the public. They have some formed -- okay -- public
16 hearings and things like that.

17 It is my best hope that -- my best hope
18 that they will come up, you know, to the sense that
19 this is not something our school district need or is
20 not something that provide benefits to our district.
21 In fact, this divided our district and serve, you
22 know, as a -- caused problem for our district.

23 So I was not, you know, trying to
24 initiate any lawsuit or, you know, things like that,
25 although I heard from them. Okay? Not until when

1 they pass the resolutions in March 15th based on the
2 options certificate do I realize that all of those
3 so-called consultations, public input and things like
4 that are just a show. They genuinely do not, you
5 know, have the best interests of the school district
6 or student in mind. That's when I, you know, decided
7 more actions need to be taken.

8 And I would say that I did not become
9 active or, you know, initiate of these sort of things.
10 Sue Catterall call me in I'd say maybe late May, early
11 June, and ask me, hey, you know, the -- there's some
12 group interested to file a lawsuit. And she knows my
13 opinions of this program. And she and I are good
14 friends. So that's when I participate.

15 Q. Did you take any action in April or May
16 to try to gather more information about the program?

17 A. I do. In the April district
18 accountability committee meetings, at that meeting,
19 the topic is about the 2011 to 2012 school budget. I
20 asked our CFO, what is this voucher programs -- I'm
21 sorry. What is this option certificate programs, or
22 what do they call it right now, will impact the 2011
23 to 2012. At that time, it was never put into the
24 financial estimations on how this is going to impact.

25 The explanations to me is, oh, don't

1 worry, we're going to get the money, the 25 percent
2 money, you know. It's going to remedy the loss of
3 students from the school. It's going to cover the
4 administrative cost and things like that. But we
5 don't want to figure yet.

6 And I also asked Dan about, hey, how many
7 school is participating and how can we enroll them
8 into this program. Was it published the voting rules
9 in the school website. When do we get the lists of
10 those schools who sign on and things like that. I
11 don't believe I get an answer in April.

12 Then when we go to the May meeting, it's
13 the same thing, you know. It's not even on the
14 agenda. So I virtually is hitting some sort of a wall
15 on trying to get -- trying to get a feel to see
16 exactly what are we -- what are we looking at. I
17 mean --

18 MR. MACDONALD: Your Honor, I don't have
19 any further questions.

20 THE COURT: Cross-examination.

21 MR. LYONS: None from us, Your Honor.

22 THE COURT: No cross-examination? All
23 right. That will conclude the testimony of Mr. Leung.
24 If there's no objection, he may step down. Thank you,
25 sir.

1 THE WITNESS: Thank you, Your Honor.

2 Thank you.

3 THE COURT: Well, it's approaching the
4 noon hour. Why don't we go ahead and take a lunch
5 break. Mr. Douglas, can you give me a flavor of where
6 we are in terms of scheduling? Are you on pace? Are
7 we behind? Mr. McCarthy.

8 MR. DOUGLAS: I think we're on pace, Your
9 Honor.

10 THE COURT: All right. It's noon.
11 Let's come back at 1:15. We'll see you then. Court's
12 in recess.

13 (Recess taken, 11:59 a.m. to 1:17 p.m.)

14 THE COURT: Please be seated.

15 Good afternoon. We are going to continue
16 now in case 11CV4427 with the plaintiffs' case in
17 chief. Plaintiff, call your next witness.

18 MR. MACDONALD: Your Honor, the
19 plaintiffs call as an adverse witness Robert Hammond.

20 There's one preliminary matter if I could
21 take up before then, Your Honor.

22 THE COURT: Yes.

23 MR. MACDONALD: I understand from Your
24 Honor's ruling this morning with discussion about our
25 motion in limine to exclude the expert, Professor

1 Glenn, that you're going to rule on that on Thursday.
2 And Thursday is the day that the defendants would like
3 to put on Mr. Glenn.

4 We indicated in the motion that we filed
5 that we were able to procure a potential rebuttal
6 expert yesterday. He is a professor named Steven
7 Green. He's at Willamette University. And the
8 problem with Mr. Green is, he's on a family vacation
9 in northern Michigan. And if -- the only way he could
10 testify is to testify by telephone.

11 We've discussed that with lead counsel
12 for defendants, who has not consented to Mr. Green
13 testifying by telephone. And so I just wanted to ask
14 Your Honor's pleasure whether you'd like a written
15 motion or whether we can just move orally right now.
16 That if Mr. Glenn is allowed to testify about the
17 meaning and the intent of enacting these provisions
18 into the Colorado Constitution and the federal Blaine
19 amendment, appears to be one of the central issues
20 that defendants have raised in their briefs about, I
21 guess, the constitutionality of the Colorado
22 provisions in -- the religious provisions in the
23 Colorado Constitution, that we would certainly like
24 the opportunity to put Mr. Green on -- Professor Green
25 on. I understand, just based on the short call I was

1 able to have with him yesterday, he knows Mr. Glenn;
2 they've debated each other previously.

3 So I guess, at Your Honor's discretion,
4 we certainly would like the opportunity to provide you
5 with that testimony if the testimony of Professor
6 Glenn comes in.

7 THE COURT: Are you asking for me to
8 prejudge the issue on the motion in limine now without
9 the benefit of response?

10 MR. MACDONALD: No, Your Honor. I guess
11 the question is whether or not we need to file a
12 motion to have Mr. Green be able to testify
13 telephonically in the event that you grant the motion.

14 And I guess, to put a fine point on it,
15 we've asked the defendants would they consent to
16 having Mr. Green testify telephonically. They have
17 told us no, they would not consent. They will oppose
18 that.

19 THE COURT: Why don't you file a
20 motion, because I think that protects the record and
21 makes it more clear. There is also specific criteria
22 for telephone testimony that have to be established.

23 As if you don't have enough to do in the
24 proceeding, I'm sure you can find somebody to file
25 that. Okay?

1 MR. MACDONALD: We'll do that, Your
2 Honor. And the only issue for us will be, he's in a
3 cabin with somewhat limited contactability. So we'll
4 need to know Your Honor's ruling -- if you were at
5 least provisionally to allow telephonic testimony,
6 we'd just need enough time to coordinate.

7 THE COURT: How much time would you
8 need if I were to deny your motion in limine?

9 MR. MACDONALD: If you deny the motion in
10 limine, I think we would need to have probably an
11 answer sometime tomorrow, so that we could try to get
12 in contact with Mr. Green so that he could be
13 somewhere where he could testify telephonically.

14 THE COURT: So you are asking me to
15 expedite my ruling on motion in limine.

16 MR. MACDONALD: No, Your Honor. I guess
17 what I would say is, it just goes to the question of a
18 provisional. If you grant the motion in limine, may
19 Mr. Green testify telephonically?

20 THE COURT: All right. So you're
21 asking me will you be permitted to submit a rebuttal
22 testimony to the testimony of Mr. Glenn, assuming I
23 provide that.

24 MR. MACDONALD: That's right, Your Honor.

25 THE COURT: Okay. Fair enough. Why

1 don't you go ahead and file a motion. And then we'll
2 take up either a response from the defense, or a
3 response, but you will have a ruling on that issue
4 tomorrow.

5 MR. MACDONALD: Thank you, Your Honor.

6 THE COURT: Next witness, please.

7 MR. MACDONALD: With that, the plaintiffs
8 call as an adverse witness Mr. Robert Hammond.

9 THE COURT: Come up here, please.

10 ROBERT K. HAMMOND,
11 having been first duly sworn to state the whole truth,
12 testified as follows:

13 THE COURT: Please be seated.

14 All right. Doctor, I'm going to ask you
15 to do your best to speak up at an audible level so we
16 can hear you. You have the right to provide a
17 response to the questions you are asked.

18 Finally, remember the proceedings are
19 being recorded by the court reporter in front of me.
20 She needs to be able to transcribe the questions
21 you're asked and the answers you give. That means we
22 only have one person speak at a time. Fair enough?

23 THE WITNESS: Fair.

24 THE COURT: All right.

25

1 DIRECT EXAMINATION

2 BY MR. MACDONALD:

3 Q. Good afternoon, Mr. Hammond. Please
4 state your name for the record.

5 A. My name is Robert K. Hammond.

6 Q. Mr. Hammond, my name is Tim Macdonald. I
7 represent some parents and organizations that are
8 opposing the Douglas County plan. And we haven't met
9 before, have we?

10 A. No.

11 Q. Could you please tell us your current
12 position.

13 A. My current position is the commissioner
14 of education for the state of Colorado.

15 Q. And how long have you been the
16 commissioner of education for the state of Colorado?

17 A. June 1 of this year.

18 Q. February 1st of 2011?

19 A. No. June 1st, 2011.

20 Q. I apologize. My hearing is not all that
21 great.

22 And could you describe briefly your job
23 responsibilities, sir, as the commissioner of
24 education.

25 A. My responsibility as the commissioner of

1 education is, I serve at the pleasure of the state
2 Board of Education. I'm appointed by a seven-member
3 board, and my job is to really oversee all the
4 funding, as well as the responsibilities that are
5 dictated by statute for our school districts in the
6 state of Colorado.

7 Q. And if I understand your testimony,
8 you're appointed by the state Board of Education. Is
9 that right?

10 A. That's correct.

11 Q. And you serve at their pleasure?

12 A. Yes.

13 Q. And if I understand the state's position
14 in this case, the state's position is that they have
15 not made any decision with respect to the Douglas
16 County -- about counting students as public school
17 students or kids who receive the option certificates
18 or scholarships. Is that right?

19 A. Correct.

20 Q. And it's also the state's position, as I
21 understand it, that you can -- the state can claw back
22 the money that is provided to Douglas County for these
23 students if the state later determines that the
24 program is improper. Is that right?

25 A. Correct.

1 Q. And you, sir, don't know how clawing back
2 the money would affect Douglas County if, in fact, the
3 state were to reach that conclusion, do you?

4 A. First, I would not use that word.
5 Secondly, the answer would be no.

6 Q. You don't know.

7 A. Correct.

8 THE COURT: Hang on just a second.

9 (Pause in the proceedings.)

10 Q. (BY MR. MACDONALD) And if the state
11 determined that the program was not proper or lawful,
12 you don't know how that would impact the 500 students
13 or their families who are using these scholarships, do
14 you?

15 A. Correct.

16 Q. And could you just briefly describe your
17 own education, Mr. Hammond. What degrees do you hold?

18 A. I have a bachelor's degree in psychology,
19 sociology. Then I have a master's degree in public
20 administration.

21 Q. Where are those degrees from?

22 A. My undergraduate degree is from Baker
23 University in Baldwin City, Kansas. And my graduate
24 degree is from the University of Kansas in Barnes,
25 Kansas.

1 Q. You're a Jayhawk.

2 A. That's correct.

3 Q. I'd like to start by discussing your
4 involvement in responding to questions from Bob
5 Schaffer, who is a member of the state Board of
6 Education. Is that right?

7 A. Correct.

8 Q. And first, before I go down this line,
9 we've had some objections this morning about what we
10 call the program that's at issue.

11 Sir, you've referred to this as a voucher
12 program. Is that fair? At times?

13 A. Correct.

14 Q. Was that a yes?

15 A. Correct.

16 Q. So if I refer to it as a voucher plan or
17 a voucher program, you understand what I'm talking
18 about?

19 A. I would.

20 MR. BLUE: Objection, Your Honor. We've
21 established that this is not about the program here
22 today, but it's called a Choice Scholarship Program.

23 THE COURT: Well, we've established
24 that the defense position is that it's not a voucher
25 program and that it's a program of choice. And we've

1 established that the plaintiffs have taken a separate
2 position that it is.

3 And so for purposes of the questioning --
4 ultimately, I'll have to make certain decisions based
5 on the evidence. But for purposes of the questioning,
6 to expedite that, they can call it what they want. If
7 the witness doesn't understand, the witness will tell
8 us. You may proceed.

9 MR. MACDONALD: Thank you, Your Honor.

10 THE COURT: Long answer, the objection
11 is overruled.

12 Q. (BY MR. MACDONALD) And just so the record
13 is clear, Mr. Hammond, you, yourself, have referred to
14 this as a voucher program or voucher plan; is that
15 right?

16 A. I believe I have. I can't recall
17 firsthand.

18 Q. Do you recall, Mr. Hammond, having e-mail
19 discussion, correspondence with Mr. Schaffer and
20 others in your department about the Douglas County
21 voucher plan?

22 A. You'll have to clarify your question a
23 little better for me.

24 Q. Sure. Do you recall, back in November of
25 2010, a series of communications with Mr. Schaffer of

1 the Board of Education -- the state Board of Education
2 about the Douglas County voucher program?

3 A. I'm aware of one e-mail that went to the
4 board clerk. That was the extent of it.

5 Q. You're aware of one e-mail that went to
6 who? I'm sorry.

7 A. The clerk -- well, the director of state
8 board relations.

9 Q. Is that Mary Frances Nevans?

10 A. Correct.

11 Q. And that's the only -- you're only aware
12 of a single e-mail relating to questions from
13 Mr. Schaffer?

14 A. Just the one e-mail. There were
15 discussions from Ms. Nevans to me making me aware of
16 them. And there could have been an e-mail that she
17 forwarded to me. I really can't recall.

18 Q. You recall that Mr. Schaffer of the state
19 Board of Education had questions about the Douglas
20 County voucher program in November of 2010; is that
21 right?

22 A. I believe it was that date.

23 Q. And do you recall the nature of
24 Mr. Schaffer's questions?

25 A. Yes.

1 Q. What were they?

2 A. The memorandum that he wrote basically
3 stated whatever we could do to assist Douglas County
4 in their program, he would like us to do that.

5 Q. And Mr. Schaffer is one of your bosses,
6 correct?

7 A. Correct.

8 Q. Do you recall that Mr. Schaffer stated
9 that he would like to pave the way for Douglas County
10 within the Colorado Department of Education for the
11 voucher plan?

12 A. It might have been stated as that, but I
13 don't recall that.

14 Q. Let's take a look at Exhibit 65. I'll
15 put it up on the screen.

16 MR. MACDONALD: And this is one of the
17 stipulated exhibits, Your Honor.

18 Q. Go to the second page, please. And the
19 top portion of this e-mail, Mr. Hammond, is from Mary
20 Frances Nevans to Dwight Jones. Do you see that?

21 A. Yes, I do.

22 Q. It's dated November 18th, 2010? Is that
23 right?

24 A. Correct.

25 Q. And first, Mary Frances Nevans, she works

1 for the Colorado Department of Education, correct?

2 A. That's correct.

3 Q. And her title is director of state board
4 relations; is that right?

5 A. That's correct.

6 Q. And Dwight Jones. He held your position
7 before you; is that right?

8 A. That's correct.

9 Q. So at that time, he was the commissioner
10 of education, correct?

11 A. Correct.

12 Q. And you were his assistant or his deputy?
13 What was your title?

14 A. I was deputy commissioner, administration
15 operations.

16 Q. And the bottom e-mail, if we can go
17 there, is from Bob Schaffer to Mary Francis Nevans.
18 It's dated November 17, 2010. Do you see that?

19 A. Yes.

20 Q. And the subject line of that is Douglas
21 County vouchers. Do you see that?

22 A. Yes.

23 Q. And Mr. Schaffer says in the first line,
24 "I'd like to pave the way for Douglas County right
25 away within CDE." Do you see that?

1 A. Correct.

2 Q. And were you aware -- made aware of
3 Mr. Schaffer's request to pave the way for the Douglas
4 County voucher program within your department?

5 A. I recall a different memo. But that may
6 have been the same one. That doesn't -- I think I saw
7 that, but it doesn't surprise me.

8 Q. Let's look at the next line.
9 Mr. Schaffer asks Ms. Nevans to "ask around and see if
10 you can identify any barriers at CDE regarding funding
11 or anything else." Do you see that?

12 A. Yes.

13 Q. And were you made aware that Ms. Nevans
14 was asked to identify any barriers at your department
15 with regard to the voucher plan?

16 A. No, I wasn't.

17 Q. I think you testified you're not sure if
18 you saw this e-mail. You think you might have?

19 A. I might have. But I don't recall -- the
20 question you just asked me, I don't recall Ms. Nevans
21 doing that.

22 Q. We'll get an exhibit in a minute, I
23 think, that shows you copied on this. But let me ask
24 whether -- if you look at the next line, starting on
25 the second line it begins, "Essentially, Douglas

1 County adopts a voucher plan. Will there be any
2 problems in getting the money to follow the student?"
3 Do you see that?

4 A. I do.

5 Q. Were you aware that Mr. Schaffer asked
6 Ms. Nevans to ask around within your department to
7 determine whether there would be any problem to have
8 the money follow the student if Douglas County adopts
9 the voucher plan?

10 A. I honestly don't recall. But if she did,
11 that's not a problem.

12 Q. You don't have any recollection of
13 Mr. Schaffer asking this?

14 A. Not today.

15 Q. Mr. Schaffer goes on to say, "If so, I
16 intend to do everything I can to fix ASAP any such
17 problems that can be fixed by the board." Do you see
18 that?

19 A. I do.

20 Q. Were you aware, sir, that your -- one of
21 your bosses at the state Board of Education informed
22 Ms. Nevans that he intended to do everything he could
23 to fix any problems that can be fixed by the Board of
24 Education?

25 A. Today I honestly don't recall that. But

1 if -- if indeed I was, he has every right to ask that.

2 Q. And you, in fact, got to work trying to
3 carry out Mr. Schaffer's request to fix any problems
4 that can be fixed with respect to a voucher plan. Is
5 that fair?

6 A. I would say, in general, that would be
7 correct.

8 Q. Let's take a look at Exhibit 139, please.
9 And first, if we can blow up that first page. Blow
10 that up a little more, please. Thank you.

11 Do you see your -- on the very first
12 e-mail, it's date ad Thursday, November 18, 2010. Do
13 you see that?

14 A. I do.

15 Q. And you are listed as one of the cc's; is
16 that right?

17 A. Correct.

18 Q. And this is an e-mail from Bob Schaffer
19 back to Dwight Jones, and the subject is Douglas
20 County vouchers. Do you see that?

21 A. Correct.

22 Q. And if we could just turn to the next
23 page of the exhibit, and scroll down to the bottom.
24 All the way to the bottom, please. Thank you.

25 You see down at the bottom of this e-mail

1 chain that you received is the request from Bob
2 Schaffer stating that he wanted to pave the way for
3 the voucher plan. Do you see that?

4 A. I do.

5 Q. Does this refresh your recollection, sir,
6 in any way that you, in fact, received a copy of
7 Mr. Schaffer's request to Ms. Nevans?

8 A. Honestly, I don't. But I don't deny
9 that. That's perfectly fine.

10 Q. And if we could just go up to the next
11 e-mail. This is a response, sir, from Mr. Jones to
12 Ms. Nevans, and you're cc'd on it again. Is that
13 right?

14 A. Correct.

15 Q. And this is dated November 18, 2010, and
16 the subject is Douglas County vouchers. Do you see
17 that?

18 A. Correct.

19 Q. And again, at this time, Mr. Jones was
20 the commissioner of education and you reported to him,
21 correct?

22 A. Correct.

23 Q. And in the first line of Mr. Jones'
24 e-mail he says, in the second sentence, "I will copy
25 Vody" -- let me just stop there and ask. Vody

1 Hermann. She's copied on the e-mail. Who is she?

2 A. She was the former assistant commissioner
3 of school finance. The department.

4 Q. Thank you.

5 And Mr. Jones says, "I will copy Vody and
6 ask her to put together what she knows at this time."
7 Do you see that?

8 A. I do.

9 Q. Were you aware that Mr. Jones asked
10 Ms. Hermann to put together what she knows at this
11 time about the Douglas County voucher plan?

12 A. I'm sure I was, because I was copied.
13 But, you know, there's been some time that passed, and
14 I just don't recall that particular memo.

15 Q. If we can go back to the first page of
16 Exhibit 139. And the e-mail -- that top e-mail. We
17 can stay there -- from Mr. Schaffer to Mr. Jones, cc
18 to you and others. Mr. Schaffer states that he saw a
19 draft proposal at the DCISD website. Do you see that?

20 A. Yes.

21 Q. And that's a reference to the Douglas
22 County Independent School District website; is that
23 right?

24 A. I presume.

25 Q. And at this point, do you recall a series

1 of communications amongst you and others at the
2 Colorado Department of Education responding to
3 Mr. Schaffer's request in the mid-November time frame?
4 Do you recall a series of communications? And I'm not
5 asking the substance of those communications. Do you
6 recall having communications?

7 A. Counselor, I'm sure there were, but I
8 just don't -- during that period of time when
9 Mr. Jones was leaving the department and I was asked
10 to transition in as the commissioner on that basis,
11 I'm sure there was lots of discussions, but I just
12 can't recall any firsthand right now. But I don't
13 deny that they didn't exist, so --

14 Q. Let me see if I can just refresh your
15 recollection. If you could -- let's put up
16 Exhibit 121, please.

17 And, Mr. Hammond, I'll represent to you
18 this is a revised privilege log that was provided to
19 us by your counsel as part of this case. And it's
20 dated July 22nd, 2011. If we can just highlight that.
21 Perhaps we can't. That's okay.

22 Let me just direct your attention to the
23 first page. You see a series of -- on the far
24 left-hand, first column, document type, e-mail chain,
25 you see dates there. And the first four entries

1 between November 18th and November 22nd. You see
2 those are e-mails that the subject matter relates to
3 either questions from Bob Schaffer or questions about
4 the Douglas County voucher program or the Douglas
5 County Option Certificate Program? Do you see that?

6 MR. HALL: Your Honor, I object to this
7 line of questioning. I don't see the relevancy of the
8 entire line of questioning.

9 THE COURT: I'm going to give him a
10 little leeway. I'll note the objection. It's
11 overruled at this point. Stick to the point,
12 Mr. Macdonald.

13 Q. (BY MR. MACDONALD) Do you see those
14 entries, sir?

15 A. I do.

16 Q. And if we can turn to the next page.
17 There are a series of entries on November 18th,
18 November 19th, November 20th that all address the
19 Douglas County voucher plan that you're copied on. Do
20 you see those?

21 A. I do.

22 Q. And does this refresh your recollection
23 about at least a series of conversations that you,
24 sir, were engaged in? And again, I'm not asking you
25 to reveal any of the substance of the communications.

1 Do you recall those conversations that you had about
2 the Douglas County voucher program amongst your
3 staff?

4 A. Not to a great extent, to be honest with
5 you. You have refreshed my memory and they do exist,
6 and I don't deny that they don't exist. And I'm sure
7 we obviously talked about it at some point, which
8 would be appropriate.

9 Q. And you understood that your task was to
10 put in place the request that one of your bosses, Bob
11 Schaffer, made to pave the way for the voucher plan,
12 correct?

13 A. No, that's not correct.

14 Q. You understood that that's what one of
15 your bosses, Mr. Schaffer, has asked you to do,
16 correct?

17 A. The request was not of myself. It was of
18 staff. And I see the memorandums. It would be
19 typical to us, if we got a request from any board
20 member, conduct, you know, appropriate research. And
21 then we would advise either that board member or the
22 entire board. I presume that went on at that time.

23 Q. Do you recall having a meeting with
24 Douglas County school district members on January 5th,
25 2011, sir?

1 A. Can you -- was that school board members
2 you stated?

3 Q. District -- district members.

4 A. Correct.

5 Q. And you recall that you had your
6 assistant reach out to the Douglas County school
7 district members to understand why they wanted to meet
8 with you? Do you have any recollection of that?

9 A. I recall that meeting, that we had a
10 meeting with them.

11 Q. And before that meeting, you understood
12 that Douglas County wanted to talk about the funding
13 of students and participation in their voucher plan,
14 correct?

15 A. Well, what I recall is, that was making a
16 lot of publicity at the time. And internally, we
17 felt, as we kept hearing things, that we really needed
18 to sit down and talk with them. I can't remember who
19 initiated the meeting. I think we did. Which would
20 not be unusual in something like that. To -- you
21 know, we need to sit down with the staff and the
22 district and talk to them about what they're trying to
23 do, so they don't run into any problems from an audit
24 standpoint a year later.

25 Q. You understood part of your job was to --

1 if I understood the testimony in this case, so that
2 they didn't run into audit problems a year later?

3 A. That's correct.

4 Q. And when you say run into audit problems,
5 are you saying problems like their counting students
6 as public school students and then you later decide
7 that they're not public school students for purposes
8 of that audit? Would that be one of the problems that
9 you're speaking of?

10 A. That would be correct. Because I -- it's
11 my belief that our job is to assist our school
12 districts wherever is possible. And I think the worst
13 thing that could happen to a school district, if
14 they're venturing on a new program, or even if we
15 learned about something that's a current program, a
16 year later there's a problem, and they have to pay
17 back an incredible amount of money. That's never
18 good.

19 Q. In your view, that would be a terrible
20 thing.

21 A. I do.

22 Q. And so you and your staff worked to make
23 sure that wouldn't happen. Is that fair?

24 A. The purpose of that meeting was to
25 understand what they were trying to do.

1 Q. And first, where did that meeting take
2 place?

3 A. That was in my office.

4 Q. And I think you testified you recall that
5 you called that meeting?

6 A. I believe I did.

7 Q. And why were you there in particular?

8 A. Because I was the interim -- well, I was
9 the commissioner of education at that point in time,
10 as well. And that was an issue of high importance
11 because of all visibility the program was doing, and
12 it was something that hadn't been done before. So I
13 felt it was appropriate.

14 Plus, I also was serving in my former job
15 as deputy of administration operations. I had school
16 financing under my authority. So it was under both
17 roles.

18 Q. And was another reason that Mr. Schaffer
19 had asked you -- Mr. Schaffer, one of your bosses, had
20 asked you to identify whether there were any problems
21 or barriers to funding a voucher plan?

22 A. No.

23 MR. BLUE: Objection, Your Honor. This
24 is misstating the e-mails, as the witness has been
25 clear. There was never a direction to this witness to

1 get rid of the barriers. The witness made that clear.

2 THE COURT: The objection is,
3 mischaracterizes the evidence. The objection is
4 overruled.

5 A. Ask your question again.

6 Q. (BY MR. MACDONALD) Let's see if I can
7 remember the question.

8 I think I was asking why you attended.
9 And you said one of your jobs was to help school
10 districts implement new programs in a way that would
11 be permissible. Is that right?

12 A. Generally, I would say that's correct.
13 It is providing -- answering questions and providing
14 advice they may have at that time.

15 Q. And you understood that one of your
16 bosses wanted to ensure that the Douglas County
17 voucher program was -- that there were no barriers
18 within your department to the implementation of that
19 program. Correct?

20 A. The meeting was not called based on
21 requests of a specific board member. It was based on
22 my request, as I recall.

23 THE COURT: That wasn't his question.
24 I want you to listen carefully to his question and
25 just answer that question. All right?

1 MR. MACDONALD: Ms. Court Reporter, can
2 you repeat the question.

3 (The last question was read back as
4 follows: "And you understood that one of your bosses
5 wanted to ensure that the Douglas County voucher
6 program was -- that there were no barriers within your
7 department to the implementation of that program.
8 Correct?")

9 A. Correct.

10 Q. (BY MR. MACDONALD) And I think you just
11 testified it was in your office. Is that right?

12 A. It was in, yes, my office.

13 Q. And people attended in person; is that
14 right?

15 A. Yes.

16 Q. It was not just a telephonic meeting?

17 A. Correct.

18 Q. Did anyone participate by telephone, if
19 you recall?

20 A. We had two meetings that I recall with
21 Douglas County. And I believe at one of these, I
22 thought their attorney was -- was on the phone,
23 telephoned in.

24 Q. And when you say their attorney, are you
25 referring to Mr. Hall?

1 A. Correct.

2 Q. Who's sitting here in the courtroom to my
3 right?

4 A. Correct.

5 Q. Do you recall reviewing typed minutes of
6 the January 5th, 2011, meeting?

7 A. Yes.

8 Q. And how long did the meeting last,
9 roughly?

10 A. Approximately an hour.

11 Q. And did Mary Frances Nevans -- does she
12 prepare the meeting minutes, if you recall?

13 A. I would say, going -- as far as what I
14 would call meeting minutes, they were not that. They
15 were just broad notes that occurred at the meeting. I
16 would acknowledge that. And I think she prepared
17 those that first time.

18 Q. They were notes of the meeting, correct?

19 A. Correct.

20 Q. Ms. Nevans good at her job?

21 A. Yes.

22 Q. She tries to accurately reflect what
23 happened in meetings; is that right?

24 A. Correct.

25 Q. Let's take a look at --

1 MR. BLUE: Objection, Your Honor. I
2 don't see how he has a foundation of her intent when
3 she took her notes.

4 THE COURT: He has foundation. He
5 works with her. He knows what his experience is with
6 her. Speaking to experience. The objection is
7 overruled.

8 Q. (BY MR. MACDONALD) If we can take a look
9 at Exhibit 127, please. And let's look at the bottom
10 e-mail first, please. And this is an e-mail from
11 Ms. Nevans to you and others dated February 14, 2011.
12 Do you see that?

13 A. I do.

14 Q. And the subject line is, Douglas County
15 voucher meeting minutes, 1/5/11. Do you see that?

16 A. I do.

17 Q. And Ms. Nevans is sending the Douglas
18 County voucher meeting minutes to you and Margo Allen.
19 Do you see that?

20 A. I do.

21 Q. And first, who's Ms. Allen? Who's Margo
22 Allen?

23 A. She was my executive assistant at the
24 time.

25 Q. And in the top e-mail, you then forward

1 the notes to a collection of people later that same
2 evening, on Monday, February 14th. Do you see that?

3 A. I do.

4 Q. And you state that the write-up was very
5 helpful. Do you see that?

6 A. I do.

7 Q. Does that comport with your memory, that
8 you reviewed the meeting minutes and thought they were
9 helpful?

10 A. Correct.

11 Q. And you asked the people that you sent
12 this to whether they see any need for corrections. Is
13 that right?

14 A. Correct.

15 Q. Do you recall if you got any corrections
16 to the meeting minutes, sir?

17 A. I don't recall.

18 Q. And you reference Tony there in the
19 second line. Is that Tony Dyl?

20 A. Correct.

21 Q. And Mr. Dyl is here in the courtroom.
22 He's senior assistant attorney general for education?

23 A. Correct.

24 Q. Let's turn to the next page, to the next
25 exhibit -- or this exhibit. The first speaker that's

1 listed is Fagen. Do you see that on the left?

2 A. I do.

3 Q. And about four rows down, she describes
4 the concept. Do you see that?

5 A. I see that.

6 MR. BLUE: Objection, Your Honor. We're
7 into hearsay now.

8 THE COURT: No. Overruled.

9 Q. (BY MR. MACDONALD) And Ms. Fagen
10 describes the concept as taking an option certificate.
11 And then the next -- the bottom sentence says, "Must
12 meet criteria. Go to the school but still be a
13 Douglas County student, like special education
14 students." Do you see that?

15 A. I do.

16 Q. Was this the first meeting you had
17 directly with anyone from the Douglas County school
18 district, sir?

19 A. I believe it was.

20 Q. But you'd reviewed the program as Douglas
21 County had set it forth prior to this meeting; is that
22 right?

23 A. Other than what we saw in the press. Not
24 me specifically.

25 Q. Do you know whether any members of your

1 staff had gone on to the Douglas County website and
2 reviewed what Douglas County school district had about
3 the program at this time?

4 A. They may have, but I don't recall that.

5 Q. You're listed -- the second time you're
6 listed there on the left. It says, "Hammond. If
7 given voucher certificate." Do you see that?

8 A. Yes.

9 Q. And you say, "As part of the agreement
10 with the private school, would you work out a cost
11 structure?" Do you see that?

12 A. I do.

13 Q. Let's blow that up a little bit. I'm
14 sorry. I didn't hear you.

15 A. I said I do.

16 Q. Okay. The following statement says,
17 "Schools would receive 25/75 proposed by
18 subcommittee." Do you see that?

19 A. I do.

20 Q. And do you recall, sir -- was that a
21 question you were asking or a suggestion you were
22 making?

23 A. I believe that was -- the superintendent
24 was outlining -- or somebody at the meeting -- I
25 assume that was Elizabeth -- was outlining the aspects

1 of the program. And that was my clarifying what
2 that -- what that meant.

3 Q. And so you understood at this time that
4 what was being discussed was that 75 percent of the
5 money would go to a private school and 25 percent of
6 the money would not go to a private school? Would
7 stay within the school district?

8 A. I believe that's correct.

9 Q. And this was public money. This was
10 state money that would be sent to them, correct? At
11 least, in part?

12 A. Correct.

13 MR. BLUE: Objection, Your Honor. That
14 misstates the evidence so far.

15 THE COURT: Overruled.

16 Q. (BY MR. MACDONALD) The next time you're
17 listed here, Mr. Hammond, it states, "Implemented on a
18 small scale at first, then adjust." Do you see that?

19 A. I do.

20 Q. And my question for you, Mr. Hammond, is,
21 was this a question you were asking or a suggestion
22 you were making?

23 A. A question.

24 Q. And you also asked whether private
25 schools could be religious; is that right?

1 A. Correct.

2 Q. And at the bottom of this page Ms. Betz
3 is speaking, and she references the budget. Ms. Betz,
4 you understand, is the CEO of the Douglas County
5 school district?

6 A. Correct.

7 Q. And she says, "Budget. If we offer this,
8 can we count child who participates? If so, how?" Do
9 you see that?

10 A. I do.

11 Q. And do you recall this question from
12 Ms. Betz, the CFO of Douglas County school district,
13 generally?

14 A. Yeah. Generally, if it's in there, I can
15 count on that she asked the question.

16 Q. And she says, "Means about 6,000 out of
17 district without assurance." Do you see that?

18 A. I see that.

19 Q. And in that discussion, did you
20 understand that Douglas County, sir, was looking for
21 the assurance that they would be able to count
22 students who were attending private school partners as
23 public school students, so that they could receive the
24 money from the state, the per pupil funding?

25 A. They were working -- they were looking

1 for direction.

2 Q. And you understand that they were looking
3 for assurance of that, because otherwise, it could
4 have a huge negative impact financially, correct?

5 A. Correct.

6 Q. On the next page of this exhibit, at the
7 top, Tony Dyl, your attorney, identifies two separate
8 universes of legal issues. Do you see that?

9 A. I do.

10 Q. And the first issue that Mr. Dyl
11 identifies is that the voucher program includes
12 religious schools. Do you see that?

13 A. I do.

14 Q. And then he states, "This is a
15 potential violation of Colorado Constitution, article
16 9, section 7." Do you see that?

17 A. I do.

18 Q. Do you recall a discussion at this
19 meeting that Mr. Dyl identified this article 9,
20 section 7 as a potential violation -- that the voucher
21 program could be a potential violation of this
22 constitutional provision?

23 A. I do, because it's stated in there.

24 Q. And Mr. Dyl states there that it risks
25 attracting a legal challenge in court. Do you see

1 that?

2 A. I do.

3 Q. And based on this discussion and other
4 discussions you had with Douglas County, did you
5 understand that Douglas County understood that they
6 risked a legal challenge in court if they went forward
7 with that understanding?

8 A. I can't speak to the understanding. But
9 we clearly made our concerns known to them, that, you
10 know, this was an issue that could face legal
11 challenge.

12 Q. And the second universe of legal issues
13 that Mr. Dyl identified as the statutory issue. Do
14 you see that?

15 A. Correct.

16 Q. And he says, "Public school kids in
17 private system, how to count." Do you see that?

18 A. I do.

19 Q. And do you recall the discussion
20 identifying that the voucher plan raised a potential
21 statutory issue of how to count public school's kids
22 that are in a private system?

23 A. I'm not sure it was quite around that
24 particular issue. But according to Colorado statutes,
25 public money can go to private entities. And I can't

1 cite the specific statute number. I believe that's
2 what Mr. Dyl was referencing. But you would have to
3 clarify that with him.

4 Q. We may have to do that at some point, but
5 probably not this week.

6 You understood that he identified it as
7 one of the legal issues that you discussed at the
8 January 5th, 2011, meeting, this statutory issue and
9 how to count kids. Is that right?

10 A. That's what it says. But I can't -- I
11 honestly am not sure that we meant it -- verify as a
12 legal issue was certainly an issue that was brought
13 forward.

14 Q. Sitting here today, you don't remember.

15 A. Correct.

16 Q. The next entry -- just let me ask this.
17 Eric Hale. Is that a reference to Mr. Hall, who we
18 discussed earlier?

19 A. I would assume so.

20 Q. And if you just turn back to the first
21 page, I was confused by that, because I don't see
22 Mr. Hall listed as one of the attendees. Do you
23 recall, sitting here today, whether Mr. Hall did
24 attend the January 5th, Douglas County school district
25 voucher meeting?

1 A. My recollection was, he was on the phone
2 as a part of that meeting. It's either that one or
3 the March one. If his name was down there, obviously,
4 that was the meeting.

5 Q. Let's take a look back at the second page
6 again. The next page. Excuse me. Bottom of the
7 page. You see near the bottom of the page -- keep
8 going down -- the second to last entry, Mr. Dyl, your
9 attorney, assistant attorney general, states, "The
10 statute precludes conversion of public schools to
11 private." Do you see that?

12 A. I do.

13 Q. And do you recall what statute Mr. Dyl
14 was describing that precludes conversion of public
15 schools to private?

16 A. Not offhand.

17 Q. The next line -- the next words say --
18 and this again from Mr. Dyl -- "Trying to create a
19 charter school would mount legal challenges." Do you
20 see that?

21 A. I do.

22 Q. Do you recall the discussion at this
23 January 5th meeting about the fact that creating a
24 charter school would mount legal challenges?

25 A. Not specifically. It was obviously

1 discussed at that meeting. But as to the detail of
2 what Mr. Dyl stated, I don't recall.

3 Q. The next line, Mr. Hammond, is you
4 speaking, and it says, "Things you can do to be able
5 to count students." Do you see that?

6 A. I do.

7 Q. Do you recall identifying at this meeting
8 that there were things you could do to count students?

9 A. I do.

10 Q. And you say there following that the risk
11 is up to Dougco. Referring to Douglas County?

12 A. Correct.

13 Q. And what did you mean when you said that
14 the risk is up to Douglas County? What do you
15 recall -- what were you conveying at that meeting,
16 sir?

17 A. I believe Ms. Hermann was at that meeting
18 with me, as well. And what I was trying to convey to
19 them is that there is a certain process following the
20 statutes, not just the School Finance Act, on how the
21 enrollment of students and the hours that those
22 students have to be in class. And they have to follow
23 the statutes.

24 And the devil is really in the details.
25 The program -- we didn't have all the details, by any

1 means. And so obviously the risk is up to Douglas
2 County, because it's their proposal, and they're in
3 charge of how they count the students following the
4 statute.

5 Q. Look at the next page. And the fourth
6 entry is Fagen. And within that entry, there's a --
7 looks like Ms. Sirko -- Diana Sirko is speaking.
8 Could you tell me who she is?

9 A. She was the deputy commissioner of
10 services at the time.

11 Q. And that's within your department?
12 Within the Colorado Department of Education?

13 A. Correct.

14 Q. And she works for you?

15 A. Correct.

16 Q. And Ms. Sirko says, "If counted, can't
17 preclude SPED kids." Referring to special education
18 kids; is that right?

19 A. Correct.

20 Q. And she goes on to say, "For option
21 schools or program, must provide FAPE."

22 And that's free and adequate public
23 education, correct?

24 A. Correct.

25 Q. Do you recall Ms. Sirko stating in this

1 meeting that if the kids were counted, that Douglas
2 County could not preclude special education kids?

3 A. Would you restate the question?

4 Q. Do you recall the discussion by
5 Ms. Sirko that if Douglas County or the state were
6 counting the kids who were in the private school
7 partners, that you can't preclude special education
8 kids? Do you remember Ms. Sirko talking about this at
9 that meeting?

10 A. I do.

11 Q. And did you agree with her, that for
12 option schools or program, Douglas County must provide
13 a free and adequate public education for kids who
14 would receive -- who would be counted for purposes of
15 state funding?

16 A. I can't recall the specifics of the
17 conversation. I know we were all concerned about
18 special education children, and that they have open
19 access. And how those kids are counted. I know we
20 had discussion at both meetings about counting special
21 education students.

22 Q. And you understand that private schools
23 are not obligated to provide a free and adequate
24 public education, as that term is understood in your
25 profession. Correct, sir?

1 MR. BINDAS: Your Honor, objection. The
2 acronym FAPE does not stand for free and adequate
3 public education.

4 THE COURT: Sustained on foundation.

5 Q. (BY MR. MACDONALD) Mr. Hammond, sorry.
6 What does FAPE stand for?

7 A. You know, today I can't actually recall
8 it. I'd have to have help with that, because I
9 actually don't recall that right now.

10 Q. We'll return to it. FAPE is something
11 that you, as commissioner of education, work on,
12 correct?

13 A. I can't recall right now. We have so
14 many acronyms in education. It's hard to keep track
15 of them.

16 Q. Do you understand that the voucher plan
17 or the Choice Scholarship plan, whatever Douglas
18 County wants to call it -- do you understand that plan
19 today requires kids to give up certain special
20 education rights and services?

21 A. No, I don't.

22 Q. Do you understand the term "parentally
23 placed students," sir?

24 A. No.

25 Q. Have you heard of a voluntary parental

1 placement within the meaning of the special education
2 services? Does that mean anything to you, sir?

3 A. I've heard the reference to that term.

4 Q. Do you know what it means?

5 A. Not as you're referring to in that -- I
6 mean, when Douglas County met with us about the
7 program, you know, some of the detail that followed
8 that and established the program I'm having a hard
9 time even recalling, other than I've heard the word in
10 looking at some of the affidavits -- or not the
11 affidavits, but some of the information that came
12 across. But, you know, any detail after that I
13 don't --

14 Q. Are you familiar with an individual
15 education plan, or IEP, within the special education
16 field, sir?

17 A. I do.

18 Q. And do you understand that if a student
19 is in the public school system and they have a
20 disability, the school districts are obligated to work
21 with the student to develop an IEP?

22 A. They are.

23 Q. And do you understand that a parent who
24 places their kid -- their child in a private school
25 does not have a right to have that IEP follow the kid

1 and make the private school comply with the IEP? Do
2 you understand that, sir?

3 A. No, I don't.

4 Q. Do you know one way or another? Do you
5 think a private school is obligated to comply with an
6 individual education plan within special education
7 services, sir?

8 A. If the money follows the student in a
9 program, they have to comply with the special
10 education act.

11 Q. That's a different question.

12 A. Okay.

13 Q. Do you know whether a private school is
14 obligated to comply with an individual education plan
15 for a student with disabilities?

16 A. No.

17 THE COURT: No, you do not know the
18 answer to that question?

19 THE WITNESS: I don't know the answer to
20 that question.

21 THE COURT: Thank you.

22 Q. (BY MR. MACDONALD) The next line in the
23 exhibit is -- Mr. Cutter is speaking. And he works
24 for Douglas County school district, correct?

25 A. I believe so.

1 Q. And he says, "Lottery for those
2 interested students; but not right now asking private
3 schools to change admission process." Do you see
4 that?

5 A. I see what's on the board.

6 Q. And do you recall that Douglas County was
7 not asking private schools to change their admission
8 process?

9 A. I really can't recall what was being -- I
10 know they were discussing that at the time. But I
11 honestly can't speak to that part of the conversation.

12 Q. The next line is Mr. Dyl speaking, and he
13 said -- again, this is the state's attorney. He says,
14 "Might encounter problem especially using religious
15 criteria." Do you see that?

16 A. I do.

17 Q. Do you recall the state's attorney, at
18 this meeting, saying that the voucher plan might
19 encounter a problem, especially using religious
20 criteria? Do you recall that?

21 A. I recall something similar to that.

22 Q. Let's go back to the FAPE for a minute.
23 Have you heard the term free and appropriate public
24 education?

25 A. Yes.

1 Q. And do you understand that is what FAPE
2 stands for in the special education field?

3 A. I do now. I just couldn't recall it
4 earlier.

5 Q. Neither of us were having a good memory.
6 Do you know whether private schools are
7 obligated to provide a free and appropriate public
8 education for students with disabilities?

9 A. No, they're not, as I think about it. I
10 have to qualify that. It depends on the money they're
11 receiving. You know, I don't deal with that day in
12 and day out anymore. But if they're receiving any
13 state funds in any way, they would.

14 Q. So let me ask this: With respect to the
15 students, the 500 students, who are in the voucher
16 program, is it your testimony that those private
17 schools will have to provide a free and appropriate
18 public education as that term is used in the
19 disability -- special education field?

20 A. Correct.

21 Q. And based on your discussions with
22 Douglas County school district, do you understand that
23 Douglas County has a different view from the one that
24 you just expressed? That is, the private school
25 partners do not have to provide a free and appropriate

1 public education?

2 A. The discussions we had about this at that
3 time all centered around special education students.
4 And if they were going to have the configuration of
5 the program that they at least were talking to us at
6 the two meetings, it's my understanding they assured
7 us that whatever they do, the kids would be
8 appropriately accounted. And if they did receive
9 funds as special education students, they would have
10 to meet all the regulations and requirements, both
11 state and federal.

12 Q. Are you aware that the legal center for
13 people with disabilities and older people has filed a
14 complaint with the U.S. Department of Justice alleging
15 that the voucher program violates disability laws?
16 Are you aware of that?

17 MR. HALL: I object to that. This is a
18 separate matter and a separate jurisdiction. Hearsay.

19 THE COURT: Well, it's to test the
20 witness' knowledge. Objection is overruled.

21 A. I'm aware of it.

22 Q. (BY MR. MACDONALD) Have you seen the
23 complaint that the legal center has filed, sir?

24 A. I haven't spent time reviewing that.

25 Q. It sounds to me like you have at least

1 seen the document. Is that fair?

2 A. That's fair.

3 Q. We'll come back to this exhibit. Let's
4 put up Exhibit 105.

5 MR. HALL: I'm sorry. I object, Your
6 Honor. This is not agreed to be admitted.

7 THE COURT: I think he's going to try
8 and lay a foundation to have it admitted, so let's see
9 what he's doing. Objection is premature.

10 Q. (BY MR. MACDONALD) Mr. Hammond -- and if
11 you need it, you can look in your book under
12 Exhibit 105 -- does this look like the complaint of
13 the Legal Center for People with Disabilities and
14 Older People filed with the U.S. Department of
15 Justice?

16 A. It does.

17 THE COURT: Mr. Macdonald, what's your
18 purpose here? What are we doing with this?

19 MR. MACDONALD: Your Honor, I would like
20 to see if I can establish with Mr. Hammond that, in
21 fact, there was a difference of opinion between the
22 state and Douglas County about what it is doing on the
23 special education front with respect to this program,
24 Your Honor.

25 THE COURT: Well, ask him that. You

1 can ask him that question.

2 Q. (BY MR. MACDONALD) Mr. Hammond, do you
3 understand that Douglas County, as part of the voucher
4 plan, the Choice Scholarship Program -- that parents
5 who take the scholarship option or voucher, that
6 Douglas County's position is, they will use a
7 voluntary parental placement in the private school for
8 purposes of special education services?

9 A. First, Counselor, I did not review that
10 complaint in any detail other than maybe glancing at
11 it.

12 THE COURT: He's not asking you that.
13 He's asking you a specific question. Listen carefully
14 to it and answer his question.

15 A. Ask it again, then.

16 MR. MACDONALD: Read the question back,
17 please.

18 (The last question was read back as
19 follows: "Mr. Hammond, do you understand that
20 Douglas County, as part of the voucher plan, the
21 Choice Scholarship Program -- that parents who take
22 the scholarship option or voucher, that Douglas
23 County's position is, they will use a voluntary
24 parental placement in the private school for purposes
25 of special education services?")

1 A. No.

2 Q. (BY MR. MACDONALD) Let's go back to our
3 prior exhibit. Actually, maybe I misunderstood that
4 answer. You don't have that understanding; is that
5 right?

6 A. Not of that document when you asked me.

7 Q. I'm trying to go away from the document.
8 So let's go to Exhibit 133. Let's see if we can nail
9 this down, Mr. Hammond.

10 Exhibit 133, Mr. Hammond, is an e-mail
11 from Rob Ross dated March 15, 2011. And it's to you
12 and Mr. Dyl. Do you see that?

13 A. I do.

14 Q. And this is the day that Douglas County
15 approved its voucher plan; is that right?

16 A. I have no reason to -- I assume that's
17 correct.

18 Q. And the subject is policy adopted. Do
19 you see that?

20 A. I do.

21 Q. And the attachment is Choice Scholarship
22 summary and policy. Do you see that?

23 A. Yes.

24 Q. Okay. And so you understand that
25 Mr. Ross -- and you can take a look at the body of the

1 e-mail -- tells you that Douglas County has
2 approved -- the Board of Education of Douglas County
3 has approved this policy that's attached to
4 Exhibit 133. Do you see that?

5 A. I do.

6 Q. And if we could just turn to the third
7 page of the exhibit. First, let's go to the second
8 page. This is the DCSD Choice Scholarship executive
9 summary. Do you see that?

10 A. I do.

11 Q. Do you recall receiving this from Douglas
12 County?

13 A. I do.

14 Q. And on the next page, down at the bottom,
15 the last bullet says, "Participation in the Choice
16 Scholarship Program will be viewed as a voluntary
17 parental placement in the private school for purposes
18 of special education services." Do you see that, sir?

19 A. I do.

20 Q. Does this refresh your recollection that
21 from Douglas County's standpoint, they view a student
22 who accepts a voucher as one who is a voluntary
23 parental placement in the private school for purposes
24 of special education services?

25 A. I see that there. You know, I remember

1 also the document. But, you know, I did not go
2 through, at that point in time, it in any further
3 detail.

4 Q. And do you understand that a voluntary
5 parental placement in the private school for purposes
6 of special education services means that those
7 students will not receive a free and appropriate
8 public education, as that term is understood in
9 special education services?

10 A. No, I don't.

11 Q. Do you have any knowledge one way or
12 another, sir?

13 A. No.

14 Q. The next line says, "District provided
15 services to parentally placed students with
16 disabilities are limited." Do you see that?

17 A. I do.

18 Q. And do you recall that, in fact, school
19 district services for parentally placed students with
20 disabilities are limited? Do you recall that fact?

21 A. I see that it states that.

22 Q. Are you aware of that fact?

23 A. I'm sure I was at some point. But, you
24 know, in our discussions, again, when we had the
25 preliminary discussions with Douglas County, we were

1 specifically dealing with, at one of the meetings, our
2 special ed staff. And I'd certainly be glad to give
3 you the names of the staff that were trying to answer
4 questions of Douglas County as it got into the
5 specifics of how to treat special education students.

6 Q. Sitting here today, do you realize that
7 Douglas County's view is that for students who take
8 the 500 scholarships, that they have -- they're viewed
9 as voluntary parental placement?

10 A. I see that.

11 Q. Other than reading it here, are you
12 otherwise aware of that fact?

13 A. Counselor, I'm sure I was. But, you
14 know, to the extent my -- the extent of the
15 discussions falls back to when we were working with
16 Douglas County and how the information was first
17 presented.

18 Once we were done answering as many
19 questions as they had of us and what they asked of us,
20 you know, the discussion was pretty much over. And
21 then, you know, as a school district, they set the
22 program up based on what they felt best would support
23 their district from our guidance.

24 Q. Let's look at page 8 of this same
25 exhibit. Midway down the page, you see little I, "No

1 specialized programs." Do you see that, sir?

2 A. I do.

3 Q. And the first sentence says, "The parent
4 of a Choice Scholarship student shall acknowledge that
5 the district will not create specialized programs in
6 private school partners." Do you see that?

7 A. I do.

8 Q. And it goes on again to talk about
9 voluntary parental placement after that. Do you see
10 that?

11 A. Correct.

12 Q. And you were aware that by accepting a
13 Choice Scholarship, parents were being asked to
14 acknowledge that the district will not create any
15 specialized programs in the private school partners?

16 A. I see that. And I don't deny that.

17 Q. Let's go back to Exhibit 127. And go to
18 the fourth page. These are the meeting minutes of the
19 January 5th, 2011, meeting, Mr. Hammond.

20 A. Yes.

21 Q. We had a detour on the special education
22 comment of Ms. Sirko. If we can look down near the
23 bottom, Mr. Cutter -- on the third to the bottom,
24 Mr. Cutter is speaking. Mr. Cutter says that there's
25 a loophole in charter schools. Do you see that?

1 A. I do.

2 Q. Do you recall a discussion about a
3 loophole in charter schools by Mr. Cutter that the
4 Douglas County school district identified?

5 A. I'm sure there was discussion, but I
6 don't recall the discussion.

7 Q. The next sentence is from -- the next
8 line is by Ms. Betz, the CFO of Douglas County. And
9 she says, "What kind of resistance will we get from
10 CDE?" The Colorado Department of Education. Do you
11 see that?

12 A. I do.

13 Q. And she says, "Do not want to have a plan
14 and then be shot down." Do you see that?

15 A. I do.

16 Q. Were you aware that Douglas County wanted
17 to understand and wanted to know from you and your
18 department that they would not be shot down with the
19 voucher plan they came up with?

20 A. That's correct.

21 Q. And the next line -- you're speaking --
22 in the second to the bottom, you say, "Don't intend to
23 block it." Do you see that?

24 A. Correct.

25 Q. Do you recall telling the Douglas County

1 school district at the January 5th, 2011, meeting that
2 your department, Colorado Department of Education, did
3 not intend to block the voucher plan?

4 A. We would not, as it was presented to us
5 that particular time. If it was in accordance with
6 the statute and everything was, you know, envisioned
7 as they presented it, then there would be no reason to
8 block it.

9 Q. And I think you previously testified, you
10 don't know if you had actually seen any written
11 materials at the time that you told them that you
12 don't intend to block it. Correct?

13 A. That was from the January minutes, so
14 that would be very early on in the discussion.
15 Obviously, there was information in the press. And I
16 suspect some of the staff may have had information.

17 But at that particular meeting, we were
18 going off of, as I recall, what Douglas County was
19 presenting to us.

20 Q. So when you told them that, we don't
21 intend to block it, you don't recall having any
22 written materials that outlined what the program was.
23 Is that correct?

24 A. Not in any specific detail. There may
25 have been some information at the time, obviously, but

1 I just don't recall that.

2 Q. But you told them, we don't intend to
3 block it.

4 A. That's correct.

5 Q. Can we go to the next page, please. The
6 third entry is Hermann. And this is voting on it,
7 correct?

8 A. Correct.

9 Q. And she says, "Hopefully on small scale
10 at first because money comes out of other districts."
11 Do you see that?

12 A. I do.

13 Q. Do you recall discussion by Ms. Hermann
14 that she hoped that the program would be small scale
15 at first, because money comes out of other districts?

16 A. There was discussion from her. And her
17 primary concern, as I recall -- again, you'd have to
18 talk to her for further details, but it was the
19 concern we had with students coming from other
20 districts. And as part of that discussion, I recall
21 they stated it would be a small pile and all the
22 students would be Douglas County students. That was
23 some of her problems.

24 And if there was any additional money
25 that had to be generated, given the status of the

1 state's economy and what schools were receiving, her
2 concerns would have been to take money from other
3 districts.

4 Q. And you recall her voicing the concern
5 that it would take money -- the voucher plan that
6 Douglas County was discussing would take money out of
7 other districts?

8 A. I think she was just making a statement
9 at that time. And you'd need to ask her about the
10 specifics, given the time that's passed since that
11 statement was made.

12 Q. After this January 5th, 2011, meeting
13 with Douglas County, you continued to keep Bob
14 Schaffer, your boss at the state Board of Education,
15 apprised of the Douglas County voucher program,
16 correct?

17 A. No.

18 Q. That's not correct?

19 A. That's not correct.

20 Q. Let's take a look at Exhibit 73, please.
21 The top e-mail is from Ms. Nevans, director of state
22 board relations, to Marcia Neal. It's dated January
23 20th. Do you see that?

24 A. Correct.

25 Q. Who's Marcia Neal?

1 A. She's one of our board members. She's
2 also vice chair of the board.

3 Q. She's on the Board of Education, like
4 Mr. Schaffer?

5 A. That's correct.

6 Q. One of the elected members?

7 A. Correct.

8 Q. And Ms. Nevans is writing to Ms. Neal.
9 And if you could look at the third sentence. The
10 second line says, "You haven't missed a lot on this
11 issue because Robert, keeping Bob apprised, has been
12 working with Douglas County to support their plan."
13 Do you see that?

14 A. Correct.

15 Q. Is that Robert referring to you?

16 A. Correct.

17 Q. And it says, "Keeping Bob apprised."
18 That's a reference to Bob Schaffer?

19 A. Correct.

20 Q. And so Ms. Nevans is telling Ms. Neal,
21 from the state Board of Education, that you are
22 keeping Bob apprised. Is that right?

23 A. That's correct.

24 Q. And Ms. Nevans is also telling Ms. Neal
25 that you've been working with Douglas County to

1 support their plan. Is that right?

2 A. It states that.

3 Q. And that's accurate?

4 A. The accuracy is exactly what I stated to
5 you before. That we worked with Douglas County to
6 give them the best advice on the plan or, at that time
7 back in January, on the concepts that they proposed to
8 us. You know, our objective, like in any school
9 district, we don't want them to go down a path we
10 think is going to cause a problem and then we end up
11 not funding them.

12 Q. And so you were supporting the Douglas
13 County plan. You were supporting them with their
14 plan, correct?

15 A. I don't recall making that statement.
16 That's Mary Frances' words, not mine.

17 Q. But Ms. Frances is telling one of your
18 bosses that that's what you're doing, correct?

19 A. That's what it states.

20 Q. And let's take a look at Exhibit 70. The
21 top e-mail is from Bob Schaffer to Ms. Nevans on
22 Tuesday, January 11th. Do you see that?

23 A. I do.

24 Q. And Mr. Schaffer says to Ms. Nevans -- he
25 references the meeting with Douglas County. Do you

1 see that?

2 A. Yes.

3 Q. And do you know how Mr. Schaffer, on
4 January 11th, which I guess is a little less than a
5 week after the January 5th meeting -- do you know how
6 Mr. Schaffer was aware of the January 5th meeting with
7 Douglas County?

8 A. I would presume it was from Mary Frances
9 Nevans. And also, by clarifying, you know, I stated I
10 wasn't keeping Mr. Schaffer informed. To the best of
11 my knowledge, we weren't. What we --

12 THE COURT: Sir, there's not that
13 question pending. We have limited time in this
14 proceeding, so I want you to do your best, please, to
15 listen carefully to the question you're asked.

16 THE WITNESS: I'm trying, Judge.

17 THE COURT: Try better.

18 THE WITNESS: I have to ask the question
19 again.

20 Q. (BY MR. MACDONALD) I'm not sure there was
21 a question pending.

22 THE COURT: Well, you asked him if he
23 knows why Bob -- I guess, Mr. Schaffer -- knew about
24 the meeting on January 5th.

25 Q. (BY MR. MACDONALD) I believe you

1 testified that you didn't know. Is that right?

2 A. Yes.

3 THE COURT: Okay. Let's move on to
4 something else.

5 MR. MACDONALD: Your Honor, just as one
6 housekeeping matter, I think all of the exhibits I
7 have used with Mr. Hammond so far are stipulated and
8 admitted, except for Exhibit 139. And so that I don't
9 forget to do so, this is the e-mail chain from Bob
10 Schaffer to Mr. Hammond and others. It was November
11 18th. If we could put that back up just quickly.

12 THE COURT: I remember it. Any
13 objection to 139? Are you offering it at this time,
14 sir?

15 MR. MACDONALD: I am, Your Honor.

16 MR. HALL: No.

17 THE COURT: 139 is admitted without
18 objection. You may proceed.

19 MR. HALL: Your Honor, just one point of
20 clarification. My understanding is that the DOJ
21 complaint was not offered. It was not admitted.

22 THE COURT: It wasn't offered, and it
23 certainly wasn't admitted.

24 MR. HALL: Thank you, Your Honor.

25 MR. MACDONALD: Can we put up

1 Exhibit 140, please.

2 Q. (BY MR. MACDONALD) Mr. Hammond, at the
3 top, this is an e-mail from Robert Ross, counsel for
4 Douglas County school district, to Tony Dyl, counsel
5 for the state, dated February 17th. And the subject
6 is Douglas County school district option certificates.
7 Do you see that?

8 A. I do.

9 MR. HALL: Your Honor, we're going to
10 object. This exhibit has not been admitted, either.
11 And I don't know how Mr. Hammond is going to lay a
12 foundation for it.

13 THE COURT: What are you asking him
14 about? Where are you going with this?

15 MR. MACDONALD: I'm going to ask him
16 first if he's seen the document, and try to lay a
17 foundation for it.

18 THE COURT: Okay. Go ahead.

19 MR. MACDONALD: And if I could just say,
20 Your Honor, this was an exhibit that was produced to
21 us yesterday from the state. It is a late addition to
22 our exhibit list, because we got it literally -- I had
23 it in my hands sometime around 10:00 or 11:00
24 yesterday morning.

25 THE COURT: All right. Well, let's see

1 if you can get the foundation through this witness. I
2 don't know, but we'll find out.

3 Q. (BY MR. MACDONALD) The first line,
4 Mr. Hammond, references an outline of the latest
5 concept of the pilot program. Do you see that?

6 A. Correct.

7 Q. Do you recall that Mr. Dyl provided you a
8 copy of this outline?

9 A. I don't recall.

10 Q. Don't know one way or another?

11 A. Counselor, I presume he did at some
12 point, because we had a further meeting in March.

13 Q. Let me see if I can refresh your
14 recollection, because we have two exhibits that are
15 similar. One has the attachment and one does not.

16 THE COURT: He just told you that he
17 recalls that he was given the outline; he just doesn't
18 know when. So if it's important to know when, then
19 you might want to establish that. If it's not, you
20 have that foundational element.

21 MR. MACDONALD: Thank you, Your Honor. I
22 was going to try to go to the same e-mail that
23 actually has the attachment and try to establish that.

24 THE COURT: Okay. Go ahead.

25 Q. (BY MR. MACDONALD) Before we leave this,

1 can you tell me, Mr. Hammond, are those your
2 handwritten notes on the first page of this e-mail?

3 A. Doesn't look like it.

4 Q. Turn to the second page, and tell me
5 whether those are your handwritten notes.

6 A. I don't think so. They could have been.
7 I'm not recognizing my own writing, if that is my
8 writing.

9 THE COURT: So the record is clear, is
10 the writing reflected on this exhibit, the
11 handwriting, your handwriting?

12 THE WITNESS: I don't know.

13 THE COURT: Okay. Thank you.

14 Q. (BY MR. MACDONALD) Let's take a look at
15 Exhibit 142. This is the same e-mail, Mr. Hammond,
16 you can see. Excuse me. I said 142. I meant 141. I
17 apologize. This is not the same.

18 THE COURT: Are we on 141 or 142,
19 Mr. Macdonald?

20 MR. MACDONALD: 141. I'm sorry, Your
21 Honor.

22 THE COURT: Okay.

23 Q. (BY MR. MACDONALD) This is another copy
24 of that same e-mail at the top from Mr. Ross to
25 Mr. Dyl that states, "Attorney." There is

1 handwriting. If you can just go down and tell me
2 whether you recognize this on the first page as your
3 handwriting.

4 A. I don't recognize it as mine.

5 Q. Let's turn to the fourth page of this
6 document. And at the top -- this is the attachment,
7 by the way. And it says, "DCSD Choice Scholarships."
8 Do you see that at the top?

9 A. I do.

10 Q. And do you recall receiving this summary
11 of the pilot program in mid-February 2011?

12 A. I probably did, but I don't recall it. I
13 mean, I recall that was -- something to that effect.
14 If that was the one, then that would be correct. That
15 was distributed at the time.

16 Q. So you do recall seeing it?

17 A. I have seen it.

18 MR. MACDONALD: Your Honor, I'll move the
19 admission of Plaintiffs' Exhibit 141.

20 MR. HALL: Your Honor, I'll object,
21 because the testimony is that he's seen the
22 typewritten document but not all the handwriting.
23 Wasn't sure whose what handwriting is. I'll object on
24 that basis.

25 THE COURT: Are you offering just this

1 attachment, or are you offering the other item that
2 has all of the handwriting he doesn't recognize as his
3 own?

4 MR. MACDONALD: Well, Your Honor, I would
5 offer the admission of the e-mail, because I think it
6 is a business record of the state of Colorado, and
7 party opponent in this case produced to us as part of
8 this case and part of our core production. So I think
9 it's non-hearsay and admissible on that basis.

10 At least for now, I will not move the
11 admission of it. We can provide a redacted copy of
12 this one with the handwritten notes.

13 THE COURT: I think you have foundation
14 for the exhibit as a business record, including the
15 attachment, but not the handwritten notes. So with
16 that caveat, with the redaction to that exhibit, I'll
17 note the objection to Exhibit 141 and it will be
18 admitted.

19 MR. MACDONALD: Thank you, Your Honor.
20 We will provide a redacted copy.

21 Q. (BY MR. MACDONALD) Mr. Hammond, if you
22 will look at the -- let's look at the fifth page --
23 sixth page of this document. Excuse me.

24 Do you recall -- let's zoom out for a
25 minute, so you can see that there are two options

1 listed here. Option 1 and option 2. It's a little
2 bit hard to read, but we can zoom in if necessary. Do
3 you see that?

4 A. I do.

5 Q. And option 1 is charter school. Do you
6 see that?

7 A. I do.

8 Q. And option 2 is district program. Do you
9 see that?

10 A. I do.

11 Q. And do you recall the two options, both
12 charter school and district program, being presented
13 by the district to your department?

14 A. I recall those as part of the discussions
15 that we had with Douglas County.

16 Q. And do you recall that the Department of
17 Education ultimately favored a charter school option
18 for the Douglas County program?

19 A. We stated that would be an easier option
20 to go through than the district program. I believe
21 that was stated at the meeting.

22 Q. Let's go to the first page of this
23 exhibit, the e-mail. And the second line begins, "We
24 are looking for input on whether the program would be
25 eligible for PPR as this is conceived." Do you see

1 that?

2 A. Correct.

3 Q. And you understood that that was Douglas
4 County's -- one of their objectives, to be eligible
5 for the per pupil revenue funding?

6 A. That's correct.

7 Q. And the next line says, "I know when we
8 met in January that your first take was that we should
9 have legislation to authorize this." Do you see that?

10 A. I do.

11 Q. Do you recall that it was your
12 department's position that the Douglas County school
13 district should have legislation to authorize its
14 voucher program?

15 A. I think that was part of the discussions,
16 but I don't know who made it at the time.

17 Q. The next line, sir, says, "We understand
18 the district will be challenged legally." Do you see
19 that?

20 A. I do.

21 Q. And you had discussions with the Douglas
22 County school district that they'd be challenged
23 legally. Do you recall those?

24 A. As I've stated on two different times, we
25 met with Douglas County, and in between those two

1 times, they shared information back and forth with our
2 attorney. And we were trying to provide them the best
3 advice that we could as they established their
4 program. That was part of it.

5 Q. And -- excuse me. Sorry.

6 A. The legally challenged issue that had
7 been brought up at each meeting.

8 Q. And what Douglas County says next is,
9 "What we are looking for now is whether there are any
10 issues that you see as this is currently drafted that
11 would cause your office to consider whether you have
12 to actually oppose it." Do you see that?

13 A. I do.

14 Q. And you're aware that that's what Douglas
15 County wanted from your office?

16 A. Yes.

17 Q. Let's look at Exhibit 142. And, sir,
18 this is an e-mail from you, dated February 23rd, 2011.
19 Do you see that?

20 A. Correct.

21 Q. And it's to people in your department.
22 Do you see that?

23 A. I do.

24 Q. And at the top you say, "I just realized
25 there are issues in the proposal that Tony and I

1 believe you need to weigh in on." Do you see that?

2 A. I do.

3 Q. And these are issues with the Douglas
4 County Choice Scholarship Program that had been
5 presented to you, correct?

6 A. Correct.

7 Q. And at the bottom, the e-mail -- it's an
8 e-mail from you to Mr. Ross of Douglas County school
9 board in which you thank him for submitting
10 information for your review. The last line, you say,
11 "Once we have concluded this meeting" -- referring to
12 an internal meeting -- "we will be in a position to
13 advise you best how to proceed." Do you see that?

14 A. Yes.

15 Q. And did you see it as your job to advise
16 Douglas County how best to proceed with this voucher
17 program, sir?

18 THE COURT: He's told me that at least
19 a half dozen times, Mr. Macdonald. Please don't ask
20 him that again. And the answer has been the same
21 every time: Yes.

22 Q. (BY MR. MACDONALD) Sir, the issues that
23 you just realized, did those go to the constitutional
24 prohibition of funding religious education? Is that
25 one of them?

1 A. I'm going to ask you to ask your question
2 again, what you're asking me.

3 Q. Sure. The top e-mail says that you just
4 realized there are issues in the proposal.

5 A. Yes.

6 Q. And I'm asking you whether one of the
7 issues that you are referring to is that -- is the
8 constitutional prohibition of funding for religious
9 schools.

10 A. No.

11 MR. MACDONALD: First, Your Honor, I'd
12 like to move admission of Exhibit 142.

13 THE COURT: Any objection to 142?

14 MR. HALL: No, Your Honor.

15 THE COURT: 142 is admitted without
16 objection.

17 Q. (BY MR. MACDONALD) You had a
18 meeting, sir, with your staff, an internal meeting, on
19 March 1st. Is that right?

20 A. Correct.

21 Q. And did Margo Allen, your executive
22 assistant, set that meeting up?

23 A. I have no reason to believe otherwise.

24 Q. Let's take a look at Exhibit 145.

25 MR. HALL: I'll make the same objection.

1 There's no indication of Exhibit 145 that Mr. Hammond
2 knows about the exhibit.

3 THE COURT: Well, we're going to find
4 out. Objection is overruled.

5 Q. (BY MR. MACDONALD) Mr. Hammond, this is
6 an e-mail from Margo Allen to people on your staff.
7 Do you see that?

8 A. I do.

9 Q. It's dated February 23rd, 8:09 a.m.

10 A. Yes.

11 Q. And it references a meeting notice for
12 this Tuesday, March 1st, 1:00 to 2:00 p.m.,
13 commissioner's office. Do you see that?

14 A. Yes.

15 Q. And that was the meeting that you called,
16 the internal meeting, to discuss the voucher program;
17 is that right?

18 A. That would be correct.

19 Q. And Ms. Allen attaches a document to this
20 e-mail? If you could look at the second page, just so
21 you could see that. And let's go to the third page.

22 And then let's go to the last page of the exhibit.

23 It's entitled, "Discussion Points - Private and Public
24 Schools." Do you see that?

25 A. Correct.

1 Q. And do you recall that this -- first, do
2 you recall that this document was the subject of your
3 meeting on March 1st, sir?

4 A. It wasn't the primary focus of the
5 meeting at all.

6 Q. Was it a part of the discussion at your
7 March 1st meeting, sir?

8 A. It was discussed.

9 MR. MACDONALD: Your Honor, I'd move the
10 admission of Exhibit 145.

11 THE COURT: Same objection?

12 MR. HALL: Same objection.

13 THE COURT: I will sustain the
14 objection at this point on foundation.

15 Q. (BY MR. MACDONALD) Mr. Hammond, have you
16 seen this Discussion Points - Private and Public
17 Schools document -- in particular, this last page of
18 Exhibit 145?

19 A. I have.

20 MR. MACDONALD: Your Honor, I'd move the
21 admission of Exhibit 145.

22 THE COURT: Same objection?

23 MR. HALL: Yes, Your Honor.

24 THE COURT: I think the foundation
25 speaks for itself at this point. Goes to its weight,

1 not its admissibility. It's overruled.

2 Q. (BY MR. MACDONALD) First, there's a
3 discussion of the constitution. And the first line
4 says, "Forbids funding to go to private institutions,
5 two different articles." Do you see that?

6 A. I do.

7 Q. And the next line says, "Article 9,
8 Sections 9, 10, 17, refer to public education for
9 funding public trust lands funds and general funds."
10 Do you see that?

11 A. I do.

12 Q. And if you'll go down to statutes,
13 there's a question that says, "If the boards have no
14 jurisdiction, the privates are not under absolute
15 control of the state, and are they not, therefore,
16 ineligible for funding?" Do you see that?

17 A. I do.

18 Q. And, sir, was that discussed at the March
19 1st meeting with your staff?

20 A. That particular document was done by
21 Vody. You already referenced that she worked at the
22 department. That was what she put together and
23 brought forward at this meeting. And Mr. Dyl was
24 there, and we talked about that. And I don't know the
25 exact articles, but Ms. Hermann was incorrect in some

1 of her statements. That was pointed out by our
2 counselor. And so she was incorrect in some of the
3 statements she made.

4 And then we went on from there to review,
5 I think, the proposal, and our concerns were around
6 the special ed cite.

7 MR. BLUE: Your Honor, we're treading
8 into -- this meeting had a lot of attorney-client
9 privileged communications occurring within it. And
10 I'm trying to be conscientious and not interrupt here,
11 but at this point, I think I'm going to have to object
12 to testimony regarding that meeting on privilege.

13 THE COURT: You're always entitled to
14 exercise your right to claim privilege for any
15 information that you believe violates it. Up till
16 this point, I have not heard that objection and that's
17 why I'm not going to read into it. So the objection
18 is noted and sustained.

19 Mr. Macdonald, where else do we need to
20 go with this document?

21 MR. MACDONALD: I think we're done with
22 this document, Your Honor.

23 THE COURT: All right.

24 Q. (BY MR. MACDONALD) Can we look at
25 Exhibit 79, please.

1 First, independent of this exhibit,
2 Mr. Hammond, let me just ask you a question. Was it
3 your view that the work that you and your department
4 had done with Douglas County in this voucher program
5 had gone way beyond the call of duty?

6 A. No.

7 Q. Exhibit 79, sir, are meeting notes that
8 someone's taken. They're dated March 1st, 2011. This
9 is one of the stipulated exhibits.

10 If I could turn your attention to the
11 last page. And down at the bottom there are initials
12 RH. The second to last bullet, it says, "RH. Gone
13 way beyond call of duty." Do you see that?

14 A. Right.

15 Q. Is RH a reference to you, sir?

16 A. Right.

17 Q. Was it your view, as expressed in the
18 notes of your March 1st, 2011, meeting, that you had
19 gone well beyond the call of duty?

20 A. I agree it states that there. But I
21 honestly have to tell you that I don't know what it's
22 referencing. I didn't write those notes and what it
23 was referencing.

24 Q. Let's take a look at Exhibit 84.

25 Exhibit 84, sir, at the top is an e-mail from Nancy

1 Hegele? Is that her name?

2 A. Hegele.

3 Q. And it's dated March 3rd. You're cc'd on
4 it. Do you see that?

5 A. Yes.

6 Q. And the second paragraph references that
7 you would like to convene our internal group in
8 advance of the meeting with Douglas County. Do you
9 see that?

10 A. Yes.

11 Q. And if you'll look at the third page of
12 the exhibit -- first, let's go to the second page.
13 It's an attachment, which is the Douglas County School
14 Choice Scholarship executive summary. Do you see
15 that?

16 A. I do.

17 Q. Let's go to the next page. And at the
18 bottom, you'll see the language that you and I talked
19 about a little bit earlier that says, "Participation
20 in Choice Scholarship Program will be viewed as a
21 voluntary parental placement in private school for
22 purposes of special education services. District
23 provided services for parentally placed students with
24 disabilities are limited." Do you see this?

25 A. Correct.

1 Q. And you agree that that same language was
2 in the final plan that was approved on March 15th?

3 A. As I recall from what we saw.

4 Q. And written to the right is the words
5 "not acceptable." Do you see that?

6 A. I do.

7 Q. And is that your handwriting, sir?

8 A. I don't believe it is.

9 Q. Is it the handwriting of someone on your
10 staff?

11 A. I don't know. I mean, it's somebody's
12 handwriting.

13 Q. Let's look at Exhibit 90. This is from
14 Margo Allen. This is your executive assistant; is
15 that right?

16 A. Correct.

17 Q. To you. And it states that there are her
18 notes from the meeting with Douglas County on March
19 7th, correct?

20 A. Correct.

21 Q. And did Ms. Allen -- was she the one
22 taking the meeting minutes for the March 7th meeting
23 with Douglas County?

24 A. Correct.

25 Q. If we can look at the last page of the

1 exhibit. And before I go here, let me just ask, how
2 long did this meeting last? Do you remember?

3 A. I don't recall.

4 Q. Was this at your offices?

5 A. Correct. It probably -- Counselor, it
6 probably would have been an hour.

7 Q. Anyone on the phone?

8 A. I don't believe so.

9 Q. Well, let's look at the first page -- or
10 second page of the exhibit, just to refresh your
11 recollection. The attendance indicates that Mr. Hall
12 was on the phone. Do you think that's right?

13 A. If it states it, that would have been
14 correct.

15 Q. And let's go back to the last page. And
16 here your reference, sir, in the discussion about
17 charter or program. Do you see that?

18 A. Correct.

19 Q. And you say, "A key issue is how you spin
20 it as a charter or a program. As a charter, easier on
21 waivers." Do you see that?

22 A. Correct.

23 Q. And so that's what you were conveying at
24 the time to Douglas County, that it would be easier to
25 implement their program to charter school?

1 A. Not one of my finer use of words, but
2 that's correct.

3 Q. Down at the bottom, Mr. Ross, counsel for
4 the district, says, "Responsible for accounting and
5 financial information. Are you satisfied with the
6 changes?" Do you see that?

7 A. I do.

8 Q. And you state that your concern is in the
9 special education area; is that right?

10 A. Correct.

11 Q. And do you recall whether you told him
12 you had any other concerns at this time?

13 A. That was the second meeting. And as we
14 continually, you know, met off and on, on those two
15 occasions that we met with staff, again, our concerns
16 was based upon the information that was provided. We
17 provided our best advice. We were concerned about how
18 special education were being treated.

19 But based upon our meetings and what they
20 presented, it appeared they could do what they could
21 do. But again, the devil is really in the details of
22 how the program would finally get approved. And
23 that's up to the school district.

24 Q. In this meeting, did you ever tell
25 Douglas County that you reserved the right -- that the

1 department -- your department reserved the right not
2 to fund the program?

3 A. Not that I recall.

4 Q. In the course of -- between the original
5 meeting with Mr. Schaffer in November and the meetings
6 in January and meetings in March and the work you did
7 in February that we've talked about, did you ever tell
8 Mr. Schaffer that there was a problem -- that there
9 may be a problem, in your view, with funding the
10 voucher plan from the state's perspective?

11 A. We updated the board. But then we get
12 into executive session, I believe, and our counsel,
13 so -- I mean, we updated the board on what we had
14 talked about.

15 Q. I'm not asking for any privileged
16 communications.

17 A. Right. I mean -- and Mr. Schaffer was a
18 part of that.

19 MR. MACDONALD: Your Honor, I don't have
20 any further questions. I believe Mr. Deihl, for the
21 taxpayers, may have some. I shouldn't speak for him.

22 THE COURT: How much do you have?

23 MR. DEIHL: I probably have 15 minutes.
24 No more.

25 THE COURT: I'd like to finish the

1 direct exams before we take our break, so why don't
2 you go ahead Mr. Deihl.

3 DIRECT EXAMINATION

4 BY MR. DEIHL:

5 Q. Good afternoon, Mr. Hammond. I'm Colin
6 Deihl. I represent Taxpayers for Public Education. I
7 have a few questions for you. We have never met
8 before; is that correct?

9 A. Correct.

10 Q. Now, one of the obligations of your
11 department is to distribute funds to local school
12 districts, correct?

13 A. Correct.

14 Q. And you distribute funds from both state
15 revenue and local revenue to those school districts,
16 right?

17 A. Correct.

18 Q. And K through 12 schools in Colorado are
19 funded through a dual taxation system that combines
20 that local and state revenue, right?

21 A. Correct.

22 Q. And the department disburses those funds
23 based on the requirements set forth in our Public
24 Finance Act, right?

25 A. That would be correct.

1 Q. And the local share of that money
2 primarily comes from local property taxes and specific
3 ownership taxes, right?

4 A. That's correct.

5 Q. And you collect that local share and then
6 pay it out to the districts, right?

7 A. Counselor, I was incorrect. I've now
8 been out of it long enough, I had forgotten that point
9 of it. But our school finance staff could advise you
10 on that if you have further questions, because I can't
11 actually recall any more whether that's correct or
12 not. I'd have to go back to my material.

13 Q. Have you reviewed the state's answer in
14 this case, Mr. Hammond?

15 A. No.

16 Q. Haven't looked at the answer in this
17 case?

18 A. No.

19 Q. You're not aware of what the state's
20 admitted in its answer?

21 A. No.

22 Q. I'm going to take a look at the state's
23 answer, which is Exhibit 137. And if we could take a
24 look at page 3, paragraph -- I'm sorry. Let me find
25 it. Page 3, paragraph 3, please.

1 And it says -- I'm sorry. I must be on
2 the wrong page.

3 MR. DEIHL: Excuse me, Your Honor.

4 Q. It's page 3, paragraph 3, answer to
5 section titled factual allegations up at the top of
6 the page. Well, let me just read it to you. In the
7 answer it says, "Defendants admit the allegations in
8 paragraph 17 through 23 of the complaint."

9 And the state share is funded from
10 personal income tax and corporate sales tax, correct,
11 Mr. Hammond? Among other things?

12 A. Correct.

13 Q. And included in the state's share is
14 money from the public school fund established by
15 article 9, section 3 of the Colorado Constitution.
16 Right, Mr. Hammond?

17 A. Correct.

18 Q. Now, the Public Finance Act contains a
19 formula by which the district is funded, correct?

20 A. That's correct.

21 Q. And boiled down, a district's funding
22 under the Public School Finance Act is determined by
23 multiplying the district's per pupil funding amount by
24 the district's funded pupil count.

25 A. Correct.

1 Q. And adjusting for specific statutory
2 factors, correct?

3 A. Correct.

4 Q. And so the department calculates the base
5 per pupil, and then multiplies that by the number of
6 pupils, correct?

7 A. Correct.

8 Q. And that's the funding that flows to the
9 county, correct? From the state's share.

10 A. To the school district. Right.

11 Q. To the school district. Yes.

12 So if the number of students in a
13 particular school district increases, the amount of
14 money that flows to that district from the state's
15 share also increases, correct?

16 A. That's correct.

17 Q. And so if Douglas County can count 500
18 students who are in private school as public school
19 students, the amount of money that flows to Douglas
20 County will increase by 500 students, correct?

21 A. Correct.

22 Q. Now, the state has already determined
23 that this program is constitutional, right?

24 A. I don't think we made that determination.

25 Q. Now, in your answer, you've asserted that

1 this program complies with the Colorado constitutional
2 provisions, have you not?

3 A. Did I state that?

4 Q. Did your answer? Did the state's answer
5 in this case state that?

6 A. I don't recall that.

7 Q. You don't know what the state's answer in
8 this case states.

9 A. Not specifically.

10 Q. You say here today that you haven't made
11 a decision on whether or not you're going to decide to
12 count these 500 students, right?

13 A. Correct.

14 Q. The state's taken the position in its
15 answer that the program's constitutional, but you say
16 here today you haven't decided if the state's going to
17 count these 500 students. Is that correct?

18 A. That's correct. That would be based on
19 audit that we do.

20 Q. And you know that Douglas County
21 intends to count these students as public school
22 students in their October count, and submit it to the
23 state of Colorado and ask the state of Colorado to
24 send 3 million dollars to Douglas County for these 500
25 students, right?

1 A. Correct.

2 Q. That was the whole purpose of all these
3 meetings you had with Douglas County, was to make sure
4 that you can count these 500 students, right?

5 A. It was to make sure that they could
6 receive funding for the students as part of this
7 program.

8 Q. They were looking to you to tell them, we
9 can count these students, right?

10 A. They were looking to us for advice.

11 Q. And despite the fact that the state has
12 taken the position in its answer that this program is
13 constitutional, you do not believe that this court
14 should enter a preliminary injunction, right?

15 A. I personally, as commissioner, would make
16 that statement.

17 Q. That's the position of the state
18 Department of Education. Right, Mr. Hammond?

19 A. That's the position of the state.

20 Q. And your position is that the state has
21 the authority, sometime in 2012, to reach back and
22 pull this 3 million dollars back into the state
23 coffers or not fund Douglas County for the following
24 year if you decide that these 500 students aren't
25 really public school students, right?

1 A. That's a possibility.

2 Q. So even though you helped Douglas County
3 create this program, you're just going to take the
4 position that let's wait and see, and we'll decide a
5 year from now whether or not we were right.

6 MR. BLUE: Objection. Mischaracterizes
7 the evidence.

8 THE COURT: It's argumentative.
9 Sustained.

10 Q. (BY MR. DEIHL) Do you know if you can get
11 the money back from the private schools once it's been
12 sent to the private schools?

13 MR. BLUE: Objection, Your Honor. That's
14 not what happens, as has been testified --
15 mischaracterizes the evidence. Sorry.

16 THE COURT: Objection is overruled.

17 A. Would you ask the question again?

18 Q. (BY MR. DEIHL) Do you know if you can get
19 the money back from the private schools after it's
20 been paid to them?

21 A. Our relationship's with the district.

22 Q. Do you know if you can get the money back
23 from the parents after it's been paid to them?

24 A. Again, our relationship's with the
25 district.

1 Q. Let's take a look at Exhibit 60, please,
2 which I believe is admitted. If we could look at the
3 first page, Mr. Hammond. Exhibit 60 is a Douglas
4 County District Choice Scholarship Program, private
5 school partner participation agreement between the
6 district and one of the private schools, the
7 Mackintosh Academy. Do you see that?

8 A. I do.

9 Q. If we can turn to the second page of this
10 agreement, and take a look at paragraph 4, please.
11 And if we could blow up paragraph 4. "It is
12 understood that funding for the Choice Scholarships
13 provided to students by the district are provided by
14 the Colorado Department of Education through its
15 funded pupil count, and if such funds are not made
16 available to the district by the state, this agreement
17 shall be terminated. In the event the private school
18 agrees -- in that event, the private school agrees not
19 to assert any claims against the district or any
20 Choice Scholarship student."

21 Did you have an understanding that if the
22 state determines that it will not fund this program,
23 that all of these private contracts with these school
24 districts will be terminated, Mr. Hammond?

25 A. No. And I haven't seen that document,

1 either.

2 Q. So if I'm a child who enrolls in a
3 private partner school, and the state decides a year
4 from now that the program violates the law, what's --
5 what happens to that child, Mr. Hammond?

6 A. If we go through an audit process, and
7 the program was not according to statute, then they'll
8 have to reimburse the state.

9 Q. That student will have to reimburse the
10 state?

11 A. No. The district will have to reimburse
12 the state.

13 Q. And that student will no longer be
14 qualified to get public funds from Douglas County,
15 right?

16 A. Well, that would be correct.

17 Q. And they may have to change schools after
18 a year, because they're no longer getting the
19 scholarship, right?

20 MR. BLUE: Objection. This witness has
21 no knowledge of that.

22 THE COURT: Foundation. Sustained.

23 Q. (BY MR. DEIHL) Can we take a look at
24 Exhibit 113, please. Exhibit 113 is one of the
25 division contracts between one of the parents and

1 Woodlands Academy.

2 And if we can go down to the middle
3 paragraph below the payment terms there. It states,
4 "We understand the obligation to pay the tuition and
5 fees for the academic year is unconditional and that
6 no portion of such tuition and fees so paid or
7 outstanding will be refunded or cancelled,
8 notwithstanding the subsequent absence, withdrawal or
9 dismissal of the student."

10 Is it your understanding, Mr. Hammond,
11 that this parent, if the scholarship program is
12 determined to be improper, will be on the hook to pay
13 tuition to this school?

14 MR. BLUE: Objection. Foundation.

15 THE COURT: Sustained, to the form of
16 the question.

17 Q. (BY MR. DEIHL) Mr. Hammond, did you have
18 discussions with the district about what happens to a
19 parent who signs a tuition contract with a private
20 school based on the state's representation that state
21 funds are going to be used to fund this program?

22 A. No, we did not.

23 Q. Take a look at this contract. It was
24 signed in April of this year. Do you see that?

25 A. Correct.

1 Q. So some of these contracts were signed
2 before the program was up and running. At least the
3 charter school was.

4 Now, you couldn't be here tomorrow to
5 testify, Mr. Hammond, because you're going to be at a
6 state Board of Education meeting, correct?

7 A. Correct.

8 Q. And on the agenda tomorrow at that state
9 Board of Education meeting is a waiver application by
10 the Choice Scholarship Charter School, right?

11 A. I believe so.

12 Q. And a waiver application is a procedure
13 whereby a charter school can obtain waivers from
14 certain statutory requirements, right?

15 A. Correct.

16 Q. Now, the Choice Scholarship Charter
17 School is no school in the ordinary sense of the word,
18 right, Mr. Hammond?

19 MR. BLUE: Objection. Foundation.

20 THE COURT: No. Overruled.

21 A. It's a part of the Douglas County
22 program.

23 Q. (BY MR. DEIHL) It's a school that doesn't
24 have any teachers, right, Mr. Hammond?

25 A. I don't know that.

1 Q. It's a school that doesn't have its own
2 separate building, right, Mr. Hammond?

3 A. I don't recall.

4 THE COURT: There's water in the
5 pitcher there.

6 THE WITNESS: That would be good. Ask
7 your question again.

8 Q. (BY MR. DEIHL) It's a school that doesn't
9 have its own separate building, right, Mr. Hammond?

10 A. Douglas County has set up a charter
11 school.

12 Q. Right. I'm talking about that charter
13 school. This Choice Scholarship Charter School that
14 is on your agenda for tomorrow to approve waivers
15 doesn't have its own separate building, right?

16 A. I can't answer that question.

17 Q. You don't know one way or another?

18 A. No.

19 Q. Doesn't have its own books, right?

20 A. I can't answer your question, Counselor.

21 Q. Have you already approved the Choice
22 Scholarship Charter School, Mr. Hammond?

23 A. Yes.

24 Q. And you don't know whether it's got its
25 own building or whether it's got its own teachers?

1 A. In accordance with the state statute,
2 they applied for the necessary waivers, and there's
3 automatic waivers that the state grants. And in our
4 review of that, and our staff's review of that, we met
5 all the conditions of the statute.

6 Q. But you don't know whether it's got its
7 own building or its own teachers.

8 MR. BLUE: Objection. Asked and
9 answered.

10 THE COURT: Sustained.

11 Q. (BY MR. DEIHL) It's true, is it not,
12 Mr. Hammond, that the Choice Charter School is just a
13 mechanism for Douglas County to count students as
14 public school students to obtain private school money?

15 MR. BLUE: Objection. Foundation.

16 THE COURT: Overruled.

17 A. Would you ask the question again,
18 Counsel?

19 Q. (BY MR. DEIHL) It's true, is it not,
20 Mr. Hammond, that the Choice Scholarship Charter
21 School is simply a mechanism to count public school
22 students -- to count private school students as public
23 school students for purposes of state funding?

24 A. That's correct.

25 Q. And all of the students who are enrolled

1 in the Choice Charter School will all attend private
2 schools, correct?

3 A. I -- I presume so.

4 Q. You're familiar with the Charter School
5 Act, Mr. Hammond?

6 A. I know of the Charter School Act when I
7 reviewed it, but it's been some time. We have staff
8 that knows it in detail.

9 Q. That act defines a charter school as a,
10 quote, public, non-sectarian, non-religious,
11 non-home-based school, which operates within a public
12 school district. Does that sound correct to you?

13 A. If you're reading from the statute, that
14 would be correct.

15 Q. I am.

16 A. Okay.

17 Q. The Choice Scholarship Charter School
18 doesn't operate within Douglas County, does it?

19 A. It is our recollection that it does.

20 Q. Aren't there private schools that are
21 outside of Douglas County where students are going to
22 enroll?

23 A. That's correct.

24 Q. And the private partner schools are not
25 non-religious, are they?

1 A. That's correct.

2 MR. DEIHL: No further questions. Thank
3 you.

4 THE COURT: Thank you. It's 3:20.

5 Let's take our break and come back at 3:35.

6 Dr. Hammond, if you'll regain your seat when we come
7 back, we'll finish up your examination.

8 THE WITNESS: Sure. Thank you.

9 THE COURT: Thank you. Court is in
10 recess.

11 (Recess taken, 3:20 p.m. to 3:37 p.m.)

12 THE COURT: All right. Mr. Blue,
13 examination of Dr. Hammond.

14 MR. BLUE: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. BLUE:

17 Q. Hello, Mr. Hammond.

18 Would you state your occupation again,
19 please, so we can start this off.

20 A. Commissioner of education.

21 Q. What do you see your role as commissioner
22 with regards to school districts and programs in
23 deciding what to implement?

24 A. If they ask us questions or seek our
25 advice, my position has been, and has been that

1 whatever advice we can or technical support we can
2 provide them to answer any questions they have.

3 Q. And what would be the purpose of helping
4 them by answering those questions?

5 A. Just as I stated previously, I don't
6 think any of us ever want to see a district in a
7 position of having to hold back money, because they
8 did something that wasn't right.

9 Q. Earlier, counsel for plaintiffs showed a
10 couple of exhibits with the language of paved the way
11 for the programs. Do you see that as part of your
12 role for all programs by all districts, to help pave
13 the way for those programs?

14 A. If they ask us, again, for our technical
15 advice and support, the answer would be yes.

16 Q. So would you say that how you treated
17 Douglas County and their school Choice Program is any
18 different from how you treat any other school
19 different that came to you with an innovative program?

20 A. It's not any different. This is unusual
21 because of what it represented. It was something
22 different. It presented itself in the media, in the
23 papers. Hadn't been done before. But it's no
24 different than if we had another district with
25 something completely different like this, we'd end up

1 spending the same amount of time if it happened again.

2 Q. Have you had experience with programs in
3 the past who had not come to you in the beginning to
4 ask questions, where you've had to go back and try to
5 help them fix it?

6 A. Yes.

7 Q. Could you give an example of one?

8 A. The most recent one would have been
9 Aurora Public Schools. And I believe it was called
10 their Choice Program. It had been going on for some
11 time, and we ended up discovering in an audit that
12 they had not -- they were operating full educational
13 program, as we saw it, in other districts. I think
14 there was about seven or eight other districts.

15 And they had not gotten approval, as
16 required by statute, to do that. So basically, they
17 have to cease and desist. However, when we were aware
18 of that, we called the district and talked to them.
19 They felt they had some implicit approval from the
20 department in the past.

21 Our job is not to shut the program down,
22 even though it was a concern and we felt it violated
23 statute. We felt that it would be shut down. And
24 what we'd ask them to do, if you go back and get the
25 necessary approvals from all the districts, then we

1 would not have an issue with that any longer. And
2 that's exactly what they did.

3 And they went painstakingly went back and
4 got all the approvals from the districts of which
5 they're a part of.

6 Q. And again, if they had come to you at the
7 beginning of the program, you would not have had to do
8 the back end work?

9 A. That's correct.

10 Q. Earlier today you were asked about
11 revenues and collecting revenues and distributing
12 revenues to the school districts. Do you collect
13 revenues?

14 A. No.

15 Q. Who collects the revenues?

16 A. The district or the county.

17 Q. Thank you.

18 Finally, on charter schools, who approves
19 charter schools?

20 A. The district.

21 Q. The state Board of Education does not
22 approve charter schools?

23 A. No. By statute, what the state board
24 ends up doing is approving the waivers. The actual
25 approval of charter schools is the district.

1 Q. And do they approve all the waivers?

2 A. If they're automatic waivers, they would.

3 MR. BLUE: Thank you. I have no more
4 questions, Your Honor.

5 THE COURT: Any further inquiry?
6 Mr. Hall?

7 MR. HALL: Yes, Your Honor. Thank you.

8 CROSS-EXAMINATION

9 BY MR. HALL:

10 Q. Good afternoon, Mr. Hammond.

11 Are local school districts in Colorado
12 primarily responsible for educating children?

13 A. They are.

14 Q. Is that the idea behind local control?

15 A. Yes.

16 Q. As commissioner, do you expect that local
17 school districts will innovate?

18 A. Of course.

19 Q. There was quite a lot of testimony about
20 the discussions that occurred with Douglas County and
21 CDE. Is it fair to summarize that as that there were
22 discussions intermittently between January and March
23 both internally at CDE and with Douglas County, two
24 occasions?

25 A. Yes.

1 Q. And some concerns were raised; is that
2 correct?

3 A. Yes.

4 Q. And one of the concerns was whether money
5 was going to be taken from other districts; is that
6 correct?

7 A. True.

8 Q. And do you know how that problem was
9 resolved?

10 A. I don't think it was a concern of our --
11 Vody Hermann, who was our assistant commissioner of
12 school finance at the time. But it was a matter of
13 resolving the issue. They had every right do that.
14 If they counted the students, the money would flow to
15 the students.

16 Q. Do you recall if during the discussions,
17 Douglas County decided to put in a requirement that
18 the students had to be prior enrolled in a Douglas
19 County school the year before?

20 A. Can you repeat that again?

21 Q. Yes. Do you recall that Douglas County
22 put in a requirement into the policy that the
23 students, in order to be eligible for a scholarship,
24 had to be enrolled in a Douglas County school the year
25 before?

1 A. Yes. We were made aware of that in one
2 of the meetings.

3 Q. And does that mean that the policy
4 becomes fiscally neutral as to the state?

5 A. From our standpoint, when they brought
6 that -- all I recall is Vody Hermann again. Myself --
7 I mean, they had various limitations to the program.
8 That at the time, as presented, we basically make a
9 cost control. But again, it depends on where the
10 students house.

11 Q. In your testimony, you said at one point
12 that public education moneys can go to private
13 entities. Do you recall that?

14 A. I did.

15 Q. Do you have one example of that?

16 A. We -- you know, sitting up here today and
17 recalling it versus being at the office. But, you
18 know, we have several of our facilities schools and
19 special education. And I just recall reviewing that
20 the other day. We have 59 facility units. Of those,
21 57 are private -- private entities.

22 Q. Private schools?

23 A. Right.

24 Q. And are you aware of the contract school
25 statute in --

1 A. Yes, I am.

2 Q. And under that statute, a public school
3 can contract with private schools to provide education
4 services, correct?

5 A. That's correct.

6 Q. And are you aware, for instance, that
7 Denver Public Schools has three contracts?

8 A. Yes.

9 Q. And for those schools, are you aware that
10 the students are counted as public school students for
11 the purpose of the Public School Finance Act?

12 MR. MACDONALD: Your Honor, objection.
13 Leading.

14 THE COURT: No. Overruled.

15 Q. (BY MR. HALL) Are you aware of that?

16 A. Yes.

17 Q. And yet they are enrolled in a private
18 school, correct?

19 A. Correct.

20 Q. And they receive educational services
21 from the private school, correct?

22 A. Correct.

23 Q. Do you recall also some questions about
24 the Public School Finance Act that you were asked?

25 A. Correct.

1 Q. And do you also recall that one of the
2 provisions of that statute allows that districts had
3 the discretion as to how to spend the Public School
4 Finance Act money; is that correct?

5 A. Correct.

6 Q. And that also ties back into the whole
7 Colorado scheme of local control?

8 A. Correct.

9 Q. I want to end by talking just a little
10 bit about FAPE, Mr. Hammond. Mr. Hammond, have you
11 heard of an administrative unit?

12 A. Correct.

13 Q. And are you aware that administrative
14 units are responsible for providing FAPE?

15 A. Correct.

16 Q. And that administrative units are either
17 school districts or both?

18 A. That's correct.

19 Q. And so it's an administrative unit as a
20 whole that are responsible for providing FAPE to a
21 child; isn't that correct?

22 A. Correct.

23 Q. Not any individual school; isn't that
24 correct?

25 A. Well, I'd also say that it does go to

1 individual schools. But an answer to your question
2 would be correct.

3 Q. If there's a very high needs child going
4 to a neighborhood school, that neighborhood school
5 would have to bring in all the resources to serve that
6 very high needs child?

7 A. No. The district would have the option
8 to send that child where they can best meet the kid's
9 needs.

10 Q. And, Commissioner Hammond, is that also
11 true for special needs children with church schools?

12 A. True.

13 MR. HALL: Thank you. No further
14 questions. Oh, I'm sorry, Your Honor. One more
15 question.

16 THE COURT: All right.

17 Q. (BY MR. HALL) Commissioner Hammond, you
18 were asked about potential violations with the
19 scholarship program, both as to count and as to
20 special education. Do you recall that testimony you
21 gave?

22 A. True.

23 Q. Okay. Are there procedures in place
24 within the Colorado education system that deal with
25 both of those issues?

1 A. Yes.

2 Q. So if the state of Colorado, CDE,
3 determines that there is a count problem, that will be
4 dealt with in the normal course, correct?

5 A. That's correct.

6 Q. And similarly, for serving special needs
7 children, if someone at CDE determines there's a
8 problem with how Douglas County serves special needs
9 children under this program, that would be dealt with
10 in the usual course, correct?

11 A. That's correct.

12 MR. HALL: Thank you. Those are all my
13 questions.

14 THE COURT: All right. Mr. Bindas, any
15 questions?

16 MR. BINDAS: No, Your Honor.

17 THE COURT: Okay. Any re-examination,
18 Mr. Macdonald?

19 MR. MACDONALD: No, Your Honor.

20 THE COURT: Mr. Deihl?

21 MR. DEIHL: No, Your Honor.

22 THE COURT: That will conclude the
23 testimony of this witness. If there's no objection,
24 he may step down and he's excused.

25 Plaintiff, call your next witness.

1 MR. McCARTHY: Your Honor, plaintiffs
2 call Christian Cutter as an adverse witness for
3 cross-examination.

4 THE COURT: All right. Raise your
5 right hand, please.

6 CHRISTIAN L. CUTTER,
7 having been first duly sworn to state the whole truth,
8 testified as follows:

9 THE COURT: Please be seated.

10 Before you start, Mr. McCarthy, I imposed
11 a sequestration order, and I couldn't help but notice
12 when Mr. Cutter stood up, he was sitting in the back
13 of the room and walked right up here. Are we not
14 enforcing my sequestration order? What's going on?

15 MR. LYONS: He's a representative of the
16 district.

17 THE COURT: So he's a party?

18 MR. LYONS: And as a party, he's entitled
19 to be here.

20 THE COURT: Okay.

21 MR. McCARTHY: And, Your Honor, in terms
22 of enforcing the sequestration order, to try to be
23 directly responsive to your question, in all candor,
24 I've never laid eyes on Dr. Cutter before, so I --
25 it's part of rule 65 practice, I guess, Your Honor,

1 but --

2 THE COURT: Okay. All right. Sir,
3 I'll ask you to follow the following guidelines.
4 Please do your best to speak up. Use the microphone
5 in front of you. Speak in an audible level. Permit
6 the questioner to complete the question they're asking
7 you before you start to answer it. Our court reporter
8 will appreciate that, and we'll have a clear record if
9 you do.

10 And I'm going to throw this one in too.
11 Listen carefully to the questions you're asked, and
12 answer just the questions you're asked. All right?

13 THE WITNESS: Got it.

14 THE COURT: If somebody asks you what
15 time it is, tell them what time is it, not how to make
16 a watch. Okay?

17 Mr. McCarthy.

18 MR. McCARTHY: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. McCARTHY:

21 Q. Sir, please state your name.

22 A. Christian Lawrence Cutter.

23 Q. Sir, what's your business address?

24 A. 620 Wilcox Street, Castle Rock.

25 Q. How are you employed?

1 A. I am the assistant superintendent for
2 elementary education.

3 Q. For Douglas County school district?

4 A. Douglas County.

5 Q. Okay. How long have you held that
6 position?

7 A. Since October of 2010.

8 Q. Were you employed by the district prior
9 to October of 2010? Douglas County school district?

10 A. No.

11 Q. Where were you employed prior to working
12 at Douglas County in your current capacity?

13 A. Colorado Springs School District 11.

14 Q. And what was your position there?

15 A. I was the executive director of schools.

16 Q. What's your educational background, sir,
17 briefly?

18 A. I have a general BA. I have diplomas in
19 child psychology and teaching. I have a master's in
20 education and a doctorate in educational leadership.

21 Q. Okay. Dr. Cutter, it's correct, is it
22 not, that you had extensive involvement, from October
23 of 2010 forward, in the initiatives that Douglas
24 County school district engaged in with respect to
25 programs involving the payment of tuition for Douglas

1 County students at private schools? Correct?

2 A. Extensive as of December 17th of 2010.

3 Q. What was -- let me ask you, sir, what was
4 it that identifies December 17th of 2010 as the date
5 when you became specifically involved in the voucher
6 initiatives for Douglas County?

7 A. That was the day the superintendent
8 charged me with pursuing it.

9 Q. Now, the superintendent was Dr. Fagen; is
10 that right?

11 A. Yes.

12 Q. Okay. But from that point in time, so in
13 other words, late last year forward, you've been
14 extensively involved in Douglas County's voucher
15 initiatives; isn't that right, sir?

16 A. Yes.

17 Q. And there were a number of meetings that
18 you participated in, involving both the public and the
19 school board, concerning the voucher initiatives in
20 Douglas County, correct?

21 A. Yes.

22 Q. And those meetings culminated, did they
23 not, Dr. Cutter, in the adoption of a program, the
24 Choice Scholarship Program, by the Douglas County
25 school board on March 15th of 2011, this year.

1 Correct, sir?

2 A. Correct.

3 Q. If I could ask you to please look at
4 what's been marked and stipulated into evidence as
5 Exhibit 107. Dr. Cutter, that's -- and if we could --
6 that's the Choice Scholarship Program, the pilot
7 program, that was adopted by Douglas County on
8 March 15, 2011, correct?

9 A. Yes, it appears so.

10 Q. And there were other terms that were used
11 to describe this program prior to it becoming
12 identified as a Choice Scholarship Program.
13 Specifically, it was referred to, was it not, sir, as
14 the Option Certificate Program at one point? Right?

15 A. Yes.

16 Q. And they called it the OCP program for
17 short, right?

18 A. They did.

19 Q. And actually, at certain points in time,
20 Dr. Fagen, to whom you report at Douglas County now,
21 also referred to the program as the contract schools
22 program. Isn't that right?

23 A. I don't recall that, no.

24 Q. Do you recall a letter that Dr. Fagen
25 sent to the employees of the district that referred to

1 the program as the contract schools program?

2 A. That could be, yeah.

3 Q. Okay. You remember that generally?

4 A. Generally.

5 Q. Okay. But ultimately, the school board
6 decided upon calling it the Choice Scholarship
7 Program, right?

8 A. A point of clarity. It was a
9 recommendation from our community outreach on
10 scholarships.

11 Q. But to answer my question, ultimately,
12 the school board decided to call it the Choice
13 Scholarship Program when it adopted it, as indicated
14 here in Exhibit 107, right?

15 A. Yes.

16 Q. Okay. Let me ask you, sir, if I can have
17 you look at what is included in Exhibit 107 -- I'll
18 refer to it in shorthand as the CSP -- paragraph 9, on
19 the first page under heading A.

20 And specifically I'll invite your
21 attention to the sentence that begins, "So long as."
22 "So long as the private school partners meet
23 conditions of eligibility in section E.3, private
24 school partners need not modify their admission
25 criteria or education programs to participate in the

1 Douglas County school district Choice Scholarship
2 Program."

3 That stands today as one of the features
4 of the Choice Scholarship Program, correct?

5 A. Yes.

6 Q. And so there's no obligation, is there,
7 Dr. Cutter, on the part of any of the private schools
8 who participate in this program to modify their
9 admission criteria in order to participate, correct?

10 A. Correct.

11 Q. They don't have to change their education
12 program either, right?

13 A. No, they don't.

14 Q. So in terms of those private schools that
15 have been admitted to the program, if a private school
16 would decline to admit a handicapped child, they can
17 enforce that admissions policy and still participate
18 in the program, correct?

19 A. That could be possible.

20 Q. Okay. And similarly, if a school that
21 declined to admit HIV positive children as part of its
22 admission practices, they would not have to change
23 that admission practice, and they could still
24 participate in the program, correct, Doctor?

25 A. That may be, yeah.

1 Q. Okay. And similarly, if the education
2 program that they refer to here in paragraph 9
3 incorporate religious teachings, there's no need for
4 the private school to change that aspect of their
5 education program in order to participate in CSP in
6 Douglas County, correct, Doctor?

7 A. Yes.

8 Q. Let me ask you to look at Exhibit 2.
9 We're going to come back to 107, but let me ask you to
10 look at Exhibit 2. Another exhibit admitted by
11 stipulation.

12 You recognize this as a page from the
13 Douglas County website, correct?

14 A. Yes.

15 Q. And, in fact, this page reflects -- FAQ
16 is a shorthand for frequently asked questions, right?

17 A. Yes.

18 Q. And included among those frequently asked
19 questions -- and if we could blow this up. And then
20 scroll down, if we could, please, specifically to
21 the -- I am going to ask you to scroll to the second
22 page, please.

23 And in focusing your attention upon the
24 question on Exhibit 2, "What about graduation
25 requirements that include theology classes?" Do you

1 see that, sir?

2 A. Uh-huh.

3 Q. And the answer -- that's the question
4 that you pose on the website. The answer is,
5 "Families must be informed that graduation
6 requirements at private school partners include
7 minimum course selection and include a variety of
8 subject areas. Diplomas at these schools are
9 dependent upon a student's satisfactory
10 participation."

11 So if, in fact, a private partner school
12 requires the completion of theology classes as a
13 graduation requirement, that private school can
14 participate in Douglas County's CSP, right?

15 A. Correct.

16 Q. There's no need to change that, right?

17 A. No.

18 Q. And, in fact, there was a recognition,
19 was there not, Dr. Cutter, that frequently the private
20 partner schools, which are religious or sectarian in
21 nature, embed in their program of education religious
22 teachings. And those schools are nevertheless
23 permitted to participate in Douglas County's CSP;
24 isn't that right, sir?

25 A. That's correct.

1 Q. Let's go back to Exhibit 107. And just
2 to clarify the applicability, on page 2 of
3 Exhibit 107, paragraph 6, private school partner.
4 These are the private schools with which Douglas
5 County is partnering, correct?

6 A. That's what we're referring to them as,
7 yes.

8 Q. And that's really the whole function of
9 this CSP, is to partner with private schools, correct?

10 A. It is. To make an opportunity for
11 students to go to those schools.

12 Q. To make an opportunity for public school
13 students to have tuition payments dedicated toward
14 their education in private schools. Correct?

15 A. That is the program, yes.

16 Q. Okay. And so of necessity, and by
17 definition, under the CSP, a private school partner is
18 a nonpublic school, correct?

19 A. Correct.

20 Q. And so only nonpublic schools can be
21 private school partners with Douglas County under the
22 CSP, right?

23 A. As it is written now, yes.

24 Q. You don't have any plans to change it, do
25 you, sir?

1 A. It's a pilot. It's probably going to
2 change as we redo it.

3 Q. But the whole point of it is to allow for
4 tuition payments to be made to private schools, right?

5 A. It was -- the whole -- the purpose of it
6 was to get more opportunities for students to go where
7 they felt they'd be the most successful. And it
8 includes what you just said.

9 Q. Right. And right now, that includes only
10 private schools, right?

11 A. Yeah. That was the program. That was to
12 get the opportunity for those students to get access
13 to schools that they didn't have access to right now.

14 Q. And you're going to use the public school
15 funding that you get from state and local taxes to
16 make those tuition payments to private schools, right?

17 A. We're going to assist them in their
18 tuition through this program, yeah.

19 Q. And you're going to use public school
20 funding to do that, right?

21 A. That's the dollars we get.

22 Q. Correct. And if I could ask you to look
23 at paragraph C-3. Now, there was -- at the time that
24 this program was adopted by the Douglas County school
25 board in mid-March of this year, the school board

1 stated that the voucher payments -- the Choice
2 Scholarship payments, as the board refers to them --
3 were going to be made in four separate installments.
4 Right?

5 A. Yes.

6 Q. And I'm asking you to look at paragraph 3
7 where it says, "On behalf of the district, the Choice
8 Scholarship office shall pay to the parent of a Choice
9 Scholarship opportunity one-quarter of the value of a
10 Choice Scholarship in September, November, February,
11 and May, subject to adjustments as described herein."

12 The amount -- the total amount of the
13 payment is \$4,575; isn't that right?

14 A. Yes.

15 Q. The RPP that was received -- the revenue
16 per pupil that was received, or is going to be
17 received, based upon your current projections from the
18 state, is a little over \$6,000. Is that right?

19 A. When we were designing the program, we
20 were using the number \$6100 as our basis.

21 Q. You were using the number what, sir?

22 A. \$6100.

23 Q. So the difference between 4575 and 6100
24 is planned to be retained by the Douglas County school
25 district, correct?

1 A. Correct.

2 Q. C-3 says that the first payment is going
3 to be made in September, right?

4 A. Yeah.

5 Q. But you've already made payments, haven't
6 you?

7 A. We felt the need to get the money to the
8 students so that they could enroll. We didn't
9 recognize that when we originally went into it.

10 Q. But you never modified this written
11 program to reflect that, have you, sir?

12 A. We haven't modified this yet, no.

13 Q. So what the public would see was that the
14 first payment under this program was intended to be
15 made in September, right?

16 A. Yeah. According to this document.

17 Q. Okay. And that would have been one
18 quarter of the \$4,575, right?

19 A. Uh-huh.

20 Q. Is that correct, sir?

21 A. Yes.

22 Q. Okay. And Douglas County started making
23 those payments, the Choice Scholarship voucher
24 payments, on or about July 1st of this year. Isn't
25 that right, sir?

1 A. Yes.

2 Q. And you started making those payments
3 shortly after you heard that the plaintiffs in this
4 case were going to move for a preliminary injunction.
5 Isn't that right, Dr. Cutter?

6 A. There wasn't a correlation for me.

7 Q. I'm sorry, sir?

8 A. That wasn't the excuse that --

9 Q. But my question to you, sir, is, you
10 learned in early July that the plaintiffs in this case
11 were going to file a motion for preliminary
12 injunction. Isn't that right?

13 A. I've been hearing that there's going to
14 be a suit on this since we passed it in March.

15 Q. But that's not my question, Dr. Cutter.

16 A. I didn't hear it specifically, no. Would
17 you -- I can clarify what was our motivation to do
18 that. Would you like that?

19 Q. Your counsel can bring that out under his
20 examination, sir.

21 A. All right.

22 Q. My question to you, sir, is, the Douglas
23 County school district came to learn in early July
24 that there was going to be an injunction filed in this
25 case. Isn't that right?

1 A. I believe the district did, yes.

2 Q. I'm sorry?

3 A. I believe so, yes.

4 Q. And then you started pushing that money
5 out in early July, notwithstanding the fact that you
6 said the first payment was going to be in September.
7 Right, Dr. Cutter?

8 A. Well, to be clear, I'm not seeing that
9 correlation. You're making a statement that I'm not
10 agreeing with.

11 Q. Well, you started pushing the money out
12 in early July, right?

13 A. Well, we started distributing the funds
14 with assistance.

15 Q. You started making voucher payments to
16 scholarship recipients --

17 A. We call them --

18 Q. I need to finish, and then you can
19 answer.

20 A. Okay.

21 Q. You started making payments to
22 scholarship recipients in early July, right?

23 A. We did.

24 Q. And you learned in early July, as you
25 said a moment ago, that an injunction was going to be

1 filed, right?

2 A. Right. I think that probably the time is
3 right. But I don't recall when I heard that there was
4 an injunction going to be filed.

5 Q. If I could ask you to look, Dr. Cutter,
6 at D-2 in Exhibit 107. I think it's on page 4 of 9.
7 I'm sorry. A little bit higher. Back up a page. And
8 where it says, "Choice Scholarship students shall
9 independently satisfy all admission requirements of
10 the private school partner. Eligibility for Choice
11 Scholarship under this policy does not guaranty
12 admission to any private school partner. Scholarship
13 recipients are encouraged to learn about the private
14 school partners' admission criteria, dress codes, and
15 expectations of participation and the school programs,
16 be they religious or non-religious, before applying
17 for a Choice Scholarship."

18 And it is Douglas County's policy and
19 understanding, is it not, Dr. Cutter, that if a
20 private school partner expects a scholarship recipient
21 to participate in religious programs, they can be
22 expected to do so?

23 A. How would you define a program?

24 Q. I'm defining program as this program,
25 sir. I'm saying that if the scholarship recipient

1 wants to receive money under this and go to a private
2 school partner that has a religious program -- not a
3 service, a program --

4 A. Okay.

5 Q. -- that they can be expected to
6 participate in that religious program, correct?

7 A. The intent is, the parent has that
8 information to be able to make that decision, yes.

9 Q. And in terms of the actual funding
10 mechanism here that was used by Douglas County, let's
11 go to D-7-C. That's at the bottom of this page.
12 Restrictive endorsement.

13 Douglas County decided not to just pay
14 this money directly to the private schools, right?

15 A. No. Yes, you are correct.

16 Q. Okay. And instead, what they decided to
17 do was to use the family of the scholarship recipients
18 as the conduit or the means by which to get that money
19 to the private school, right?

20 A. We are --

21 MR. BINDAS: Objection, Your Honor.

22 Mischaracterizes the program.

23 THE COURT: Overruled.

24 A. We are giving the money to the parents,
25 yes.

1 Q. (BY MR. McCARTHY) But you don't give the
2 money directly to the parents, correct? Because you
3 send the check to the school, right?

4 A. For accountability reasons, so that we
5 know that the money is going where it was intended to
6 be.

7 Q. So there's a check that's made payable to
8 the parent of the child, the student, but you don't
9 hand that check to the parent of the child; you mail
10 it to the school. And the parent is required to
11 restrictively endorse that check over to the school,
12 right?

13 A. That they've been enrolled at, yes.

14 Q. Looking at D -- this is again
15 Exhibit 107, the CSP, the Choice Scholarship
16 Program. D-7-H. Financial responsibility. It's on
17 page 5 of 9.

18 Dr. Cutter, it's, in fact, the case --
19 looking at the terms of this aspect of the CSP, the
20 parent of the Choice Scholarship student shall be
21 responsible for all tuition costs and fees in excess
22 of the amount provided by the Choice Scholarship that
23 may be assessed by the private school partner that
24 they choose.

25 That continues to be today, as we sit

1 here in this courtroom, the policy of the Douglas
2 County school board; isn't that right?

3 A. That is correct.

4 Q. And so it's, in fact, the case, is it
5 not, sir, that to the extent that there is a
6 difference between the \$4,575 that is going to
7 represent the voucher payment and the actual tuition,
8 that difference has to be made up somehow by the
9 parent and student, correct?

10 A. If there is a difference, then the parent
11 is responsible for making that up.

12 Q. So to that extent, that child is not
13 provided with a free education under this program at
14 the private partner school, right?

15 A. I am not quite sure I understand the
16 question.

17 Q. They got to pay money beyond what the
18 scholarship amount is, right?

19 A. For some of the schools, they will, yes.

20 Q. And they have to pay that money in order
21 to go to that school, right?

22 A. They may, yes.

23 Q. Well, if the amount of the tuition is
24 greater than the scholarship award, and they want to
25 go to that school, they got to pay that extra amount

1 in order to go to that school, right?

2 A. Yes.

3 Q. So it's not free for them to go to that
4 school, right?

5 A. I'm not quite sure really how to answer
6 that question.

7 Q. So they've got to pay money to go to the
8 school, right?

9 A. Well, I mean, we have fees at all our
10 schools. So I don't know if you can characterize it
11 as fees.

12 Q. I'm not asking about fees, Dr. Cutter.
13 I'm asking about tuition. Isn't it true --

14 A. For the schools that have tuition that
15 exceed the scholarship payment, the parent is
16 responsible for paying the rest. So if that's how you
17 are characterizing free, then, no, it isn't.

18 Q. All right. Thank you, sir.

19 And, in fact, you know that there are
20 private schools that are included among those that
21 have been approved as private school partners that, in
22 fact, have tuition higher than the amount of the
23 scholarship awards, right?

24 A. Yes.

25 Q. And looking at D-7-I, the next paragraph

1 down, "No Specialized Programs. The parent of a
2 Choice Scholarship student shall acknowledge that the
3 district will not create specialized programs in
4 private school partners. Participation in the Choice
5 Scholarship Program will be viewed as a voluntary
6 parental placement in the private school for purposes
7 of special education services, and students will
8 receive a level of services provided by the private
9 school partner."

10 As we sit here today in this courtroom,
11 that remains the policy of the Douglas County school
12 district, correct?

13 A. For this program, yes.

14 Q. So if there is a student that has special
15 needs, for whatever reason, that student will only get
16 those needs met to the extent that the private school
17 partner has those services or not, correct?

18 A. Correct.

19 Q. So the parent has to take the private
20 school partner as they present, correct, sir?

21 A. Yes. And the parent has to take the
22 school as they deliver the programs.

23 Q. But if that parent sent their child to a
24 Douglas County school, Douglas County would have an
25 obligation to meet the needs of that special needs

1 student, would it not, sir?

2 A. Who sent them? I'm sorry.

3 Q. If the parent -- if a child attends a
4 Douglas County school and has special needs, the
5 Douglas County school district is obligated, under the
6 law, to meet those special needs, is it not, sir?

7 A. Yes.

8 Q. So that child is going to be treated
9 differently -- that special needs child is going to be
10 treated potentially differently in the private school
11 versus what that child -- how that child would be
12 treated in the Douglas County schools. Isn't that
13 true?

14 A. I think so, yeah.

15 Q. Okay. And if I could ask you,
16 Dr. Cutter, to please look at Exhibit 107, page 7 of
17 9. It's E-3-F. "Non-discrimination. A private
18 school partner is prohibited from discriminating in
19 its employment or enrollment decisions on any basis,
20 protected under applicable federal and state law,
21 except that religious private school partners may make
22 employment and enrollment decisions based upon
23 religious belief, so long as such employment and
24 enrollment decisions are not otherwise prohibited by
25 applicable law."

1 As we sit here today, sir, that remains
2 the policy of the Douglas County school district,
3 correct?

4 A. Yes.

5 Q. So private partner schools can, in fact,
6 make decisions about faculty, for example, based upon
7 religious beliefs of the faculty if they so choose,
8 and still participate in CSP, right?

9 A. That is true.

10 Q. So if a private school partner made the
11 decision that the only faculty that they hired could
12 be faculty of a particular faith, they can do that and
13 still participate in this program, right?

14 A. Correct.

15 Q. Douglas County doesn't do that when it
16 hires teachers, does it?

17 A. Not around religion, no.

18 Q. No. Douglas County doesn't take into
19 account the religious belief of an applicant to be a
20 teacher when it makes an employment decision, does it,
21 sir?

22 A. Not in their public schools, no.

23 Q. And similarly, looking at E-3-H,
24 enrollment, "Private school partners shall provide its
25 enrollment policies, including any enrollment

1 agreement the school requires students or parents to
2 sign."

3 And looking further down, the last
4 sentence, I believe, which says, "The private school
5 partner shall apply its admission requirements to
6 Choice Scholarship students in the same manner as it
7 does with non-Choice Scholarship students so long as
8 they do not discriminate."

9 Going back up further, and what I really
10 wanted to focus on was the "except" clause. "A
11 private school shall not discriminate when enrolling
12 students." If you can see that. It begins on the
13 third line.

14 "A private school partner shall not
15 discriminate when enrolling students on any basis
16 protected under applicable federal or state law,
17 except that religious private school partners may make
18 enrollment decisions based upon religious beliefs."

19 As we sit here again today in this
20 courtroom, that remains the policy of the Douglas
21 County school district, does it not, sir?

22 A. Yes.

23 Q. And so a private school partner can take
24 public funding that finances these Choice Scholarship
25 payments and still decide not to admit a student --

1 not to enroll a student based upon that student's
2 religious belief. Right?

3 A. They may.

4 Q. And then looking below that, "Student
5 conduct and discipline policies." Focusing on the
6 sentence, "To be eligible to participate in the Choice
7 Scholarship, a private school partner's policies and
8 procedures on discipline, suspension, and expulsion
9 need not replicate the requirements for a traditional
10 district school."

11 Again, sir, that remains the policy of
12 the Douglas County school board as we sit here today,
13 does it not, sir?

14 A. Yes.

15 Q. And so --

16 THE COURT: I didn't hear his answer.

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 Q. (BY MR. McCARTHY) And so a private school
20 partner doesn't -- can have the policies that they
21 choose on discipline, suspension, and expulsion and
22 still participate. Isn't that right?

23 A. Yes. And they do.

24 Q. Okay. And you don't -- I'm sorry. I'll
25 withdraw that.

1 And then let me ask you, sir, to look
2 at -- on page 8 of 9, I think it's E-3-L. "Opt out of
3 religious services," which provides, "A religious
4 private school partner shall provide Choice
5 Scholarship parents the option of having a child
6 receive a waiver from any required religious services
7 at the private school partner."

8 That remains the policy of the Douglas
9 County school board, does it not?

10 A. Yes.

11 Q. And when you were considering this Choice
12 Scholarship Program, Dr. Cutter, there was a
13 distinction that was made by the school district
14 between religious programs and religious services.
15 Isn't that true?

16 A. There was.

17 Q. And so, in fact, religious programs, and
18 in particular religious educational programs, can be
19 imposed upon students that go to the religious
20 schools, and that school can still participate in
21 this. Isn't that right?

22 A. Yeah. The decision was that you couldn't
23 opt out of the content or core-based instruction.

24 Q. Okay. And, in fact, with respect to
25 religious services, is it not also the policy of the

1 Douglas County school board that a school -- a private
2 partner school can require a CSP recipient to attend
3 services but not require them to participate in
4 services? That was a distinction you made, right?

5 A. Yes. They can require that, as --

6 Q. So if a private partner religious school
7 has as part of its daily activities the attendance at
8 a religious service, it can require those students to
9 attend that service, but they can't require them to
10 participate. Just so we're clear. Right?

11 A. That's correct.

12 Q. Okay. Going back in Exhibit 7 to C-1. I
13 think C-1 is on page 2 of 9. And it's the first
14 paragraph under Choice Scholarship Program and office
15 created.

16 So this Choice Scholarship Program
17 adopted by the Douglas County school board on
18 March 15, 2011, provides in paragraph 1 that the
19 board -- that's the school board, right?

20 A. Uh-huh.

21 Q. -- hereby creates the Choice Scholarship
22 Program as an additional educational office offered by
23 DCSD. The Choice Scholarship office is also created
24 to administer the Choice Scholarship Program. Do you
25 see that, sir?

1 A. Yes.

2 Q. The Choice Scholarship office never
3 really came into being and became operational; isn't
4 that right?

5 A. To the extent that you don't count me,
6 yes.

7 Q. The answer to my question is correct?

8 A. There's no formal Choice Scholarship
9 office.

10 Q. Right. So as we sit here today, even
11 though this says that the program's going to be
12 administered by Choice Scholarship office, it's not,
13 right?

14 A. No. The decision to move to a charter
15 format was decided.

16 Q. Right. So, in fact, the Choice
17 Scholarship Program is administered by the Choice
18 Scholarship School, right?

19 A. Correct.

20 Q. But the Choice -- and again, I'm going to
21 ask you to look at Exhibit 5. You've seen that
22 before, haven't you?

23 A. Could you make it a little bigger for me,
24 please?

25 Q. I'm sorry, sir. Dr. Cutter, you've seen

1 this, haven't you?

2 A. Yes.

3 Q. This is the Choice Scholarship school
4 application, right?

5 A. Yes.

6 Q. Choice Scholarship School didn't exist on
7 March 15, 2011, right?

8 A. No.

9 Q. And the Choice Scholarship School didn't
10 exist in April of 2011, did it, sir?

11 A. No.

12 Q. Didn't exist in May of 2011, did it?

13 A. No.

14 Q. There wasn't any application submitted to
15 create a Choice Scholarship School until June 21st of
16 2011. Isn't that right?

17 A. That is correct.

18 Q. And, in fact, it is the Choice
19 Scholarship School that administers the Choice
20 Scholarship Program. Isn't that right, sir?

21 A. It will be, yes.

22 Q. It will be?

23 A. Well, we're in the process. We've just
24 created it, so, I mean, this is something we're
25 developing right now.

1 Q. Right. So it's under -- it's evolving
2 even as we speak here today, right, sir?

3 A. It is.

4 Q. And this Choice Scholarship application
5 didn't come into being and wasn't presented to the
6 board until June 21st, 2011. Isn't that right?

7 A. I believe that's correct.

8 Q. And that was coincident with the date of
9 a school board meeting; isn't that right?

10 A. It could be. I'm not sure. I'd have to
11 check on it.

12 Q. Choice Scholarship application was
13 submitted for two readings before the school board,
14 wasn't it?

15 A. There was one reading. And then Dan
16 looked at it. And then there was a section for
17 approval.

18 Q. Right. And the first reading was June
19 21st. And the second one was in July, right?

20 A. I think so.

21 Q. June 21st was the day this case was
22 filed, right?

23 A. I don't know. Is that true?

24 Q. I believe it is, sir. I believe the
25 record will reflect that.

1 A. Okay.

2 Q. Okay. Let me ask you to look at

3 Exhibit 6. Are you able to see that, Dr. Cutter?

4 A. Any enlargement would be appreciated.

5 Thanks.

6 Q. Me too. You've seen this, haven't you,

7 sir?

8 A. I think I have, yes.

9 Q. And this is the -- Exhibit 6, which is
10 stipulated into evidence, is the agreement that was
11 prepared by the school district to reflect the rights
12 and responsibilities of the Choice Scholarship School
13 and the school district, right?

14 A. Uh-huh.

15 Q. And, in fact, if you look at page 2 of
16 Exhibit 6, under compliance -- I'm sorry. It's page 4
17 of Exhibit 6. And it's C, compliance.

18 MR. McCARTHY: I beg your pardon, Your
19 Honor.

20 Q. (BY MR. McCARTHY) Page 4. It's right
21 after -- got it?

22 And you see under the -- you're familiar
23 with this agreement, are you not, Dr. Cutter?

24 A. I am familiar with it.

25 Q. And you were involved in its formation,

1 were you not, sir?

2 A. I assisted, yeah.

3 Q. You assisted in its creation?

4 A. I assisted in its creation, yeah.

5 Q. And this really kind of defines how the
6 Choice Scholarship Program is going to be run by the
7 Choice Scholarship School, right?

8 A. That was the intent, yes.

9 Q. And under compliance, what it says is,
10 the school shall assume all of the -- the school is
11 the Choice Scholarship School, right?

12 A. I believe so.

13 Q. "The school shall assume all of the
14 duties assigned to the Choice Scholarship office in
15 policy JCB" -- "comply with policy JCB and all
16 applicable federal and state laws." Correct?

17 A. Correct.

18 Q. So what happened when this agreement was
19 created -- and again, if we go back to the first page
20 of the agreement. It's on Exhibit 6, actually. June
21 21st, 2011. So this agreement came into existence and
22 was presented to the school board on June 21st, 2011.
23 Right?

24 A. Uh-huh. Yes.

25 Q. But the Choice Scholarship School, as

1 reflected in what we looked at in Exhibit 5, the
2 application, and as its responsibilities were defined
3 in Exhibit 6, this agreement, wasn't operational yet,
4 right?

5 A. Right.

6 Q. Because it had to go through a second
7 reading by the school board, right?

8 A. That's standard practice, yeah.

9 Q. And that second reading didn't happen
10 until I believe it was July 9th of 2011. Isn't that
11 right, sir?

12 A. I think that was the next scheduled board
13 meeting.

14 Q. And it was approved by the school board
15 at that point in time.

16 A. Right. It was approved.

17 Q. So now we have the CSS, just as of not
18 even a month ago, up and running and it's supposed to
19 administer the Choice Scholarship Program, correct?

20 A. Right.

21 Q. And that's the charter school that is
22 principally responsible for administering the Choice
23 Scholarship Program, right?

24 A. That's our agent of accountability.

25 Q. How many members are there on the board

1 of the Choice Scholarship School?

2 A. Five.

3 Q. What are their names?

4 A. I don't recall.

5 Q. Is Ben DeGroat on the board?

6 A. That name is one of them, yes.

7 Q. Ben DeGroat is not an employee of the
8 school district, is he?

9 A. No. Mr. DeGroat is an employee of the
10 Independence Institute; isn't that right, sir?

11 A. I believe that's true.

12 Q. And the Independence Institute is a
13 private organization that supports voucher programs,
14 right?

15 A. I don't know what they do.

16 Q. Is John Caldera the executive director of
17 the Independence Institute?

18 A. That's a new name to me.

19 Q. You don't know that, then?

20 A. I don't know.

21 Q. Okay. At the time that the Choice
22 Scholarship Program was approved by the school board
23 in mid-March of 2011, a legal defense fund was
24 established at the same time. Isn't that right?

25 A. I believe that's correct.

1 Q. And legal defense fund was established
2 because it was, as we've seen in testimony,
3 anticipated that there was, in all probability, going
4 to be a legal challenge made to the Choice Scholarship
5 Program. Right?

6 A. There was a lot of speculation.

7 Q. So the district started raising money for
8 a legal defense fund at the same time that it created
9 the program, right?

10 A. That could be true. But it's not my area
11 of specialty. I don't know anything about --

12 Q. But you know that a legal defense program
13 was created.

14 A. I do know that that was created.

15 Q. Okay. Now, sir, did you, in your
16 responsibilities for the district -- I take it you've
17 had contact with individuals of the private partner
18 schools. Haven't you?

19 A. Yes.

20 Q. And were you involved in negotiating the
21 documents that created relationships between the
22 private partner schools and the school board?

23 A. I would say that the documents are a
24 product of a lot of conversations we had with possible
25 private partners, yes.

1 Q. But you were involved in those
2 discussions, right?

3 A. That was one of my responsibilities, yes.

4 Q. And when you had those discussions with
5 private school partner representatives, you warned
6 them that litigation was likely concerning this
7 program, did you not, sir?

8 A. No. Never once.

9 Q. You didn't warn them -- even though you
10 had a legal defense fund, you never provided any
11 warning to the private school partner representatives
12 that litigation was likely?

13 A. That wasn't the focus of our meetings.

14 Q. Did you ever discuss with any private
15 school partner representatives the prospect of
16 litigation?

17 A. Not that I recall.

18 Q. Okay. Now, what we established through
19 your testimony, sir, is that the charter school that
20 is going to administer -- the choice -- the Choice
21 Scholarship School that's going to administer the CSP
22 wasn't finally approved by the school board until July
23 9th, right?

24 A. The charter school wasn't approved until
25 July 9th? Is that the question?

1 Q. Yeah.

2 A. I believe that's correct.

3 Q. But yet the Douglas County school
4 district made Choice Scholarship payments to private
5 partner schools, or the parents of scholarship
6 recipients before that charter school was in existence
7 and approved, right?

8 A. That is correct. We were still under the
9 guise that we were going to do this as an office.

10 Q. And isn't it, in fact, the case that
11 moneys that come to Douglas County school district --
12 it is the case, is it not, that moneys that come to
13 the Douglas County school district to fund the RPP,
14 the revenue per pupil -- you know what that term is,
15 don't you?

16 A. PPR?

17 Q. PPR. Per pupil revenue. I flipped it.

18 A. There's a lot of acronyms.

19 Q. The money that funds per pupil revenue
20 from the state comes in late July of each calendar
21 year.

22 A. I don't know.

23 Q. You have no idea?

24 A. No. That would be a business question.

25 Q. Do you know where the money came from to

1 fund the payments that were made on July 1st?

2 A. No.

3 Q. You're in the position that you are with
4 the Douglas County school district, but you don't know
5 where that money came from. Is that your testimony,
6 sir?

7 A. Yeah.

8 Q. Who does?

9 A. Probably the superintendent and chief
10 financial officer.

11 Q. Did you ever ask where that money was
12 coming from?

13 A. No, sir.

14 MR. McCARTHY: Your Honor, I have no
15 further questions at this time. I believe we have
16 some additional questioning.

17 THE COURT: All right. Mr. Douglas.

18 MR. DOUGLAS: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. DOUGLAS:

21 Q. Good afternoon, Dr. Cutter.

22 A. Hello, sir.

23 Q. My name is Matt Douglas, and I represent
24 the plaintiffs in this case. You and I have never met
25 or spoken before; is that correct?

1 A. I don't think so, no.

2 Q. Dr. Cutter, I want to talk a little bit
3 about the specific private schools that are part of
4 the Douglas County program. And there are 23 schools
5 currently approved for the program; is that correct?

6 A. I believe that's true.

7 Q. And for the program, you didn't just
8 limit yourselves to Douglas County private schools,
9 did you?

10 A. No.

11 Q. You went outside the boundaries of
12 Douglas County.

13 A. We did.

14 Q. Is it true that the only non-religious
15 private school in Douglas County is Woodlands Academy?

16 A. That's approved?

17 Q. No.

18 A. Or that's in existence? I'm not sure.
19 But I do know they are one of the approved schools.

20 Q. If they hold themselves out as the only
21 non-religious private school of this kind, would you
22 have any reason to disagree with that?

23 A. I wouldn't have any reason to disagree
24 with that.

25 Q. So you went outside of Douglas County to

1 look for schools. And at this point, 18 of the 23
2 approved schools are religious schools. Is that
3 correct?

4 A. I believe that is true.

5 Q. Is it true that at the high school level,
6 there's only one non-religious school?

7 A. That could be true.

8 Q. Well, do you know whether or not it is
9 true?

10 A. I can only think of one, which is the one
11 that's been brought up today.

12 Q. Humanex?

13 A. Yes.

14 Q. Am I saying that correctly?

15 A. You are.

16 Q. And Humanex is -- Humanex is a very small
17 school; is that correct?

18 A. It is.

19 Q. And it serves only special needs
20 students?

21 A. It has that specialized focus.

22 Q. It has an enrollment of less than 50
23 students total, kindergarten through 12th grade,
24 correct?

25 A. I think that's correct, yeah.

1 Q. So assuming it's true, and I think the
2 evidence -- I think the record will show that Humanex
3 is the only non-religious school at the high school
4 level, and assuming that's true, even going outside of
5 Douglas County, there's not a single non-religious
6 high school for the program inside the -- other than
7 one that serves only special needs students?

8 A. That we have a partnership with at this
9 point, that is correct.

10 MR. DOUGLAS: Your Honor, at this point,
11 I would offer into evidence two exhibits that have not
12 been stipulated to: Exhibits 123 and 124. I believe
13 the evidence may cause an objection. Start with 124,
14 Your Honor.

15 THE COURT: All right.

16 MR. HALL: I'm sorry, Your Honor. If I
17 could look at the exhibits first, make sure what we're
18 talking about.

19 THE COURT: The whole idea was to
20 exchange exhibits before we got here, so we wouldn't
21 have to take time to do this.

22 MR. HALL: I apologize, Your Honor. I
23 have now looked at them.

24 Yes, Your Honor. We have an objection to
25 124; a foundation objection. These are statements by

1 some other entity that Dr. Cutter has not testified
2 about.

3 And to the extent that 123 is similar to
4 124, which I believe it is, we have the same objection
5 for 123.

6 THE COURT: Mr. Douglas, what are we
7 doing with these exhibits? How are they admissible?
8 Are you intending to lay foundation through this
9 witness? Or do they have some other independent
10 criteria by which I may consider their admissibility?

11 MR. DOUGLAS: Your Honor, they do have
12 independent criteria that I would like to discuss.

13 Exhibit 124 is a number of pages that are
14 printed off from the National Council -- sorry.
15 National Center for Education Statistics. They say
16 that on the document. The web link is listed. And I
17 will say these were provided to opposing counsel a
18 couple days ago.

19 These are official government records and
20 compilation of data by the National Center for
21 Education Statistics. It's their job to do that as
22 part of their -- what they do under rule 901(b)(7). I
23 believe that establishes authenticity as a public
24 record or report, and also hearsay exception 803(a)
25 for similar public records and reports that are --

1 appear on their face what they purport to be.

2 And the defendants have had a couple of
3 days to go to the National Center for Education
4 Statistics website and make sure we've printed these
5 correctly. We believe those are admissible. They're
6 also relevant. This is the basic information about
7 where these schools are, how many kids they enroll,
8 what grades they serve, which we believe is very
9 relevant and also very useful for the court and the
10 parties to have in the record as it's data that's
11 produced and collected by the government, and we
12 believe it's relevant and admissible.

13 THE COURT: Mr. Hall, why doesn't
14 803(a) permit their admissibility assuming they are,
15 in fact, under 907 -- 901?

16 MR. HALL: I'm sorry, Your Honor. I
17 didn't hear that.

18 THE COURT: Why isn't his offer -- why
19 doesn't it allow their admissibility? You maintain
20 your objection?

21 MR. HALL: Yes, I do, Your Honor. And it
22 is true we got them a couple of days ago and we have
23 looked through them. Again, some of them have
24 statements that some government person presumably
25 made, like, schools are -- I mean, statements like

1 that carry certain weight, and we object to statements
2 like that if Mr. Douglas wanted to do this, we have
3 all the partner schools applications admitted, and so
4 he could have drawn these statistics from the
5 applications themselves that we've stipulated to.

6 THE COURT: Your objection goes to the
7 weight, not the admissibility of these exhibits. The
8 court will admit them under 803(a), and we will find
9 if they meet the criteria. Otherwise, a
10 self-authenticating document. So they'll be admitted
11 over your objection. Mr. Douglas, you may proceed.

12 MR. DOUGLAS: Your Honor, I'd like to
13 make one point of clarification. 123 is a summary of
14 Exhibit 124 as data contained in Exhibit --

15 THE COURT: So they'll be admitted
16 under 1006 as a summary.

17 MR. DOUGLAS: Thank you.

18 THE COURT: You may proceed.

19 Q. (BY MR. DOUGLAS) Dr. Cutter, if you would
20 turn to Exhibit 124, which should be in the binder in
21 front of you, as well. And the ninth page of
22 Exhibit 124 is where I'm headed.

23 A. What's the page?

24 Q. I'm sorry. Exhibit 124.

25 A. There's no page numbers. I'm wondering

1 what the title is.

2 Q. Humanex Academy.

3 A. Thank you.

4 Q. Are you with me on that page?

5 A. Yes, sir.

6 Q. Okay. And just to confirm, it says the
7 total student enrollment at Humanex Academy is 43. Is
8 that correct?

9 A. Two years ago, it was, yes.

10 Q. 2009-2010 data. And that's located in
11 Arapahoe County?

12 A. Yes.

13 Q. And that's the total enrollment for --
14 there's actually grades 8 through 12; is that correct?

15 A. That's what their graph depicts, yes.

16 Q. All right. Now, let's talk about some of
17 the other -- so that's the one option for high school.
18 This also confirms that this is a special education
19 school, correct?

20 A. Where would you direct me to?

21 Q. It's under characteristics. It's got
22 type --

23 A. Type is special education.

24 Q. All right. Now, for grades kindergarten
25 through 8, as far as schools approved for the program,

1 there are four non-religious options; is that correct?

2 A. That could be true, yes.

3 Q. Well, let's go through them. And if you

4 can think of more, let me know. Woodlands Academy.

5 Is that one of them?

6 A. I believe that's on our list, yes.

7 Q. Okay. That's the information from the

8 National Center for Education Statistics on page 21 of

9 Exhibit 124. Take a quick look at that, please.

10 A. Woodlands Academy?

11 Q. Yes. That's a school in Douglas County,

12 correct?

13 A. Yes.

14 Q. And at least as of 2009-2010 school year,

15 the total enrollment was 21 students, correct?

16 A. Yes.

17 Q. Mackintosh Academy, is that another

18 approved school?

19 A. Yes.

20 Q. That's on page 12 of Exhibit 124. Do you

21 see that?

22 A. Yes.

23 Q. Total enrollment of -- looks like 124

24 students, K through 8. Is that correct?

25 A. 124 students.

1 Q. I'm sorry. Yes. K through 12.

2 A. Yes.

3 Q. Although, it does look like it only
4 serves three of the grades, right?

5 A. That's right. It does look like that on
6 this graph.

7 Q. That's in Arapahoe County?

8 A. Littleton. I don't know if that's
9 Arapahoe County or not.

10 Q. If you'll look at the top box under
11 information on that exhibit --

12 A. I see it. Sure. Yes.

13 Q. Aspen Academy. Is that another one of
14 the non-religious schools --

15 A. It is.

16 Q. -- in the program? And that's on the
17 very first page of Exhibit 124?

18 A. Yes.

19 Q. And that's 243 students, K through 8? Is
20 that right?

21 A. Correct.

22 Q. And that's also Arapahoe County?

23 A. Correct.

24 Q. And the last of the non-religious private
25 school partners is Beacon Country Day? Is that

1 correct?

2 A. Yes.

3 Q. Do you see that on page 3 of Exhibit 124?

4 A. I do.

5 Q. It's also in Arapahoe County; is that
6 right?

7 A. It is.

8 Q. And it's a school that serves
9 kindergarten through 8?

10 A. Uh-huh.

11 Q. Yes?

12 A. Yes.

13 Q. And has 82 total students; is that
14 correct?

15 A. Yes.

16 Q. Okay. So those are all of the options
17 for anyone who wants to enroll in the program and does
18 not want to send their kids to a religious school; is
19 that correct?

20 A. I believe that is correct, for now.

21 Q. Now, Douglas County -- the district
22 maintains a spreadsheet where you keep track of the
23 program students, information, their enrollment,
24 school lunch information, that kind of thing. Is that
25 true?

1 A. We do keep track of that.

2 Q. Is that -- if you'll take a look at
3 Defendants' Exhibit QQ. I don't know if you have that
4 in a binder in front of you or not. Do you have that?

5 A. Yes.

6 Q. And is that a copy of the spreadsheet
7 that the district maintains about the program
8 students, including information about which of the
9 private school partners they're enrolled in?

10 A. Just a minute, sir.

11 This appears to be a list of the people
12 that applied for a scholarship.

13 Q. Okay. Is it your understanding that
14 it's -- well, maybe I should take a look at it. But
15 it's not your understanding that it's a list of the
16 people who not only applied for but were accepted?

17 A. Because there aren't any names on it, I
18 can't confirm that. But it looks like there's too
19 many for the ones that have been accepted to schools.

20 Q. Well, does it have 500 people on it?

21 A. I don't know. There's a number of pages.
22 I would assume there's approximately 500 people listed
23 here.

24 Q. Okay. If your counsel -- if the
25 district's counsel represents that that spreadsheet

1 includes all of the participants and then separately
2 lists the schools of enrollment that have been
3 confirmed, does that comport with your understanding
4 of what that exhibit would be?

5 A. Yes. Could you show me how this
6 identifies the school that they've been accepted to?
7 Because it doesn't look like that.

8 Q. It's in one of the later columns. You
9 may have to flip down to get to it.

10 A. I see the spreadsheet goes however many
11 pages. Is that what you're talking about?

12 Q. Yes. The columns to the right are
13 further down. And one of them lists the schools at
14 which -- the partner schools. If you'll look, for
15 example, at page 35 of Exhibit QQ. You can see that
16 for the students starting there, it lists a partner
17 school.

18 A. Uh-huh. I do see it now. 35 is a good
19 direction.

20 Q. All right. Well, that exhibit is in
21 that, and I don't need to take you -- I agree, it's
22 not that easy to manipulate in the form. And maybe
23 we'll work on getting a form that would be easier to
24 work with.

25 But the good news is, Exhibit RR, if

1 you'll take a look at that, is a summary of the
2 information that's in that spreadsheet. So can you
3 take a look at that?

4 A. Yes.

5 Q. And this is already in evidence,
6 Exhibit RR. And have you seen this before?

7 A. I've seen these as they've been updated,
8 yes.

9 Q. And did you help in the preparation of
10 this exhibit?

11 A. No.

12 Q. Do you know who did?

13 A. My assistant, Tammy Taylor.

14 Q. Tammy Taylor?

15 So your understanding, then, is that this
16 is -- this is a summary of the information the
17 district has about what schools the students that have
18 been accepted into the program are enrolled in for the
19 254 students that have provided proof of such
20 enrollment to the district. Is that right?

21 A. Yes.

22 Q. And as far as you know, this is accurate?

23 A. It's pretty close.

24 Q. Okay. In the sense that it's been
25 updated in the last couple of days?

1 A. Sure. I think we're at 271.

2 Q. 271. Okay. Well, I'll represent to you
3 that the district -- that the most recent one from the
4 district is last Thursday, and it's this 254 number.
5 So with that, let's look at what some of the
6 information is.

7 We talked about the five non-religious
8 schools. Then let's take a look at the enrollment
9 there. Aspen Academy, four students. Correct?

10 A. Total number of students, four.

11 Q. Beacon Country Day, three students.
12 Correct?

13 A. Uh-huh. Yes.

14 Q. Humanex, two students. Correct?

15 A. Direct.

16 Q. Mackintosh Academy, one opportunity.
17 Correct?

18 A. Yes, correct.

19 Q. Woodlands Academy, eight students.

20 Correct?

21 A. Correct.

22 Q. So the total number of these 254 students
23 for which you have confirmed enrollment, who have
24 chosen non-religious schools, is 18. Is that right?

25 A. I trust your math, yes.

1 Q. That means the other 236 students are
2 going to religious private partner schools. That's a
3 little bit more than they've enrolled in and said you
4 approved, correct?

5 A. Correct.

6 Q. So would that be about 93 percent?

7 A. Again, I'll trust your math.

8 Q. Okay. And at the high school level, this
9 information from the district shows that there are 120
10 high school students with confirmed enrollment; is
11 that correct? If you look at ninth, 10th, and 11th
12 grade.

13 A. Did you say 126?

14 Q. 120. If we -- if you'll look at the
15 bottom, total recipients with proof of enrollment, 9th
16 grade, 102; 10th grade, 11; 11th grade, seven.

17 A. Oh, okay. So there's zero in 12th grade.
18 Correct.

19 Q. So 120 high school students. And out of
20 those, one is enrolled in a non-religious private
21 school; is that correct?

22 A. It appears that way, yes.

23 Q. And that's at Humanex, the special needs
24 school we've already talked about.

25 A. Right.

1 Q. So for those 119 high school students --
2 assuming they don't have the special needs required of
3 Humanex -- that's almost half of the confirmed people
4 you have, their choice was to attend a religious
5 school or not participate in the program at all.
6 Correct?

7 A. At this point, that is true.

8 Q. How many high school students were
9 enrolled in all of Douglas County's public schools
10 last year? Rough ballpark.

11 A. Almost 29,000.

12 Q. Students or high school students?

13 A. I don't know what the breakdown is. It's
14 probably about half of that, though.

15 Q. Somewhere in the ballpark of 15,000
16 students?

17 A. If you count seventh and eighth grade,
18 it's about half.

19 Q. And so for those students, if some of
20 those 15,000 or so students wanted to participate in
21 the program, if they did not have the special needs
22 that Humanex serves, their choice was a religious
23 school or no program, right?

24 A. The choices right now that exist are
25 that, yes.

1 Q. Okay. Now, this summary in Defendants'
2 Exhibit RR also separates out the number of students
3 of the -- of the 500 total student enrollment in the
4 program at this point who qualify for free or reduced
5 lunch. Do you see that?

6 A. Yes.

7 Q. And that's, at this point, 13 out of the
8 500?

9 A. Uh-huh.

10 Q. So about 2.5 percent, roughly?

11 A. Right.

12 Q. You were part of the meetings with the
13 state Department of Education; is that correct?

14 A. I was.

15 Q. You attended both of those?

16 A. I did.

17 Q. The Department of Education told you,
18 told the district, that it would prefer if Douglas
19 County made the program for low socioeconomic status
20 students, correct?

21 A. They did, I think. I'm not quite sure
22 who said it, but I do remember the conversation being
23 talked about.

24 Q. And you told them that you weren't going
25 to go that way, right?

1 A. I think our response was that we wanted
2 to make it available to all the students. We didn't
3 target a group.

4 Q. In fact, the program has no income
5 requirements or limitations of any kind. Is that
6 true?

7 A. They don't. But we do offer support
8 services through another agency to those students.

9 Q. Support services specific to the program?

10 A. We've partnered with a group in Denver
11 called the Ace Alliance to further support assistance
12 for the students that qualify for this program.

13 Q. But if people qualify for or apply for
14 that, that's outside the program and the policy that
15 we're talking about?

16 A. It is outside of the program and policy
17 as we've designed it currently.

18 Q. As part of the meetings that we're
19 talking about with the Department of Education, the
20 department mandated that the program only include
21 Douglas County school district students from last year
22 as part of its approval of the program. Is that
23 correct?

24 A. That probably needs to be clarified. I
25 don't think there was ever a mandate. I probably was

1 under the idea first that there was an insinuation. I
2 think that they were hoping that it would be that way
3 and ended up going that direction. But I don't recall
4 there ever being a mandate.

5 Q. Well, they certainly told you that they
6 had significant concerns --

7 A. That's how they told me.

8 Q. Okay. The program were not limited to
9 only students who enrolled in Douglas County schools
10 last year, right?

11 A. Yes. That was one of the things Vody
12 Hermann was concerned about.

13 Q. But don't think they mandated that as
14 part of their approval of the program?

15 A. No. But like you said, they certainly
16 voiced concern in the way that I heard.

17 Q. All right. Could we put up Exhibit 94,
18 please. And if we could zoom in on that, and at this
19 point look at the very top. There's an e-mail at the
20 top of the chain from Dan McMinimee. Is that right?

21 A. Yes.

22 Q. And who is he?

23 A. He is my partner at the secondary level,
24 assistant superintendent.

25 Q. And it's an e-mail to your assistant and

1 to you, correct?

2 A. That's correct.

3 Q. And he's forwarding an e-mail exchange
4 that it looks like your assistant had with the
5 potential program participant; is that correct?

6 A. It looks that way, yes.

7 Q. I'm sorry. We need to scroll down a
8 little bit. Keep going down. I assume you read this
9 e-mail when you got it.

10 A. I try to read all the e-mails, yes.

11 Q. Would you -- in a situation like this
12 where your assistant is writing back a response to
13 communication from a prospective parent in the
14 program, would you review and approve that
15 communication before it went out?

16 A. No. I do it in hindsight most of the
17 time.

18 Q. Well, do you provide guidance to
19 Ms. Taylor as to how she should answer questions from
20 prospective parents?

21 A. I try to, yes.

22 Q. And let's take a look at what she wrote.
23 This is on March 30th, to Alexis. She says, "Good
24 afternoon, Alexis. I did not intend to indicate in my
25 e-mail that you did not live in the county. Being a

1 resident along with having a student currently
2 enrolled in a Douglas County school district school
3 are the criteria for eligibility so I mentioned them
4 both." Do you see that?

5 A. Uh-huh.

6 Q. She then says, "This criteria was
7 mandated to us by the Colorado Department of Education
8 with the approval of the program." Do you see that?

9 A. I do.

10 Q. And so your assistant responded to a
11 student or prospective student family in that way
12 after speaking to you about how she should respond to
13 these questions. Is that right?

14 A. That's right. Incorrectly, I might add.

15 Q. I'm sorry?

16 A. The word "mandated" was wrong.

17 Q. You don't think she got that word from
18 you?

19 A. No. She might have early on. I think
20 that I had a false impression as we were going
21 forward, just by the insinuation. But I tried to
22 clear that up sometime probably after this e-mail.

23 Q. But this is -- but as of March 30th, two
24 weeks after the program was approved, that's what
25 Ms. Taylor said after talking to you.

1 A. At this point, I think that's what she
2 believed, yes.

3 Q. Now, Mr. McCarthy talked to you a little
4 bit about the checks and being made out in the name of
5 the parents and that. You remember that examination,
6 correct?

7 A. Yes.

8 Q. I just want to clarify one thing. The
9 money paid by the program can only be used for tuition
10 at the private schools; is that correct?

11 A. That is correct.

12 Q. So it can't be used for books, fees,
13 sports uniforms, anything of that kind, right?

14 A. No, sir.

15 Q. Only tuition. Correct?

16 A. Only tuition.

17 Q. And the decision to make the checks out
18 in the name of the parents was done specifically to
19 try to get around the constitutional prohibition
20 against government funding of religious schools. Is
21 that true?

22 A. I think we were trying to make a program
23 where the parents could use the dollars for the
24 tuition. And that seemed to be the way we could do
25 it.

1 Q. The way to do it to try to make it
2 constitutional.

3 A. I think we went into this, yeah.

4 Q. Let's take a look at Exhibit 100. Please
5 look at the very top. So the primary message you see
6 is from Elizabeth Fagen. That's your boss, the
7 superintendent, correct?

8 A. Yes.

9 Q. On January 6th to a whole host of people.
10 And you're first on the list, correct?

11 A. I am.

12 Q. And this is the day after you met with
13 the Colorado Department of Education; is that right?

14 A. I believe it is. Or two days later. One
15 of them.

16 Q. All right. And if we go down, "Dear
17 director. We had a good meeting with several leaders
18 from the Colorado Department of Education yesterday
19 afternoon." Do you see that?

20 A. Uh-huh. Yes.

21 Q. And you tried to describe what you
22 learned and discussed in a nutshell, right?

23 A. Yes.

24 Q. And one issue that was discussed is the
25 church and state issue. Do you see that?

1 A. Church and state issue.

2 Q. That was discussed at the meeting?

3 A. Yes.

4 Q. And she says, "All present agreed that
5 the legal issues associated with the separation of
6 church and state are likely handled by giving the
7 scholarship -- quote, scholarship -- directly to the
8 parents/students. The district not paying any
9 religious private school directly." Do you see that?

10 A. I do.

11 Q. So that's the reason you make the checks
12 out to the parents, so that you can say you're not
13 paying the school directly. Correct?

14 A. We definitely make the checks out to the
15 parents.

16 Q. And that's why. So that you can say,
17 look, we're not paying the school directly, right?

18 A. That's what Dr. Fagen was saying, yes.
19 This is her e-mail, right?

20 Q. Yes.

21 A. Okay.

22 Q. And you agree with it? That's the reason
23 you're making them out in the names of the parents,
24 correct?

25 A. I think that's -- this expresses it that

1 way.

2 Q. And in the next two sentences down, it
3 says, "Another item, not new, is that we will probably
4 need to have an opt out of the religious portion of
5 the day for all Douglas County school district
6 students." Do you see that?

7 A. At the time, that was the thought, yes.

8 Q. And that was another thing that you
9 believed you needed to do to try to avoid the problems
10 of the separation of church and state, correct?

11 A. That's correct. To make the program
12 work.

13 Q. And at the time, January 6th, the plan
14 for that opt-out is, it was going to include religious
15 services and also religious instruction, correct?

16 A. Yes. That's what we thought at the time.

17 Q. And then this e-mail says, "They would
18 not have to exercise this right, but they could if
19 they wanted to." And then CDE warned that even with
20 all of this, we will likely be challenged on this
21 matter under article, section 34 of Colorado
22 Constitution and other grounds, right?

23 A. In other words, that's speculation.

24 Q. Well, it says likely, right?

25 A. That's how she felt, yes.

1 Q. So as of January 6th of this year, the
2 Department of Education advised the district that it
3 was likely to face litigation in this case, correct?
4 Or over the program.

5 A. You're asking me if CDE thought that way?

6 Q. If they advised you that.

7 A. It did come up that it was a possibility,
8 yeah.

9 Q. Well, according to Dr. Fagen, it came up
10 that they told you likely, right?

11 A. That's what she said.

12 Q. And you agree with that?

13 A. I don't know if I agree. I think that
14 we've had so many people speculate that there's never
15 been a program like this nationally that hasn't been
16 challenged, that that's been our mentality going
17 through this.

18 Q. All right. But Dr. Fagen wrote that the
19 department advised likely litigation. And this is as
20 of January, right?

21 A. I just think you should ask her. Those
22 are her feelings.

23 Q. Okay. But that's what she wrote,
24 correct?

25 A. Yes. I can see it right there.

1 Q. Did you ever write back and tell her that
2 you thought that was speculation?

3 A. No.

4 Q. Did you review the complaint that was
5 filed in this case at the time it was filed?

6 A. The -- this suit?

7 Q. Yes.

8 A. I did get a copy of it, and I went
9 through it. But not being a lawyer, much of it was
10 above me.

11 Q. Do you recall that the complaint stated
12 that the plaintiffs intended to seek a preliminary
13 injunction?

14 A. I do believe that was the topic of
15 conversation.

16 Q. And that would have been on or around
17 June 21st litigation was filed?

18 A. Yes.

19 Q. Do you agree that there's nothing in the
20 program policy or the contracts with the private
21 schools under this program that would prevent them
22 from raising their tuition by the \$4,575 that they
23 received for a student under the program?

24 A. I don't know. I don't think there is.

25 Q. You don't think there's anything that

1 would prevent them from doing that?

2 A. I'm not sure if there is, no. That was
3 my answer.

4 Q. There's nothing that you're aware of that
5 would prevent that.

6 A. I don't know if there is.

7 Q. Or if a private school chose to decrease
8 financial aid to a Choice Scholarship Program student
9 in the amount of the scholarship, \$4575, there's
10 nothing in the program or the contract that would
11 prevent that. Is that correct?

12 A. Well, I believe in the contract it states
13 that they need to be treated the same as they would
14 for any other student through the admission process.
15 So I think that would cover it.

16 Q. Okay. So you think that it would be a
17 violation of the contract with the district for a
18 school to reduce financial aid to a student in the
19 amount of the scholarship.

20 A. I think that would go against the
21 intended contract.

22 Q. Do you know if any of the private partner
23 schools have done that or tried to do that?

24 A. I am not aware of anyone who's done that.

25 Q. Okay. Let's take a look at Exhibit 102,

1 please. I believe this is already in evidence.

2 Dr. Cutter, let's scroll down to -- first
3 of all, the very top e-mail is Rob Ross forwarding
4 himself, it looks like this e-mail, or an e-mail. Do
5 you see that?

6 A. Yeah.

7 Q. So let's go down to what he's forwarding.
8 And you see this is an e-mail from someone named
9 Rhonda to your assistant, Tammy Taylor, with a cc to
10 Bonnie Betz and to you. Correct?

11 A. Yes.

12 Q. It's dated July 6th of this year, 2011?

13 A. Uh-huh.

14 Q. And Rhonda Mills appears to be a Choice
15 Scholarship parent, from what we can tell?

16 A. Uh-huh.

17 Q. Yes?

18 A. Yes.

19 Q. And she says, "Hi Tammy. We have decided
20 to send the kids to" -- blank, which is redacted --
21 "and not to Valor." Valor is Valor Christian,
22 correct?

23 A. Yes, I believe so.

24 Q. And that's one of the private school
25 partners participating in the program, right?

1 A. Yes.

2 Q. In fact, they have the most students in
3 the program are enrolled in Valor. Is that true?

4 A. I'm sorry. I was reading. Can you ask
5 the question again?

6 Q. In fact, the largest number of students
7 going to any particular school with confirmed
8 enrollment under the program are going to Valor,
9 correct?

10 A. That might be. I don't have that open
11 any more. But I think it's one of the highest, if not
12 the highest.

13 Q. We can take a quick look. It's
14 Defendants' Exhibit RR.

15 A. Yeah. 61 students.

16 Q. 61 out of the 254. That's just under 25
17 percent, right?

18 A. Yes.

19 Q. All right. And then let's go back to
20 Exhibit 102, the e-mail. And so the parents said,
21 "We've decided to send the kids to somewhere else and
22 not to Valor. Once we got the voucher, Valor adjusted
23 our financial aid and so reduce it by the amount of
24 the voucher. We really needed both financial aid from
25 Valor and the voucher to make it all work." Do you

1 see that?

2 A. I do.

3 Q. So at least this parent reported to your
4 assistant and to you that Valor was doing exactly what
5 you said they're not supposed to be doing, right?

6 A. Yeah.

7 Q. Do you remember receiving this?

8 A. I don't.

9 Q. So did you ever follow up with Valor or
10 anyone else about this?

11 A. No, because I don't remember receiving
12 this.

13 Q. Do you know if any of the other private
14 partner schools are doing this?

15 A. I don't.

16 THE COURT: How much more with this
17 witness, Mr. Douglas?

18 MR. DOUGLAS: Your Honor, I've got a
19 significant amount left. Probably 45 minutes.

20 THE COURT: Okay. We're going to stop
21 for the day. Is this a good time?

22 MR. DOUGLAS: Sure.

23 THE COURT: It's almost quarter after
24 5:00, so we're going to stop. We'll start tomorrow at
25 9:00 a.m. I have an 8:30 matter that may carry over

1 beyond 9:00. But make sure that you're here at 9:00.

2 I would suggest that you take a look at
3 your witness list and reassess where you are in terms
4 of scheduling, keeping in mind that my take on it, it
5 seems, that we're behind schedule, looking at the
6 witness list.

7 And two, my pretrial order told you guys
8 to divide the time however you deem appropriate, but
9 evenly between the plaintiffs and the defendants. And
10 the defendants are going to have a case that they're
11 going to want to present. And my intention is to
12 obviously let them do that. So we're going to make
13 sure that their half time that they reserved isn't
14 taken up by presentation. So I'll look for enhanced
15 efficiencies tomorrow. Okay?

16 MR. DOUGLAS: Thank you, Your Honor.

17 THE COURT: All right. Thank you very
18 much. With that, court is adjourned.

19 WHEREUPON, the within proceedings were
20 recessed at the approximate hour of 5:15 p.m. on the
21 2nd day of August, 2011.

22

23

24

25

1 DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
2 Denver, Colorado 80202

3
4 Plaintiffs:

5 JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF
6 COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM
HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA
CARRERA; SUSAN MCMAHON,

7 v. Case Number: 2011CV4424
Courtroom: 259

8 Defendants:

9 COLORADO BOARD OF EDUCATION; COLORADO DEPARTMENT OF
10 EDUCATION; DOUGLAS COUNTY BOARD OF EDUCATION; DOUGLAS
COUNTY SCHOOL DISTRICT,

11 Movants:

12 FLORENCE DOYLE; DERRICK DOYLE; ALEXANDRDA DOYLE;
13 DONOVAN DOYLE; DIANA OAKLEY; et al.

14 and

15 Plaintiffs:

16 TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD;
MASON S. BARNARD,

17 v. Case Number: 2011CV4427
Courtroom: 259

18 Defendants:

19 DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY
20 SCHOOL DISTRICT RE-1 BOARD OF EDUCATION; COLORADO
DEPARTMENT OF EDUCATION; COLORADO STATE BOARD OF
21 EDUCATION.

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REPORTER'S TRANSCRIPT - VOLUME II

The preliminary injunction hearing in the above-entitled matter resumed on Wednesday, August 3, 2011, at 1437 Bannock Street, Courtroom 259, Denver, Colorado 80202, before the Honorable Michael A. Martinez.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Reported by: Sharon L. Szotak, RPR, CRR

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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 THE COURT: I am now calling 11CV4424.
3 And the record reflects the parties and counsel are
4 present. Everyone ready to proceed today?

5 MR. McCARTHY: We are, Your Honor.
6 Again, Michael McCarthy for the taxpayer plaintiffs.

7 I just wanted to note, my partner, Colin
8 Deihl, was obligated to be in federal court this
9 morning. He couldn't get out of that, Your Honor.
10 He's going to join us a little later in the morning.
11 I wanted to provide that as a courtesy to the court.

12 THE COURT: Okay. I'm happy to
13 accommodate that. In the future, for future
14 reference, we actually do play nicely with our
15 colleagues up there. We have a program available that
16 we call the pick-up-the-phone program. If you have a
17 conflict like that, call me and let me know that and I
18 can call the judge and sometimes we can work that out.

19 MR. McCARTHY: Thanks for letting me
20 know, Your Honor. I appreciate it.

21 THE COURT: Okay. We were --

22 MR. LYONS: Your Honor, if I may.

23 THE COURT: Yes, Mr. Lyons.

24 MR. LYONS: With regard to sequestration
25 of witnesses, Dr. Cutter will continue to be the

1 designated witness for the district party, so long as
2 he is here and testifying. When his testimony is
3 complete, we will then have Dr. Elizabeth Fagen, who
4 is the superintendent of the district, be the
5 designated representative of the district party. The
6 party advised counsel of that, but it wanted to let
7 the court know, as well.

8 The representative of the board is
9 Mr. John Carson, who was here yesterday and will
10 continue to be the representative of the board entity.

11 Thank you, Your Honor.

12 THE COURT: Thank you, Mr. Lyons. Any
13 objection to that?

14 MR. McCARTHY: No objection, Your Honor.

15 THE COURT: All right. Well,
16 Superintendent Cutter was on the stand. Where is he?

17 THE WITNESS: Right here.

18 THE COURT: Come on up, sir. Go ahead
19 and grab a seat. Make yourself comfortable. And,
20 sir, you remain under oath. You understand what that
21 means?

22 THE WITNESS: I do.

23 THE COURT: And you remember the
24 instructions I gave you yesterday?

25 THE WITNESS: Yes, sir.

1 THE COURT: Will you still follow them?

2 THE WITNESS: I will.

3 THE COURT: All right. Please do.

4 Mr. Douglas, you may pick up where you
5 left off.

6 MR. DOUGLAS: Thank you, Your Honor.

7 CHRISTIAN L. CUTTER,

8 having been previously duly sworn to state the whole
9 truth, testified as follows:

10 CROSS-EXAMINATION

11 BY MR. DOUGLAS:

12 Q. Good morning, Dr. Cutter. Welcome back.

13 A. Thank you.

14 Q. Dr. Cutter, when we broke yesterday, we
15 were discussing Plaintiffs' Exhibit 102, the e-mail
16 from a parent to your assistant and you, related to
17 Valor Christian and financial aid. Do you recall that
18 discussion?

19 A. Yes, sir.

20 Q. I want to go down in that e-mail and look
21 at the start of the chain. This is reverse
22 chronological. It starts at the bottom and moves up;
23 is that right?

24 A. Yes, sir.

25 Q. Okay. So the e-mail that we were

1 discussing about Valor and the financial aid was
2 actually a reply by Ms. Rhonda Mills to an e-mail from
3 the district; is that right?

4 A. Yes, sir.

5 Q. And the subject line of the e-mail from
6 the district that she was responding to -- if we go up
7 a little higher. It doesn't show up there at the
8 bottom, but it's repeated in her reply. Subject line,
9 "Re: Urgent - DCSD Choice Scholarship Parent
10 Invoice." Do you see that?

11 A. Yes.

12 Q. And what Ms. Mills was responding to was
13 this urgent e-mail that was sent to all Douglas County
14 school district Choice Scholarship recipients,
15 correct?

16 A. Those that had been accepted into the
17 school and were now learning the process of financial
18 aid, yes.

19 Q. Which at that time was about 193
20 families?

21 A. Could have been, yes.

22 Q. And was that e-mail sent out at your
23 direction?

24 A. In tandem with the CFO.

25 Q. Okay. CFO Bonnie Betz?

1 A. Yes.

2 Q. And your assistant is the one who sent
3 the e-mail?

4 A. She is our primary contact, yes, through
5 this program.

6 Q. And the date of the e-mail that went out
7 with that urgent request was July 6th?

8 A. It appears so, yes.

9 Q. And do you recall we discussed how on
10 June 21st, the complaint in this case was filed?

11 A. Yes.

12 Q. And July 5th, that was the date
13 preliminary injunction motions were filed in this
14 case. Is that your understanding?

15 A. That's my understanding.

16 Q. So the very next day, you sent this
17 urgent e-mail asking -- if you'll look at the
18 substance of the e-mail, it says, the last sentence,
19 "We are asking that you" -- and then there's some
20 bold -- "complete and return the attached parent
21 invoice as soon as possible." Do you see that?

22 A. Yes.

23 Q. So that's what you requested from the
24 parents urgently as soon as possible the day after the
25 preliminary injunction motions were filed, right?

1 A. We did.

2 Q. And these are the payments that you
3 discussed yesterday that were originally scheduled to
4 go out in September?

5 A. That was the original plan, yes.

6 Q. In fact, the program policy still says
7 they got to go out in September, right?

8 A. It does.

9 Q. And you testified yesterday, I believe,
10 that you suddenly realized that the private schools'
11 tuition would be due before September, and that was
12 the reason you --

13 A. We had --

14 MR. HALL: Objection.

15 THE COURT REPORTER: I'm sorry. What was
16 the answer?

17 THE COURT: Well, this is the problem.
18 Mr. Cutter, you have to let him finish the question
19 before you start to answer.

20 THE DEPONENT: I apologize.

21 MR. HALL: Objection. Misstates the
22 testimony.

23 THE COURT: Overruled.

24 Q. (BY MR. DOUGLAS) Did you understand the
25 question?

1 A. Why don't you try again.

2 Q. All right. You testified yesterday that
3 the reason you moved these payments up prior to
4 September was that you suddenly realized that the
5 private school tuition would be due before September.
6 Is that right?

7 A. We had -- I had heard from a parent that
8 was concerned about paying early, because they were
9 expected to. So one of my motivations was to do so,
10 yes.

11 Q. And before that, you didn't have any idea
12 when the private schools would expect tuition from the
13 parents?

14 A. It was one of those things that we hadn't
15 considered, going into it.

16 Q. You had been talking to these private
17 schools for months, weren't you?

18 A. Around the parameters of their conditions
19 of eligibility, yes.

20 Q. All right. And along those lines, you
21 were the primary person at Douglas County in the
22 school district who interacted with the private
23 partner schools during the design and creation of the
24 program; is that correct?

25 A. Yes.

1 Q. And you were the primary person at the
2 district involved in the process by which the private
3 schools applied to the program; is that correct?

4 A. Yes.

5 Q. The application materials that the
6 schools filled out and submitted were submitted to
7 you?

8 A. Yes.

9 Q. And you reviewed those as part of the
10 process of approving the private partner schools?

11 A. Not alone, but, yes.

12 Q. You were one of the people who reviewed
13 those?

14 A. I did.

15 Q. And the contract between the private
16 school partners and the district for their
17 participation in the program, those are all signed by
18 you on behalf of the district, right?

19 A. Myself or my partner, Dan McMinimee.

20 Q. You signed a number of them yourself.

21 A. I did.

22 Q. You agree that a number of the private
23 school partners that are approved in the program are
24 controlled by a religious denomination, correct?

25 A. I believe that is true.

1 Q. A number of them are owned and operated
2 by a church, correct?

3 A. That could be true, yes.

4 Q. Well, you asked for this information on
5 the school application by instruction, correct?

6 A. We did.

7 Q. And your recollection is that a number of
8 them told you they were owned and operated by a
9 church, correct?

10 A. I believe that is true, yes.

11 Q. Okay. And you agree that some of them
12 are actually part of a church, correct?

13 A. Are you saying physically attached to
14 one? Because that would be yes.

15 Q. Well, I was asking a different question,
16 but we'll take that. But some of them described
17 themselves as part of a church in the application. Is
18 that true?

19 A. That is true.

20 Q. Okay. And you agree that many of the
21 participating private schools embed religious studies
22 in all areas of their curriculum, correct?

23 A. Yes.

24 Q. And that many of these schools' religious
25 curriculum includes the teaching of particular

1 religious doctrines and beliefs, correct?

2 A. Correct.

3 Q. For example, Lutheran?

4 A. I don't recall Lutheran.

5 Q. Okay. You agree that many of the
6 participating private schools require attendance at
7 religious services, correct?

8 A. That is what I believe to be true, yes.

9 Q. That nearly all of them require that,
10 right?

11 A. Yes.

12 Q. And that includes worship services?

13 A. As an expectation?

14 Q. Yes.

15 A. Yes.

16 Q. And prayer in the classrooms.

17 A. I believe that does exist, yes.

18 Q. Do you recall whether a number of the
19 schools referred you, in the application, to their
20 websites for additional information about their
21 programs, curriculum, beliefs, that kind of thing?

22 A. I believe there was one that I looked at
23 that did that, yes.

24 Q. Okay. Do you remember which one it was
25 that did that?

1 A. I don't. Sorry, sir.

2 Q. We can look at some examples, but at
3 least one did say that, right?

4 A. Yes.

5 MR. DOUGLAS: Your Honor, in the
6 interests of time, we have a number of web pages from
7 the school websites that are exhibits that have been
8 stipulated as to authenticity, and that they are the
9 business records of the school maintained in their
10 ordinary course of business. So fully stipulated as
11 to foundation and authenticity.

12 The defendants reserve the right to
13 object on the basis of relevance. And I would offer
14 those into evidence at this time.

15 I do have a list that I can hand out, if
16 it would streamline the process, of which exhibits
17 those are. Or I could read them off.

18 THE COURT: Has the defense seen the
19 list?

20 MR. DOUGLAS: No. I'm handing that to
21 them now.

22 MR. HALL: Your Honor, yes, we object on
23 relevance. We've already stipulated to all the
24 applications, and the applications cover the same
25 ground as the websites.

1 THE COURT: Why is it not cumulative?

2 MR. DOUGLAS: Your Honor, the websites,
3 as stated in some of the school applications, which we
4 could look at, go into significantly more detail about
5 the curriculum, the mission, the governance structure,
6 the financing, things like that. And a number of the
7 websites did refer -- the applications referred to
8 their websites.

9 So this is information that supplements
10 and is not the same as what's in the applications.
11 It's clearly relevant as those issues are central to
12 what the court is looking at, and there's no dispute
13 that they are business records of the school.

14 THE COURT: All right. Any other
15 objection other than what's been noted to this point?

16 MR. BINDAS: Yes, Your Honor. I would
17 just object as a general matter of relevance. The
18 parental choice of this school breaks any connection
19 between the county and anything that's part of the
20 curriculum in these schools and, therefore, they're
21 irrelevant for that reason.

22 THE COURT: Objections go to weight,
23 not admissibility. The exhibits are going to be
24 admitted, noting the objection. Which exhibits am I
25 talking about? You can give the list to the court

1 reporter. She'll put it in later.

2 MR. DOUGLAS: The exhibits are 20, 21,
3 22, 24, 26, 27, 28, 30, 32, 33, 34, 35, 36, 38, 39,
4 43, 45, 46, 50, 52, 53, 55, 57, 59 -- almost done --
5 61 and 63.

6 And I would just note for the record that
7 this includes website pages for the religious schools
8 and the non-religious schools. We did not
9 discriminate in that.

10 THE COURT: Fair enough. Thank you.

11 MR. DOUGLAS: Thank you, Your Honor.

12 Q. (BY MR. DOUGLAS) Dr. Cutter, you
13 discussed yesterday that the private religious schools
14 are allowed -- specifically allowed, under the program
15 policy, to discriminate in both enrollment and hiring
16 decisions on the basis of religious beliefs, correct?

17 A. I agreed that that was a possibility,
18 yes.

19 Q. Well, they're specifically allowed to do
20 that under the policy. That's true, right?

21 A. That -- that they follow their admission
22 policy, yes.

23 Q. Well, we can look at it again, but
24 doesn't the policy specifically say that they cannot
25 discriminate except it specifically allows for them to

1 be able to discriminate on the basis of religious
2 belief as to enrollment and hiring, correct?

3 A. Yes.

4 Q. Okay. And you know that a number of the
5 private partner schools, based on what they put in
6 their applications, in fact, do discriminate in
7 enrollment and hiring decisions on the basis of
8 religious beliefs, correct?

9 A. Correct.

10 Q. All right. Dr. Cutter, we talked a
11 little bit yesterday about how the original opt-out
12 for religious services -- or the original opt-out that
13 Douglas County was considering would have included the
14 ability of students to opt out of both religious
15 instruction and religious services, correct?

16 A. At the beginning, yes.

17 Q. And part of your involvement with the
18 program was to discuss that original plan for an
19 opt-out with the religious schools to gauge their
20 reaction to it, correct?

21 A. It did become part of my job, yes.

22 Q. And, in fact, you sent an e-mail to many
23 of the religious schools asking for their thoughts on
24 the opt-out provision, correct?

25 A. I did.

1 Q. And you got what you described as mixed
2 responses, right?

3 A. I did.

4 Q. Many were very opposed, right?

5 A. Yes.

6 Q. Let's take a look at Exhibit 86, if we
7 could. First of all, if we go to the very can --
8 well, let's establish what this is. This is in
9 evidence, but this is an e-mail from you to Phil
10 Steele. Do you see that?

11 A. Yes.

12 Q. And Phil Steele is at Regis?

13 A. Yes.

14 Q. He's the president of Regis Jesuit High
15 School?

16 A. Reverend Steele. Yes.

17 Q. If you'd go to the second page. The last
18 paragraph, you write -- and this is the e-mail that
19 you sent to -- well, strike that. Let me start again.

20 In the last paragraph you tell Reverend
21 Steele you've received mixed responses from private
22 school heads regarding the mandatory use of an opt-out
23 waiver. "This would require private schools who
24 receive Douglas County students with scholarships to
25 allow those students to remove themselves from

1 faith-based classes and/or activities." Do you see
2 that?

3 A. I do.

4 Q. And then he -- you tell him you're hoping
5 to pick his brain on thoughts, right?

6 A. It seemed like a friendly way to start
7 the conversation.

8 Q. All right. And he writes back to you, on
9 the first page. He says, "Christian." And then at
10 the beginning of that top paragraph, "I'm having a
11 hard time imagining how such an opt-out waiver could
12 be structured in a way that would satisfy the
13 requirements of church-state separation and still
14 allow us to remain true to our mission."

15 That's what he told you, right?

16 A. Yes.

17 Q. He said, "It would certainly be untenable
18 for us to actually have students who are not taking
19 theology classes their classmates are required to take
20 or not attending the religious activities that all our
21 other students are required to attend, especially for
22 a purely monetary reason." Do you see that?

23 A. Yes.

24 Q. He then goes on to say in the next
25 paragraph, "We have a hard time imagining our current

1 families actually making the choice to opt out. Why
2 would they send their kids to Regis Jesuit? But, in
3 fact, I can imagine a small number of other families
4 choosing us precisely because theirs kids could get a
5 bargain private education without having to be, quote,
6 indoctrinated."

7 Right? That's what he told you.

8 A. His words, yes.

9 Q. So he thought it wouldn't be right if
10 program students were able to get the education at
11 Regis without having to be indoctrinated, right?

12 MR. BINDAS: Objection, Your Honor. That
13 misstates the e-mail.

14 THE COURT: Overruled.

15 A. Yes.

16 Q. (BY MR. DOUGLAS) All right. Let's take a
17 look at Exhibit 87, please. This is an e-mail chain
18 between you and Larry Baker at Denver Christian
19 Schools, correct?

20 A. Correct.

21 Q. And what is Larry Baker's position at
22 Denver Christian Schools? Do you know?

23 A. Superintendent.

24 Q. And you also asked for his thoughts on
25 the opt-out, correct?

1 A. I did.

2 Q. And he writes to you in the second
3 paragraph, "At Denver Christian we incorporate what is
4 often referred to as a reformed christian perspective.
5 The main ingredient of that perspective is that
6 religious education takes place in all areas of the
7 curriculum, not just in Bible classes." Do you see
8 that?

9 A. Yes.

10 Q. He says, "So if a family wanted to opt
11 out of religious instruction, they would have to
12 prepare their child to bolt out of any class, and I
13 suspect that would occur frequently." Do you see
14 that?

15 A. I do.

16 Q. And then what I really want to ask you
17 about here is, he says, "Because of the nature of our
18 Jesus is Lord of everything type of education, no
19 family who wanted to opt out would even be interested
20 in coming to Denver Christian and, indeed, I would try
21 hard to determine their stand on religious education
22 in the interview and application process and steer
23 them in a different direction."

24 Do you see that?

25 MR. HALL: Your Honor, I'm going to

1 object that it is cumulative and irrelevant.
2 Dr. Cutter already testified that he had discussions
3 and the responses. We don't need to go through each
4 individual e-mail.

5 THE COURT: Well, I'm not going to
6 permit him to go through each and every one. But I am
7 going to allow him to establish the record. The
8 objection is overruled.

9 MR. DOUGLAS: Thank you, Your Honor.

10 Q. (BY MR. DOUGLAS) So that's what Mr. Baker
11 told you, correct?

12 A. Yes.

13 Q. Did you talk to him about his statement
14 that he would try to steer families away if they were
15 not interested in education from the reformed
16 christian perspective?

17 A. I recall on our first meeting he was --
18 he did pose questions like why would anybody apply,
19 knowing that we are a christian school, and that he
20 interviews each prospective family personally. But I
21 don't recall the language other than in his e-mail to
22 me here.

23 Q. Okay. So you never asked him or
24 discussed with him his plan to steer people away,
25 right?

1 A. No, I didn't ask him about his plan to
2 steer people away.

3 Q. Do you think that's acceptable under the
4 program criteria, that these religious schools can
5 actually try to steer people away if they don't share
6 their religious beliefs?

7 A. I think it's acceptable that he maintains
8 the same process of admissions that he has previous to
9 taking many of our scholarship students.

10 Q. I don't think that's my question. Do you
11 think it's acceptable for a school such as Denver
12 Christian or one of the other schools, during the
13 application process for program participants, to try
14 to steer them away if they don't share the religious
15 beliefs of the school? Is that acceptable under the
16 program?

17 A. Yes.

18 Q. Okay. And at the very top of this e-mail
19 is your response to Mr. Baker, correct?

20 A. Yes.

21 Q. And you write, "Your thoughts are in line
22 with several other superintendents in similar roles."
23 Correct?

24 A. I was validating his input.

25 Q. All right. Let's look at Exhibit 88,

1 please. Exhibit 88 is an exchange on this issue that
2 you had with Tia Reed at the Rock Academy; is that
3 correct?

4 A. Yes.

5 Q. And her reaction to your initial question
6 about the full opt-out that included classes and
7 instruction and worship is at the bottom. It says,
8 "Dr. Cutter: Yes, this waiver would be a deal breaker
9 for our school. We integrate faith into every aspect
10 of our school day, and it would be impossible to
11 exclude a student from this." Do you see that?

12 A. I do see that.

13 Q. And you wrote back to her above. You
14 say, "Just a thought. Would it make a difference if
15 the opt-out waiver was for services only, i.e., mass,
16 not faith based instruction?" Do you see that?

17 A. I do.

18 Q. Of course, that's how the final opt-out
19 was finally structured, right?

20 A. It was, yes.

21 Q. And her response to you at the top is, "I
22 don't think it would make a difference. Everything we
23 do in our chapel services we also do in the classroom
24 daily (i.e., pray, sing, worship songs, learn Biblical
25 principles, et cetera.) Our chapel services are a

1 time to do this as a student body." Do you see that?

2 A. I do.

3 Q. But the Rock Academy is a participating
4 school in the program, right?

5 A. As well as the other schools we've
6 mentioned so far.

7 Q. Okay. So did something change? Did you
8 discuss this with her and change her mind? Or how did
9 it come about that the Rock ended up participating?

10 A. They were willing to sign the contract
11 that allowed their students to opt out of services.
12 So they changed their mind.

13 Q. And in the final opt-out, one thing that
14 Ms. Reed doesn't mention here is that the students
15 still can be required, and are required, at the Rock
16 to attend the chapel services if they choose to sit
17 silent, correct?

18 MR. HALL: Objection as to foundation as
19 to what happens at the Rock.

20 THE COURT: Sustained.

21 Q. (BY MR. DOUGLAS) I believe the Rock told
22 you in its application that they require students to
23 attend respectfully, even if they are exercising the
24 opt-out. Is that your recollection?

25 A. That is my recollection.

1 Q. Okay. And so given that, that's -- the
2 bottom line is, the Rock ended up participating, and
3 what's not mentioned in this e-mail is, the students
4 would actually still be required to attend, just not
5 participate, right?

6 MR. HALL: Objection to foundation.
7 Same.

8 THE COURT: It's overruled.

9 A. Yes.

10 Q. (BY MR. DOUGLAS) Let's take a look at
11 Exhibit 91, please. And this is an e-mail chain on
12 the same subject between you and Terri Loiselle. Is
13 that correct?

14 A. I believe so.

15 Q. And she is at Ave Maria; is that correct?

16 A. I believe that is correct too.

17 Q. Do you know what her title is there?

18 A. I think she is the principal.

19 Q. And I'm not going to, in the interests of
20 time, go through the details, but she was very
21 opposed, as well, correct?

22 A. May I have a second?

23 Q. Sure. You can take a look at it. Take
24 whatever time you need, actually.

25 A. Well, I can tell from the first line that

1 she says it's a deal breaker.

2 Q. And then the very top of this e-mail is a
3 response from you to her where you say, "The Board of
4 Education reviewed the draft policy last night. It
5 appears that it will move forward in its current form,
6 which includes the provision of an optional waiver for
7 families to opt out of faith-based services."

8 So that's where you cut out the religious
9 instruction, correct?

10 A. That's part of the final product, yes.

11 Q. And you say, "I have spoken with several
12 schools that feel this is a workable compromise in
13 order to give the scholarship program the best chance
14 of being implemented at religious schools." Correct?

15 A. That was one of the things we were trying
16 to do, yes.

17 Q. It was important for Douglas County for
18 the program to have the participation of religious
19 schools, correct?

20 A. I don't know if it was important, but it
21 was -- it was my effort to take as many schools as
22 possible. And there are a large number of religious
23 schools.

24 Q. If you didn't have the religious schools'
25 participation, you wouldn't have much of a program,

1 would you?

2 A. Not at this point, no.

3 Q. And that's why you spent so much time and
4 energy on this opt-out, correct?

5 A. Yes.

6 Q. Take a look at Exhibit 97, please. Look
7 at the bottom of this page, Exhibit 97. This is an
8 e-mail from you to Robert Ross and Dan McMinimee,
9 correct?

10 A. It's between me and legal counsel and
11 cc'd to Dan McMinimee.

12 Q. Yes. And that's March 28th, correct?

13 A. Correct.

14 Q. So about two weeks after the adoption of
15 the program.

16 A. Correct.

17 Q. You say, "This morning we described the
18 opt-out as attendance, but not participation. For
19 example, attend chapel services, be respectful of the
20 ceremony, but no expectation to pray, sing, or recite
21 prayers." Right?

22 A. Yes.

23 Q. When you say, "This morning we
24 described," what were you referring to?

25 A. I don't recall. I can assume that we

1 must have had a conversation.

2 Q. Who's we?

3 A. I don't recall.

4 Q. Okay.

5 A. But obviously, I would assume it was the
6 members -- or the people I sent the e-mail to.

7 Q. All right. And if we go up, Rob Ross
8 responds to that description of your opt-out. And
9 that's the way it is now? That's the way it ended up?

10 A. Yes.

11 Q. And his entire response to you is, "Not
12 much of an opt-out," right?

13 A. Yes.

14 Q. Let's take a look at Exhibit 96, please.
15 So first of all, we can agree that the way the opt-out
16 is worded, the key is, you can opt out of what are
17 called religious services, right?

18 A. Yes.

19 Q. And there's no specific definition of
20 what religious services are in the program materials,
21 is there?

22 A. No.

23 Q. And so this is an e-mail exchange that
24 you had with Ken Palmreuter? Is that how you say his
25 name?

1 A. I don't know how to say his name. Sorry,
2 sir.

3 Q. Okay. But this is an e-mail exchange you
4 had with what appears to me to be Ken Palmreuter of
5 Trinity Lutheran?

6 A. Yes.

7 Q. And he's specifically, if you look at the
8 top, asking for an explanation of religious services,
9 as stated in the application, to participate as a
10 private school partner. Do you see that?

11 A. He's asking for clarification of the
12 conversation we'd had around that.

13 Q. You had had a phone conversation with him
14 regarding this?

15 A. I believe he actually came to meet with
16 me in person.

17 Q. And the meeting was for what purpose?

18 A. He was preparing an application to be a
19 partner school and wanted to get some questions
20 answered.

21 Q. All right.

22 A. This was one of them.

23 Q. Do you remember the subject of the other
24 questions?

25 A. No. Actually, I don't.

1 Q. Okay. But the opt-out -- or the
2 definition of religious services was one of his
3 questions that you discussed, right?

4 A. Yes.

5 Q. And he followed that with an e-mail
6 setting out his understanding of how that would be
7 defined, correct?

8 A. Yes.

9 Q. And that's -- if you scroll down a little
10 bit, that's what he describes here. "Religious
11 services are worship services they are required to
12 attend but not participate."

13 We already talked about that. That's
14 what he says, right?

15 A. Yes.

16 Q. Then further down, in the paragraph that
17 starts, "Are parents permitted to exclude their
18 student from religious services," he says, yes, they
19 may. And this is his understanding again, right?

20 A. Yes. That's one of the questions from
21 the application.

22 Q. Okay. He says, yes, they may exclude
23 them from active participation, but they're required
24 to attend. And they just -- they don't have to
25 actively participate, he says, so long as the child or

1 parent does not call attention to the child's
2 non-participation. Right?

3 A. Yes.

4 Q. And you tell him -- and we can look at it
5 from each of it -- that that part of how he defines
6 religious services is accurate, right?

7 A. Correct.

8 Q. Then in his last sentence says,
9 "Scholarship students will not be exempt from
10 religious instruction or any other religious activity
11 during the school day." That's what he tells you,
12 right?

13 A. That's what he tells me.

14 Q. And if we go to the next page, your
15 response to him -- let's go up a little bit. Sorry.
16 Down. Under number 3, if we look at the third line
17 down on the far right, it says, "This first part meets
18 the intended recognition." So that's the first part
19 that we just talked about.

20 A. Correct.

21 Q. "However, the part after 'or' may need to
22 be defined." And that's, "Could religious activities
23 during the day be mistaken for services." Right?

24 A. Yes.

25 Q. So there was some question as to what --

1 whether further religious activities during the day
2 would be services or not, right?

3 A. This was the first time someone ever
4 referred to religious activities.

5 Q. And you write in the next paragraph that
6 what you want to do is work this out with him
7 one-on-one, right?

8 A. Correct.

9 Q. "Because services vary between faiths and
10 institutions, the waiver will include unique specifics
11 for each individual school. It's not a one waiver
12 fits all. You and I can work together to make sure it
13 is comprehensive after your application is submitted."
14 That's what you told him, right?

15 A. I did.

16 Q. Did you, in fact, work directly with
17 Mr. Palmreuter or someone else at Trinity Lutheran on
18 the definition of religious services that would apply
19 at their school?

20 A. He has not requested that.

21 Q. Have you done that with any other
22 schools?

23 A. Not yet.

24 Q. But it's your understanding, as part of
25 your role in implementing this program, that you may

1 well need to work out with each individual private
2 partner school what constitutes religious services at
3 those schools that could be opted out of, correct?

4 A. The final paragraph of the contract
5 requires them to provide one, and I am always
6 available to help.

7 Q. To provide what?

8 A. An opt-out waiver.

9 Q. Well, let's say if there's a dispute
10 between a program student and a private partner school
11 about whether a particular religious activity during
12 the day is something they can opt out of, who resolves
13 that dispute?

14 A. We would definitely help resolve that
15 dispute.

16 Q. You would get involved in that dispute?

17 A. If they asked, yes.

18 Q. So as far as helping the schools and the
19 students figure out what is a religious service and
20 what is not, you intend to be involved in that
21 process; is that right?

22 A. If they wanted our advice, we would give
23 it, yes.

24 Q. Dr. Cutter, are you familiar with the
25 filings in this case relating to the intervenor

1 families? The Oakley family in particular?

2 A. I don't think so. But --

3 Q. Have you read any of the materials that
4 were submitted by the Oakley family or their counsel
5 about Diana Oakley or her son Nate?

6 A. I have not.

7 Q. Are you aware that one of the intervenors
8 in this case is a student who has attended Douglas
9 County schools in the past and has Asperger's
10 syndrome?

11 A. I am familiar with Nate, if that's what
12 you're asking.

13 Q. You are familiar with Nate.

14 A. I am.

15 Q. How are you familiar with Nate?

16 A. He had a bullying issue at one of our
17 schools that we had to work through this past year.

18 Q. Based on what you know about Nate's
19 situation and his needs, do you believe that Douglas
20 County was providing a free appropriate public
21 education to Nate?

22 THE COURT: What point in time?

23 Q. (BY MR. DOUGLAS) Well, let's go with last
24 school year. Do you believe that Douglas County has
25 provided a free appropriate public education to Nate?

1 A. Yes.

2 Q. If Douglas County determined that it was
3 not providing a free appropriate public education to
4 Nate, and if Humanex Academy was determined to be a
5 place that can provide free and appropriate public
6 education to Nate, then Douglas County would be
7 required to pay the entire tuition that Humanex under
8 those circumstances; is that correct?

9 MR. BINDAS: Objection to foundation.
10 The IEA is a very complicated statute. It does have
11 reimbursement procedures that require lawsuits against
12 the district to get reimbursement.

13 THE COURT: And he's asking the
14 superintendent of the school district. Assistant
15 superintendent. I would hope he knows something about
16 the subject. Let's let him test his knowledge,
17 Mr. Bindas. Objection is overruled.

18 A. That is correct.

19 MR. DOUGLAS: Your Honor, I have no
20 further questions.

21 THE COURT: Any further inquiry from
22 the plaintiff? Mr. McCarthy, no inquiry?

23 MR. MCCARTHY: No further inquiry, Your
24 Honor. I believe that we have -- we have agreed with
25 defense that they may examine Dr. Cutter on anything

1 that they needed to question him about with respect to
2 their case in chief. And I'd reserve the right to
3 examine, as necessary, following that.

4 THE COURT: That's typically what I'll
5 do in this scenario, let you broaden the scope of your
6 examination to incorporate the testimony that's been
7 given.

8 So Mr. Hall is standing, so I presume
9 he's going to start asking questions. Mr. Hall, the
10 floor is yours.

11 MR. HALL: Yes, Your Honor. Thank you.

12 DIRECT EXAMINATION

13 BY MR. HALL:

14 Q. Good morning, Dr. Cutter.

15 A. Good morning.

16 Q. Again, you are the assistant
17 superintendent for elementary education; is that
18 correct?

19 A. I am.

20 Q. So you deal with primarily elementary
21 education?

22 A. Yes.

23 Q. Does every school in Douglas County serve
24 all grades, K to 12?

25 A. No.

1 Q. And the Choice Scholarship Program is one
2 program offered in Douglas County?

3 A. Yes.

4 Q. Is every school in Douglas County
5 equipped to serve the needs of every single student at
6 Douglas County?

7 A. No.

8 Q. What would be an example of a situation
9 where a student couldn't be served by one particular
10 school in Douglas County?

11 A. Highly gifted students have center based
12 programs located throughout the district where their
13 needs could be met. Special ed services are limited
14 based on needs. So we have specialized personnel at
15 different buildings.

16 Q. So just to take those examples, if a
17 parent with a -- either one -- highly gifted child,
18 for instance, came to a specific school and said, my
19 child needs these additional services, and they
20 weren't provided at that particular school, what would
21 the district do?

22 A. We would try to help the parents choose
23 to go to a school that had a center based highly
24 gifted program called Discovery.

25 Q. And could a parent in that situation

1 demand that those other services be provided in the
2 specific school they want?

3 A. The parent could demand it.

4 Q. Would the district have to provide it?

5 A. We can -- we can supplement the needs of
6 a lot of our students in all of our schools, but
7 actually often specialized stuff that you're saying a
8 parent was demanding, they'd have to go to the
9 Discovery program.

10 Q. And let's take the example of special
11 education and faith, because the plaintiffs talked
12 about that. Again, if there's a certain child who has
13 certain special needs, what's the process for a
14 district ensuring that faith is met?

15 A. First, I shall add, a student -- we have
16 a whole process where a team reviews the IET regularly
17 to make sure that those needs are being met, and then
18 we meet them.

19 Q. And what if those needs can't be met at
20 one specific school in the district? What happens
21 then?

22 A. We would provide transportation for that
23 student to go to a school that can meet those needs.
24 Or the parent can choose to not do it and stay at
25 their school.

1 Q. So parents have the option to not accept
2 some special ed services if they want.

3 A. There is a right of refusal.

4 Q. Dr. Cutter, does Douglas County provide
5 full day kindergarten?

6 A. Yes.

7 Q. Do all the elementary schools provide
8 full day kindergarten?

9 A. No.

10 Q. Who is it up to as to whether full day
11 kindergarten is provided at some elementary schools or
12 others?

13 A. It's a school decision based on demand.

14 Q. And does Douglas County charge tuition if
15 a parent wants whole day kindergarten?

16 A. We have to charge tuition for the second
17 half of the day.

18 Q. And if a parent can't or doesn't want to
19 pay tuition for full day kindergarten, what's their
20 option?

21 A. Well, they -- it's a choice to do it, so
22 they don't have to. And sometimes there are
23 opportunities to help supplement or pay for
24 programming on their behalf through our parent
25 associations or other entities.

1 Q. Now, you mentioned yesterday during your
2 testimony that Douglas County has partnered with
3 another -- I think it was foundation -- Ace
4 Foundation? Is that correct?

5 A. Ace Alliance.

6 Q. Could you describe a little bit more what
7 Ace Alliance is?

8 A. To my understanding, Ace Alliance is a
9 Denver-based philanthropic organization that helps
10 support students from free and reduced income families
11 attend private schools or alternative choice schools
12 that come with a cost.

13 Q. And is that a private organization?

14 A. I believe it's a private organization.

15 Q. Okay. And the partnership in Douglas
16 County is working with Ace Alliance to help on the
17 Choice Scholarship Program specifically?

18 A. Right now, that is the only partnership
19 we have with them under the Choice Scholarship
20 Program.

21 Q. And it's to provide additional funds in
22 case some families can't cover the difference for the
23 partner school; is that correct?

24 A. They're offering more tuition assistance.

25 Q. Let's go back and let me ask you, when

1 did you first hear about the Choice Scholarship
2 Program?

3 A. Sometime around the middle of October.

4 Q. And when did you first actually become
5 involved in developing the program?

6 A. Probably not until the middle of December
7 when it was actually tasked to me.

8 Q. And who tasked it to you?

9 A. The superintendent, Dr. Elizabeth Fagen.

10 Q. And what happened in the interim?

11 A. The option certificates, as it was called
12 back then, was part of a task force of community
13 members. It was one of several recommendations they
14 made to the board in November that would treat -- and
15 it was being developed at that level.

16 Q. And so the board heard about it in
17 November. And then did the board take action in
18 December? What happened in November and December?

19 A. The best way I could describe it is, I
20 believe the board formally received the
21 recommendations of that task force.

22 Q. Okay. And then what did the board do
23 after it received the recommendations?

24 A. They charged the superintendent with
25 looking into them, as well as the things that the

1 superintendent was already looking into, to build a
2 choice initiative and a strategic plan for the
3 district.

4 Q. Okay. So the Choice Scholarship Program
5 is one of a number of choice -- school choice
6 initiatives at that time?

7 A. It was.

8 Q. So then it tasks the superintendent, who
9 then tasks it to you, Dr. Cutter; is that correct?

10 A. Yes.

11 Q. So going forward from December, what did
12 you do then to help develop the program?

13 A. Well, we were going into winter break, so
14 we basically all started to put our minds around what
15 we knew, and I started doing internet searches and
16 trying to read other programs that had been in place
17 and what kind of things they felt they had to include,
18 and things that had been bumps in the road for them.

19 And we came back and realized the first
20 thing we needed to do was make sure we can aid the
21 students. So we set up a meeting with CEE.

22 Q. Okay. There's been a lot of discussion
23 about the meeting with CEE. Just very briefly, how
24 many meetings were there with CEE?

25 A. I was part of two meetings.

1 Q. And again, briefly, from your
2 perspective, what happened at those meetings?

3 A. Well, the first one was sort of, you
4 know, this is what we're thinking. And their response
5 was, you should probably also be thinking about these
6 things. And they gave us input. And we had a
7 conversation around some of the things that might
8 cause us difficulty in creating a program, and some of
9 the things that we might want to consider to make the
10 program viable.

11 Q. And did you and other folks on the
12 administration developing this change the program
13 based upon some of the recommendations?

14 A. Yes. It changed, as we've seen over the
15 last two days. It's been evolving ever since we
16 started with the idea.

17 Q. Were you working within any sort of
18 parameters, general parameters, as to what -- how this
19 program should come out?

20 A. Well, the first parameter was, we wanted
21 to create more choice for our students and families.

22 And the second one that I operated under
23 was, we needed to make it financially viable.

24 Q. And what does that mean?

25 A. We couldn't -- we couldn't do a program

1 that cost the district dollars.

2 Q. Do you think you met those parameters?

3 A. At this point, we have, yes.

4 Q. So there's been discussion about you
5 working with private schools. Describe how you
6 approached your work with the private schools.

7 A. Well, at first, we had a good sense that
8 there was definitely a demand for this, based on the
9 task force work.

10 What we didn't know is whether or not we
11 actually had schools that wanted to participate. So
12 our first effort was to kind of reach out. We sent a
13 survey to about 105 schools that were in a proximity
14 close to Douglas County, using the criteria of
15 eligibility. And then we followed up by making
16 one-on-one meetings with some of the heads of schools,
17 talking to them about some of the survey data and
18 conditions of eligibility.

19 Q. Okay. I want to stop you right there.

20 You sent an e-mail, which is
21 Exhibit 75 -- I don't think we looked at it -- where
22 you talked about identifying hot spots. And you just
23 said, here are some red flags. What were some of
24 those -- the primary hot spots or red flags that you
25 found from the survey?

1 A. Some of the original ones were the
2 financial data that we were originally going to
3 request. And then what came of the discussions really
4 was, the heads of schools that we met with were really
5 afraid that we were going to tell them how to run
6 their school.

7 Q. Any others besides those two? Financial
8 and tell them how to run the school?

9 A. That's what I can remember.

10 Q. Okay. And then did you speak with any
11 organizations that deal with private schools?

12 A. There is one organization in Colorado
13 called the Association of Colorado Independent
14 Schools. They represent 36 private schools throughout
15 Colorado. I had several -- not several. I had two
16 phone conversations with Lee Quimby, who is the
17 executive director of that organization, around
18 materials that had been sent out.

19 Q. And what was the -- did you learn
20 something more about, you know, how to move forward
21 with working with private schools from that
22 conversation?

23 A. Lee Quimby was very generous with his
24 time. He even wrote us a letter and gave us
25 recommendations, one of which was that a lot of the

1 schools that I was approaching were nationally
2 accredited and already gone through many of the things
3 that were on our original conditions of eligibility.

4 He is suggested that we use the national
5 accreditations that covered our conditions of
6 eligibility as one of our conditions, so that we could
7 work with those schools in a less evasive way.

8 Q. Okay. And then again to bring you back
9 into where you were testifying in your chronology. So
10 you sent out the survey, you identified some hot spots
11 and concerns, and then you were, I believe, saying you
12 talked to some of the schools personally. Is that
13 correct?

14 A. Yes.

15 Q. What was your goal throughout this
16 process as you did this information gathering of
17 potential partner schools?

18 A. Well, first and foremost, we wanted to
19 build relationships with these schools, so that we
20 could move forward with talking about conditions of
21 eligibility.

22 We wanted to talk to them about their
23 schools, so that we had a good impression of what it
24 was they were offering and delivering so that we could
25 build the necessary criteria to evaluate them

1 formally.

2 Q. Okay. And as part of that, did the
3 opt-out discussion come up when you were talking with
4 religious schools?

5 A. It was on the survey, and it did come up
6 occasionally, yes.

7 Q. And then you just were examined about
8 some of those e-mails going back and forth. If you
9 can look at Exhibit 86. And specifically go to the
10 second page, which again you just looked at a moment
11 ago. This is with Reverend Steele. All I want to
12 call your attention to is the language there, "Pick
13 your brain," and then the language in the next
14 paragraph.

15 What I want you to do, Dr. Cutter, is to
16 compare that to Exhibit 88 and again the language in
17 that e-mail that you sent out to a whole host of
18 schools two days later, on March 7th. Have you done
19 that, Dr. Cutter?

20 A. Yes.

21 Q. Is that language substantially similar?

22 A. There was a conscious effort to use
23 similar consistent language through my e-mails, yes.

24 Q. Why was it a conscious effort to use
25 similar language?

1 A. Because I wanted their responses to the
2 exact same question.

3 Q. And then if you continue to look at
4 Exhibit 88 and see your response -- and this is with
5 Tia Reed. You have this response: "Just a thought.
6 We make a difference if opt-out waiver is for services
7 only."

8 Was that a consistent follow-up response
9 that you sent to partner schools?

10 A. Yes. I used that same follow-up response
11 with everyone.

12 Q. Okay. So, Dr. Cutter, were you trying
13 to, the best you could, deal consistently with all the
14 schools on this issue?

15 A. That was my intention.

16 Q. Okay. And then, as you just testified
17 to, ultimately, the policy has an opt-out for
18 religious services. Correct?

19 A. Correct.

20 Q. And in your discussions about this
21 opt-out on religious services, what does that term
22 mean?

23 A. Can you ask me again? Sorry.

24 Q. Sure. In your discussions on religious
25 opt-out for religious services, what does the term

1 "religious services" mean?

2 A. In short, anything outside of the
3 curriculum.

4 Q. Okay. And then there are also some
5 questions about participation versus --

6 THE COURT: Attendance.

7 MR. HALL: Attendance. Thank you.

8 Q. (BY MR. HALL) Participation versus
9 attendance. Describe the distinction there.

10 A. One of the -- one of the ways that we
11 referred to defining it for the school's benefit was
12 that we did think that it would be within the intent
13 of religious -- opting out of religious services that
14 they may require attendance at these extra -- beyond
15 the curricular services, for example, mass, the
16 stations of the cross, whatever it may be that they
17 offer, morning prayer. But that there wasn't an
18 expectation around them participating. It was really
19 just a sign of respect, since they are attending an
20 institution that does have faith-based beliefs, but
21 not a necessary commitment to that faith.

22 Q. Okay. And then that language was
23 specified further in the contract between the district
24 and the partner schools, correct?

25 A. I believe so, yes.

1 Q. So let's look at that in Defendants'
2 Exhibit F, which has been stipulated for admission.
3 And specifically, Dr. Cutter, if you could look on
4 page 4, and at item number 10, which is at the top of
5 page 4.

6 Now, Dr. Cutter, just to orient everyone,
7 this is the template contract for Douglas County
8 partner schools; is that correct?

9 A. Yes.

10 Q. And this contract has been used with
11 every partner school that signed the contract,
12 correct?

13 A. Correct.

14 Q. And the language here on page 4, item 10,
15 is the description of the opt-out of the contract,
16 correct?

17 A. Correct.

18 Q. And there it makes the distinction as to
19 participation, correct?

20 A. Yes.

21 Q. Has this contract language been applied
22 consistently with every religious partner school?

23 A. Yes.

24 Q. And we could, if we wanted, look at every
25 single contract, because they're all of record, and

1 see that that's the case, correct?

2 A. Correct.

3 Q. So, Dr. Cutter, from your perspective,
4 there is a rule that the district is applying to all
5 religious schools, correct?

6 MR. DOUGLAS: Your Honor, I have to
7 object as leading at this point.

8 THE COURT: Sustained.

9 Q. (BY MR. HALL) Dr. Cutter, how is the
10 opt-out applied to religious schools?

11 A. Every partner school has signed the exact
12 same contract and has agreed to follow it.

13 Q. Now, in your discussions with religious
14 partner schools, did you discover that the partner
15 schools have different specific things that vary as to
16 religious services?

17 A. We originally went in thinking that --
18 before designing the contract, that we would be
19 designing the opt-out waiver. We found that that was
20 impossible to do for every school. And it's not a one
21 waiver fits all because of the differences in
22 programs.

23 We realized that the schools had to take
24 that as written in this number 10 on their own to be
25 able to define all of the services that they provide.

1 Q. So what are some examples of just
2 different instances that you came across as you were
3 doing the investigation where different schools would
4 have different instances of opt-out of services?

5 A. Frequency of mass would be one. Stations
6 of the cross, which is a language I can't explain, but
7 I've heard from only a few schools, not all. Whether
8 they all pray in the morning or they do it once a
9 week. It's just -- it really is different.

10 Q. But from your perspective, has the
11 district treated all those schools in the same manner
12 as this opt-out?

13 A. We have tried to treat all schools the
14 same.

15 Q. And how so, specifically as to the
16 opt-out?

17 A. That the expectation for all of the
18 faith-based institutions provide one that reflects
19 what it is they offer.

20 THE COURT: Can I interject for a
21 second, Mr. Hall?

22 Mr. Cutter, so if I understand what
23 you're telling me, you're saying that because of the
24 unique differences in individual schools and perhaps
25 the religion they may practice, that the -- you

1 decided to leave it up to the school to determine what
2 the content of the waiver would be, what they're
3 willing -- and then present that to each parent? Is
4 that what you're telling me?

5 THE WITNESS: Present to each parent that
6 comes to the school equally, yes.

7 THE COURT: Right. Each applicant the
8 same language, whatever their waiver may be. So
9 Ave Maria, for example, may have a different waiver
10 than the Rock Academy.

11 THE WITNESS: That includes the services
12 they provide, yes.

13 THE COURT: Okay.

14 Q. (BY MR. HALL) And, Dr. Cutter, that's
15 part of -- I believe it's Exhibit B of the contract,
16 correct?

17 THE COURT: Exhibit B or paragraph B?

18 MR. HALL: Pardon me. Actually, it's
19 Exhibit B to Exhibit F. So Exhibit F is the template.
20 And to that Exhibit F, there's an Exhibit B. And I
21 believe that's where the partner schools describe the
22 services.

23 Q. (BY MR. HALL) I'm sorry. That's
24 incorrect. Let's look back at Exhibit F, item 10.
25 That's where it is.

1 So, Dr. Cutter, if you're back on page 4,
2 item 10, do you see there in the language of the
3 contract, it says, "Religious private schools shall
4 provide Choice Scholarship parents with the
5 description of any religious services in which its
6 students participate"? Do you see that?

7 A. Yes.

8 Q. Is that what you're referring to?

9 A. Yes.

10 Q. Okay. Then, Dr. Cutter, the policy was
11 approved by the board on March 15th; is that correct?

12 A. Yes.

13 Q. And then moving forward from March 15th,
14 you assisted in implementing the program, correct?

15 A. I did.

16 Q. And you, I think, made a reference
17 yesterday that you became, in a way, the Choice
18 Scholarship office during that implementation time.

19 A. Basically, I was the office, yes.

20 Q. Did you work with partner schools and
21 families going forward from there?

22 A. We did.

23 Q. All right. Let's talk about partner
24 schools first on the implementation side after March
25 15th.

1 How many partner -- private schools
2 inquired into the program?

3 A. I'm not sure. I think there were close
4 to 50 that were originally interested, that had
5 expressed an interest.

6 Q. And how many actually applied?

7 A. We're still receiving them. I think
8 we're at 32.

9 Q. Okay. And how many have been accepted,
10 to date, the best you know?

11 A. I believe that today's count is 23.

12 Q. Okay. Dr. Cutter, during this
13 implementation phase, were there any public meetings
14 about the program?

15 A. We held -- we held three public meetings
16 in the three different areas about within Douglas
17 County at the end of February. I believe the dates
18 are the 22nd, 23rd, and 24th.

19 Q. And what happened at those public
20 meetings?

21 A. The intent was to share the drafts of the
22 strategic plan for the district. We knew that the
23 scholarship program was something that we wanted to
24 put in front of everybody, so we emphasized that
25 component of our strategic plan draft more than

1 anything else.

2 Q. Did information about the program get
3 posted to the district website?

4 A. I believe it did, yes.

5 Q. And was there information about the time
6 line for implementation?

7 A. There was, yes.

8 Q. And did you have a time line in your mind
9 as to how implementation was going to work?

10 A. I did have an idea of how it would work.
11 It did change, though.

12 Q. Were you working against the beginning of
13 school this year?

14 A. That was one of a couple of factors. We
15 wanted to have a menu of schools that the
16 participating families would be able to have an
17 awareness of, so that they could apply for a
18 scholarship knowing their options of where they could
19 use it.

20 Originally, we felt that was a priority.
21 We've learned since then that it shouldn't have been.

22 Q. What happened?

23 A. Because we had a deadline for schools to
24 apply. And after that deadline passed, we had
25 another, you know, half a dozen schools come up to us

1 and wanted to apply, and our objective for this was to
2 provide as much choice as possible, so we want to
3 entertain those applications.

4 Q. At any point in this process, did you
5 prefer religious over non-religious schools, or vice
6 versa?

7 A. No, sir.

8 Q. Did you also -- was there also a process
9 to do with the families that were interested?

10 A. There was. Point of contact was Tammy
11 Taylor.

12 Q. And she's your assistant?

13 A. She's my assistant.

14 Q. How much were you involved in dealing
15 with the families?

16 A. I tried to be involved as much as I
17 could. But I did delegate a lot of the work.

18 Q. Are you aware of the general time line as
19 to how families applied and were accepted?

20 A. Yes.

21 Q. Could you describe that?

22 A. Well, we put out a two-week window for
23 the application to be completed and submitted. We
24 collected those at the end of the two-week period. We
25 had 497 that met our conditions of eligibility.

1 Q. Did you have more families apply than
2 were accepted?

3 A. Yes. We had over 600 applications.

4 Q. And then you had 497, and that was in
5 May. And then did you have a lottery later on?

6 A. We discussed it and felt that we really
7 did want to fulfill the pilot program's original
8 parameters, and that was to get 500 families involved
9 in this.

10 It made sense to reopen another window
11 where we got nearly 80 more applications. And because
12 we only had -- we had less spots -- less scholarships,
13 we did use a lottery, and so we drew all the names.
14 And as people now apply, which we've been receiving
15 more applications since that, we add them by the date
16 stamp that we applied to the end of the weight list.

17 Q. Okay. And so now as it stands, there are
18 500 families participating?

19 A. There are 500 scholarships. Monday, the
20 number I got was 271 had been accepted to one of our
21 partner schools. But all 500 scholarships have been
22 allocated to a family.

23 Q. And what's the difference between 500 and
24 the 271? Do you know?

25 A. Part of the program is -- we've taken

1 them as two different entities, the partnership of the
2 families and the partnership of the schools. So it's
3 on the family to actually be accepted to one of the
4 partner schools. And as they get accepted, we then
5 process the scholarship.

6 Q. Has the district taken any role in how
7 families match with partner schools?

8 A. No. Actually, we've encouraged families
9 to make those choices to the best of their ability.

10 Q. Now, at some point, Dr. Cutter, is it
11 true that you did a financial analysis as to the
12 break-even point, if you will, for this program being
13 a financial benefit for the district?

14 A. We did. We did want to make sure that we
15 used our best judgment to make the program financially
16 viable. So when we did the presentations to the
17 community members in the forums in February, we
18 projected what the costs would be to oversee the
19 program and to try to get within the 25 percent that
20 we were keeping as a district.

21 And we found, again, because the program
22 is brand new, to the best of our judgment, that the
23 program broke even after 200 students.

24 Q. Okay. Now, there were questions posed to
25 you about litigation deadlines and payments made. Do

1 you remember those questions?

2 A. Yes.

3 Q. So you're aware that this case was filed
4 on June 21st, correct?

5 A. I am.

6 Q. You are aware that the plaintiffs filed a
7 motion for preliminary injunction on July 5th,
8 correct?

9 A. Correct.

10 Q. At that time, were you monitoring the
11 court filings in the district?

12 A. No.

13 Q. You know that the payments first went out
14 in July, correct?

15 A. Yes.

16 Q. Do you know when in July?

17 A. I don't know the exact date.

18 Q. Was it early July?

19 A. Yes.

20 Q. Did the payments going out in early July
21 have any correlation with the litigation filings?

22 A. Not to my knowledge.

23 Q. And again, when you were testifying
24 before, you expressed an interest in explaining the
25 motivation for sending the money out early. Could you

1 do that now?

2 A. Well, you know, we're in a customer
3 service business, so we try to facilitate as much
4 positive movement within everything we do.

5 In this case, you know, I'd heard that
6 families that were receiving the tuition were
7 depending on the tuition. And for some, it was the
8 decision to actually enroll their child into one of
9 the private school partners. And they wanted to start
10 using the dollars that we were going to support them
11 with towards the tuition throughout the year.

12 Given that, it just seemed prudent to
13 assist them sooner than originally planned.

14 Q. Have there been discussions along the way
15 about how to make this program better going forward?

16 A. Yes. We're constantly improving it. The
17 application of the policy has shown us different ways
18 to achieve the ultimate goal of the policy. The
19 Choice Scholarship office versus the charter school is
20 one of those appropriate adjustments that was needed.

21 Q. Could you look at Exhibit 101. This is a
22 letter from Robert Bignell to you and Dan McMinimee on
23 April 15th, 2011; is that correct?

24 A. Yes.

25 Q. And if you would just read that second

1 paragraph to yourself. And again, this is
2 Mr. Bignell's characterization. Do you agree with the
3 characterization that's in that paragraph?

4 A. For the most part. Although, I wouldn't
5 have called it an interview.

6 Q. Okay. And did Cherry Hills apply to the
7 program?

8 A. Yes, they did.

9 Q. Did they ask to satisfy the conditions of
10 program like the other partner schools?

11 A. Yes, they did.

12 Q. And did they sign a contract with the
13 district?

14 A. They did.

15 Q. And will Cherry Hills be evaluated like
16 any other partner school under the policy?

17 A. They will.

18 Q. Now, will Douglas County try to run
19 Cherry Hills day to day?

20 A. No.

21 Q. If you'd look at that last paragraph
22 where Mr. Bignell writes, "If our application and
23 christian approach are acceptable to the district, we
24 look forward to partnering with you in the exciting
25 new venture." Do you see that language?

1 A. I do.

2 Q. Did you or anyone at the district
3 evaluate anyone's approach to christianity or any
4 other religion?

5 A. No. It's not part of our conditions of
6 eligibility.

7 Q. Did the district evaluate Cherry Hills'
8 application?

9 A. Yes.

10 Q. To make sure it satisfied the conditions
11 of eligibility?

12 A. Exactly.

13 Q. But as to any religious school's approach
14 to their religion, do you take any involvement in
15 that?

16 A. No, sir.

17 Q. Finally, Dr. Cutter, you're aware that
18 plaintiffs are requesting this program to be halted,
19 correct?

20 A. Yes.

21 Q. Can you speak about, if the program were
22 halted, what would be the effect on Douglas County
23 schools?

24 A. Well, I think, on the schools, it could
25 be very -- it could create a lot of hardship for

1 several of our schools.

2 Q. How so?

3 A. Well, we've already started 32 of our
4 schools.

5 Q. I'm sorry. Douglas County already
6 started classes?

7 A. Yeah. 32 of our schools have already
8 begun class this week.

9 Q. When --

10 A. Starting on Monday.

11 Q. Starting Monday. Okay. Keep going.

12 A. So those students would miss out on that
13 first day of school where, you know, everybody is new
14 and they get a sense of what's going on. They get a
15 sense of being part of a group that is discovering the
16 school year for the first time, no matter if they've
17 been to the school or not.

18 They'd be missing out on all the
19 expectations around what goes with the classes that
20 they're attending. Should there be several students
21 in the same class, the hardship on the rest of those
22 students -- we already have, because of budget
23 reasons, high class ties. We're at 29 to 30 per class
24 routinely through our out district.

25 If you start putting a couple more kids

1 back into those schools at this time of the year,
2 you're no longer in the below 30s, which not many of
3 our parents would continue to support. We're now
4 looking at perhaps creating another section in that
5 grade, bringing in a new teacher. That comes with
6 financial cost. It's also a distraction to the entire
7 grade, because now we have to take some students from
8 other classes to balance it out. And parents
9 generally aren't in favor of doing that with their
10 child.

11 It may also cause, you know, a split
12 class because of the number breakdown, which means,
13 you know, you're affecting two grades and then you're
14 having something ripple throughout the district.

15 Q. Have athletic programs started at the
16 district already?

17 A. Well, for the high school students that
18 would be returning, they'd get their core content, of
19 course, but their electives may be limited based on
20 preselection.

21 If they started to try out for a school
22 team or have practiced with them, including like
23 marching band, then a transfer wouldn't allow them --
24 because they have to get a year up on those sports,
25 and if they transferred at this point into a school

1 that already started -- or already started practicing.

2 Q. And Douglas County has charter schools,
3 as well, correct?

4 A. Ask me that again.

5 Q. Douglas County has charter schools?

6 A. We do. We have 11 charter schools.

7 Q. And some of the Choice Scholarship
8 families left those charter schools, correct?

9 A. I believe that is true, yes.

10 Q. And do those -- do the charter schools in
11 the district have waiting lists?

12 A. That's what I'm aware of, yes.

13 Q. And so if a scholarship student left the
14 charter school, would that seat be filled?

15 A. It would be, yes.

16 Q. Would they be able to get back into that
17 charter school?

18 A. I can't speak on behalf of the charter
19 schools, but my experience with them would be no.

20 MR. HALL: Thank you. Those are all my
21 questions.

22 THE COURT: All right. Mr. Bindas?

23 DIRECT EXAMINATION

24 BY MR. BINDAS:

25 Q. Good morning, Dr. Cutter.

1 A. Good morning.

2 Q. I'm fairly certain you're very familiar
3 with the Individuals with Disabilities Education Act.
4 Is that correct?

5 A. I am.

6 Q. So you testified that if a district
7 determines that provision of a free and appropriate
8 public education requires placement of a special needs
9 child at Humanex Academy, the district would have to
10 pay for it. Is that correct?

11 A. That is correct.

12 Q. So if the district determines that
13 provision of a free and appropriate public education
14 requires placement in a private school, the district
15 can pay for that education.

16 A. Yes.

17 Q. And when we're talking about a free and
18 appropriate public education, we are talking about
19 what the district deems a free and appropriate public
20 education; is that correct?

21 A. Yes, sir.

22 Q. If a parent of a special needs child
23 doesn't agree with the district's determination of
24 whether the services her child was receiving are
25 appropriate, and that only a private school can

1 provide what is an appropriate education, can the
2 parent place their child in a private school?

3 A. Can they place them at their own
4 discretion?

5 Q. Yes.

6 A. Yes, sir.

7 Q. And is the district obligated to pay the
8 private school's tuition in that case?

9 A. No, sir.

10 Q. Who pays for it?

11 A. The parent who chose to put their child
12 there.

13 Q. Okay. And I'll represent to you that the
14 plaintiffs have argued in their briefing that the
15 parent can be reimbursed for the tuition in that
16 situation. Is that correct?

17 A. I'm not aware of a program that
18 reimburses private school tuition.

19 Q. Okay. And is there any mechanism that
20 you're familiar with under the Individuals with
21 Disabilities Education Act whereby a parent who has,
22 of their own accord, placed their child in a private
23 school to get what they believe is an appropriate
24 education can seek reimbursement from the school
25 district?

1 A. Yes. They can petition, certainly. And
2 if an agreement can't be made, I suppose they could
3 sue.

4 Q. So it would eventually require a lawsuit.

5 A. Yeah.

6 MR. BINDAS: Thank you. No further
7 questions.

8 THE COURT: Any questions, Mr. Blue?

9 MR. BLUE: No.

10 THE COURT: Mr. McCarthy, do you have
11 some re-examination?

12 MR. McCARTHY: I do, Your Honor.

13 THE COURT: About how long do you think
14 you have?

15 MR. McCARTHY: 10 minutes, at most.

16 THE COURT: Take a shot.

17 MR. McCARTHY: Thanks.

18 REXCROSS-EXAMINATION

19 BY MR. McCARTHY:

20 Q. Dr. Cutter, concerning your testimony
21 that the school district made a decision to commence
22 payments in early July on the Choice Scholarship
23 Program, there was no public notice posted
24 contemporaneously with that by the school district in
25 early July, correct?

1 A. No.

2 Q. One of the parameters that you said was
3 very important to you, sir, with respect to the Choice
4 Scholarship Program was assuring that the program was
5 financially viable, right?

6 A. Yes, sir.

7 Q. And, sir, in your role at the Douglas
8 County school district, you had occasion to become
9 familiar with the financial analyses that were done to
10 make sure that the Choice Scholarship Program, the
11 voucher program, was financially viable. Isn't that
12 right, sir?

13 A. Yes.

14 Q. And it's, in fact, the case, is it not,
15 Dr. Cutter, that the Douglas County school district
16 and the school board concluded that the school
17 district would actually come out ahead by implementing
18 the Choice Scholarship Program in terms of being able
19 to retain part of the PPR, correct?

20 A. Correct.

21 Q. And they'd be able to retain in the
22 neighborhood of approximately \$350,000. Isn't that
23 right? On a 500-student basis, right?

24 A. Correct.

25 Q. And so as the number of students would

1 increase potentially -- recognizing this is a pilot --
2 that amount of money that the Douglas County school
3 district could effectively make would increase too,
4 would it not, sir?

5 A. At 500?

6 Q. No. If you increased beyond 500.

7 A. We didn't run the numbers for that.

8 Q. But logic would tell you, would it not,
9 sir, that if you increased the program, you'd make
10 more money, right?

11 A. Well, logic would tell me that there
12 would be a break point where the cost of educating
13 those students would no longer be benefited outside of
14 the district and in the district.

15 Q. But you, nevertheless, would make money
16 as the program grew, would you not, sir?

17 A. No. I don't think so.

18 Q. But you did conclude, did you not, that
19 at 500, you would make \$350,000, right?

20 A. Yes.

21 Q. Because there would be -- you would be
22 doing two simultaneous transactions, for lack of a
23 better word, right?

24 A. What's two?

25 Q. Let me expand. You would be getting

1 money from the state from for PPR of approximately
2 \$6,000 per student, right?

3 A. Yes.

4 Q. And simultaneously, you would be paying
5 out money to the parents and ultimately the private
6 schools of approximately 4500, correct?

7 A. Correct.

8 Q. And so as a result of those two
9 simultaneous transactions, the Douglas County school
10 district would have a surplus, a profit, of
11 approximately \$1500. Isn't that right? Per student.

12 A. Excluding cost of running the program,
13 yes.

14 Q. Well, sir, that would be -- and then
15 taking into account the costs of the program, you
16 analyzed that, did you not, sir?

17 A. I am familiar with the reports that
18 analyzed that.

19 Q. Let me ask you to look at Exhibit 15.

20 MR. McCARTHY: This has not been admitted
21 into evidence by stipulation, but it has been
22 stipulated as to authenticity. And if you could blow
23 that up.

24 Q. (BY MR. McCARTHY) Dr. Cutter, you see
25 this is -- and this is a document that we obtained

1 from the school district. It's a pro forma regarding
2 costs associated with option certificates. And you're
3 familiar with this, are you not, sir?

4 A. Yes, sir.

5 Q. And you're familiar with the numbers that
6 are presented there, are you not, sir?

7 A. I've seen them before, sir.

8 Q. And what we're looking at is, in the
9 revenues column, \$6,100 per pupil revenue right at the
10 top. Do you see that?

11 A. Yes.

12 Q. And so you ran the numbers at 100
13 students and at 500 students, right?

14 A. We did.

15 Q. And so what Douglas County estimated it
16 would do -- it would take in \$3,050,000 from PPR at
17 500 students; isn't that right?

18 A. Correct.

19 Q. And then you ran what it would cost to
20 operate the program, right?

21 A. Yes.

22 Q. At a hundred and at 500, right?

23 A. Yes.

24 Q. And so that, added up, if we go down to
25 the line that says total program overhead in dark

1 letters -- so the overhead costs on the program was
2 \$361,000. 361,199, right?

3 A. Yes.

4 Q. And the scholarship cost -- now, that's
5 what you computed it at the \$4,575 per student, right?

6 A. Yes.

7 Q. So if you add together that total of
8 2,287,500 plus 361,199, you get the total program cost
9 for both the scholarship and Douglas County's
10 administration of 2,648,699. Correct?

11 A. Yes.

12 Q. And I think it's difficult to read
13 because it's dark, but the difference between
14 2,648,000 -- and if you go all the way back up to the
15 top, what we saw at the beginning, the 3 million 50,
16 which is approximately \$350,000, that's what Douglas
17 County would make on this program, right?

18 A. At the time, yes.

19 Q. Right. And as you sit here today, that's
20 currently your estimate of what Douglas County would
21 make, using those numbers, right?

22 A. Well, since then, we've felt that, you
23 know, having that in reserve would be good, just in
24 case there are unforeseen costs or contingencies
25 associated with the program.

1 Q. Having what in reserve, sir?

2 A. Having that surplus of money.

3 Q. Okay. So that surplus you're referring
4 to is the 350.

5 A. Yes.

6 Q. Right. So that's a surplus that Douglas
7 County would make on this program on those numbers;
8 isn't that right, sir?

9 A. It could be, yes.

10 Q. And that, in fact, was part of the way
11 that -- that's one of the things that Douglas County
12 touted to the public about this program, was it not,
13 sir?

14 A. It was included, yes.

15 Q. It was included in how you promoted this
16 program to the public, wasn't it?

17 A. Well, when I promoted it, it was bringing
18 up a cost benefit.

19 Q. It was running a what?

20 A. It was a cost benefit to the district.

21 Q. Right. So you'd have surplus, right?

22 A. Uh-huh.

23 Q. And that surplus came out of the money
24 that came to you from the state, right?

25 A. That's right.

1 MR. McCARTHY: No further questions, Your
2 Honor.

3 THE COURT: Any further questions,
4 Mr. Douglas?

5 MR. DOUGLAS: No questions, Your Honor.

6 THE COURT: Mr. Hall, anything?

7 MR. McCARTHY: I'm sorry, Your Honor. I
8 overlooked. I'd like to move the admission of
9 Exhibit 15 into evidence.

10 THE COURT: Any objection to 15?

11 MR. HALL: No, Your Honor.

12 THE COURT: 15 is admitted without
13 objection.

14 MR. HALL: No, Your Honor.

15 THE COURT: Mr. Bindas?

16 MR. BINDAS: No, Your Honor.

17 THE COURT: The witness may step down.
18 If there's no objection, he'll be excused. Thank you.

19 It's 10:40. Let's take 15 minutes and
20 come back at 10:55. Court's in recess.

21 (Recess taken, 10:38 a.m. to 10:58 a.m.)

22 THE COURT: Please be seated.

23 Returning to the record, 11CV4424. Plaintiffs will
24 call your next witness.

25 MR. MACDONALD: Your Honor, the

1 plaintiffs call Robert Bignell as an adverse witness.

2 Before I do that, Your Honor, can I take
3 up one preliminary matter?

4 THE COURT: Okay.

5 MR. MACDONALD: We filed -- well, we've
6 filed here electronically -- the motion to allow
7 telephone testimony. I have a hard copy for Your
8 Honor, if you'd like one.

9 THE COURT: Yes, please.

10 MR. MACDONALD: The motion, Your Honor,
11 it's just over three pages. The thickness is because
12 as we read the rules, we attached the documents. And
13 I have two for your clerks as well, Your Honor.

14 THE COURT: Thanks.

15 MR. MACDONALD: And I have provided this
16 to counsel.

17 MR. LYONS: Excuse me, Your Honor.
18 May I?

19 THE COURT: Yes.

20 MR. LYONS: Would you prefer we try and
21 file a written response to this by tomorrow morning?
22 Or would you be comfortable with argument?

23 THE COURT: I'm comfortable with
24 argument, Mr. Lyons. But if you guys are comfortable
25 with argument, we'll do it that way.

1 MR. LYONS: Thank you.

2 MR. MACDONALD: Will that be later this
3 afternoon, or will we argue this tomorrow morning?

4 THE COURT: You know, there's two
5 issues here. One question is, if I grant the motion
6 in limine, obviously your request is moot.

7 If I consider the evidence in some other
8 way, would you be able to file a rebuttal and have the
9 witness testify in rebuttal. That is what I said I
10 would rule on before the end of the day today. Okay.

11 And my understanding yesterday was that
12 the defense had an objection to that rebuttal. Is
13 that right?

14 MR. MACDONALD: I think the defendants'
15 objection is to the telephone portion.

16 THE COURT: To the telephone portion of
17 the testimony.

18 MR. LYONS: That's correct, Your Honor.

19 THE COURT: All right. And so the
20 concern was that they -- the witness -- what his
21 cross-examination would be hindered in some fashion
22 without being available by telephone?

23 MR. LYONS: Well, that's part of it, Your
24 Honor. The fact is, this is someone we've never met
25 or laid eyes on. I don't know how the court can

1 assess credibility under those circumstances, which is
2 one of the requirements of the rule, of course, in
3 granting these things.

4 The fact is that we expect some
5 significant cross-examination on this witness' prior
6 writings. It's going to be very difficult to do that
7 if he's not here. If we're required to do that in
8 advance, then we've given them a road map to our
9 cross-examination, which we find to be prejudicial.

10 So basically, that's our opposition. We
11 don't object to them calling Mr. Green. It's the
12 method by which they want to present his testimony.

13 THE COURT: Okay. So I'm fully
14 versed in the objection and the basis for it. I'll
15 make a ruling on your request for rebuttal today,
16 and then we'll argue the motion in limine tomorrow.
17 Okay?

18 MR. MACDONALD: Thank you, Your Honor.

19 MR. LYONS: Thank you, Your Honor.

20 THE COURT: So do we have a witness?

21 MR. MACDONALD: Plaintiffs call Robert
22 Bignell, Your Honor. I believe he's just entered the
23 courtroom.

24 THE COURT: Sir, would you raise your
25 right hand, please.

1 ROBERT BIGNELL,
2 having been first duly sworn to state the whole truth,
3 testified as follows:

4 THE COURT: Please be seated. While
5 you're making yourself comfortable, I'm going to ask
6 that you follow these rules in providing your
7 testimony.

8 It's very difficult to hear and be heard
9 in this courtroom. I'll ask that you do your best,
10 please, to speak up in an auduble level. Use the
11 microphone in front of you. You may adjust it to your
12 comfort. Pull it closer to you. But make sure you're
13 using it.

14 Our proceedings are being recorded by
15 this court reporter in front of us. It's important
16 that you permit the questioner to complete the
17 question that they are asking before you begin to
18 answer. Sometimes human nature is such that we hear a
19 question and think we have an answer, we want to start
20 talking. Please don't do that. Let them finish their
21 question. We'll ask them to extend to you the same
22 courtesy in your answers. All right?

23 THE WITNESS: Yes.

24 THE COURT: Thank you. Mr. Macdonald.

25

1 DIRECT EXAMINATION

2 BY MR. MACDONALD:

3 Q. Good morning, Mr. Bignell. My name is
4 Tim Macdonald, and I represent the plaintiffs in this
5 case. Could you state your name for the record, sir.

6 A. Robert Bignell.

7 Q. And we haven't met before. Could you
8 please state your position, Mr. Bignell.

9 A. I'm superintendent at Cherry Hills
10 Christian.

11 Q. And Cherry Hills Christian is an
12 elementary and middle school; is that right?

13 A. Correct. We also have preschool.

14 Q. Pre-K through eighth grade?

15 A. Correct.

16 Q. And you have applied and been approved as
17 a participant in the Douglas County Choice Scholarship
18 Program; is that right?

19 A. Yes.

20 Q. And you actually were the one who signed
21 the contract with Douglas County?

22 A. I did.

23 Q. And did you help prepare the application
24 to be a private partner school?

25 A. Yes.

1 Q. And as part of your participation in the
2 program -- and at times I will refer to the program as
3 a voucher program. Is that something you're familiar
4 with?

5 A. Yes.

6 Q. You, yourself, have called it a voucher
7 program; is that right?

8 A. I have.

9 Q. As part of the Cherry Hills Christian's
10 participation in the voucher program, you've had an
11 increased enrollment; is that right?

12 A. Our enrollment is actually slightly
13 smaller than it was a year ago.

14 Q. That was an inartful question.

15 Do you know if there are -- do you know
16 how many kids are receiving vouchers from Douglas
17 County to go to your school?

18 A. I know a range.

19 Q. What's that range?

20 A. It's somewhere between 20 and 35.

21 Q. And if we could put up Exhibit RR. This
22 is Defendants' Exhibit RR. If we could blow this up a
23 little bit, so we can see the row with Cherry Hills
24 Christian. Do you see the line for Cherry Hills
25 Christian there?

1 A. Yes.

2 Q. This is an exhibit that the Douglas
3 County school district has provided us. And it was at
4 a time when they had -- as you see at the bottom, on
5 the bottom left, 254 students have been confirmed at
6 that point. And at that time, there were -- let's go
7 back up. Cherry Hills Christian had 31 students
8 confirmed out of the 254. Do you see that?

9 A. Yes.

10 Q. And does that comport with your
11 understanding, at least as of a number of days ago,
12 that there were 31 students that had been part of the
13 program at your school?

14 A. That's consistent with what I said. We
15 have some that are not -- that are Douglas County
16 students that are not yet confirmed voucher receiving
17 students. So that's why I said there are 20 to 35.
18 But that's in the correct range, yes.

19 Q. Do you think there might -- is it fair to
20 say that there are a few more students that may be
21 added to this list?

22 A. I don't know. That might be total.

23 Q. How long have you been a superintendent
24 at Cherry Hills Christian, sir?

25 A. Six years.

1 Q. And as part of your job duties, you
2 report to the executive pastor of the Cherry Hills
3 Community Church?

4 A. That's correct.

5 Q. And you give an annual report to the
6 church board of elders?

7 A. Yes.

8 Q. Focusing on the numbers there, they're
9 broken down by grade level. Do you see that?

10 A. Yes.

11 Q. And let's look at grade 6, if you can.
12 There are seven students receiving vouchers that are
13 in grade 6 going to your school, correct?

14 A. Yes.

15 Q. And is that about 10 percent of your
16 total grade 6 class?

17 A. Yes.

18 Q. About 70 students in the class?

19 A. We'll be -- we may hit 80. I think we
20 were at 76 earlier this week.

21 Q. And let's look at grade 4. There are
22 seven students in grade 4 receiving vouchers, correct?

23 A. Yes.

24 Q. And that's, again, about 10 percent of
25 your grade 4 class?

1 A. Correct.

2 Q. And do you know, sir, are these
3 additional students, in your view, that would be
4 attending Cherry Hills Christian because of the
5 voucher program?

6 A. It's speculation for sure. Because it's
7 the first year, we haven't been able to figure that
8 out. We generally get a number of new students within
9 Douglas County where we reside. So how many of them
10 came because of the voucher or how many of them would
11 have come anyway, I have no idea.

12 Q. Have you talked to any of the parents
13 about whether the voucher helped them make a decision
14 to come to your school?

15 A. I have not.

16 Q. And the tuition that the parents pay
17 helps support the school, correct?

18 A. The tuition that the parents pay pays the
19 costs of running the school. Correct.

20 Q. And that supports the school, correct?

21 A. I guess I would need a better definition
22 of supports.

23 Q. Well, does the money that the parents pay
24 help you to sustain your mission as a school?

25 A. Yes.

1 Q. And it aids the school in its mission,
2 correct?

3 A. Correct.

4 Q. And the mission of Cherry Hills Christian
5 School is to honor Christ by teaching, encouraging,
6 training, and grounding students in God's truth within
7 a dynamic academic environment. Is that a fair
8 description?

9 A. Yes.

10 Q. And an important educational goal of your
11 school is to develop the child spiritually with a
12 deeper understanding of Christ; is that right?

13 A. That is correct.

14 Q. And the school aims to develop a
15 life-long learning within a christian world view for
16 the students; that is right?

17 A. Yes.

18 Q. And is that an Evangelical christian
19 world view?

20 A. Yes.

21 Q. Are students required to attend daily
22 Bible classes?

23 A. All of our students have Bible daily.
24 Correct.

25 Q. And that's true from grades 1 through 8?

1 A. Yes, it is.

2 Q. Students are required to attend chapel --
3 weekly chapel services?

4 A. Correct.

5 Q. A student cannot opt out of Bible
6 classes, correct?

7 A. Correct.

8 Q. And a student can't opt out of religious
9 services, correct?

10 A. Religious services meaning chapel?
11 That's the only religious service we have. And all of
12 our students attend, yes.

13 Q. As part of your application -- well,
14 first, have you -- let me ask you this: When does
15 school start? I'm sorry. I should have asked that at
16 the beginning.

17 A. When does school start for this coming
18 year?

19 Q. Yes.

20 A. The 22nd of August.

21 Q. And have you provided the parents of the
22 voucher recipients with a description of the religious
23 services that the students can opt out of forced
24 participation?

25 A. Yes.

1 Q. And what is that description that you
2 provide?

3 A. It -- it's a document that talks about
4 our chapel and our Bible instruction, much like you
5 just asked me.

6 Q. And does it tell parents that the only
7 religious service that they can opt out of is the
8 chapel service -- at least, opt out of from forced
9 participation?

10 A. Opt out of forced participation from the
11 chapel service; correct.

12 Q. And that's the only thing that they don't
13 have to participate in in your school as part of this
14 opt-out; is that right?

15 A. Correct.

16 Q. And they have to attend those religious
17 services, correct?

18 A. Correct.

19 Q. If we could look at Exhibit -- before I
20 look at Exhibit 19, let me ask, is it your
21 understanding that the voucher recipients are public
22 school students?

23 A. I'm unclear on the answer to that
24 question.

25 Q. Why are you unclear on the answer to that

1 question?

2 A. Well, because the students will attend
3 Cherry Hills Christian exclusively, which is not a
4 public school. I do understand there's a paragraph in
5 the contract that talks about that.

6 But for me to say they're a public school
7 student or not a public school student, I think we're
8 talking about a legal definition here.

9 Q. In your view, they're a private school
10 student at Cherry Hills Christian, correct?

11 A. That is my view, correct.

12 Q. And Cherry Hills Christian is a
13 department of the Cherry Hills Community Church; is
14 that right?

15 A. Yes, it is.

16 Q. And as a department of the church, Cherry
17 Hills Christian School has the full financial
18 resources of the church available for support?

19 A. I believe our executive pastor wrote
20 something to that effect to satisfy our financial
21 obligations, yes.

22 Q. What -- I'm sorry. I didn't mean to cut
23 you off. Did you want to finish your answer?

24 A. I'll say yes.

25 Q. Let's take a look at Exhibit 19. And

1 I'll represent to you, Mr. Bignell, this is an exhibit
2 that's already been admitted, so we're not going to go
3 through it in any significant way.

4 The first pages are your signed contract
5 with Douglas County. If we turn a couple pages to
6 page 7, you'll see your signature. Do you see that?
7 Is that your signature there, sir?

8 A. Yes

9 Q. And if we can turn to page 15. And I
10 think, in your testimony you just referenced that the
11 executive pastor of Cherry Hills Community Church;
12 that's Dutch Franz. Is that right?

13 A. Yes.

14 Q. And Mr. Franz sent an e-mail or this
15 letter to Dr. Cutter at the Douglas County school
16 district, correct?

17 A. Correct.

18 Q. And here Mr. Franz states in the second
19 sentence that "The school has complete access to all
20 facilities and property belonging to the church." Do
21 you see that?

22 A. I do.

23 Q. And you don't disagree with that?

24 A. Which is why I answered yes to your
25 previous question. Yes.

1 Q. All right. I just wanted to make sure we
2 were on the same page. Thank you.

3 Mr. Franz carries on that, as a
4 department of the church, it -- referring to your
5 school -- has the full financial and administrative
6 resources of the church available for its support. Do
7 you see that?

8 A. Yes.

9 Q. And that's correct?

10 A. If Dutch said it, I believe it.

11 Q. You have no reason to disagree with it?

12 A. That's correct.

13 Q. Is Dutch ultimately one of the people you
14 report to?

15 A. Dutch is the person I directly report to.
16 He's the executive pastor. Yes.

17 Q. Are some of the Cherry Hills Christian
18 School classes taught in church -- in the church
19 facilities?

20 A. Yes.

21 Q. They're taught in a -- give me some
22 examples, if you can.

23 A. It's a multi-use facility. The
24 classrooms that we use Monday through Friday are used
25 in the evenings by the youth department, on the

1 weekends for Sunday school classes. So they're not
2 ours exclusively.

3 Q. The school and the church share the same
4 facilities?

5 A. We share space. That's correct.

6 Q. And the school is a ministry of the
7 church, correct?

8 A. Correct.

9 Q. If we could turn to page 18. This is a
10 description of the Cherry Hills Christian mission and
11 faith; is that right?

12 A. Yes.

13 MR. HALL: Objection. Relevance and
14 cumulative.

15 THE COURT: Overruled on relevance.
16 I'm going to sustain it on cumulative, unless you can
17 establish something different from what you already
18 asked.

19 MR. MACDONALD: Your Honor, I'm merely
20 going to lay the foundation for a couple of questions
21 about this.

22 THE COURT: All right. Let's get to it
23 quickly, please.

24 Q. (BY MR. MACDONALD) Mr. Bignell, the
25 students who apply to your school have to agree with

1 the faith that is set forth here on Exhibit 19, page
2 18 of that exhibit, correct?

3 A. The parents agree that this is what their
4 children will be taught.

5 Q. And, in fact, the application says that
6 they agree with the faith, correct?

7 A. Correct.

8 Q. And the approximate tuition at Cherry
9 Hills Christian for grades 1 through 5 is about
10 \$7,000; is that right?

11 A. Yes.

12 Q. Tuition for grades 6 through 8 is a
13 little more than \$8,000?

14 A. Yes.

15 Q. And maybe some fees on top of that?

16 A. Yes.

17 Q. And so the voucher will not cover -- the
18 voucher from Douglas County won't cover the cost of
19 tuition, right?

20 A. That is correct.

21 Q. And the parents will have to pay the
22 difference, correct?

23 A. Yes.

24 Q. And Cherry Hills Christian, as part of
25 your admission process, reserves the right to

1 prioritize placement to members of the Cherry Hills
2 Community Church, correct?

3 A. Membership priority is only through
4 preschool, so it wouldn't affect the voucher program
5 at all.

6 Q. Let's take a look at page 20. This is
7 describing admission information for your school; is
8 that right?

9 A. Yes.

10 Q. And if we can go down to the bottom. You
11 reserve the right to prioritize placement of
12 applicants. And one of them near the bottom is,
13 parent is currently a member of Cherry Hills Community
14 Church. Is that right?

15 A. Right. The list that you have there is
16 inclusive for preschool through grade 8, but not all
17 of those apply to every one of the three schools. And
18 that particular one is preschool only.

19 Q. The one above it, parent involvement in
20 full-time christian ministry, does that apply to
21 grades 1 through 8?

22 A. Is the question, would parents involved
23 in full-time christian ministry -- would those
24 students get priority over others? Is that the
25 question?

1 Q. Do you reserve the right to prioritize
2 placement of students in grades 1 through 8 based on
3 this factor that a parent is currently a member of --
4 parent involvement in full-time christian ministry?

5 A. If that parent was involved in full-time
6 ministry at Cherry Hills Community Church, the answer
7 would be yes.

8 Q. If we could look at page 22, please. And
9 this is application for students grades 6 through 8;
10 is that right? The application form?

11 A. Yes.

12 Q. And if we could just look down near the
13 bottom, under -- we'll have to blow this up, because
14 it's hard to read. The paragraph -- fourth full
15 paragraph, "I fully understand and support the mission
16 of CHC to develop my child in the knowledge and love
17 of Christ." Do you see that?

18 A. Yes.

19 Q. And a few lines down, the parent commits
20 that -- to help my child -- they understand that the
21 mission is to -- of the school is to help my child to
22 learn about and experience God's love, commit his or
23 her life to Jesus Christ as personal Lord and savior.
24 Is that right?

25 A. That is correct. Parents sign that.

1 Q. And one of the objectives of the school
2 is to have the children commit their life to your
3 faith. Is that fair?

4 A. That is correct.

5 Q. It's your view that the study of Bible
6 and christianity is one of the things that sets apart
7 Cherry Hills Christian from surrounding public
8 schools, correct?

9 A. Yes.

10 Q. And Cherry Hills Christian incorporates
11 religious doctrine throughout the district, correct?

12 MR. HALL: Objection. Cumulative.

13 THE COURT: Sustained.

14 Q. (BY MR. MACDONALD) Mr. Bignell, are you
15 aware of the HIV/AIDS policy of Cherry Hills
16 Christian?

17 A. I am not.

18 Q. Let's look at page 100.

19 A. That's Denver Christian School policy
20 that you're reading.

21 Q. Thank you for that clarification.

22 THE COURT: Does Cherry Hills Christian
23 School have such a policy similar to --

24 THE WITNESS: Not that I'm aware of.

25 THE COURT: Thank you.

1 THE WITNESS: Which is why I answered.

2 Q. (BY MR. MACDONALD) If we could look at
3 Exhibit 20, please. At the top -- if we could blow
4 that up -- you see these are the meeting minutes from
5 a parent council meeting on January 12th, 2011.

6 A. Yes.

7 Q. Do you recall attending this meeting?

8 A. Yes.

9 Q. And at this meeting, you thought it would
10 be -- you talked to the parents that they ought to
11 support the voucher program. You thought it would be
12 a good idea if the voucher program would be
13 implemented, correct?

14 A. You know, in January, the voucher
15 program, as we're now talking voucher program, it was
16 different than it is today. I encouraged our parents
17 to pray for the Douglas County school board as they
18 considered this. And I encouraged our parents to
19 attend the Douglas County meetings.

20 We hadn't taken a specific stand as a
21 school in January. I think, in January, many of our
22 parents thought they could be recipients. And then
23 the program was changed pretty significantly.

24 So there was that conversation, but the
25 school had not taken a stand.

1 Q. Turn to the second page. At the top you
2 say there may be a pilot program for option
3 certificates in the 2011-2012 school year. Do you see
4 that?

5 A. Yes.

6 Q. And then you say, "If it works well, it
7 may go districtwide for the year 2 (2012-2013)." Do
8 you see that?

9 A. I do see that.

10 Q. Where did you get that information?

11 A. That's a good question. There was a lot
12 of information both in the Denver Post and throughout
13 various communications. Like I said, I think in
14 January we thought we -- myself, other school
15 administrators, and parents of Douglas County private
16 school students thought it may involve them.

17 There was conversation. And I cannot
18 recall the details. There was conversation going on
19 within Douglas County about a pilot program that might
20 have even included just a couple of grade levels, like
21 kindergarten and first grade, for that initial year.
22 It wasn't a formal proposal. It was just discussion
23 that was occurring.

24 So that's my best recollection of
25 whatever I was saying in January.

1 THE COURT: Sir, his question was, do
2 you know where you got the information leading to the
3 statement, if it works well, it may go districtwide
4 for the year 2. Do you know?

5 THE WITNESS: I do not.

6 THE COURT: Okay. Thank you.

7 Q. (BY MR. MACDONALD) The next statement at
8 this meeting, sir, is that the Cherry Hills families
9 may greatly benefit from those option certificates.
10 Do you see that?

11 A. Yes.

12 Q. And that was your view at the time, that
13 option certificates may greatly benefit the school?

14 A. May greatly benefit the parents. At that
15 time, I thought our current parent at Cherry Hills
16 Christian could become participants in this program.
17 So that would have been a great benefit to them.

18 Q. Now, do you agree that the fact that you
19 have 31 -- or in the neighborhood of 31 students
20 attending or will be attending Cherry Hills Christian
21 with the voucher program -- do you think that is a
22 great benefit that those families will receive?

23 A. Could it be a great benefit for those 31?
24 Is that the question?

25 Q. Yes.

1 A. I believe so.

2 Q. And derivatively, it will be a benefit
3 for the school, because they'll receive the money. Is
4 that right?

5 A. Correct. But I would not say a great
6 benefit to the school. It's a small percentage of our
7 population. And some of those students would likely
8 have come to our school, anyway. I would have said a
9 great benefit if all of our parents were going to be
10 participating. So I would say probably not a great
11 benefit to the school.

12 Q. You'd agree it is a benefit to the
13 school.

14 A. Yes.

15 Q. And in your view, you think of the 31
16 students, some of them would have come to your school,
17 anyway. Is that -- I think you just testified to
18 that.

19 A. That is what I believe. I don't have
20 evidence of that, but I believe that.

21 Q. In the paragraph little I under 3 -- I'm
22 sorry. Maybe it's 1. Little 3-I, paragraph 1, you
23 describe a program that would not be acceptable to
24 you. Do you see that?

25 A. I do.

1 Q. And that was your view at the time, that
2 Cherry Hills Christian must be able to discriminate in
3 hiring practices based on a person's religious belief.
4 That was something that was important to you before
5 Cherry Hills Christian would participate in the
6 program, correct?

7 A. That is correct. And I was speaking my
8 personal view to a group of our school parents.

9 Q. And did the school parents agree with
10 that view?

11 A. I didn't ask them. I would speculate
12 that most would agree. They signed --

13 Q. Excuse me. Go ahead.

14 A. Well, based on the other document that
15 you asked if our parents signed, I think they would
16 agree.

17 Q. And the person that you report to, the
18 pastor, do you think he agrees, based on your
19 conversation?

20 MR. HALL: Objection. Foundation.

21 THE COURT: Sustained.

22 Q. (BY MR. MACDONALD) Down under -- a few
23 more paragraphs down, it says, "Robert is meeting with
24 the 12 other private schools in Douglas County next
25 week to describe what restrictions the schools can

1 accept." Do you see that?

2 A. I do see that.

3 Q. And it since, "Since 11 of the 12 private
4 schools in Douglas County are religious schools, we
5 hope be united in what restrictions we can accept."
6 Do you see that?

7 A. I see that.

8 Q. And did you, in fact, have a meeting with
9 the other 12 -- with the 12 other private schools in
10 Douglas County on January 20th? Do you recall?

11 A. Yes.

12 Q. And were the religious schools united in
13 the restrictions they could accept, as you would hope?

14 A. Well, I would like to comment on the
15 paragraph. One of our parents -- the parent council
16 secretary was making notes, which you're referring to.
17 I doubt that I said we would have a meeting where we
18 would make a decision based on restrictions that we
19 would accept. I doubt that I said that. I doubt I
20 could have said that, because these are 12 independent
21 schools.

22 I probably said something to the effect
23 that we would discuss things that would be acceptable
24 to the group.

25 Q. And do you recall that when you met with

1 the other religious private schools for Douglas
2 County, that you and those schools agreed that a broad
3 religious opt-out would not be acceptable?

4 A. No. We had a significant discussion that
5 day. It's the first time those 12 had ever been in
6 the room at the same time. And we discussed a lot of
7 different things that we had heard about what this
8 program was. And a couple times during the meeting,
9 we took straw pull counts: Would this be acceptable
10 to you, would that be acceptable to you. And I don't
11 think there was ever anything unanimous.

12 There was just discussion about things
13 that we had heard along the way.

14 Q. Did you have another parent council
15 meeting on March 9th, 2011?

16 A. Do you have evidence that we did? I
17 mean, we meet monthly. I'm just not recalling that it
18 was March 9.

19 Q. Sure. I'll represent to you that off
20 your website, I got meeting minutes from March 9.

21 A. Okay.

22 Q. Does that sound right?

23 A. That sounds right.

24 Q. Do you recall at that meeting noting that
25 the name change in the program from voucher to

1 scholarship?

2 MR. HALL: Objection. Relevance.

3 THE COURT: Where we going here?

4 MR. MACDONALD: Your Honor, we've had a
5 lot of discussion and objections about what this thing
6 is called. And I'm merely trying to establish that it
7 was a deliberate effort to change the name of the
8 program.

9 THE COURT: But how is he going to get
10 you to that? He's not with the school district.
11 Sustained.

12 Q. (BY MR. MACDONALD) What type of services
13 does Cherry Hills Christian offer to program -- to
14 children with special needs?

15 A. We have a department in our school called
16 CHAS. It's Cherry Hills Academic Services. And it
17 serves children on both ends of the academic extremes.
18 Those who are gifted and need extra work and those who
19 have special needs and need extra help.

20 Part of that program is a program called
21 Discovery, where we have one-on-one tutoring for
22 students with special needs. Typically, we have a
23 dozen or so enrolled in that.

24 Q. And for participation in those programs,
25 students have to pay additional tuition, correct?

1 A. That is correct.

2 Q. And the enrollment of children with
3 special needs is considered on an individual basis; is
4 that right?

5 A. Yes.

6 MR. MACDONALD: No further questions,
7 Your Honor.

8 THE COURT: Mr. Deihl?

9 MR. DEIHL: No questions, Your Honor.

10 THE COURT: All right. Mr. Bindas?
11 Mr. Adams, any questions?

12 MR. HALL: Yes, Your Honor. Just a few.

13 THE COURT: Okay. By the way, if I
14 call you by the wrong name -- there's so many of
15 you -- correct me, please. I'm trying to do my best.

16 CROSS-EXAMINATION

17 BY MR. HALL:

18 Q. Good morning, Mr. Bignell.

19 A. Good morning.

20 Q. Just very briefly. So Cherry Hills
21 serves grades pre-K to 8; is that correct?

22 A. Yes.

23 Q. But for this scholarship program, you are
24 only serving grades 1 through 6; is that right?

25 A. Yes.

1 Q. Why is that?

2 A. That was a decision on the part of our
3 school. Once we received the contract from Douglas
4 County, there was language in that contract referring
5 to no child left behind.

6 Q. Highly qualified.

7 A. Highly qualified teachers. Correct.

8 And we made a determination we didn't
9 want to fall under that in grades 7 and 8.

10 Q. So you've read the policy, for instance,
11 of the scholarship program, correct?

12 A. Yes.

13 Q. And you also read Exhibit 19, which is a
14 contract Cherry Hills signed with Douglas County to
15 participate, correct?

16 A. Correct.

17 Q. And what you're referring to is one
18 portion of that contract which says that one of the
19 requirements of participation is that the scholarship
20 students have highly qualified teachers, defined by no
21 child left behind, correct?

22 A. Yes.

23 Q. And that's why your middle school is not
24 participating; is that right?

25 A. Yes.

1 Q. And also in the program, Cherry Hills had
2 to demonstrate to Douglas County that it had a quality
3 educational program, correct?

4 A. Yes.

5 Q. It had to meet Douglas County's end
6 statements, correct?

7 A. Yes.

8 Q. And you're aware that the end statements
9 are Douglas County's academic goals for its schools,
10 correct?

11 A. Yes.

12 Q. And prior to the scholarship program,
13 Cherry Hills had no relationship, no need to satisfy
14 those end statements, correct?

15 A. That is correct.

16 Q. But now you had to demonstrate that,
17 didn't you?

18 A. Yes.

19 Q. And you did in your application, correct?

20 A. Yes.

21 Q. You got accepted.

22 A. That is correct.

23 Q. That's right. And there were 12
24 conditions of eligibility in the policy, correct?

25 A. Yes.

1 Q. And you had to send in an application and
2 satisfy all those conditions, correct?

3 A. Yes.

4 Q. And, Mr. Bignell, you understand that
5 participating in this program, Cherry Hills will be
6 evaluated by Douglas County on a periodic basis,
7 correct?

8 A. Yes.

9 Q. To see if Cherry Hills is satisfying the
10 terms of the contract.

11 A. Yes.

12 Q. And that Douglas County has the ability
13 to not renew Cherry Hills' participation in the
14 program if it feels Cherry Hills isn't satisfying
15 those conditions, correct?

16 A. Yes.

17 Q. Mr. Bignell, did Douglas County ever
18 require you to change any part of your curriculum?

19 A. No.

20 THE COURT: I'm sorry, Mr. Adams. Was
21 your question can they or have they?

22 MR. HALL: Both.

23 THE COURT: So you asked two questions
24 at one time? When a lawyer figures that out, that's
25 like gold.

1 MR. HALL: Would shorten things up,
2 wouldn't it?

3 THE COURT: Would be gold to me too. Why
4 don't you answer both questions, sir.

5 Q. (BY MR. HALL) Has Douglas County ever
6 required Cherry Hills to change any part of its
7 religious program?

8 A. No.

9 Q. Now, there is a requirement to permit the
10 opt-out, correct?

11 A. Yes.

12 MR. HALL: Thank you. No further
13 questions.

14 THE COURT: Mr. Bindas.

15 CROSS-EXAMINATION

16 BY MR. BINDAS:

17 Q. Good morning, Mr. Bignell.

18 A. Good morning.

19 Q. My name is Mike Bindas. I represent
20 three families who have received scholarships under
21 the program.

22 Any of the parents with whose children
23 have received scholarships from Douglas County and
24 have chosen to attend Cherry Hills Christian ever
25 indicated to you that they were coerced to attend or

1 choose the school by Douglas County?

2 A. No.

3 Q. Have any of the parents whose children
4 have received scholarships from Douglas County and
5 chosen to attend Cherry Hills ever indicated to you
6 that they were compelled by Douglas County to attend
7 or select that school?

8 A. No.

9 Q. So is it your understanding that they
10 made that decision privately?

11 A. Yes.

12 Q. And is it your belief that they made that
13 decision independently?

14 MR. MACDONALD: Objection. Foundation.
15 Leading.

16 THE COURT: Sustained.

17 Q. (BY MR. BINDAS) Mr. Macdonald asked you a
18 series of questions that used words from our state --
19 from the Colorado state constitution concerning
20 support, sustain, aiding private schools. Do you
21 recall that series of questions?

22 A. No.

23 MR. BINDAS: No further questions.

24 THE COURT: Any re-examination,
25 Mr. Macdonald?

1 MR. MACDONALD: No, Your Honor.

2 THE COURT: All right. That will
3 conclude the testimony of this witness. If there's no
4 objection, he may step down.

5 Thank you, Mr. Bignell.

6 THE WITNESS: You're welcome.

7 THE COURT: Plaintiff, call your next
8 question. And just for planning purposes, we will go
9 a little bit into the lunch hour, probably about 15
10 minutes.

11 MR. DOUGLAS: Thank you, Your Honor.

12 The plaintiffs will call Dan Gehrke to
13 the stand. I believe he's out in the hallway. I'll
14 go get him.

15 THE COURT: Okay. Sir, would you raise
16 your right hand, please.

17 DANIEL GEHRKE,
18 having been first duly sworn to state the whole truth,
19 testified as follows:

20 THE COURT: Mr. Gehrke, I'm going to
21 ask you to follow some pretty simple rules in
22 providing your testimony here. Please do your best to
23 speak up at an audible level into the microphone in
24 response to the questions you're asked.

25 Please make sure you permit your

1 questioner to complete the question they are asking
2 you before you start to answer it, so we have a clear
3 record of the proceedings, the questions that are
4 asked and the answers that are given.

5 And in the interests of time, I'm going
6 to ask you to could your best to listen to the
7 question carefully that you're asked and answer just
8 that question. The example I usually give is, if
9 someone asks you what time it is, tell them what time
10 it is, not how to make a watch. Okay? Go ahead.

11 DIRECT EXAMINATION

12 BY MR. DOUGLAS:

13 Q. Good morning, Mr. Gehrke.

14 A. Good morning.

15 Q. Am I pronouncing your name correctly?

16 A. Correct.

17 Q. Could you please state your full name,
18 and spell your last name.

19 A. Daniel Gehrke, G-e-h-r-k-e.

20 Q. And please tell the court how you are
21 currently employed.

22 A. I'm executive director of the Colorado
23 Lutheran High School Association, which runs the
24 Lutheran High School which is located in Parker,
25 Colorado.

1 Q. Are you also the principal of Lutheran
2 High School?

3 A. No. I was formerly the principal at
4 Denver Lutheran High School. The two schools have
5 consolidated and I'm now in a new position of
6 executive director for the on Lutheran High School in
7 Parker.

8 Q. First of all, Lutheran High School is one
9 of the participating private schools in the -- what's
10 called the Douglas County Choice Scholarship Program.
11 Is that true?

12 A. That is true.

13 Q. When did you change positions from
14 principal of Denver Lutheran High School to executive
15 director of the Colorado Lutheran High School
16 Association?

17 A. July 1st.

18 Q. Of this year?

19 A. Correct.

20 Q. How long were you principal at Denver
21 Lutheran?

22 A. Five years.

23 Q. And did you -- were you working for
24 Denver Lutheran High School prior to that time?

25 A. Yeah. It was 11 years prior to that, I

1 was teacher and baseball coach.

2 Q. So you've been with the Lutheran High
3 School family for --

4 A. 16 years, total.

5 Q. 16 years. Thank you.

6 And you're now, you said, the executive
7 director of the Colorado Lutheran High School
8 Association?

9 A. Correct.

10 Q. And what is that association?

11 A. It's an association of 32 Lutheran
12 churches in the Denver metro area that support
13 financially to make up the government body for
14 Colorado Lutheran High School Association.

15 Q. So all of the members of the Colorado
16 Lutheran High School Association are churches,
17 correct?

18 A. Correct.

19 Q. Are they all Lutheran churches?

20 A. Correct.

21 Q. And it's that organization, the Colorado
22 Lutheran High School Association, that owns and
23 operates Lutheran High School?

24 A. I would not say owns and operates. In
25 other words, they have a vested financial interest in

1 the organization. We're a separate 50(c)(3)
2 organization, and we operate -- the churches have
3 delegates that serve on a delegate board that approve
4 board members for the Lutheran High School
5 Association. But in terms of ownership or operating,
6 we do that separately.

7 Q. Who's we that does that separately?

8 A. The administration and board of directors
9 for the high school.

10 Q. Well, let's put up Exhibit 33, please.
11 And this is a document that's in evidence. If we
12 could zoom in to right under the -- well, first of
13 all, does this appear to be a page from the Lutheran
14 High School website?

15 I'm sorry. Did you answer? Does this
16 appear to be a page from --

17 A. Oh, I'm sorry. Yes.

18 Q. Okay. If we look down under member
19 churches of the association. Zoom in a little so we
20 can see that. It says, "Lutheran High School is owned
21 and operated by the Colorado Lutheran High School
22 Association." Do you see that?

23 A. I do.

24 Q. So that's what it says on your website,
25 right?

1 A. Yes, that's what it says on the website.

2 Q. And you agree with that?

3 A. I guess I have a semantics issue with our
4 web designer.

5 Q. But if that's what you're representing on
6 your website, you don't have any reason to dispute
7 that, right?

8 A. I guess I do have a reason to dispute it,
9 to answer your question. In other words, I would be
10 probably changing the wording of that as I move into
11 my new position. Because to say that we're
12 technically owned and operated probably isn't right,
13 according to our bylaws.

14 Q. The school bylaws or the association
15 bylaws?

16 A. The association bylaws.

17 Q. Is it correct that Lutheran High School
18 is a part of the Colorado Lutheran High School
19 Association?

20 A. Correct.

21 Q. And that's an association that you said
22 was exclusively made up of churches?

23 A. Correct.

24 Q. And the primary mission of Lutheran High
25 School is to carry out the vision of the Colorado

1 Lutheran High School Association; is that right?

2 A. Correct.

3 Q. What are your current job
4 responsibilities as executive director of the Lutheran
5 High School Association?

6 A. I'm basically the CEO of the
7 organization. The board of directors has it in their
8 policy based governance model as one employee, and
9 that is me. And I carry out the vision and direction
10 of the entire association, which currently at this
11 time is one high school in Parker. There was
12 previously two.

13 Q. So the primary business of the Lutheran
14 High School Association is to operate the high school,
15 Lutheran High School.

16 A. Yes. At this time, that's correct.

17 Q. Is the Lutheran religion a specific
18 denomination?

19 A. Lutheran is a christian denomination,
20 yes.

21 Q. It's a specific denomination within the
22 christian religion?

23 A. Correct.

24 Q. What makes the Lutheran denomination
25 different from other christian denominations or from

1 non-denominational christian faith?

2 MR. BINDAS: Objection, Your Honor.

3 Relevance.

4 THE COURT: I'm sustaining that.

5 MR. DOUGLAS: Your Honor, I -- well, I'll
6 move on.

7 THE COURT: If you want to tell me a
8 legitimate reason that you think you can persuade my
9 mind on that question, I'll give you the opportunity
10 to do that.

11 MR. DOUGLAS: No. I can move on, Your
12 Honor. Thank you.

13 THE COURT: Okay. Thank you.

14 Q. (BY MR. DOUGLAS) Mr. Gehrke, Lutheran
15 High School teaches its students the religious
16 doctrines and beliefs of the Lutheran denomination; is
17 that correct?

18 A. Correct.

19 Q. Would you agree that Lutheran High School
20 provides a Christ-centered LCMS Lutheran
21 theology-based education?

22 MR. HALL: Objection. Relevance.
23 Cumulative.

24 THE COURT: I'm going to overrule it.
25 I'm going to give him a little bit of room here.

1 Overruled.

2 A. Would you repeat the question?

3 Q. (BY MR. DOUGLAS) Yes. Would you agree
4 that Lutheran High School provides a Christ-centered
5 LCMS Lutheran theology-based education?

6 A. Yes.

7 Q. And what does LCMS stand for?

8 A. Lutheran Church Missouri Synod.

9 Q. Missouri Synod?

10 A. Synod, S-y-n-o-d.

11 Q. And what does that mean, the Missouri
12 Synod part of Lutheran Church?

13 A. There are a variety of Synods that exist
14 within the umbrella of the Lutheran Church. There's
15 an Evangelical Lutheran Church in America, 5.2 million
16 members nationwide. There's a Lutheran Church
17 Missouri Synod, 2.6 million members nationwide. There
18 would be the Wisconsin Evangelical Lutheran Synod,
19 currently over 400,000 members nationwide.

20 It would be akin to whether you were
21 Southern Baptist or American Baptist. Same type of
22 concept.

23 Q. So it's a subset of the Lutheran Church,
24 Missouri Synod?

25 A. It is its own denomination.

1 Q. Okay. The contract and application --
2 well, first of all, the contract between Lutheran High
3 School and Douglas County relating to Lutheran
4 participation in the program, that was signed by you,
5 correct?

6 A. It may have originally been signed by
7 Reverend Charles Clausson. I've been -- he was the
8 former CEO. It is possible that the most recent set
9 of paperwork was signed by me leading into my new
10 position. It may have signatures from myself, the
11 principal. May have been a transition.

12 Q. It looks to me like you have a good
13 memory, but just to refresh your recollection, let's
14 put up Exhibit 37, please. And just zoom in so we can
15 see what this is at the top there.

16 Does this appear to be the contract
17 between Lutheran High School and Douglas County for
18 its participation in the program?

19 A. Yes.

20 Q. And if you'll look at the seventh page of
21 that exhibit. Down at the bottom, there's a signature
22 block. And you're one of the people who signed that,
23 correct?

24 A. Correct.

25 Q. And then following the contract -- and

1 this document is what -- is the materials that
2 Lutheran High School provided Douglas County as part
3 of its application.

4 A. Correct.

5 Q. And were you involved in the preparation
6 of that application?

7 A. No.

8 Q. Did you review those before they went to
9 Douglas County?

10 A. Yes.

11 Q. Do you agree that the principal of
12 Lutheran High School is required to be a minister of
13 religion ordained or commissioned by the Lutheran
14 Church Missouri Synod?

15 MR. HALL: Objection. Cumulative.

16 THE COURT: No. Overruled.

17 A. I'm sorry. Could you repeat the
18 question?

19 THE COURT: Does your principal have to
20 be an ordained minister in your church?

21 A. He does not have to be an ordained
22 minister. In other words, does not have to be a
23 pastor of a church.

24 Q. (BY MR. DOUGLAS) All right. Let's look
25 at page 75 of this Exhibit 37. And again, this

1 material that Lutheran High School provided to Douglas
2 County in its application for the program?

3 A. Right. And I understand there's a
4 difference in the Lutheran Church is a Synod, being
5 called a commissioned church worker --

6 THE COURT: Let's do this, Mr. Gehrke.
7 We'll let him ask you the question and you can answer
8 that question.

9 THE WITNESS: Okay.

10 Q. (BY MR. DOUGLAS) So we're looking at
11 page 75 of this exhibit at the top. It says
12 administrative job descriptions. And under principal,
13 it says, "The principal shall be a minister or
14 religion ordained or commissioned by the Lutheran
15 Church Missouri Synod." Do you see that?

16 A. Yes.

17 Q. Is that correct?

18 A. Yes.

19 Q. If you want to explain, go ahead.

20 A. Okay. But minister, in terms of being a
21 minister of church, would be -- it's a semantics
22 issue. I am technically, under the Lutheran Church
23 Missouri Synod, a minister of religion and
24 self-employed as such under the tax code.

25 So being a minister of religion is not a

1 term that exists. It's just if somebody was heading
2 up a church within the LCMS.

3 Q. But ordained or commissioned; what does
4 that mean?

5 A. Ordained would be in a church.
6 Commissioned would be what we are.

7 Q. Okay. And do you agree that the
8 principal -- and we'll just look down here at the
9 document. Let's look two paragraphs down.
10 Responsibility of principal. It says the principal
11 shall be the spiritual and educational leader of the
12 school. Do you see that?

13 A. Yes.

14 Q. And you agree with that?

15 A. Yes.

16 Q. "The principal's first concern shall be
17 to administer and conduct the Christian Lutheran High
18 School, realizing that the school will have little
19 value if it neglects the spiritual values in worship
20 and the instruction and training of its students." Do
21 you see that?

22 A. Yes.

23 Q. And you agree with that?

24 A. Yes.

25 Q. All right. And then it says, "More

1 specifically, the principal will, in the name of the
2 Lord Jesus Christ, minister and provide for ministry
3 to students, teachers, parents, alumni, and all who
4 participate in the Lutheran high family." Do you see
5 that?

6 MR. HALL: Objection. Relevance.
7 Cumulative.

8 THE COURT: Overruled.

9 A. Yes.

10 Q. (BY MR. DOUGLAS) What does --

11 THE COURT: Let me be more clear in my
12 ruling. There's 19, as I understand it, religious
13 schools, or 18. If he gets to beyond this, then I'm
14 going to sustain your objection to cumulative. To
15 this point, I'm going to permit the inquiry. Go
16 ahead.

17 MR. DOUGLAS: Thank you, Your Honor.

18 Q. (BY MR. DOUGLAS) Can you just explain
19 what you mean by the principal will provide ministry
20 to students?

21 A. Sure. Ministry to students would be
22 incorporating the fact that the mission statement of
23 the school is nurturing academic excellence and
24 encouraging growth in Christ. Under that second half
25 of the mission statement, the encouraging growth in

1 Christ, it would be the principal's job to carry out
2 the mission statement in full. That encouraging
3 growth in Christ aspect would permeate all operations
4 of the school. That would be ministering.

5 Q. Do you agree that Lutheran High School is
6 part of the Lutheran Missouri Synod Church?

7 A. Correct.

8 Q. All right. Let's take a look at page 65
9 of this exhibit, please.

10 THE COURT: Still 37?

11 MR. DOUGLAS: Yes. Exhibit 37. Thank
12 you, Your Honor.

13 Q. (BY MR. DOUGLAS) And this is the employee
14 handbook; is that correct?

15 A. That is correct.

16 Q. And that's something you provided Douglas
17 County in this application.

18 A. Yes.

19 Q. And it says, under requirements for
20 employment, the second sentence, "It is recognized
21 that CLHSA" -- that's the Lutheran High School
22 Association?

23 A. Correct.

24 Q. -- "is uniquely Lutheran, and that one of
25 the main responsibilities of the schools is to provide

1 the means and opportunities for religious education
2 and faith development of the students." Do you see
3 that?

4 A. Yes.

5 Q. And this is in respect to teacher
6 employment. It says, "The High School Association
7 will only seek candidates who demonstrate a strong
8 walk with the Lord and strong skills in teaching their
9 respective subjects." Do you see that?

10 A. Yes.

11 Q. And then it sets out the preferences for
12 calling and/or contracting teachers in order, right?

13 A. Yes.

14 Q. What does that mean, the calling of
15 teachers?

16 A. Well, the call would be what designates
17 us as a commission minister of religion. So if we
18 have an employee who was trained in the Lutheran
19 Church Missouri Synod, meaning that they have received
20 such formal training, then they would receive what is
21 commonly called in LCMS jargon as the call.

22 It's not anything different, per se, than
23 being hired and having a job, but it places -- because
24 of that call designation, we are then considered to be
25 commissioned ministers of religion.

1 The contract would just be somebody who
2 wasn't a called -- that contract, then.

3 Q. And the first preference in hiring
4 teachers is teachers who are a Lutheran Church
5 Missouri Synod trained teacher eligible for a call,
6 right?

7 A. Correct.

8 Q. And then the second is teachers who are a
9 Lutheran Church member, slash, teacher willing to
10 complete the call program, correct?

11 A. Correct.

12 Q. And third, teachers who are members of
13 another Lutheran congregation.

14 A. Correct.

15 Q. And you apply those preferences in the
16 hiring of teachers at Lutheran high; is that right?

17 A. Yes.

18 Q. One of the reasons you need teachers who
19 meet those descriptions is that the Lutheran faith is
20 infused throughout everything that goes on at Lutheran
21 High School; is that correct?

22 A. Yes.

23 Q. And if we could look at page 43 of this
24 same Exhibit 37. This is the admissions standards for
25 your school, correct?

1 A. Yes.

2 Q. And admission standard number 1 says,
3 "Students will be admitted to Lutheran High School in
4 Parker if, number one, parents/guardians and students
5 are supportive of the mission of the school as stated
6 in the mission statement and on the enrollment data
7 sheet." Do you see that?

8 A. Yes.

9 Q. And the students who do not meet that
10 standard number one, they will not be admitted to
11 Lutheran High School, correct?

12 A. Correct.

13 Q. Do you agree that tuition is the largest
14 source of revenue for Lutheran High School?

15 A. Yes.

16 Q. And revenue from tuition supports the
17 operation of Lutheran High School?

18 A. It does.

19 Q. It supports teacher salaries, for
20 example?

21 A. Yes.

22 Q. It supports chapel facilities?

23 A. Yes.

24 Q. Tuition aids your school in carrying out
25 its mission, correct?

1 A. Correct.

2 Q. All right. I want to put up Exhibit 36.
3 It's in evidence. Okay. Are you familiar with this
4 document?

5 A. I am.

6 Q. And it says, "The vision of" -- well,
7 first it talks about the vision of the Colorado
8 Lutheran High School Association, correct?

9 A. Correct.

10 Q. And I think you agree that the vision of
11 Lutheran High School is to carry out the vision of the
12 Lutheran High School Association, correct?

13 A. Correct.

14 Q. So just briefly on these bullets,
15 number 2, "The vision is to engage in the spiritual
16 battle for the lives of the youth of our Denver metro
17 community, that they may have a personal faith
18 relationship with Jesus, their savior, through the
19 Lutheran High School ministry." Do you see that?

20 MR. HALL: Objection. Cumulative.

21 THE COURT: Overruled.

22 Q. (BY MR. DOUGLAS) What do you mean by the
23 spiritual battle for the lives of the youth of our
24 Denver metro community?

25 A. At the time that this document was

1 written and used on the night of -- that the
2 consolidation of our two high schools was announced,
3 the target audience was people that were in the high
4 school in Denver, so the meaning of this was, get
5 onboard with the mission of the Lutheran High School
6 ministry that will now exist only in Parker, which is
7 part of a larger mission of our ministry to the youth
8 in the Denver metro community.

9 So it means, I guess, what it says in
10 that part of -- it's encouraging growth in Christ
11 aspect of our mission statement of the school. It was
12 used as a rallying cry to the group in terms of, hey,
13 we're waging a larger spiritual battle here that once
14 was in a two-school ministry but now will be in a
15 one-school ministry.

16 Q. So battle is just the -- the mission to
17 try to convert as many high school students as
18 possible to this religion. Is that what that means?

19 A. I think a conversion -- no. I think
20 conversion is a small aspect of that operation. In
21 other words, encouraging growth in Christ isn't just
22 to convert. It's not just to convert others to
23 christianity, but also includes a -- encouraging
24 growth in Christ would be, I would say, conversion,
25 and building them up in their faith. Teaching them in

1 that regard. We often say turning them into spiritual
2 championships, if you will.

3 So, yes, conversion would be a part of
4 that.

5 Q. And the next one says, "Fulfill the great
6 commission by making disciples of high school
7 students." What do you mean by disciples?

8 A. Probably the same answer as my previous
9 one. Incorporate all of those aspects of encouraging
10 growth in Christ from probably a disciple from
11 scratch -- that would be conversion -- to taking
12 christian students and encouraging and teaching them
13 in their faith.

14 Q. All right. If we go to the bottom of
15 this document, you mentioned the consolidation of the
16 Denver Lutheran High School and the Lutheran High
17 School Parker into one school in Parker, right?

18 A. Right.

19 Q. And that just happened this summer?

20 A. Correct.

21 Q. And that was for financial reasons,
22 correct?

23 A. Correct.

24 Q. And this document says, "What impedes and
25 threatens our vision? Financial debt." Correct?

1 A. That is correct. At the time that was
2 written, yes.

3 Q. And when was this written?

4 A. That would have been presented at a forum
5 on the decision to consolidate the high school. That
6 would have been public, I believe it was Wednesday,
7 February 3rd. It may have been the 2nd. But it was
8 Wednesday of that first week of February.

9 Q. But this financial debt, this financial
10 issues that related -- or that led to consolidation of
11 the schools into one, that still persists today,
12 correct?

13 A. Well, the short-term money currently
14 owed, the 450,000 -- I think we raised about \$260,000
15 to that end. The remainder of which sits in a
16 short-term line of credit within the church extension
17 fund, which is our bank.

18 The long-term financial viability of the
19 school is still attached to the 10 million dollar debt
20 on the campus at Parker. We have a fair mortgage in
21 the future.

22 Q. Right. And that 10 million dollar debt
23 is a loan to Lutheran High School Association directly
24 from the Lutheran Church, correct?

25 A. No. It's a loan from the Lutheran Church

1 extension fund, which is a bank, but also is a dual
2 ministry in partnership with other Lutheran Church
3 entities.

4 Q. It's a bank that's part of the Lutheran
5 Church?

6 A. Uh-huh.

7 Q. Yes?

8 A. Yeah. Correct. I'm sorry.

9 Q. That's all right.

10 Now, the next page of this Exhibit 36,
11 page 2, says what you just said. You have to pay your
12 mortgage to keep the school going, correct?

13 A. Correct.

14 Q. And it lists four things that you're
15 going to try to do to help pay the mortgage in the
16 future, right?

17 A. Absolutely, yes.

18 Q. To help keep the school afloat, right?

19 A. Yes.

20 Q. And number 3 -- bullet number 3 is
21 enrollment growth. "Concerted efforts and resources
22 will be focused on building the enrollment at Lutheran
23 High School." Do you see that?

24 A. Yes.

25 Q. And that's one of the reasons you wanted

1 to participate in the Douglas County program, to help
2 increase enrollment, correct?

3 A. Yes.

4 Q. And that's, in fact, what has happened,
5 right?

6 A. Yes.

7 Q. Do you know how many students are
8 currently enrolled at Lutheran High School under the
9 Douglas County program?

10 A. To the best of my knowledge, I believe
11 it's 14. And there may be other students, as I
12 recall, in the queue, that are being processed. To
13 the best of my knowledge.

14 Q. If the information that the district has
15 provided us in this case says 18, would that be
16 consistent with your recollection?

17 A. Yes. I would say that that is
18 consistent. The 14 was a number that was on our --
19 was on our enrollment marker board at the end of last
20 week. I have an admissions person who works
21 diligently. So I would guess that that is right.

22 Q. What was the total enrollment at Lutheran
23 High School last year?

24 A. At the high school in Parker, the total
25 enrollment was 178.

1 Q. So 18 additional students would be about
2 a 10 percent increase in your enrollment?

3 A. That would account for an increase in
4 enrollment. We're also -- we also have 40 of the kids
5 that went to Denver coming down, so enrollment would
6 increase substantially.

7 Q. And that revenue from the Douglas County
8 program, because of the increased enrollment, will
9 help support Lutheran High School in addressing its
10 debt issue, correct?

11 A. Yes.

12 Q. The revenue from the program will help
13 support your school in carrying out its vision we just
14 talked about, correct?

15 MR. BINDAS: Objection, Your Honor.

16 THE COURT: He already said that.

17 Sustained.

18 MR. DOUGLAS: No further questions.

19 THE COURT: Cross-examination,

20 Mr. Adams.

21 MR. HALL: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. HALL:

24 Q. Good afternoon.

25 A. Good afternoon.

1 Q. What's the tuition at Lutheran High
2 School?

3 A. You'll forgive me. It was different at
4 both places. I believe at the Lutheran High School in
5 Parker, the tuition is \$8600 for non-association and
6 \$7900 for association members.

7 Q. Okay. And when does school start for
8 Lutheran High School?

9 A. Wednesday, August 17th.

10 Q. And do you know if any of the scholarship
11 students have been engaged in any activities at
12 Lutheran High School prior to now?

13 A. I do not, no.

14 Q. You all have sports programs?

15 A. Correct, yes.

16 Q. Have the sports teams been practicing?

17 A. No. They're not allowed to. They're
18 gathering. They do their workouts during the course
19 of the summer.

20 Q. Gotcha. You don't know whether any
21 scholarship students are on the sports teams?

22 A. I do not know specifically.

23 Q. Again, Lutheran is part of the
24 scholarship program, correct?

25 A. Correct.

1 Q. And so it signed the contract that you
2 just looked at, which is Exhibit 37, right?

3 A. Yes.

4 Q. If you could look at that again briefly.
5 And if you'd turn to page 4 once you're there. And
6 look at the opt-out provision for the top, number 10.
7 Do you see that?

8 A. Yes.

9 Q. So you're aware of this opt-out provision
10 from Douglas County, correct?

11 A. Yes.

12 Q. And you're aware that it had a waiver
13 from participation from religious services, correct?

14 A. Correct.

15 Q. And what has Lutheran High School done in
16 response to being in the program and having this
17 opt-out?

18 A. We're in consultation with our attorney
19 to draw up the appropriate documents.

20 Q. And I don't want to get into any
21 attorney-client communications, but is Lutheran High
22 School -- how is it going to change how it deals with
23 scholarship students based upon being in this program
24 and having the opt-out?

25 A. Change from the preceding year?

1 Q. Well, how is the opt-out going to work if
2 the parent asks for an opt-out at Lutheran High School
3 and is a scholarship student?

4 A. We're going to provide them with what's
5 being provided by the program. Those documents are
6 being worked on as we speak.

7 Q. Okay. And have you provided the parents
8 of the scholarship students with a description of what
9 the religious services are at Lutheran High School?

10 A. Yes. They understand that -- through all
11 of our material and discussions, they would have an
12 understanding that we have theology classes and chapel
13 three days a week.

14 Q. And you can see here again in number 10,
15 under the opt-out, it says that the partner school
16 will provide parents with a description of any
17 religious services. Do you see that?

18 A. Correct.

19 Q. So my question is, have you done that
20 with parents?

21 A. Yes.

22 Q. Okay. Has Douglas County been involved
23 in this opt-out any more than, you know, having you
24 sign this contract?

25 A. Not to my knowledge.

1 Q. Has Douglas County required Lutheran to
2 change any part of its curriculum?

3 A. No.

4 Q. But Lutheran High School did have to
5 apply to the program, correct?

6 A. Correct.

7 Q. And had to meet the conditions of
8 eligibility in the program, correct?

9 A. Yes.

10 Q. And none of those conditions of
11 eligibility cared one way or the other about your
12 religious practices at Lutheran, correct?

13 A. Correct.

14 Q. Does Lutheran High School have special
15 needs children?

16 A. Yes.

17 Q. And how does it serve those children?

18 A. Typically, if a student comes to Lutheran
19 High School with special needs, or if they're a
20 transfer from a public school setting, possibly they
21 have an IEP, individualized education plan, we would
22 take those students and we are able to serve them in
23 our community. And we do a pretty good job of that.

24 We would take their IEP and we would
25 write an accommodation plan for teachers in the school

1 for that student within that setting. The IEP is
2 specific to the public school environment, but we do
3 work with the IEPs to write an accommodation plan that
4 would meet the needs of the special needs student.

5 Q. And do you know if any scholarship
6 students coming to Lutheran have special needs?

7 A. I do not.

8 Q. You're aware that the plaintiffs are
9 asking the scholarship program to be halted, correct?

10 A. Yes.

11 Q. If it were halted sometime soon, what
12 effect would that have on Lutheran?

13 A. Well, certainly it would have some very
14 disappointed families. My sense is that for many of
15 these families, it is the voucher that allows them to
16 consider coming to Lutheran High School.

17 If it were pulled away from them, how
18 many of them would still attend the high school? I
19 don't know for sure, but I would imagine not many. It
20 would certainly affect the fact that if they have been
21 a part of things already this summer, you know, they
22 would obviously be starting over again in a different
23 location.

24 It certainly affects the operation of the
25 school for 13, 14, or 18 students that would come in

1 as possibly the hiring and then subsequent firing of a
2 teacher potentially.

3 You know, there are -- we budget
4 conservatively, but we get to a point where, if you're
5 counting students that are not there, that does have
6 an effect on your operation.

7 MR. HALL: Thank you. No further
8 questions.

9 THE COURT: Mr. Bindas.

10 CROSS-EXAMINATION

11 BY MR. BINDAS:

12 Q. Good morning -- or good afternoon. My
13 name is Michael Bindas. I represent three Douglas
14 County families who have received scholarships and are
15 defending the program alongside the state.

16 Have any of the parents whose children
17 have received scholarships in Douglas County and
18 chosen to attend Lutheran High School ever indicated
19 to you that they were coerced to choose Lutheran by
20 Douglas County?

21 A. No.

22 Q. Have any of the parents whose children
23 have received scholarships from Douglas County and
24 chosen to attend Lutheran indicated to you that they
25 were compelled to choose this school by Douglas

1 County?

2 A. No.

3 Q. For the Douglas County scholarship
4 families who have selected Lutheran High School, do
5 you have any reason to believe that their choice of
6 Lutheran was anything other than a voluntary choice?

7 A. No.

8 MR. DOUGLAS: Objection, Your Honor.
9 Foundation.

10 MR. BINDAS: Your Honor, I asked if he
11 had any reason to believe.

12 THE COURT: Well, you haven't really
13 established foundation that he knows -- has knowledge
14 about these 18 families, other than the peripheral
15 foundation. I'm going to overrule the objection. You
16 can answer.

17 A. No.

18 Q. (BY MR. BINDAS) I'm sorry. I
19 misunderstood. Thank you.

20 For those Douglas County scholarship
21 families who have chosen to attend Lutheran, do you
22 have any reason to believe that their choice of
23 Lutheran was anything other than a private choice?

24 A. No.

25 Q. Okay. For the Douglas County -- for the

1 Douglas County scholarship families who have chosen to
2 attend Lutheran High School, do you have any reason to
3 believe that their choice of Lutheran was anything
4 other than an independent choice?

5 A. No.

6 MR. BINDAS: Thank you. No further
7 questions, Your Honor.

8 THE COURT: Mr. Douglas, any further
9 inquiry?

10 MR. DOUGLAS: Very briefly, Your Honor.

11 THE COURT: Go ahead.

12 MR. DOUGLAS: Thank you.

13 REDIRECT EXAMINATION

14 BY MR. DOUGLAS:

15 Q. Mr. Gehrke, you talked to Mr. Hall about
16 what you told -- what information you provided to
17 families about the religious services at Lutheran,
18 correct?

19 A. Correct.

20 Q. And I thought you told him that the
21 information you provided to parents is that the
22 religious services were theology classes and chapel
23 three times a week. Is that what you said?

24 A. Yes.

25 Q. And is it your understanding that the

1 program students can opt out of the theology classes?

2 A. That isn't my understanding of the way
3 the program is set up.

4 Q. Okay. Your understanding is that they
5 cannot opt out of the theology classes.

6 A. That was my understanding, yes.

7 Q. So those are not religious services,
8 then, if they can't opt out. Is that your
9 understanding?

10 A. Yes.

11 Q. Okay. And you would agree that there's
12 no obligation under the contract or participation in
13 the program for Lutheran High School to accept any
14 special needs students or students with an IEP?

15 A. That there's --

16 Q. No obligation that you would have to take
17 such students?

18 A. Correct. There's no obligation to take
19 such students.

20 MR. DOUGLAS: That's all I have. Thank
21 you.

22 THE COURT: Mr. Adams, any questions?

23 MR. HALL: Mr. Hall, Your Honor.

24 THE COURT: That's twice I called you
25 that. Mr. Hall.

1 MR. HALL: That's okay. No further
2 questions, Your Honor.

3 THE COURT: I don't think we have an
4 Adams in this courtroom that's a lawyer.

5 Mr. Bindas?

6 MR. BINDAS: No, Your Honor.

7 THE COURT: I just have a couple of
8 quick questions, because I think we got a little
9 confused by your answers to Mr. Douglas' most recent
10 questions.

11 So the idea that you were telling the
12 parents about theology three times a week and chapel,
13 I think you said. Is that right?

14 THE WITNESS: Theology classes and chapel
15 three times a week.

16 THE COURT: All right. Do those
17 constitute religious services that cannot be opted out
18 of by the Choice Scholarship participants?

19 THE WITNESS: Yeah. I think we're hung
20 up on the word "services." To my knowledge, the
21 services would include the chapel and not the theology
22 class itself.

23 THE COURT: All right. So are you
24 breaking -- are you distinguishing between those two?
25 The theology classes cannot be opted out?

1 THE WITNESS: Correct.

2 THE COURT: But the services of the
3 chapel can be opted out?

4 THE WITNESS: Correct.

5 THE COURT: And by opt out, are we
6 talking about -- you can certainly compel their
7 attendance but not their participation?

8 THE WITNESS: It's my understanding that
9 that's the way the program is designed.

10 THE COURT: So that they would attend
11 the chapel services but not be compelled to
12 participate.

13 THE WITNESS: Correct.

14 THE COURT: But you expect them to
15 attend?

16 THE WITNESS: Correct.

17 THE COURT: And you won't consider a
18 waiver of the theology classes.

19 THE WITNESS: No.

20 THE COURT: All right. Anybody have
21 any questions in light of my questions?

22 MR. DOUGLAS: No, Your Honor.

23 MR. HALL: No, sir.

24 THE COURT: The question came,
25 Mr. Douglas, because I think you misspoke. You said

1 non-religious services instead of religious services.

2 Okay. Mr. Gehrke, you may step down. If
3 there's no objection, he'll be excused. Thank you,
4 sir.

5 We're going to go ahead and take our
6 lunch break. And my understanding is, from looking at
7 the witness list, that the plaintiffs have completed
8 their case in chief. Is that right?

9 MR. McCARTHY: Correct, Your Honor.
10 Plaintiffs rest their case in chief.

11 THE COURT: Well, I was going to give
12 you the benefit of taking the lunch hour to make sure
13 you have any exhibits in that you need in before you
14 rest.

15 MR. McCARTHY: I'm trying to move it
16 along, Your Honor.

17 THE COURT: I appreciate that. I gave
18 you till midday today to complete your case, and you
19 just got in under the bell. So if there's something
20 you need to get in that you haven't gotten in and you
21 want to move its admission, we'll do it after lunch.

22 MR. McCARTHY: We appreciate that
23 latitude, Your Honor.

24 THE COURT: The defense will be
25 prepared to present their case in chief, I presume.

1 Are there any motions we need to address before that?

2 MR. LYONS: Might I consider that over
3 the noon hour, Your Honor?

4 THE COURT: Yes, you may.

5 MR. LYONS: Thank you, sir.

6 THE COURT: So hopefully, we'll get
7 started one way or the other. It's 12:20. Let's come
8 back at 1:30. Court's in recess.

9 (Recess taken, 12:23 p.m. to 1:45 p.m.)

10 THE COURT: Please be seated.

11 Good afternoon. Okay. Before we get
12 started with the defense case in chief, there's a
13 couple of housekeeping matters I wanted to address
14 quickly.

15 So the motion, as I understood it, from
16 Mr. Macdonald was to permit -- to have the opportunity
17 to permit their rebuttal expert to Mr. Glenn's
18 testimony to testify by telephone. And we got those
19 things a little bit out of order because of the nature
20 of the pending motion in limine and the idea that we
21 were going to discuss that and argue it over the
22 course of tomorrow morning's proceedings.

23 So I've spent the afternoon or lunch hour
24 looking at that issue and the motion in limine itself,
25 and I am going to just rule on the motion in limine

1 now. So that obviates some of that thing being back
2 and forth.

3 And with respect to the defendants -- and
4 I mean that -- I'm not going to have argument from you
5 because I'm going to deny the motion in limine. I
6 don't know what objection you have to me not hearing
7 your argument, but I'm denying the motion. And,
8 frankly, I don't want to hear it, so -- even if
9 Mr. Hall wants to use two questions at a time, I'm not
10 going to hear it.

11 So the motion in limine will be denied.
12 In terms of the presentation of the testimony, I will
13 grant that motion. He will appear by telephone. And
14 so you're going to need to make arrangements with my
15 staff, Mr. Macdonald, about how to make that happen.
16 And I'm telling you that now to try to maximize as
17 much as we can the lead time you need to get it set
18 up. Okay?

19 MR. MACDONALD: Thank you very much, Your
20 Honor.

21 THE COURT: All right. So that's that
22 issue.

23 Additionally, my staff got a phone call
24 yesterday from someone, and it's not unusual, but
25 apparently a party interested -- someone interested in

1 the case who would not disclose whether they were a
2 party or not, because that was obviously the question
3 that was asked. Are you a party to the case? They
4 claimed to have information that they wanted me to
5 know and consider in making my decision in this
6 case.

7 So I'm going to presume that, as
8 officers of the court, you all have communicated with
9 your clients and your witnesses that I can only make
10 my decision based upon the law that applies to the
11 facts I find from the evidence I've heard in this
12 case.

13 And so I don't know who the person was
14 calling, and I haven't received anything. I don't
15 intend to evaluate this case based upon anything other
16 than the evidence in record. But I wanted you to be
17 aware of that, in case that circumstance came up or if
18 you are -- our phone caller yesterday was someone
19 who's interested in your position and you have some
20 sway with them, you might explain why I don't want
21 them to call.

22 Additionally, I understand the case has
23 public interest, appropriately so. Beyond that, I
24 can't consider anything that's not in the record and
25 that's not evidence. So I wanted you to be aware of

1 that concern that I had.

2 And with that, Mr. Lyons, are you ready
3 to proceed?

4 MR. LYONS: We are, Your Honor, ready to
5 proceed. And sorely tempted as I might be to bring a
6 motion at this time, we will not be bringing a motion
7 at this time.

8 If I might, in deference to her schedule,
9 the state -- state's witness, Ms. Emm, is going to be
10 called first, since she will not be available
11 tomorrow. To be followed by Dr. Fagen, who's the
12 superintendent of the Douglas County school system,
13 and Mr. John Carson, who is the president of the
14 school board.

15 If time permits, we have additional
16 witnesses that we've already advised the plaintiffs
17 about, and hope to be able to get to them, as well, so
18 we can deal with the experts tomorrow.

19 THE COURT: Great. Thank you.

20 MR. LYONS: Thank you.

21 THE COURT: Mr. Blue, you're standing.
22 Do you want to call a witness?

23 MR. BLUE: Yes, sir. I call Leanne Emm,
24 please.

25 THE COURT: Ma'am, come on up and be

1 sworn.

2 LEANNE EMM,

3 having been first duly sworn to state the whole truth,
4 testified as follows:

5 THE COURT: Please be seated. I'm
6 going to ask you to do your best to speak up at an
7 audible level so we can hear you. Use the microphone
8 in response to the questions that you are asked. And
9 permit your questioner to complete the question they
10 are asking you before you commence your answer. We
11 will ask them to extend you the same courtesy. Do you
12 understand?

13 THE WITNESS: Yes.

14 THE COURT: All right. You're going to
15 need to speak up.

16 Mr. Blue.

17 MR. BLUE: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. BLUE:

20 Q. Good afternoon, Ms. Emm. Would you state
21 and spell your name for the record, please.

22 A. Yes. It's Leanne Emm. L-e-a-n-n-e. The
23 last name is E-m-m.

24 Q. And where are you currently employed?

25 A. The Colorado Department of Education.

1 Q. And what is your position?

2 A. Assistant commissioner for public school
3 finance.

4 Q. And how long have you been in that
5 position?

6 A. Since March.

7 Q. And what was your --

8 A. April 1st, actually. Sorry.

9 Q. Were you employed by the state prior to
10 that?

11 A. Yes.

12 Q. What was your position there?

13 A. I was hired in as a principal consultant
14 in the public school finance area. And that was
15 effective January 1st.

16 Q. And before that, where were you employed?

17 A. Jefferson County public schools.

18 Q. And what was your role in Jefferson
19 County immediately prior to joining the state?

20 A. I was the director for budget and
21 planning for the division of instruction.

22 Q. And how long were you in that position
23 for? Since 2008.

24 Q. And what was your role -- what were your
25 duties in that role?

1 A. I was in charge of budget and finance for
2 the division of instruction, which encompassed special
3 education, English as a second language, the academic
4 side of the house. Title programs, instruction, those
5 kind of things.

6 Q. And in that position, were you aware of
7 other programs in which public money was paid to
8 private schools?

9 A. Yes.

10 Q. And could you identify some of those?

11 A. One that I'm very familiar with is the
12 special education private placements.

13 Q. And what can you tell us about -- well,
14 could you tell us what that program is?

15 A. Yes. It's a program that if a student is
16 determined to have needs that the district may not
17 have the capacity to deal with, that the district can
18 choose to place that student into a facility school
19 within the state.

20 The special services -- or human --
21 Health and Human Services may also make those
22 placements.

23 Q. So besides of the district and Health and
24 Human Services, who else has the ability to make those
25 placements?

1 A. Courts.

2 Q. Anybody else?

3 A. Parents rarely.

4 Q. How are those placements funded?

5 A. At a facility -- when a student goes into
6 a facility school, the student is counted as a
7 facility student, and then the state will provide per
8 pupil revenue for that student. And then the district
9 would pay the excess cost for those students on a
10 contractual basis.

11 Q. So just to summarize, it would be a
12 combination of the PPR, the state funding, as well as
13 county funds to backfill what the state doesn't cover?

14 A. Yes.

15 MR. DEIHL: Your Honor, objection.
16 Leading and relevance. We're getting into another
17 program that isn't even at issue in this case.

18 THE COURT: I'll sustain it on the form
19 of the question.

20 Q. (BY MR. BLUE) Could you tell us what a
21 facility school is?

22 A. A facility school is a school that's been
23 determined by the state to be able to provide high
24 need services to particular students or even adults.

25 Q. And are those public schools or private

1 schools?

2 A. A combination.

3 Q. And are there religious schools on the --
4 is there a list of approved facility schools --

5 A. Yes.

6 Q. -- in the department?

7 A. Yes. There is a list of facility
8 schools.

9 Q. Thank you. Just to remind you, because
10 of the court reporter, if you could try to wait for me
11 to finish my questions. I understand that in
12 conversation, it tends to be -- we tend to talk over
13 each other a lot.

14 A. Sorry.

15 Q. It's easier for her. Thank you.

16 On that list of facility schools are
17 there religious schools?

18 A. Yes.

19 Q. And could you identify one?

20 A. Mount St. Vincent would be one.

21 Q. Thank you.

22 And through this special education
23 program that we're talking about today, are these
24 part-time students or full-time students?

25 A. Normally they're full-time students.

1 Q. Are you aware of any other types of
2 programs that are out there that would -- that have
3 private money going to public -- public money going to
4 private schools?

5 A. Yes.

6 Q. Could you name another one?

7 A. The Colorado Preschool Program.

8 Q. And how is that work?

9 MR. DEIHL: Your Honor, same objection.
10 We're talking about a program that's not at issue
11 here.

12 THE COURT: I'll overrule that
13 objection and give him some leeway, just like I gave
14 the plaintiffs leeway. Objection is overruled.

15 Q. (BY MR. BLUE) If you could explain the
16 program to us briefly, please.

17 A. Yes. The Colorado Preschool Program
18 encourages public-private partnerships, and between
19 districts and private providers to support the little
20 children in the district.

21 Q. And are there private schools -- are
22 there religious schools in the approved schools in the
23 preschool program, as well?

24 A. I'm not sure.

25 Q. And finally, are you aware of any other

1 programs such as this where public money goes to
2 private schools?

3 A. Concurrent enrollment may be one.

4 Q. And what is concurrent enrollment?

5 A. Concurrent enrollment is an opportunity
6 for high school students to not only attend their high
7 school but also enroll in a college and obtain college
8 credit through the school.

9 Q. And does that include religious schools,
10 as well?

11 A. Potentially, yes.

12 Q. I'd like to move now towards -- to your
13 job as -- at the Department of Education and talk a
14 bit about school funding. Let's talk about pupil
15 count.

16 We've heard over the last day and a half
17 about school finances and how schools are financed. A
18 piece of that is pupil count. Could you tell us,
19 starting at the beginning of a year -- kind of walk
20 through the process of how the pupil count is started.
21 And I believe it starts in the summer prior to when a
22 school year would start. Is that correct?

23 A. Yes.

24 Q. What happens then?

25 A. So in the December time frame,

1 legislative council provides the Department of
2 Education estimates of the numbers of students that
3 will be attending, a funded pupil count, for us to
4 begin building budget requests for the legislature to
5 review.

6 Q. And do you know what that preliminary
7 number is based on?

8 A. It's based on estimates after districts
9 certify their one-day counts to the state.

10 Q. And we'll learn a little bit what the
11 one-day counts are, but in shorthand, I believe what
12 you're saying is that they look at the previous year's
13 pupil counts at the starting point going forward.

14 A. Yes, that's correct.

15 Q. What's the next step in the pupil counts
16 after the December preliminary number?

17 A. So after we get those preliminary
18 numbers, the budget is set and the appropriations are
19 set by the legislature.

20 In June, we then submit to districts an
21 opportunity to revise those counts. So if a district
22 anticipated many more students than what the
23 projection was, they have an opportunity to revise
24 that estimate.

25 Q. And so we just went through that process

1 for the 2011-2012 school year?

2 A. That's correct.

3 Q. And did Douglas County revise their
4 numbers?

5 A. No.

6 Q. And then what's the next step after --
7 after the districts give you revisions that they have?

8 A. Then we will begin the process of
9 determining how much state share actually gets
10 distributed out to the districts. And that begins in
11 July.

12 Q. And I believe the next step in the
13 process would be the one-day count. Could you explain
14 the one-day count to us, please?

15 A. Yes. That will occur on September 30th
16 this year, since October 1st is on a Saturday.
17 Districts will conduct that one-day pupil count.

18 Q. And what is the one-day pupil count?

19 A. That is when districts go through and
20 determine the part-time enrollment versus full-time
21 enrollment and look at all kinds of factors to
22 determine if the student should be eligible to be
23 counted for funding or not. And then they report that
24 to the state.

25 Q. And when do they report it to the state?

1 A. They must certify that by November 10th.

2 Q. And what is the Department of Education's
3 role at this point in that pupil count when they get
4 that certified number from the district?

5 A. We use those certified numbers to
6 determine how much funding each district should have.
7 And we do one -- one bit of monitoring on that to
8 ensure that there's not a double counting going on
9 between districts.

10 Q. And what do you mean by double counting?

11 A. So if Douglas County and Jeffco both
12 recorded the same student on the pupil count, then we
13 would identify that student and notify the districts
14 that they needed to reconcile which district should
15 count that student for funding.

16 Q. And when is the pupil count number
17 finalized?

18 A. Normally in December. We finish those in
19 December.

20 Q. Now, we've heard testimony that the
21 program in Douglas County has restricted the entrance
22 of students into the program to students who were
23 enrolled in Douglas County in the previous year. Are
24 you aware of that?

25 A. Yes.

1 Q. And what does that -- what impact does
2 that have on the state's share of the funding to
3 Douglas County?

4 A. Since those students were counted in the
5 prior year and were enrolled in Douglas County, there
6 would be no affect.

7 Q. And so from your perspective, it's just
8 that the state would be just an allocation by Douglas
9 County within their share? Is that what you're
10 saying?

11 A. Yes, that's correct.

12 Q. Now, my understanding is that there will
13 be an audit at some point. Could you explain what the
14 audit is of the pupil count?

15 A. Yes. We audit districts that are in
16 excess of 20,000 students on an annual basis.

17 Q. And did Douglas County fall into that?

18 A. Yes.

19 Q. When did that audit begin?

20 A. Douglas County's normally begins in the
21 February, March time frame.

22 Q. And what will they review?

23 A. Our audit team will review 100 percent of
24 the pupils for enrollment and schedules for secondary
25 students, and then enrollment and -- oh, gosh. It's

1 on the tip of my tongue. Attendance. I'm sorry. I
2 went blank. Attendance, enrollment, and schedules.

3 Q. And who does that review?

4 A. The audit team.

5 Q. And do the districts have any input?

6 A. Yes.

7 Q. And what is that input?

8 A. Once the -- the audit team will go
9 through and review the pupils, and then subsequently
10 ask for potential additional information from the
11 district. And there's a back and forth that occurs
12 during the audit process; that we may ask for
13 information on attendance if the student wasn't
14 actually there on October 1.

15 Q. And what kind of information to verify
16 the October 1 date do they look at?

17 A. Normally, the enrollment records -- or
18 the enrollment records and then the attendance records
19 that are kept at the district level.

20 Q. And generally do they look at the five
21 days before and after October 1?

22 A. That would be the next -- we'll look at
23 October 1 first. And then if the student was not
24 there on October 1, then we'll extend it to the
25 window.

1 Q. And at some point, do the auditors issue
2 a preliminary finding or some sort of finding?

3 A. Yes. Once the back and forth is
4 completed between the district and the audit team, we
5 will issue a preliminary draft report with findings
6 listed.

7 Q. And what -- just to be very clear about
8 what those auditors are looking at, are they doing any
9 legal analysis of the legality of the program, or are
10 they just looking at student participation?

11 A. We're looking at student participation.

12 Q. After they issue their preliminary
13 report, do the districts have another opportunity to
14 comply?

15 A. Yes. After the draft -- draft report is
16 issued to the district with the preliminary findings,
17 the district has another opportunity to come back and
18 provide additional documentation that would allow
19 those students to be counted.

20 Q. And then what do the auditors do at that
21 point?

22 A. Once we have -- once we've come to
23 consensus that that would be the final list, or we
24 attempt to come to consensus, then we'll issue the
25 final report to the district.

1 Q. And if the district disagrees with the
2 final report?

3 A. If they disagree, then they have one
4 opportunity to appeal to the commissioner.

5 Q. What authority does the commissioner have
6 at that point?

7 A. He can review the audit and make a
8 determination if the students should be funded or not.

9 Q. Do the auditors also review schools that
10 are under contract with the districts?

11 A. Yes.

12 Q. How does that review differ from their
13 review of the public schools?

14 A. They would review the same information;
15 however, they would also review the contracts that
16 exist between the district and the school.

17 Q. And are the auditors experienced in
18 reviewing those types of arrangements already?

19 A. Yes.

20 Q. And is that because those type of
21 arrangements already exist?

22 A. Yes.

23 MR. BLUE: No more questions, Your Honor.

24 THE COURT: Mr. Hall?

25

1 DIRECT EXAMINATION

2 BY MR. HALL:

3 Q. Ms. Emm, just a few questions.

4 Ms. Emm, I'm going to represent to you
5 that plaintiffs, in one of their filings, made this
6 statement: "Because Colorado law limits school
7 district expenditures to private schools only to
8 federal funds, Douglas County school district cannot
9 transfer funds it receives under the Public School
10 Finance Act to private schools." Did you hear that
11 statement?

12 A. Yes.

13 Q. That's an incorrect statement, is it not?

14 MR. DEIHL: Objection, Your Honor. Calls
15 for a legal conclusion. This witness --

16 THE COURT: Sustained to the form of
17 the question.

18 Q. (BY MR. HALL) Ms. Emm, we just heard you
19 testify with Mr. Blue about other programs where
20 public school finance dollars flowed to private
21 schools, correct?

22 A. Yes.

23 Q. You talked about concurrent enrollment
24 programs, for instance, correct?

25 A. Yes.

1 Q. You talked about facility schools,
2 correct?

3 A. Yes.

4 Q. Again, those are two examples where it's
5 public school finance dollars flowing to these private
6 schools, not federal funds only, correct?

7 MR. DEIHL: Objection, Your Honor.
8 Misstates the witness' testimony. Leading.

9 THE COURT: Sustained to the form of
10 the question.

11 Q. (BY MR. HALL) Let me see if I can
12 simplify the question, Ms. Emm.

13 From your experience in school finance,
14 is it -- may public school finance dollars flow to
15 private entities?

16 A. Yes.

17 Q. And you've described some of the programs
18 where that happens, correct?

19 A. Yes.

20 Q. A similar question, where one of the
21 contentions in this case from the plaintiffs is that
22 public school finance dollars cannot flow to religious
23 entities. From your experience in school finance, is
24 that an accurate statement?

25 A. Can you repeat the question, please?

1 Q. Sure. Let me rephrase it.

2 So you just testified with Mr. Blue about
3 some other programs, like the preschool program, like
4 the facilities program, where public school finance
5 dollars flow to religious entities, as well.

6 A. Yes.

7 Q. So is it accurate to say that public
8 school finance dollars can never flow to religious
9 entities in Colorado?

10 A. No.

11 Q. Ms. Emm, you're also familiar with the
12 Public School Fund, correct?

13 A. Yes.

14 Q. And this is the Public School Fund which
15 is discussed in article 9, section 3 of the state
16 constitution?

17 A. Yes.

18 Q. And are you aware that that's one of the
19 constitutional claims at issue in this case?

20 A. Yes.

21 Q. All right. In the last fiscal year, how
22 much money flowed from the Public School Fund to the
23 state share of Public School Finance Act moneys?

24 A. I know the appropriation for '11 and '12.

25 Q. Okay. Will you --

1 A. The appropriation for '11-'12 is 101
2 million.

3 Q. Okay. 101 million. And what is the
4 total education budget for Colorado, both state and
5 local share?

6 A. It's approximately -- state and local?

7 Q. Yes.

8 A. About 5.2 million -- billion.

9 Q. 5.2 billion?

10 A. Yes.

11 Q. So if you do the math, that is 2 percent?
12 The Public School Fund is 2 percent of the total; is
13 that correct?

14 A. It's about 2 percent of the state's
15 share.

16 Q. Of the state's share. So less than that
17 from the total share.

18 A. That's correct.

19 Q. Okay. And some of those moneys, the
20 Public School Fund moneys -- well, first let me
21 clarify.

22 The Public School Fund requires -- and
23 article 9, section 3 requires -- that only the
24 interest from that fund pass; is that correct?

25 A. That's correct.

1 Q. So this 101 million is the interest on
2 the fund; is that right?

3 A. Yes.

4 Q. Okay. And so that money goes to public
5 school finance dollars; is that correct?

6 A. Not in total.

7 Q. Not in total. That's the 101 million
8 does.

9 A. Yes.

10 Q. Other moneys go to construction projects.

11 A. That's correct.

12 Q. Okay. That's separate.

13 And then that -- the 101 million is mixed
14 into the total school finance dollars. And then that
15 is distributed to all the school districts; isn't that
16 correct?

17 A. That's correct.

18 Q. Okay. And then some of that money,
19 what's distributed to school districts, can be spent
20 at private schools and religious schools. Is that
21 correct?

22 MR. DEIHL: Objection to the form of the
23 question.

24 THE COURT: Sustained.

25 Q. (BY MR. HALL) Ms. Emm, does any of the

1 money from the Public School Fund eventually flow
2 through these programs you described to private
3 schools and religious schools?

4 A. I wouldn't be able to say that. I don't
5 know.

6 Q. Why not?

7 A. Because once the funds are sent to the
8 district, the district has discretion on how they
9 spend those dollars.

10 Q. And that discretion is written into the
11 Public School Finance Act, isn't it?

12 A. Yes.

13 Q. Have you ever in your history of working
14 in school finance at Jefferson County or the state
15 heard someone raise a concern that when -- that
16 there's a violation of article 9, section 3 for these
17 facility school programs or concurrent enrollment
18 programs or any of these programs?

19 MR. DEIHL: Objection, Your Honor.
20 Hearsay.

21 THE COURT: Sustained.

22 Q. (BY MR. HALL) In your experience in
23 public school finance, is that a concern that you
24 have?

25 A. I -- I don't think I have enough

1 knowledge to be able to make that determination at
2 this point.

3 MR. HALL: No further questions. Thank
4 you.

5 THE COURT: Cross-examination?

6 MR. DEIHL: Yes, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. DEIHL:

9 Q. Good afternoon, Ms. Emm. I'm Colin
10 Deihl. I represent the Taxpayers for Public
11 Education.

12 You spoke, on direct, about the audit
13 that the state of Colorado does and can do in the
14 Douglas County school district, correct?

15 A. Yes.

16 Q. Do you recall that testimony?

17 A. Yes.

18 Q. Does the state Board of Education or the
19 state Department of Education have the authority to
20 audit private schools?

21 A. Facility schools, yes.

22 Q. How about private schools?

23 A. Not that I'm aware of.

24 Q. You spoke about facility schools,
25 correct? And you spoke about the funding of those

1 facility schools?

2 A. Yes.

3 Q. Isn't it true that facility schools only
4 get dollars under the 3-G grant programs distributions
5 and other assistance and not from assistance from
6 public schools?

7 A. No.

8 Q. You talked about special education
9 programs for children with disabilities. Do you
10 recall that?

11 A. Yes.

12 Q. The special education program does not
13 come out of the public school finance money, correct?

14 A. It's going to determine -- it's going to
15 be determined how a district funds those dollars.
16 There's various sources that could -- that they could
17 use to fund those facility payments.

18 Q. Would you take a look at the -- are you
19 familiar with the Long bill?

20 A. Yes.

21 Q. Why don't you take a look at Exhibit R,
22 please. Do you have that in front of you?

23 A. The letter from Ms. Kleinkopf?

24 Q. No. I'm sorry. It's Exhibit RR. I
25 misspoke. Double R. Do you have that in front of

1 you?

2 A. Yes, I do.

3 Q. And if you could turn to page 32.

4 A. I'm sorry. I don't have the right

5 document.

6 Q. I'm sorry, ma'am. It's RRR.

7 THE COURT: I'll leave that one alone.

8 Three Rs.

9 MR. DEIHL: I seem to be having trouble

10 with exhibits, Your Honor.

11 THE COURT: How appropriate for a

12 school case.

13 Q. (BY MR. DEIHL) I'm completely wrong.

14 It's Exhibit 145. I'm looking for the Long bill.

15 119.

16 A. Okay. I recognize this.

17 Q. There you go. Sorry.

18 A. Thank you.

19 Q. I had an old exhibit number.

20 And if you'd look at page 32, please.

21 A. Yes.

22 Q. Which is page 5 of the exhibit. And

23 there's a list there of categorical programs. Do you

24 see that?

25 A. Yes.

1 Q. What is a categorical program?

2 A. A categorical program is a program that
3 the legislature has determined they want to fund for a
4 specific program.

5 Q. So there's a specific statute that the
6 legislature passed that funds that program.

7 A. That's correct.

8 Q. And on the first line of these
9 categorical programs is special education program for
10 children with disabilities?

11 A. Yes.

12 Q. Do you see that? And can you -- under
13 special education programs, none of this money that is
14 listed going to special education programs is listed
15 as coming from the general fund exempt; is that
16 correct?

17 A. That's correct.

18 Q. And what does general fund exempt mean?

19 A. General fund exempt -- those are the cash
20 funds, or -- excuse me. Those are -- you know, I'm
21 not sure on that. I would have to defer that to
22 another person to specifically say what the general
23 fund cap -- exempt funds were.

24 Q. And if you'd look at the footnotes
25 contained under the special education program on the

1 next page, they say where these amounts of money are
2 coming from. Do you see that?

3 A. Yes.

4 Q. And the first amount is from the state
5 education fund created in section 17, open paren, 4,
6 open paren, A, article 9 of the state constitution.
7 That is a separate provision from the public school
8 lands fund, correct?

9 A. That's correct.

10 Q. And then the second amount is an amount
11 from federal funds, correct?

12 A. Yes.

13 Q. And the third is also from federal funds,
14 correct?

15 A. On the footnote?

16 Q. Yes.

17 A. Yes.

18 Q. You see footnote C?

19 A. Yes.

20 Q. And if we go back to the previous page,
21 those all tie out to the line items for the special
22 education program, right?

23 A. That's correct.

24 Q. So there's no indication on the Long bill
25 that any of these funds are coming from the public

1 school lands money, correct?

2 A. Not in this specific instance.

3 Q. You also talked about the Colorado
4 Preschool Program. Do you recall that testimony?

5 A. Yes.

6 Q. Now, the Colorado Preschool Program is
7 also set up by a specific statute that the Colorado
8 legislature enacted, correct?

9 A. Yes.

10 Q. And the same thing is true with the
11 concurrent enrollment program? That too is a specific
12 statutory provision that the Colorado legislature set
13 up, right?

14 A. Yes.

15 Q. Now, you indicated that the money for
16 Douglas County was determined based on -- for this
17 year, was based on last year's pupil count, correct?
18 Did I get that right?

19 A. As estimated by the legislative council.

20 Q. Okay. And you will true that up during
21 the coming year, correct?

22 A. That's correct.

23 Q. Now, you indicated that the district has
24 the authority to audit the enrollment data, the
25 attendance records, and the schedules, right?

1 A. That's correct.

2 Q. Do you audit to determine if the school
3 is a public school?

4 A. We would look at the contracts if the
5 school was providing an educational service.

6 Q. Do you actually look at the school to
7 determine if the school that's getting money is a
8 public school?

9 A. No.

10 Q. Do you have the ability to go into a
11 private school and ask for their enrollment
12 information?

13 A. Yes.

14 Q. And that's -- go ahead, please. You
15 wanted -- you can clarify. You were about to say
16 something.

17 A. Thank you. I would like to clarify that.
18 We will if there is a contract existing between the
19 district and the school.

20 Q. You also have the authority, do you not,
21 to make sure that children are in school in the state
22 of Colorado, right? So if there's a K through 12
23 student, you have the authority to make sure that
24 student's actually going to school, correct?

25 A. As far as I know.

1 Q. Now, in this true-up that you're going to
2 do, what more is the state going to know a year from
3 now about the 500 students that are enrolled in the
4 voucher program than the state knows today?

5 A. We would know what the contracts actually
6 state between the district and the private school.

7 Q. And you understand that Douglas County is
8 using money from the school lands fund -- some money
9 from the school lands fund to fund this program; is
10 that correct?

11 A. I wouldn't know that for sure.

12 MR. DEIHL: I don't have any further
13 questions. Thank you.

14 THE COURT: Any other questions?

15 MR. LANGENDORF: Yes, Your Honor.

16 THE COURT: Ahh. Mr. Langendorf,
17 right?

18 MR. LANGENDORF: Yes, that's right.

19 THE COURT: You think I forgot you?

20 MR. LANGENDORF: I wouldn't blame you if
21 you had, sir. I was sitting quietly.

22 THE COURT: You were sitting quietly.
23 Your pro hac vice application was granted yesterday
24 afternoon.

25 MR. LANGENDORF: Yes, sir.

1 THE COURT: You have the floor.

2 MR. LANGENDORF: I'd like to make an
3 appearance. George Langendorf on behalf of the
4 plaintiffs.

5 THE COURT: So reflected. You may
6 proceed.

7 CROSS-EXAMINATION

8 BY MR. LANGENDORF:

9 Q. Good afternoon, Ms. Emm. I'm George
10 Langendorf on behalf of the plaintiffs.

11 You discussed the Colorado Preschool
12 Program in your prior examination, didn't you?

13 A. Yes.

14 Q. And the purpose of that program is to
15 assist the most vulnerable children in the state; is
16 that right?

17 A. I believe it attempts to do that.

18 Q. And so only students who are in need and
19 at risk qualify for that program; is that right?

20 A. Depending on how the district identifies
21 those students.

22 Q. But at any rate, it's a program where
23 access to it is limited, right?

24 A. Yes.

25 Q. And do you know whether any such

1 limitation applies to the Douglas County voucher
2 program?

3 A. I am not aware. I don't know.

4 Q. And I believe you testified a moment ago
5 that there is specific authorization under a statute
6 for the Colorado Preschool Program. Right?

7 A. That's correct.

8 Q. And it's true, isn't it, though, that
9 school districts could -- they're allowed to establish
10 preschool programs using other funds than the public
11 school funds, right?

12 A. Yes.

13 Q. But if they do that, then they're not
14 allowed to receive per pupil revenue for those
15 students; is that right?

16 A. May I ask you to clarify that just a
17 little more, please?

18 Q. Absolutely. If the school district funds
19 a preschool outside of the Colorado Preschool Program,
20 in that event, it's not allowed to receive per pupil
21 revenue; is that right?

22 A. Those students would not be counted to
23 receive funding.

24 Q. Thank you.

25 And I think you testified that you didn't

1 know whether there were any faith-based schools that
2 participated currently in the Colorado Preschool
3 Program.

4 A. That's correct. I don't know.

5 Q. But you do know, don't you, that the
6 content of the instruction at those preschools may not
7 be faith-based under Colorado law?

8 A. I don't believe they would be.

9 Q. I'm sorry. You don't believe it's
10 permissible to have faith-based instruction in those
11 preschools?

12 A. Correct.

13 Q. Thank you.

14 You also mentioned the concurrent
15 enrollment program?

16 A. Yes.

17 Q. And the programs under the concurrent
18 enrollment program themselves are limited to high
19 school students who are seeking to take college
20 classes; is that right?

21 A. Correct.

22 Q. So they would not apply to elementary
23 schools or middle school students?

24 A. That's correct.

25 MR. LANGENDORF: Thank you, Ms. Emm.

1 That's all. No further questions.

2 THE COURT: Any redirect?

3 MR. BLUE: Yes, Your Honor. Thank you.

4 THE COURT: Mr. Blue.

5 REDIRECT EXAMINATION

6 BY MR. BLUE:

7 Q. Ms. Emm, I just want to clarify a few
8 quick things. We might have had a bit of inconsistent
9 questions on one issue -- answers on an issue.

10 Is the state allowed to audit schools who
11 have contracts with school districts? Private schools
12 that have contracts with school districts?

13 A. Yes.

14 Q. Thank you.

15 Now, you talked a little bit with
16 Mr. Deihl about special education and funding for
17 special education. Do you remember that?

18 A. Yes.

19 Q. In your experience, from Jefferson County
20 and currently, does the amount of money appropriated
21 by the -- under the general fund by the Long bill
22 cover the total cost of special education services?

23 A. No.

24 Q. And how did Jefferson County backfill
25 that amount when it wasn't covered by the Long bill?

1 A. It was funded out of their per pupil
2 revenue.

3 MR. BLUE: No more questions, Your Honor.
4 Thank you.

5 MR. HALL: No questions.

6 THE COURT: All right. No questions
7 from Mr. Hall. Anyone else? Mr. Deihl?

8 MR. DEIHL: No further questions, Your
9 Honor.

10 THE COURT: Mr. Langendorf?

11 MR. LANGENDORF: No further questions,
12 Your Honor.

13 THE COURT: Wow. Okay. You can step
14 down. Thank you, Ms. Emm.

15 Oh, wait just one second. I have one
16 question. So that I'm clear, the state maintains the
17 authority to audit private schools that have contracts
18 with individual school districts, right?

19 THE WITNESS: Yes.

20 THE COURT: Earlier you said that that
21 applied to facility schools.

22 THE WITNESS: And facility schools.

23 THE COURT: So it's both.

24 THE WITNESS: Yes.

25 THE COURT: Okay. Thank you. You may

1 step down.

2 Defendants, call your next witness,
3 please.

4 MR. HALL: Your Honor, defense would
5 call --

6 MR. BLUE: Excuse me, Your Honor. Just
7 to make you aware, and plaintiffs' counsel is aware,
8 Ms. Emm is our party representative and she will be
9 staying in the courtroom for a while.

10 THE COURT: Good luck finding a chair,
11 Ms. Emm. But you're welcome to stay.

12 Next witness, please.

13 MR. HALL: Defense would call
14 Dr. Elizabeth Fagen.

15 THE COURT: Raise your right hand,
16 please.

17 ELIZABETH CELANIA-FAGEN,
18 having been first duly sworn to state the whole truth,
19 testified as follows:

20 THE COURT: Please be seated.

21 Dr. Fagen, make yourself comfortable. I don't
22 remember. I'm going to guess. I think you've been in
23 the courtroom during the course of the proceedings.
24 Is that right?

25 THE WITNESS: Only today.

1 THE COURT: Did you hear my
2 instructions to the other witnesses?

3 THE WITNESS: I did.

4 THE COURT: Did you understand them?

5 THE WITNESS: I did.

6 THE COURT: Will you follow them?

7 THE WITNESS: I will try.

8 THE COURT: All right. Please do.

9 Mr. Hall, you may proceed.

10 DIRECT EXAMINATION

11 BY MR. HALL:

12 Q. Good afternoon, Dr. Fagen. Please state
13 your name for the record.

14 A. Elizabeth Celania-Fagen.

15 Q. And what's your position at Douglas
16 County school district?

17 A. I'm the superintendent.

18 Q. What is your educational background?

19 A. I have a doctorate in educational
20 leadership from Drake University, and also a master's
21 degree, specialist degree, and BA in education.

22 Q. And how long have you worked in
23 education?

24 A. Since 1996.

25 Q. And how long have you been administrator

1 in education?

2 A. Since 1999.

3 Q. What is the Choice Scholarship Program?

4 A. It's a program that allows parents to
5 select a school that they feel is appropriate for
6 their children, that best meets the needs of that
7 child. And what happens is, they apply for a
8 scholarship. The scholarship, if they are a winner in
9 the lottery, is awarded to the family.

10 The family selects a school that they
11 feel is in the best interests of their child. The
12 child must attempt to be accepted to that school. In
13 the event that they are, then the district provides
14 the money to the family to assist with the tuition.

15 Q. And what are the purposes of the program?

16 A. The district -- Douglas County school
17 district really believes in universal choice for our
18 families. We try to make information available about
19 every educational option that there is available for
20 our students. And we want to make sure that families
21 have access to that information, and then assist them
22 in matching their children to the best possible
23 program for that child.

24 Q. And is that portion of what Douglas
25 County does -- is that reflected in the strategic

1 plan?

2 A. It is.

3 Q. And how does the Choice Scholarship
4 Program fit in with the strategic plan?

5 A. Well, our strategic plan has three main
6 priorities. One of the priorities is called choice.
7 The second is world class education, because all of
8 the choices need to be world class. And the third,
9 performance framework, because we believe in a high
10 degree of assessing our own performance and then
11 sharing that information to improve our performances.

12 So the choice piece is obviously the
13 first priority and involves many, many different
14 things that both inform families and also give them
15 opportunities to match children to success. Also give
16 a little playing field -- there are many components to
17 the plan. The Blueprint for Choice is the name.

18 Q. Okay. And that's where I wanted to go
19 next. The district calls that Blueprint for Choice?

20 A. Yes.

21 Q. And that was part of the strategic plan;
22 is that correct?

23 A. That's right.

24 Q. And what are the other components of the
25 Blueprint for Choice besides the Choice Scholarship

1 Program?

2 A. There are four major categories, the
3 first of which is improving communication. That is,
4 we want to make sure our parents are fully informed
5 about all educational matters and choices in the
6 district, including diagnostic tools that help them
7 make the best choices for their children in areas
8 where they may not feel as informed.

9 Beyond that, there is a commitment to a
10 level playing field for all of our schools, so that
11 our neighborhood schools, magnet schools, online
12 schools, and charter schools all have equal
13 opportunities to be successful with our students.

14 There's a commitment to multiple pathways
15 for educational success, which is where the
16 scholarship program is located. It is one of many
17 opportunities. Others include home education, online
18 learning, contract schools, magnet schools,
19 neighborhood schools, charter schools. And so that's
20 one component of those pathways to success for
21 children.

22 And there's one -- there's a fourth one
23 that I'm not thinking of, but it's all wrapped into
24 that same idea of -- oh, it's flexibility through
25 policy. So we're reviewing all of our policies for

1 the district to make sure that there is the most
2 amount of flexibility available for our families.

3 For instance, we've increased our open
4 enrollment windows for all of our neighborhood and
5 charter magnet schools so that families have the most
6 opportunity that we can provide to find that right
7 match.

8 THE COURT: I'm going to stop you for a
9 second. Can you slow down a little bit?

10 THE WITNESS: Sure.

11 THE COURT: Thanks.

12 Q. (BY MR. HALL) Dr. Fagen, has the
13 Blueprint for Choice been posted on the district's
14 website?

15 A. Yes.

16 Q. And has the strategic plan also been
17 posted on the website?

18 A. Yes.

19 Q. And were the strategic plan, Blueprint
20 for Choice, and the Choice Scholarship Program all one
21 package, if you will?

22 A. Yes. Well -- yes. The Blueprint for
23 Choice includes all of the different pieces for
24 improving choice in our district, which the
25 scholarship program is one of perhaps 30 different

1 strategies for improving choice.

2 Q. And were they all approved together on
3 March 15?

4 A. The entire strategic plan was approved on
5 March 15th, including the Blueprint for Choice. And
6 the Blueprint for Choice obviously had the scholarship
7 program.

8 Q. Okay. And after the strategic plan, the
9 Blueprint for Choice, and the scholarship program were
10 all approved on March 15th, was there a certain
11 directive that the board gave you as to the
12 scholarship program?

13 A. The board's direction was to move
14 forward -- developing the scholarship program on a
15 time line. That meant the students would have access
16 to the private partner schools for the fall of 2011.

17 Q. Okay. And was a time line posted for the
18 entire Blueprint for Choice, as well?

19 A. Yes. We've attempted to continuously
20 update time lines associated with our strategic plan,
21 and more particularly, the Blueprint for Choice,
22 because there has been so much interest in that.

23 Q. And could you look at defense Exhibit B
24 right now. And this has, again, been admitted.

25 Dr. Fagen, is this a screen shot of the

1 district website showing the Blueprint for Choice
2 piece?

3 A. Yes.

4 Q. And let's first look at the different
5 choice options, which are just to the right of the
6 words "Blueprint for Choice."

7 So it talks about charter schools, choice
8 scholarships, contract schools, home education
9 partnerships, neighborhood school empowerment, online
10 learning, open enrollment. Do those seven capture all
11 of the components of Blueprint for Choice?

12 A. I think that they -- they capture all
13 of -- all of the available opportunities for students,
14 yes.

15 Q. Okay. And further to the right of that,
16 you can see the time line that you just mentioned for
17 the school choice process, right?

18 A. Yes.

19 Q. And then you -- I believe you just
20 testified that you -- the district tried to follow
21 that time line but adjusted it some; is that correct?

22 A. That's right.

23 Q. If you'd turn to the second page of that
24 exhibit. And at the bottom there's a chart that talks
25 about how one educational option is different from

1 another, and then lists different school types. Do
2 you see that at the bottom?

3 A. Yes.

4 Q. Could you first just describe the
5 differences, as listed there, for funding for the
6 different schools? I mean, central allocation and
7 student based budgeting. What does that mean?

8 A. We have a decentralized budgeting process
9 called student based budgeting where schools receive
10 their budgets based on their projected enrollments.
11 And then those schools use that total amount to staff
12 their schools and make local decisions about various
13 things: What electives, what specials, how many -- if
14 they have home monitors or not. All those sort of
15 things.

16 We believe in empowering our individual
17 schools to provide the experience that their students
18 most need.

19 Q. Okay. And so that same type of funding
20 is for neighborhood and magnet and alternative
21 schools; is that correct?

22 A. That's right.

23 Q. Okay. How many magnet schools do you
24 have in Douglas County?

25 A. Two.

1 Q. And what are they?

2 A. We have Lone Tree magnet, and then we
3 also have Renaissance.

4 Q. And just very briefly, what are the
5 missions of those two schools?

6 A. Renaissance is an expeditionary learning
7 school, so the environment is completely tailored to
8 that particular form of learning. And so the families
9 that choose that know that in every classroom their
10 children will experience that type of learning.

11 And the Lone Tree magnet is a work in
12 progress. They call it a quality teacher school,
13 which is a little ambiguous, but they're working very
14 closely with experts in that field. They do a micro
15 society and have very particular things. The students
16 at Lone Tree wear uniforms, and they have other things
17 that are very particular to their school.

18 Q. Okay. Let's go back to the Renaissance
19 school. It's an expeditionary learning school; is
20 that correct?

21 A. Yes.

22 Q. If a parent came to that school and said,
23 I want to be in this school but I don't want
24 expeditionary learning, what would happen?

25 A. Well, when a parent goes to visit

1 Renaissance, the principal does a very good job of
2 explaining exactly what they should expect there. And
3 then if the parent isn't aligned to that thinking for
4 their child, then they would discourage them from
5 choosing Renaissance.

6 Q. Okay. Now let's move down the list.
7 Charter is the next school type. What does full PPR
8 plus mean?

9 A. Douglas County gives 100 percent of the
10 PPR for the students in the charter schools to the
11 charter school. The plus is probably related to the
12 fact that we also share our override moneys with our
13 charter schools, even though we're not required to do
14 that.

15 Q. And then if you move down further, then
16 there are contract schools. It says fee for services.
17 Can you explain that?

18 A. So it will be contracted schools for
19 unique student circumstances, much like Ms. Emm
20 described. And we pay the services as required by the
21 contract school. So depending on what they charge,
22 then we use the per pupil money to pay for that.

23 Q. Okay. And now let's move over one line,
24 and it says CSAP testing. And it shows which schools
25 have to take CSAPs and which school types don't,

1 right?

2 A. That's right.

3 Q. And then if you move over one from there,
4 admittance. So what is, for a neighborhood school,
5 the boundaries and open enrollment? Please explain
6 that.

7 A. So every neighborhood school in Douglas
8 County has a boundary. And when a student is in
9 kindergarten or happens to move into that area,
10 they're assigned to that school. However, the parent
11 always has the option to open enroll to another
12 school. And so they receive children both ways: Just
13 because they live near the school and also because the
14 parent has selected the school through open
15 enrollment.

16 Q. Okay. And then the next two, magnet and
17 alternative, say application open enrollment. What
18 does that mean?

19 A. Again, those environments are very
20 distinct and specific. And so the application process
21 ensures that the family, in the case of magnet, knows
22 exactly what the school is about and is subscribing to
23 that learning environment.

24 The -- an alternative school is generally
25 for students who have needs beyond what can generally

1 be handled in a regular high school. Alternative
2 environments are often high school or special needs,
3 and so their application process is to make sure the
4 students are getting into the correct school for them.

5 Q. So let's follow up on that a little bit.
6 If a student with, say, special needs comes to a
7 certain neighborhood school, can every neighborhood
8 school meet the needs of every child?

9 A. No. Not in a district as large as
10 Douglas County. We have very specialized programs
11 that are regionally located. And they are not in
12 every school, because there is a significant cost to
13 doing that. So in order to be able to afford the
14 quality programs that we'd like to have for those
15 children, we regionalize those. And the family that
16 sends their child to that particular school that
17 offers that particular program allows us to, within
18 our funding, provide the services.

19 Q. Can a parent decide, well, I really want
20 to go to this school, so I guess I won't take all the
21 special ed services that I might want? Could a parent
22 decide that?

23 A. Yes, they can.

24 Q. Now, let's move on from there to charter
25 schools where it says application and lottery. What

1 does that mean?

2 A. The charter schools have no boundaries,
3 so there is no automatic enrollees in a charter
4 school. A hundred percent of their students choose
5 that school. And they have an application process.
6 Depending on their contract with the district, many of
7 them are just straight lotteries, so everybody who's
8 interested fills out an application. There's a
9 straight lottery. The students who win the lottery
10 are then enrolled in the school. The others are often
11 weight listed.

12 If a child who wins the lottery chooses
13 not to go, then the next child on the weight list is
14 asked.

15 That's true for almost all. A very few
16 of them have a preference for the students in their
17 particular area. One, American Academy, happens to
18 have an agreement that a Castle Pines students will
19 have preference, because that was what they had to do
20 with the developer of the land. I mean, it's a unique
21 circumstance. But most of the time, it's a straight
22 lottery.

23 Q. And charter schools, when they apply to
24 the district to become a charter school, can craft
25 their application with those sorts of details; is that

1 correct?

2 A. That's right.

3 Q. And then moving down the list, where it
4 talks about contract schools need-based. Explain what
5 that means.

6 A. So many contract schools are associated
7 with students who have needs that exceed what the
8 district provides. Perhaps blind student would be a
9 good example, or a student with a dependency, a
10 chemical dependency, for example, that would need some
11 sort of program that the district does not have
12 expertise in might be examples of programs that we
13 would contract with to provide the educational
14 services for those students while they're undergoing a
15 treatment program or whatever the case may be.

16 And so it's based on the needs of the
17 child.

18 Q. Okay. And then the last one, private.
19 And that says, "Application." Briefly explain that.

20 A. So what it means is that if a child needs
21 to attend a private school, they would have to apply
22 and be admitted based on that school's process.

23 Q. Okay. Thank you.

24 Now, I want to go back to the time line
25 for the Choice Scholarship Program. Again, it was

1 passed on March 15th. The board directed you, as
2 superintendent, to implement it by the 2011-2012
3 school year, correct?

4 A. Yes.

5 Q. So can you describe what you and your
6 staff did to implement the program.

7 A. So after the March 15th board meeting
8 where the entire strategic plan was approved and we
9 were directed to implement the program by the fall
10 2011, we laid out the work that would need to be done
11 in order to achieve that, and then divided it among
12 the cabinet members that were most appropriate.
13 Mostly my assistant superintendents, Christian Cutter
14 and Dan McMinimee. Myself a little bit. And then
15 also we had along the way advice from legal counsel.

16 So we knew that we needed to have
17 applications for students, applications for private
18 school partners. We knew we needed to have the
19 development of a charter school to have all of these
20 students together, and so that we could do a good job
21 of working with them and their families.

22 We knew we had to do many things. And
23 the response to the board action was overwhelming for
24 us, in that we didn't have the forms created and
25 people wanted them the next day.

1 Q. I'm sorry. Let me stop you there,
2 because you mentioned three categories that I want to
3 touch on briefly. The students' families being one,
4 the private school partners being two, and then the
5 Choice Scholarship school being three.

6 So before we charge too far ahead, I want
7 to just ask you, did the district try and post
8 information to its website about the process?

9 A. Yes. Being inundated with calls, we
10 immediately posted information where our families
11 could put in their contact information, so that as
12 applications were available, we would know that they
13 would -- they would want them and be able to
14 communicate with them about that. So we immediately
15 posted information to our website.

16 We had been doing that to -- under the
17 umbrella of transparency, but we continued to do that.

18 Q. So this is for families interested in the
19 scholarship.

20 A. That's right.

21 Q. Okay. And then did the district
22 eventually create an application for those families?

23 A. Yes.

24 Q. And was that the district's creation?

25 A. Yes.

1 Q. And then did families use that
2 application to apply?

3 A. Yes, they did.

4 Q. And then have -- let's see. We've
5 already heard about the process, you know, with
6 Dr. Cutter. We won't review that again. Certain
7 families applied. And there was a lottery later, May,
8 June.

9 And currently, Dr. Fagen, there are 500
10 students participating; is that correct?

11 A. Yes. There are 500 students who have
12 been awarded the opportunity.

13 Q. And then do some of -- do the actual
14 students themselves fluctuate some?

15 A. Yes, they do.

16 Q. Because some choose to go ahead, and some
17 back out?

18 A. Right. As some probably rushed in -- and
19 this is obviously speculation, but some rushed in to
20 get the scholarship, because there was a limited
21 number and that was well known. As they have explored
22 private schools, perhaps they changed their mind. So
23 they call us and let us know. So there's a bit of
24 fluctuation, but it's not a large amount.

25 Q. Okay. Did the district make an effort to

1 try and limit the effect of the scholarship program
2 outside the district?

3 A. With other school districts?

4 Q. With other school districts. These are
5 the other school districts, yes.

6 A. Yes. As we worked to develop the
7 program, we took a lot of input from various sources.
8 And some of the input we received was that the state
9 budget was already difficult. And another piece was
10 that this would hurt other school districts.

11 And we listened to those concerns and
12 folded them into the idea that in the program where
13 students have to be Douglas County resident student
14 and they also have to be a Douglas County resident
15 student who's attended a Douglas County public school
16 for one year. And there are multiple reasons for
17 that, but one was that it would not impact other
18 school districts or the state budget in that scenario.

19 Q. Okay. Thank you.

20 Now let's move on to -- we talked about
21 families. Now I want to talk a little bit more about
22 the partner school process. There was an application
23 process for the partner schools, correct?

24 A. Yes.

25 Q. And the district wrote that application,

1 correct?

2 A. Yes.

3 Q. And then was there also a flow chart?

4 Did you develop a flow chart as to how the process was
5 going to work?

6 A. Yes.

7 Q. Could we look at that? That's Exhibit C.
8 This has also been admitted. Dr. Fagen, this shows
9 again how the application process occurred for partner
10 schools; is that correct?

11 A. Yes.

12 Q. And how was this information made public?

13 A. We constantly posted everything we had to
14 the website as we felt that it was ready and finished.
15 And then we shared that with anyone who was interested
16 in understanding more about that.

17 And we were in communication with various
18 people who were contacting us as we developed things,
19 and we shared that out.

20 Q. And so the schools applied. And to
21 qualify, they had to meet the conditions of
22 eligibility; is that correct?

23 A. Yes.

24 Q. Okay. And that is from the policy. So
25 if you can look at Plaintiffs' Exhibit 107. Are you

1 there?

2 A. Yes.

3 Q. Okay. So looking at the policy that was
4 approved, and can you look at part E, which is a few
5 pages in. And under part E you can see E-3 talks
6 about being eligible to participate. Do you see that?

7 A. Yes.

8 Q. And then it goes on for two, 2-1/2 pages
9 with the conditions of eligibility; is that correct?

10 A. Yes.

11 Q. Okay. From your perspective as
12 superintendent, what were some of the most important
13 conditions of eligibility?

14 A. Well, student safety is always of
15 paramount concern for us for all of our students, so I
16 would always put student safety at the top.

17 Definitely educational program and
18 quality of educational program was extraordinarily
19 important, because we wouldn't want to provide an
20 opportunity for our students that we did not feel was
21 equivalent to or better than the education that they
22 would receive in the district. And, of course, the
23 financial pieces were extremely important to our CFO.

24 Q. Okay. And if we can focus in a little
25 bit more on the educational program. That's described

1 in E-3-A there, correct?

2 A. Yes.

3 Q. And it references the district's end
4 statements. Could you just explain what those are?

5 A. Our district operates under a concept
6 called policy governance; that's John Carver's work.
7 Our board participates in policy governance. Or
8 coherent governance is another version of that.

9 Under those sort of governance models, a
10 Board of Education links with their community and then
11 sets the ends or outcomes for the students in the
12 district and holds the superintendent accountable for
13 demonstrating that the students in the district
14 actually achieve those ends during their 13 years in
15 the district.

16 So the ends that the board has approved
17 are requirements for all of our students in Douglas
18 County, including these students.

19 Q. These students that go to the partner
20 schools.

21 A. Yes.

22 Q. And you, on the front end, assess that
23 these partner schools can meet the ends.

24 A. That's correct.

25 Q. And then did the district write a

1 contract for the partner schools?

2 A. Yes.

3 Q. And again, the district is the one that
4 wrote it, correct?

5 A. Yes.

6 Q. And we've already looked at it, so we
7 don't need to look at the template.

8 Can you look at E-3-F. So it's still in
9 the policy, and it's the F piece about
10 non-discrimination. Do you see that?

11 A. Yes.

12 Q. And we looked at this a lot, but we've
13 always focused on the except clause; that religious
14 partner schools can make an exception for religion.
15 This states that no descrimination can take place
16 under federal or state law, correct?

17 A. Right.

18 Q. We also heard some testimony earlier
19 about whether partner schools might be discriminating
20 against various classes. If that were to occur, what
21 would the district do?

22 A. Well, I think that the district has
23 inherent in the policy opportunities for appeal. And
24 so if that were to occur, that we would certainly look
25 into the concern.

1 However, we have been very clear with our
2 families that we are -- that they are choosing an
3 environment and that they would -- that they are --
4 that that religious piece of it is, you know, part of
5 that choice.

6 Q. But let's again put aside the religious
7 piece for the moment. Let's say there is a claim of
8 discrimination on some other protected grounds under
9 federal or state law. Does the district have the
10 power to terminate --

11 A. Yes.

12 Q. -- partner schools? And is that written
13 into the contract?

14 A. Yes, it is.

15 Q. Have you and your cabinet talked about
16 the possibility of changing, modifying the policy
17 going forward?

18 A. We -- we believe -- this has been a work
19 in progress for a little less than a year now, and
20 continues to be. And we will continue, as we learn,
21 to update and make changes as necessary.

22 Q. Does Douglas County remain ultimately
23 responsible for the education of the scholarship
24 students?

25 A. Yes.

1 Q. And how does it ensure that the partner
2 schools are delivering a quality education to these
3 students?

4 A. The expectation for the achievement of
5 the students in the private school partner environment
6 is no different than the expectations we hold our
7 neighborhood charter magnet schools and their students
8 to.

9 So all of the students, we will have
10 baseline data, because they have been a student in our
11 district in our public schools for at least one year.
12 So we will have knowledge of their achievement from
13 the past, and we will be able to monitor that
14 achievement progress. As they go forward, as we have,
15 through all the contracts and policies, retained the
16 right for CSAP testing and additional assessments that
17 are given by the district. That's part of the
18 agreement.

19 And so, therefore, we will have
20 personalized monitoring of the progress of these
21 students as they move forward. And we have made a lot
22 of effort, through the policy and the construction of
23 the program, to do that.

24 Q. Okay. And now I want to shift gears just
25 slightly to talk about charter schools. Douglas

1 County has charter schools, correct?

2 A. Yes.

3 Q. And charter schools, again, apply to
4 being a charter school with Douglas County, right?

5 A. Yes.

6 Q. Does Douglas County pick the educational
7 programs of charter schools?

8 A. No.

9 Q. Does Douglas County pick the buildings
10 for charter schools?

11 A. No.

12 Q. Does Douglas County have any say about
13 who's hired and fired at charter schools?

14 A. No.

15 Q. Does Douglas County have any control over
16 the governing boards of charter schools?

17 A. No.

18 Q. Can a charter school waive out of the
19 state statutes that deal with student conduct and
20 discipline?

21 A. Yes.

22 Q. Does Douglas County operate the charter
23 schools on a day-to-day basis?

24 A. No.

25 Q. Now, does Douglas County remain

1 ultimately responsible for the education of the
2 students in those charter schools?

3 A. Yes.

4 Q. How does it ensure that those charter
5 school students are getting quality education?

6 A. We have a review process for all of our
7 charter schools that occurs every three years. In
8 addition to that, we monitor the student data in all
9 of our schools, no matter what kind of school it is,
10 throughout the district on an annual basis.

11 Q. How is the way the district holds partner
12 schools accountable similar to the way it holds
13 charter schools accountable?

14 A. It's very similar. In fact, we obviously
15 used a lot of what we've learned in working with our
16 charter schools to develop the conditions of
17 eligibility and the model for the Choice Scholarship
18 Program.

19 Q. Dr. Fagen, when did payments to
20 scholarship students start going out from the
21 district?

22 A. I believe it was early July.

23 Q. Okay. Now, we've seen several times
24 during this hearing the part of the policy that says
25 September. Why were payments going out in early July

1 and not in September as the policy says?

2 A. Well, when we drafted the policy, we put
3 September in there as the first quarter, but I think
4 that that probably wasn't a very logical first step,
5 because I don't think that many schools would operate
6 for roughly a month without any sort of payment from
7 the family.

8 And so we're learning as we go along in
9 this program, and we're making appropriate changes as
10 things come up. And we've recognized that we were
11 putting families in a bit of a bind or schools in a
12 bit of a bind by not issuing those checks earlier.

13 Q. Has the policy where the word
14 September -- has that been changed yet?

15 A. It hasn't.

16 Q. Do you anticipate the board changing that
17 at some point?

18 A. Yes. We will recommend a change to the
19 board on that particular -- you know, the particular
20 months. The board has been very clear with me that
21 I'm empowered to make logical changes, as necessary,
22 for this program.

23 Q. Is there an annual review process for the
24 scholarship program written into the policy?

25 A. Yes. It says it's at least annually, if

1 not more.

2 Q. Okay. To go back to payments to
3 families. So the payments went out in early July. Do
4 you know, as you sit here today, how many payments
5 have gone out to families?

6 A. It's a moving target, but I believe it's
7 around 180.

8 Q. Okay. And do you know how much money
9 that is? Again, the best you know.

10 A. It's around \$200,000.

11 Q. We heard testimony earlier about how the
12 scholarship program will be a benefit financially.
13 Can you elaborate on that?

14 A. Well, there's been a lot of speculation
15 about the finances. But the CFO was directed to
16 create models for the finances for the program before
17 we recommended it forward. And so the situation is
18 that the student receives, or family receives 75
19 percent of the PPR or per pupil revenue for that
20 child. That's roughly \$4500.

21 That leaves roughly \$1500 for the
22 district to administer the program, overhead costs.
23 Our current projection of the overhead costs does not
24 require the entire \$750,000. That's the amount if all
25 500 students were to participate and you have the 1500

1 from all 500.

2 And our projection is that the overhead
3 costs may not require the entire \$750,000. Probably
4 about half of that. The remaining amount of money we
5 have designated for what we would consider extenuating
6 circumstances as a result of the program. So it will
7 help the other schools, the other students in the
8 district, as necessary.

9 Q. Okay. Is Douglas County a district that
10 is growing year by year?

11 A. Yes.

12 Q. Approximately how many students does
13 Douglas County add every year?

14 A. During the slow economic times, we've
15 been averaging around 1200 students. During more
16 robust times, we could have -- we could go clear up to
17 around 3,000 students per year.

18 Q. Does the scholarship program assist when
19 dealing with that pace of growth?

20 A. It does.

21 Q. How so?

22 A. Well, when you have that pace of growth,
23 it's very difficult to have facilities and materials,
24 et cetera, grow at the same rate of -- when you have
25 1200 students, that's more than an elementary school a

1 year of additional new students. And so you have
2 to -- and they're not usually neatly into one school,
3 so there's spread across the district, which often
4 requires mobile unit classrooms and things like that,
5 which are -- have a 60 percent higher maintenance cost
6 than a regular school.

7 So there's a great deal of cost
8 associated with managing growth. And when you have
9 students who choose to attend a private partner
10 school, those facilities and materials, et cetera,
11 while the -- the student goes, the PPR, the \$4500,
12 goes to support the learning of that child, but the
13 capital costs are not something that the Douglas
14 County school district has to manage.

15 Q. I want to now turn and talk about the
16 Choice Scholarship charter school. Okay?

17 A. Okay.

18 Q. Did the district have to use a charter
19 school as the platform for the scholarship program?

20 A. I think, on the time line that we were
21 directed to follow, we did have to use that platform.

22 Q. And why so? Why did the time line
23 dictate that?

24 A. Because charter schools are eligible for
25 automatic waivers and items that are waivable that

1 non-charter schools are not. They do not have that
2 opportunity.

3 And not having the automatic waivers
4 makes it a much more lengthy process for a new school.

5 Q. Okay. And there's been testimony about
6 when the charter school was put in place. Was the
7 program being implemented prior to the charter school
8 being put in place?

9 A. I think it was a simultaneous kind of
10 process where we were developing things as we learned,
11 and on the time line, it was necessary to keep the
12 program moving forward.

13 Q. Because the direction from the board was,
14 get it implemented by 2011.

15 A. That's right.

16 Q. Is the scholarship program neutral
17 towards religion?

18 A. Yes.

19 Q. Have you seen anything in the
20 administration of the policy that would make you think
21 Douglas County has not been even-handed with all its
22 partner schools?

23 A. No.

24 Q. Now, Dr. Fagen, I want to talk about --
25 you're aware that the plaintiffs are asking for this

1 program to be shut down, correct?

2 A. Yes.

3 Q. Okay. What would be the effect on
4 Douglas County if some number of the scholarship
5 students had to come back into Douglas County in early
6 August?

7 A. Well, some of our schools have started
8 school this week. My daughter, for example, started
9 on Monday. And we had about 30 modified elementary
10 school students start this week. And the majority of
11 our schools will all be in session after next week.

12 So to bring students back, as school has
13 already started, is a significant burden, in that we
14 always work very hard to make sure that all students
15 in our district have optimal learning environments.
16 And we do that by starting our planning in January.
17 So schools get those student based budget amounts.
18 They start planning out how many classroom teachers,
19 how many music teachers, and so forth and so on.

20 When students leave a school in Douglas
21 County, because we are a growing district and many of
22 our schools are very full, weight listed or open
23 enrollment students are then allowed in. So if a
24 student who was planning to attend a private partner
25 school were to find out that he or she could not

1 attend that school and they were going to come back,
2 it's likely if they attended a charter school, they
3 would not be able to come back, because charter
4 schools have moved on with their weight lists.

5 If that student was planning to come back
6 to a neighborhood school, there would certainly be an
7 impact to the classroom size. Because we've had
8 significant budget reductions the last several years,
9 we have pushed our classrooms to the maximum that we
10 feel is appropriate for children. And even one or two
11 more students is a significant burden in a classroom
12 right now.

13 So for that child to come back, it's
14 possible that we would have to consider additional
15 teachers splitting classes. Once children have been
16 with a teacher for a week, they don't want to leave.
17 To split a class is more difficult than just hiring a
18 teacher at the 11th hour, setting up the entire new
19 classroom. Then you have to tell half of a group of
20 students that they have to move.

21 So there are many, many things that would
22 be very difficult for us at this point.

23 MR. HALL: Thank you. No more questions.

24 THE COURT: Mr. Blue, Mr. Bindas, any
25 inquiry?

1 MR. BLUE: No, Your Honor.

2 MR. BINDAS: No.

3 THE COURT: Cross-examination.

4 MR. DEIHL: Yes, Your Honor.

5 THE COURT: Mr. Deihl.

6 CROSS-EXAMINATION

7 BY MR. DEIHL:

8 Q. Ms. Fagen, I'm Colin Deihl. I represent
9 Taxpayers for Public Education.

10 Would you take a look at Exhibit B,
11 please.

12 A. B as in boy?

13 Q. B as in boy. And if you'd turn to
14 page 2. You talked about all these different types of
15 schools on the direct examination. Do you recall
16 that?

17 A. Yes.

18 Q. And you talked about contract schools,
19 and you said those were schools where you contract out
20 for unique student services. Did I get that right?

21 A. Yes.

22 Q. And the Choice Scholarship Program is not
23 a contract school, correct?

24 A. Correct.

25 Q. It's -- you're housing it in a charter

1 school, right?

2 A. Correct.

3 Q. Okay. And at first, you were going to do
4 it a different way, but you ultimately determined that
5 you'd make it a charter school, right?

6 A. I think that we didn't know exactly how
7 to do it at first. Then ultimately, it did become a
8 charter school.

9 Q. If you could take a look at Exhibit 100,
10 please. I'll put it up on the screen for you.

11 MR. DEIHL: Your Honor, I believe this is
12 in evidence.

13 Q. (BY MR. DEIHL) Now, Exhibit 100 is an
14 e-mail from you to a number of people, correct?

15 A. Yes.

16 Q. And this e-mail was sent right after you
17 had a meeting with the state of Colorado back in
18 January of this year, right?

19 A. Yes.

20 Q. And the purpose of that meeting with the
21 state, or at least one of the purposes was to get some
22 assurance from the state to count these students for
23 purposes of public finance, correct?

24 A. Correct.

25 Q. If you'd take a look at the second

1 paragraph on this page. Counting and receiving
2 funding for OCP students. You wrote, "As you know,
3 and the main purpose of our visit was to learn the
4 parameters by which we can count and be funded for OCP
5 students. We understand now that in order for the
6 student to be eligible to be counted by DCSD and
7 receive public money, the, open quote, school, close
8 quote, will have to be in compliance with all
9 non-waivable parts of the law as they currently
10 exist."

11 Is that what you wrote?

12 A. Yes.

13 Q. And one of those non-waivable parts of
14 the law, as it indicates in the next sentence, was the
15 School Finance Act of 1994, right?

16 A. Yes.

17 Q. And you put school in quotes in this
18 memo, did you not?

19 A. I did.

20 Q. Okay. And the charter school that
21 Douglas County has set up isn't a school in any sort
22 of ordinary sense of the word, is it?

23 A. Not ordinary.

24 Q. It doesn't have a building -- its own
25 building, correct?

- 1 A. Correct.
- 2 Q. It doesn't have its own teachers?
- 3 A. True.
- 4 Q. Doesn't have its own books?
- 5 A. Right.
- 6 Q. Doesn't have its own curriculum?
- 7 A. Correct.
- 8 Q. The students enrolled in this school,
9 this charter school, are all going to attend private
10 schools, right?
- 11 A. That's right.
- 12 Q. Now, you're generally familiar with the
13 Colorado Charter School Act?
- 14 A. Generally.
- 15 Q. And you know that under the Charter
16 School Act a school is defined as a public,
17 non-sectarian, non-religious, non-home-based school,
18 which operates within a public school district. Are
19 you familiar with that definition of charter school in
20 the statute?
- 21 A. I haven't memorized it, but that sounds
22 familiar.
- 23 Q. Okay. Now, the Choice Charter School
24 doesn't operate within Douglas County, does it?
- 25 A. I believe that it operates within Douglas

1 County in the same way that the non-alliance school
2 does.

3 Q. The students, though, are going to attend
4 schools outside of Douglas County, right?

5 A. That's true.

6 Q. Some of those schools are located in
7 Denver County, for example.

8 A. Yes.

9 Q. So those students are not going to go to
10 school within Douglas County, right?

11 A. Some will not.

12 Q. And many of the private partner schools
13 are religious, correct?

14 A. Yes.

15 Q. Now if you'd take a look back at
16 Exhibit 100, at the top of your e-mail back in
17 January. This was, again, your summary of your
18 meeting with the Colorado Department of Education,
19 correct?

20 A. Yes.

21 Q. And the first issue that you identified
22 in your e-mail was church and state issues, correct?

23 A. Yes.

24 Q. And you wrote, "All present agreed that
25 the legal issues associated with separation of church

1 and state are likely handled by giving the scholarship
2 directly to parents/students." Do you see that?

3 A. Yes.

4 Q. And then at the bottom of that page you
5 wrote, "CDE warned that even with all of this, we will
6 likely be challenged on this matter under article 5,
7 section 34 of the Colorado Constitution prohibiting
8 support of religion and the U.S. Constitution First
9 Amendment clause." You wrote, "We explained that we
10 are fully aware."

11 A. Yes.

12 Q. So you were aware back in January that
13 this program that you were setting up was likely to be
14 challenged on First Amendment grounds, correct?

15 A. Yes.

16 Q. And on Colorado constitutional grounds,
17 correct?

18 A. Yes.

19 Q. And you set up a legal defense fund for
20 that possibility, correct?

21 A. Not at that time.

22 Q. If you'd take a look at the second page
23 of your memo, please. At the top of that page you
24 have a section entitled, "Charters can waive more."

25 A. Yes.

1 Q. Do you see that? And you wrote, "We
2 discussed the fact that under current law, charter
3 schools have more opportunities to waive statutory
4 requirements than do regular neighborhood schools."
5 Correct?

6 A. Yes.

7 Q. And so that was the reason ultimately
8 that you decided to set this up as a charter school?

9 A. One reason.

10 Q. And by waive statutory requirements, that
11 doesn't include the Public School Finance Act, right?

12 A. Right.

13 Q. And then if we could go a little further
14 down the page, "Public schools outside Douglas County
15 school district." It's three bullets down. Do you
16 see that? Where you wrote, "Public schools outside
17 Douglas County school district"?

18 THE COURT: It says private.

19 Q. (BY MR. DEIHL) I'm sorry. "Private
20 schools outside Douglas County." And you wrote,
21 "Under the current law, in order for us to count
22 Douglas County school district students attending a
23 private school in another district, we will need the
24 consent of that district." Do you see that?

25 A. Yes.

1 Q. Have you obtained the consent of any
2 other districts for this program?

3 A. It's our understanding we don't need to
4 anymore. That was the thinking then.

5 Q. So you had not obtained the consent from
6 the other districts?

7 A. No.

8 Q. And then below that you wrote, "Changes
9 to the law." And you wrote, "The best case scenario
10 is a law change that would allow all requirements to
11 be waived, at least for a Douglas County school
12 district pilot." Do you see that?

13 A. Yes.

14 Q. Did you explore obtaining a law change to
15 set up this program?

16 A. I discussed it with our lobbyist.

17 Q. Who did you have that discussion with?

18 A. Jason Hopfer.

19 Q. And did you attempt to obtain a law
20 change?

21 A. No.

22 Q. I think you said on direct that you began
23 working for Douglas County school about a year ago.
24 Is that right? Did I get that right?

25 A. Yes.

1 Q. And you were hired as the superintendent
2 at that time?

3 A. Yes.

4 Q. You're a proponent of choice in schools,
5 correct?

6 A. Yes.

7 Q. And you view this program as one more
8 choice, right?

9 A. Yes.

10 Q. And you believe that vouchers are like
11 Pell grants that the federal government provides,
12 right?

13 A. I don't think that I would say vouchers
14 are like Pell grants, but I do believe the scholarship
15 program is.

16 Q. And when you came to Colorado last
17 summer, you moved here from Arizona, right?

18 A. Yes.

19 Q. You were a superintendent of the Tucson
20 school district, correct?

21 A. Yes.

22 Q. Were you familiar with the Colorado
23 constitutional provisions when you moved here?

24 A. I wouldn't say in-depth, no.

25 Q. Were you familiar with the Colorado

1 School Finance Act?

2 A. Not in-depth, no.

3 Q. You are aware, are you not, that the
4 Douglas County school board derives its authority as a
5 school district from article 9, section 15 of the
6 Colorado Constitution, right?

7 A. Yes.

8 Q. That the school board is required by our
9 constitution to have control of the instruction of the
10 public schools in the district, correct?

11 A. Uh-huh. Yes.

12 Q. And that's your job in Douglas County,
13 right?

14 A. Right.

15 Q. To oversee instruction of public schools
16 in Douglas County, right?

17 A. Yes.

18 Q. You don't have the authority to oversee
19 the instruction of private schools, do you?

20 A. I can't answer that.

21 Q. You don't view it as part of your job to
22 oversee instruction in private schools, do you,
23 Dr. Fagen?

24 A. I view it as part of my job to oversee
25 the education of a hundred percent of Douglas County

1 students.

2 Q. But you don't see it as part of your job
3 to oversee instruction in private school, do you,
4 Dr. Fagen?

5 A. In all private schools, generally
6 speaking, no.

7 Q. And you don't have any control over the
8 instruction of students in private schools, correct?

9 A. Correct.

10 Q. How long were you in Tucson?

11 A. Two years.

12 Q. What was your position there again?

13 A. Superintendent.

14 Q. Were you familiar with the voucher case
15 in Arizona where the Arizona Supreme Court decided,
16 while you were there, that the Arizona voucher program
17 violated the no aid clause of the Arizona
18 constitution?

19 A. No. I was not involved with that.

20 Q. Were you familiar with it?

21 A. No, not really.

22 Q. Let's take a look at Exhibit 107, please.
23 Now, you talked to Mr. Hall about Exhibit 107 on
24 direct, correct?

25 A. Yes.

1 Q. And Exhibit 107 is the program that the
2 Douglas County school board has adopted, right?

3 A. Yes.

4 Q. And this is the program as it currently
5 exists, correct?

6 A. Yes.

7 Q. And your job is to oversee this program,
8 correct?

9 A. Yes.

10 Q. And this document guides that
11 implementation, right?

12 A. Yes.

13 Q. If you'd take a look at page 2, paragraph
14 3, please.

15 MR. DEIHL: I'm sorry. I seem to be
16 having trouble today, Your Honor.

17 Q. Page 2, paragraph 6. I'm sorry. And
18 that's the definition of a private school partner,
19 right?

20 A. Yes.

21 Q. And a private school partner is a
22 nonpublic school, by definition, correct?

23 A. Yes.

24 Q. You indicated on direct that you
25 accelerated, for lack of a better word, the payments

1 to the private schools, because you thought it would
2 work better that way in light of the school year. Am
3 I sort of summarizing your testimony correctly?

4 A. I said that we were constantly in
5 development of this program, and that initially when
6 we developed the policy, we thought September would
7 work. But as we moved forward, we recognized it
8 wasn't going to work as well as we thought.

9 Q. And I take it, you make a payment to a
10 private school when you know a student is enrolled in
11 that private school, right?

12 A. Yes.

13 MR. HALL: Objection, Your Honor. Not
14 how the policy works.

15 THE COURT: What was the objection?

16 MR. HALL: Form of the question.

17 THE COURT: Overruled.

18 Q. (BY MR. DEIHL) And your answer was? I'm
19 sorry.

20 A. Yes.

21 Q. And so you want to make sure that the
22 students are actually attending the private school
23 before you send the money, correct?

24 A. No. Accepted.

25 Q. Now, some of these students were accepted

1 to these private schools before you had this program
2 in place, right?

3 A. That's possible.

4 Q. You don't know?

5 A. I don't know of any individual
6 circumstances, no.

7 Q. You haven't reviewed the contracts
8 between the parents and the private schools?

9 A. No, I have not.

10 Q. So it's possible that some of these
11 students enrolled in the private school before the
12 program was up and running.

13 A. It's possible.

14 Q. And for those students, would it be fair
15 to say they were intending to go to the private school
16 in any event?

17 A. If indeed that were the case, yes.

18 Q. They weren't relying upon this program.

19 A. Right.

20 Q. The payments that you've already made for
21 this program, where did that money come from?

22 A. The district general fund we have.
23 Carry-forward moneys that are one-time moneys.

24 Q. So you have these carry-forward moneys,
25 and you've used those to now pay tuition in private

1 partnerships.

2 A. We have a district budget, and, yes.

3 Q. Now, if I understand the program
4 correctly, a student has to be enrolled in Douglas
5 County schools for one year, and then they can
6 participate in the program. Correct?

7 A. They can apply for the lottery, yes.

8 Q. And is there anything in the program that
9 would prevent a parent of a private school student
10 from enrolling that student in Douglas County schools
11 for one year and then reenrolling them in a private
12 school and applying for the voucher?

13 A. No. There would be nothing to prevent
14 that.

15 Q. You indicated on direct that the
16 financial piece of this program was, quote, extremely
17 important to your CFO. Do you recall that?

18 A. Yes.

19 Q. Who is your CFO?

20 A. Bonnie Betz.

21 Q. And why was it extremely important to
22 your CFO?

23 A. Because she considers herself, you know,
24 responsible for the fiscal stability of the district.

25 Q. And she wanted to make sure that you were

1 going to be able to count these students for purposes
2 of obtaining funding from the state of Colorado,
3 right?

4 A. Yes.

5 Q. Now, you were asked some questions about
6 your ability to account -- to audit and have
7 accountability for what goes on in these private
8 partner schools. Do you recall those questions?

9 A. Yes. The annual review?

10 Q. Yes.

11 A. Yes.

12 Q. And I think you stated that the only
13 remedy you have if you determine that the private
14 partner school isn't doing a good job is to terminate
15 the contract, right?

16 A. That is one remedy that we have.

17 Q. Do you have any other remedies?

18 A. I think that we have the opportunity to
19 talk with the family about a better option.

20 Q. So you can talk with the family, and you
21 can terminate the contract.

22 A. Yes. We could do both those things.

23 Q. You can't require the private partner
24 school to change its instruction of a student,
25 correct?

1 A. Correct.

2 Q. You can't require the private partner
3 school to change its enrollment policies, right?

4 A. Correct.

5 Q. You can't require the private partner
6 school to change its employment policies, right?

7 A. Right.

8 Q. You can't require it to change its
9 discipline policies?

10 A. Right.

11 Q. So all you can do is terminate the
12 contract, correct?

13 A. Yes.

14 Q. And you indicated that the way you're
15 going to measure this is through the normal
16 accountability measures that the Douglas County school
17 district uses. The CSAP tests. Correct?

18 A. That's one measure, yes.

19 Q. And other assessments that you require of
20 students, correct?

21 A. Yes.

22 Q. And so you're going to get information
23 about these private partner schools a year after these
24 children have enrolled in these schools, correct? At
25 the earliest.

1 A. No. Because we're developing interim
2 assessments for all Douglas County students. And
3 these students would be included in those.

4 Q. And if you find out, based on those
5 interim assessments, that the students aren't doing
6 well, you're going to terminate the contracts with the
7 private partner schools?

8 A. Well, we would handle this on an
9 individual student basis. I mean, one student may not
10 be doing well, but three others at the same school
11 might be doing extraordinarily well. So we would work
12 with our families in a personalized approach.

13 Q. Now, the program does not require -- I
14 think we already indicated this -- the partner schools
15 to modify their initial criteria, right?

16 A. Right.

17 Q. And many of these schools are religious,
18 correct?

19 A. Yes.

20 Q. And their admission criteria includes
21 religious admission criteria, correct?

22 A. Yes.

23 Q. Now, if a student in your district is a
24 Hindu student and wants to go to a private partner
25 school, is there a school available to them?

1 A. I do not know.

2 Q. Do you have a Hindu-based school in your
3 private school partner list?

4 A. I don't have a list of private schools
5 memorized.

6 Q. You don't know what schools are in that
7 program?

8 A. I could name some of them, but I don't
9 know all of them. And I don't have the depth of
10 knowledge that others have.

11 Q. Now, you had several meetings with the
12 state of Colorado when you were setting up this
13 program, correct?

14 A. Yes.

15 Q. One of those was in January, one of them
16 was in March, right?

17 A. Yes.

18 Q. Did you have other meetings with the
19 state?

20 A. No.

21 Q. I believe you indicated on direct that
22 your schools begin planning for the upcoming year in
23 January. Right?

24 A. Yes.

25 Q. That's when they start determining

1 classes and teachers and that sort of thing, correct?

2 A. That's when we do the projected
3 enrollments.

4 Q. And how many students are in Douglas
5 County school district?

6 A. Roughly 58,000.

7 Q. And there are 500 students in the Choice
8 Scholarship Program, right?

9 A. Yes.

10 Q. So your schools began planning in January
11 for student enrollment. And if this program is
12 terminated, some of those 500 students might return to
13 the Douglas County school district, correct?

14 A. Yes.

15 Q. And you don't know how many, right?

16 A. Right.

17 Q. And as a superintendent of a school
18 district, it's right, is it not, that you don't really
19 know how many students are going to show up in a
20 particular school until the first day of school?
21 Right?

22 A. We have a pretty good idea. We have a
23 lot of longitudinal data as well as our current
24 projections. So we have a pretty good idea about what
25 we're expecting.

1 Q. So you don't have exact data, right?

2 A. Not exact.

3 Q. People move during the summer, right?

4 A. Right.

5 Q. And some students decide to enroll in
6 private school and don't tell you, right?

7 A. True. The principals do a pretty good
8 job of trying to make sure that they know.

9 Q. And so out of the 58,000 students, how
10 off are your longitudinal studies when you determine,
11 you know, how many students are going to be in Douglas
12 County schools for the following year?

13 A. The data gets more and more accurate with
14 each passing month, because as we're planning,
15 principals start following up with families that they
16 haven't heard from, because we do have multiple
17 opportunities to hear from our families through
18 registration processes prior to school starting.

19 Q. Is Douglas County school district on a
20 year-round program for any of its schools?

21 A. Not currently.

22 MR. DEIHL: I don't have any further
23 questions. Thank you.

24 THE COURT: Mr. Douglas?

25 MR. DOUGLAS: Thank you, Your Honor.

1 THE COURT: How long do you think you
2 have?

3 MR. DOUGLAS: Not very long.

4 THE COURT: That's vague.

5 MR. DOUGLAS: 10 minutes. Maybe 15.

6 THE COURT: You know, let's go ahead
7 and give our court reporter a break. So we're going
8 to take 15 now and come back at 3:35. Court's in
9 recess.

10 (Recess taken, 3:22 p.m. to 3:38 p.m.)

11 THE COURT: Please be seated. All
12 right. We are going to continue now with the
13 examination of Dr. Fagen. And I believe Mr. Douglas
14 had some questions.

15 MR. DOUGLAS: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. DOUGLAS:

18 Q. Good afternoon, Dr. Fagen.

19 A. Good afternoon.

20 Q. My name is Matt Douglas, and I represent
21 some of the plaintiffs in this case.

22 I want to ask you quickly. You said
23 there are 15,000 students in Douglas County public
24 schools. Is that correct?

25 A. Approximately, yes.

1 Q. And how many schools is that?

2 A. Over 80.

3 Q. And as of today, the district has
4 provided information to us about 271 of the 500 Choice
5 Scholarship participants; is that correct? As far as
6 you know?

7 A. As far as I know. That's what you're
8 telling me.

9 Q. That's what's been talked about here.
10 And so when we're talking about -- well, first of all,
11 you said some of those students -- some of the 500 may
12 or may not participate, maybe they didn't get
13 accepted. You don't know exactly what's going on with
14 all the 500, correct?

15 A. Correct.

16 Q. And, in fact, as to the other 229 of the
17 500, the district, at this point, does not know
18 whether those students have been accepted in any of
19 the private partner schools or not, correct?

20 A. I do not know. And I -- I'm not aware of
21 the district's knowledge of those students.

22 Q. Douglas County has a number of students
23 who leave the district each year to attend private
24 schools; is that correct?

25 A. Yes.

1 Q. Sort of an attrition rate to private
2 schools that happens every year?

3 A. Right. There are students each year that
4 choose a private school.

5 Q. And would you agree that particularly in
6 ninth grade, a number of students go to private
7 schools every year to start at high school?

8 A. Anecdotally, I've been told that a few do
9 that.

10 Q. Okay. Do you know approximately how many
11 of the 58,000 or so students year to year in Douglas
12 County leave to go to private schools?

13 A. I do not.

14 Q. Do you know whether or not Regis Jesuit
15 and Valor Christian are high schools to which a number
16 of Douglas County schools leave each year to start the
17 ninth grade?

18 A. Again, I have been told just anecdotally
19 that we have some students that choose those two
20 schools, yes.

21 Q. In a significant amount?

22 A. I'm not exactly sure of what the number
23 is or if it's significant, given that we have quite a
24 number of high school students.

25 Q. Okay. You attended the meetings with the

1 state Department of Education that have been
2 discussed?

3 A. I did.

4 Q. Okay. Take a look at Exhibit 90, please.

5 THE COURT: Nine-zero?

6 MR. DOUGLAS: Nine-zero, yes. Thank you.

7 Q. (BY MR. DOUGLAS) All right. And this is
8 in evidence. Dr. Fagen, I'll -- well, let's look at
9 the next page. Have you seen this document before?

10 A. I've seen the meeting minutes for the
11 January meeting, but I'm not sure that I've seen the
12 March 7th minutes.

13 Q. But that's what these appear to be, is
14 the state of Colorado minutes of the meeting that you
15 attended on March 7th?

16 A. Yes.

17 Q. Let's look at the next page, page 3, of
18 Exhibit 90 at the bottom. The very last entry is from
19 Rob Ross, and he's an attorney for the district?

20 A. Yes.

21 Q. And he, according to these meeting
22 minutes, said, "This is a 500-person pilot program.
23 So far, 50 ninth graders have applied to Regis, a
24 private school in Cherry Creek, and 25 applied as
25 10-12 grade students." Do you see that?

1 A. Yes.

2 Q. Do you recall that being discussed at the
3 meeting?

4 A. I recall -- I don't recall the individual
5 numbers, but I recall that we talked about a lot of
6 different things at the meeting.

7 Q. You do recall a discussion about ninth
8 graders who already applied to Regis as of that time?

9 A. Actually, I really don't recall -- there
10 were actually some sidebar conversations that happened
11 during that meeting, so I don't believe I was actually
12 participating in this particular thing. But I
13 definitely know that there was conversation about
14 students that went to other schools.

15 Q. Okay. And if it's recorded in the
16 minutes that Mr. Ross said that 50 ninth graders have
17 already applied to Regis as of that time, you don't
18 have any information to the contrary, do you?

19 A. I don't.

20 Q. Do you know how many ninth graders are --
21 have accepted with Regis under the Choice Scholarship
22 Program?

23 A. I don't have that number memorized.

24 Q. Let's look at Exhibit -- Defense
25 Exhibit RR, please. All right. You can see on the

1 left side there's Regis Jesuit High, 39 total
2 students. Do you see that?

3 A. Yes.

4 Q. And then if we scroll over, we need to be
5 able to see the grade level. For ninth grade, there
6 appears to be 37 of the 39. Correct?

7 A. Yes.

8 Q. Currently enrolled in Regis' ninth
9 graders under the program, correct?

10 A. Yes.

11 Q. So if it's correct that 50 ninth graders,
12 as reflected in the minutes of this meeting, had
13 applied to Regis as of March 7th -- well, let me stop
14 there.

15 This was before the program was enacted,
16 correct?

17 A. Yes.

18 Q. So if in fact, as of that time, a week
19 before the program, as reflected in these minutes, 50
20 ninth graders had already applied to Regis, you would
21 expect that some of those 50 students would be part of
22 the 37 who were now enrolled under the program,
23 correct?

24 A. It's possible.

25 Q. It's likely?

1 A. I would guess.

2 Q. And for those students -- let's talk
3 about them for a minute. If the program did not
4 exist, that any student who enrolled at Regis as of
5 March 7th or 15th, that went to Regis next year, the
6 district would get no money for those students,
7 correct?

8 A. Correct. It would have no contact with
9 them.

10 Q. Right. There would be no PPR received by
11 the district for those 50 students, assuming those 50
12 went, correct?

13 A. That's true.

14 Q. But under the program, if those same
15 students go to Regis, who would have gone anyway, the
16 district now gets 25 percent of the PPR, right?

17 A. Correct.

18 Q. And let's take a look back at Defendants'
19 RR. If you look at Valor Christian High, 61 total
20 students enrolled under the program so far, correct?

21 A. Yes.

22 Q. 50 of those are going into ninth grade,
23 correct?

24 A. Yes.

25 Q. And it would also be likely that some of

1 those 50 were some of the students who would have gone
2 to Valor from Douglas County, in any event, right?

3 A. It's possible.

4 Q. And it's true for those students, as
5 well, if the program did not exist, the state -- I'm
6 sorry -- the district would receive no funding for
7 those students, but with the program it made 25
8 percent.

9 A. That's correct.

10 Q. And you testified about how that 25
11 percent of the PPR that's going to be retained by the
12 district for program students generally is going to
13 help your district financially, right?

14 A. It's going to pay for the overhead
15 expenses of maintaining contact with the families and
16 the students, administering all the assessments,
17 monitoring the attendance data, all the pieces of the
18 school required by law. And whatever portion of the
19 remaining 25 percent that is left will remain with the
20 district.

21 Q. So after the administrative costs of the
22 program, it's your testimony that the remainder of
23 that 25 percent can be used to help other schools in
24 the district.

25 A. Yes, it could.

1 Q. All right. Let's take a look at
2 Exhibit 6, please. Dr. Fagen, I assume you've seen
3 this before. This is the agreement between the
4 Douglas County school district and the charter school
5 that will be administering the program, correct?

6 A. Yes.

7 Q. All right. Let's take a look -- by the
8 way, that's dated June 21st, 2011; is that right?

9 A. Yes, it appears so.

10 Q. And let's take a look at page 11 of this
11 exhibit, please. That paragraph, revenues. Are you
12 familiar with this?

13 A. Yes.

14 Q. Okay. It says, "District per pupil
15 revenue funding. In each fiscal year during the term
16 of this contract, the district shall provide 100
17 percent of PPR to the school minus the following." So
18 let's stop there for a second.

19 So as an initial matter, the way the
20 program would be administered is that all of that
21 money you guys get from the state for each student
22 goes first to the charter school.

23 A. Yes.

24 Q. Okay. Then it says, "Minus the
25 following: The actual amount of the school's per

1 pupil share of the central administrative overhead
2 costs, up to 5 percent of the PPR." Right?

3 A. Yes.

4 Q. Okay. So the district -- the district
5 can collect up to 5 percent of that 100 percent for
6 its administration of the program, right?

7 A. Yes.

8 Q. Okay. And then it says, "Less other
9 deductions as provided herein, and adjusted as
10 provided herein." That's it, right?

11 A. Or as agreed to in writing by parties.

12 Q. So once that money goes to the charter
13 school, other than what you can take out for
14 administrative costs, the rest of that money cannot,
15 in fact, be used to help other Douglas County schools
16 or students who are not enrolled in that charter
17 school. Is that true?

18 A. No, that's not the way we look at it.

19 Q. You believe the district can take more
20 money from the charter school that it's already given
21 them?

22 THE COURT: You keep talking about
23 charter school. I think you're referring to the
24 choice school here. Is that right?

25 MR. DOUGLAS: It's the charter school

1 that they've set up --

2 THE COURT: Fair enough.

3 MR. DOUGLAS: -- to administer. So
4 it's --

5 THE COURT: All right. Fair enough. I
6 apologize.

7 A. So in addition to the 5 percent piece, it
8 is our belief that the assessments are best
9 administered by the district. That individual schools
10 were not interested in taking on that responsibility,
11 and, therefore, that is a purchased service from the
12 district, in addition to other items that are agreed
13 to by both parties in writing. So I think that that
14 covers basically what I've explained.

15 Q. (BY MR. DOUGLAS) Explained that this
16 charter school is going to do in its administration of
17 CSAP testing and things of that nature. That's what
18 you're talking about, those kinds of costs?

19 A. Right. So in Colorado, many districts
20 retain 5 percent overhead costs for administering the
21 flow-through dollars to a charter school. That's the
22 5 percent. And then in addition to that, charter
23 schools can purchase services. So our charter schools
24 have purchased special education services and other
25 things from the district with their PPR amount.

1 So as is agreed in this charter, we have
2 agreed to administer all of the assessment pieces and
3 all of the attendance and all of the pieces required
4 of the School Finance Act. And so those are
5 additional purchased services as it's agreed in this
6 contract.

7 Q. Okay. And I think we're talking over
8 each other, and I want to see if we can get back on
9 the same page.

10 As far as additional money that could be
11 used by the district to help other schools outside of
12 this charter school and this Choice Scholarship
13 Program, so the profit for the district that you
14 talked about you would be making on this 25 percent
15 that's retained, where is that coming from? Is it
16 something that you would collect back from the charter
17 school?

18 A. It's my understanding that the purchased
19 services, the dollars that are received under the
20 purchased services plan, could be used by the district
21 to offset some costs in our other schools if that's
22 what we choose to do.

23 Q. So you think that after you give a
24 hundred percent to the charter school and take the 5
25 percent for administrative costs, that you could take

1 more to help other schools?

2 A. No. I think that according to this
3 agreement, we will have purchased services that a
4 charter will purchase from the district, and using
5 that money, the district could do whatever they want
6 with the money from the purchased services.

7 Q. What types of services are we talking
8 about?

9 A. We're talking about all of the
10 assessments for the students in this program. We're
11 talking about all of the accountability requirements
12 under the School Finance Act.

13 So we have agreed to monitor the
14 students' progress. In addition to that, we've also
15 agreed to do the attendance, the schedule, all the
16 things that Ms. Emm talked about as required in
17 audited items. Those are all the pieces that we are
18 going to offer as purchased services.

19 Q. And all those services are services that
20 benefit the charter school in conjunction with the
21 program, not services relating to any other school,
22 right?

23 A. Those are services the district is
24 providing for a certain amount of money, which is the
25 5 percent plus the 20 percent. 25 percent.

1 Q. Services for the program.

2 A. Yes.

3 Q. So as far as money that could be used to
4 help other schools -- not the program, not this
5 charter school, but profit to the district -- could be
6 used for an elementary school somewhere in Castle
7 Rock.

8 A. Right.

9 Q. Where is that money coming from?

10 A. So I think that we're not communicating
11 well.

12 Q. Yeah.

13 A. So the agreement we have between the
14 district and this charter school is that the district
15 has agreed to take on certain responsibilities that
16 normally the charter would have. In this case, the
17 charter is purchasing those services from the
18 district.

19 Then the district has the option to
20 absorb or whatever they do, and use some of those
21 funds to offset -- you know, it mitigates some of the
22 issues in other schools if the district chooses to do
23 that.

24 Q. I'm still confused.

25 A. That's my best explanation.

1 Q. So let me just see if I can ask it a
2 different way to try to get on the same page.

3 Out of the hundred percent of the PPR, 75
4 percent of that's going to private school tuition,
5 right?

6 A. Yes.

7 Q. Okay. Out of the other 25 percent, the
8 district is taking 5 percent. That leaves 20 percent,
9 right?

10 A. Yes.

11 Q. And is it your testimony that some of
12 that remaining 20 percent can be used by the district
13 to provide services for schools elsewhere in the
14 district?

15 A. That's my understanding.

16 Q. On the topic of charter schools, you, I
17 believe, testified that this charter school that we're
18 talking about that would have administered this
19 program -- this charter school was a school in Douglas
20 County in the same way that an online school would be
21 a school in Douglas County. Was that your testimony?

22 A. I was trying to explain that the
23 definition of a school is somewhat different today
24 than it has been in the past, and that not all schools
25 have a brick and mortar building exactly what we

1 envisioned from, you know, traditional school like an
2 online school.

3 We have two different versions of that in
4 Douglas County with Hope Online and then EDCSD, both
5 online schools. Very different situations. One has
6 centers all over, and not even in Douglas County where
7 students attend. And they're Douglas County students.

8 Q. Okay. Are you aware that the Colorado
9 Board of Education has defined an online program as a
10 non-religious, non-sectarian, full-time online
11 education program authorized by statute?

12 A. I wasn't implying that this was an online
13 program. I was just comparing the notion of a school.

14 Q. Okay. But in that instance, this school
15 that doesn't physically exist in Douglas County, it
16 only exists online, under those circumstances, it is
17 required to be non-religious and non-sectarian,
18 correct?

19 A. Yes.

20 Q. You testified that the money that the
21 district will make off of this program would help with
22 the increasing students -- help in dealing with the
23 increase in students that you have in your district
24 every year. Is that true?

25 A. I said that it would help with the

1 capital expense, yes.

2 Q. With capital expense. Thank you.

3 And I think you mentioned that Bonnie
4 Betz is someone who you would defer to for more
5 information about that subject?

6 A. I don't recall that that was the topic
7 that I was referencing Bonnie on, no.

8 Q. She's the CFO?

9 A. Yes.

10 Q. So as far as expenses and how it might
11 help with expenses, that would be her area of
12 expertise, correct?

13 A. She and the chief operating officer,
14 Diane Dony, would be the people that work on managing
15 the growth with regard to facilities and capital
16 costs.

17 Q. And do you recall that there was a
18 meeting the week of February 21st where there was a
19 presentation by you and Dr. Cutter and probably others
20 about this program?

21 A. Yes. We had several public input
22 sessions in February. That's probably what you're
23 referencing.

24 Q. Okay. And you put together some
25 PowerPoint slides for that presentation?

1 A. Yes.

2 Q. And you sent those around for review,
3 correct?

4 A. Yes. I assume you mean internally.

5 Q. Yes.

6 A. Yes. Okay.

7 Q. And one of the subjects at those meetings
8 was the finances and how this would have been
9 affected, correct?

10 A. Yes.

11 Q. Can we take a look at Plaintiffs' Exhibit
12 77, please. If we look at the very top -- well, let's
13 do the very top. This is an e-mail from Bonnie Betz
14 to you, correct?

15 A. Yes. Me and several others.

16 Q. Well, you're the two on it. Everyone
17 else is cc'd, right?

18 A. Yes.

19 Q. And it's a response to an e-mail from you
20 where you say, "Here's my current draft. Please
21 include your comments." Right?

22 A. Yes.

23 Q. There was a PowerPoint presentation that
24 you were sending around for comment?

25 A. Right. It was a draft PowerPoint

1 presentation, because it was a collaborative project.

2 Q. Okay. And if we go to -- let's start
3 with the seventh page. And we can go back to the
4 e-mail if we want, but this one is a little hard to
5 see. But Bonnie Betz is providing her comments on
6 these slides. Is that -- this is the attachment to
7 the e-mail, so --

8 A. It does look like Bonnie's comments.

9 Q. Okay. And in some cases we can see the
10 underlying slides, in some cases we can't. So I just
11 want to ask you if you can help me with this.

12 Let's go to the -- let's go to page 15,
13 please. And so this is Bonnie Betz's comment on the
14 slide we're looking at; is that right?

15 A. I'm guessing that it is.

16 Q. Okay. And she says, "Are we going to get
17 away with this? Truly depending on where the students
18 go, we could have less costs due to economies of
19 scale, could be inflammatory, this slide." Do you see
20 that?

21 A. I see those words, yes.

22 Q. Do you know what was on the slide?

23 A. I do not know. I don't remember.

24 Q. Let's look at page 23, if we could. And
25 here Bonnie comments on the slide, saying, "Are we

1 really prepared to say this? With decreases in state
2 funding, it is probable more teachers will lose their
3 jobs than if these 500 students stayed in DCSD
4 schools." Do you see that?

5 A. Yes.

6 Q. Do you recall which slide she was
7 commenting on there?

8 A. The only thing I recall about that slide
9 is that we were talking about the fact that because
10 Douglas County is a growing district, and so we do
11 hire a fair number of teachers each year. And part of
12 our responsibility with this presentation was to
13 create modeling. What if this, what if that, all
14 different scenarios.

15 And Bonnie is a great critic, in that she
16 asks a lot of good questions. So I believe that this
17 slide was about the fact that even if all 500 students
18 elected to go to other schools, would teachers lose
19 their jobs. And our position was no. And we could
20 show that with our hiring and attrition data.

21 And so she was questioning that.
22 However, the human resources department that was in
23 charge of that particular component was very
24 comfortable with the data.

25 Q. Okay. But it was her opinion that it was

1 probable more teachers would lose their jobs if this
2 program were implemented than if it were not.

3 A. That was her opinion.

4 Q. And as far as your classrooms, and trying
5 to make sure you have teachers, you said that process
6 starts in January of every year?

7 A. That's when we begin projecting
8 enrollment for the following year.

9 Q. And this January, 2011, the program
10 hadn't been adopted, right?

11 A. Right.

12 Q. So these 500 kids were included in your
13 projection as of January, right?

14 A. Yes.

15 Q. And the same for February, right?

16 A. Yes.

17 Q. And March?

18 A. Yes.

19 Q. And April?

20 A. Right.

21 Q. And May?

22 A. I'm not sure when the projection changed.
23 I'd have to ask the planning department.

24 Q. Okay. And at this point, you still need
25 to stay somewhat flexible, because you don't know how

1 many of the 229 remaining students in the program who
2 have not submitted their proof of enrollment to you,
3 where they're necessarily going to be, right?

4 A. It's my understanding that we're
5 attempting to stay in touch with those families, so
6 that we have an idea about, you know, what -- what
7 they're thinking. And so I haven't been directly
8 involved with that, but it's my understanding that my
9 assistant superintendents have. They understand the
10 impact and are maintaining a relationship with those
11 families.

12 Q. Okay. So you want to stay in touch, but
13 as of today, you don't know.

14 A. I don't know.

15 MR. DOUGLAS: Thank you. Nothing
16 further, Your Honor.

17 THE COURT: Redirect, limited in scope
18 to cross-examination.

19 MR. HALL: Thank you, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. HALL:

22 Q. Dr. Fagen, just a few questions.

23 So there was some questions about how
24 this policy would comply with the Public School
25 Finance Act. Remember those questions?

1 A. Yes.

2 Q. Could you look at Exhibit 107, which is
3 the policy itself. Are you there?

4 A. Yes.

5 Q. And can you look at C-10. Do you see
6 that paragraph there?

7 A. Yes.

8 Q. And is that paragraph about ensuring that
9 everything will be done to comply with the Public
10 School Finance Act?

11 A. Yes.

12 Q. And then there are also some questions to
13 you about control over the partner schools. Do you
14 remember those questions?

15 A. Yes.

16 Q. And again, the process is, the partner
17 schools must apply to the district, correct?

18 A. Yes.

19 Q. And must fulfill the conditions of
20 eligibility, correct?

21 A. Yes.

22 Q. Those conditions of eligibility were
23 written by Douglas County, correct?

24 A. Yes.

25 MR. DOUGLAS: Object as leading, Your

1 Honor.

2 THE COURT: Sustained.

3 Q. (BY MR. HALL) Dr. Fagen, can you explain
4 the mechanism -- the framework under which you're
5 going to control the partner schools?

6 A. We have set up pretty clear expectations
7 through our criteria of eligibility. The partner
8 schools must apply to be a partner, and they must be
9 approved. They must be able to demonstrate to us that
10 they can meet all of the conditions that we have set
11 forth in our policy and also in our application
12 process.

13 Then we'll follow up annually, if not
14 more often, in assessing their ability to meet the
15 obligations that they said they would meet in the
16 contract. We will follow our student data very
17 closely. Periodic assessments as well as annual
18 assessments that will give us a good indication of
19 whether or not our students are indeed in a quality
20 program and learning and growing as we would have them
21 in our schools.

22 Q. Okay. Great. And can we look at policy
23 E-3. And I want to direct you to that initial
24 paragraph 3 and that last sentence. Does that
25 sentence speak directly to the fact that, under the

1 policy, the district gains control over ensuring the
2 partner's quality education?

3 A. Yes.

4 Q. And can you also now turn to E-3-G, which
5 I think is on the next page. And that last sentence
6 of E-3-G, is that the part of the policy that gives
7 the district authority to give the assessments -- the
8 interim assessments that you talked about earlier?

9 A. Yes.

10 Q. And will the school voucher program hire
11 teachers or -- I'm sorry -- administrators?

12 A. Yes.

13 Q. Staff. Part of that staff you will use
14 to administer those assessments?

15 A. Yes.

16 Q. Can you now look at the policy on C-5.
17 And this is going to the question, Dr. Fagen -- do you
18 remember the question about what remedies are
19 available to the school district?

20 A. (Witness nodded head up and down.)

21 Q. And can you see under C-5 that one of
22 those remedies is to freeze partner school moneys?

23 A. Yes.

24 Q. Then can you also now look at Exhibit F,
25 which is the template contract. And again, Dr. Fagen,

1 this -- if you'd please look at page 4 of that
2 contract, and subsection G. And again going to the
3 question of how will the district ensure control over
4 the partner schools.

5 Can you read just to yourself one, two,
6 and three, and then summarize for the court what sort
7 of control this gives.

8 A. These -- it gives us the ability to
9 review records for the students. It also provides the
10 opportunity for periodic visits, and requires that we
11 receive access to our students when given the
12 appropriate notice.

13 Q. Do you mean access to the classrooms?
14 You can go to the partner schools and sit in?

15 A. Yes.

16 Q. There are also questions about whether
17 the policy limited the district on issues like the
18 hiring practices of private schools and enrollment
19 practices of private schools. Remember that?

20 A. Yes.

21 Q. Could the district change the policy if
22 it wanted to, if it saw problems?

23 A. Yes.

24 Q. Including those areas?

25 A. Yes.

1 MR. HALL: No further questions.

2 MR. BINDAS: Your Honor, I have two
3 questions related to cross.

4 THE COURT: Mr. Bindas.

5 DIRECT EXAMINATION

6 BY MR. BINDAS:

7 Q. Good afternoon, Dr. Fagen. My name is
8 Michael Bindas. I represent families who have
9 received scholarships under the program. Do you
10 recall being asked under cross-examination about
11 whether there were any -- I'll repeat the question.

12 Do you recall being asked during
13 cross-examination if any Hindu schools were
14 participating in the program?

15 A. I do recall that.

16 Q. If a Hindu school applied to be a private
17 school partner, would it be treated any differently
18 than any other school applying to be a private school
19 partner?

20 A. No, it would not.

21 MR. BINDAS: Thank you.

22 THE COURT: Recross, limited in scope
23 to redirect.

24 MR. DOUGLAS: No, Your Honor.

25 MR. DEIHL: No, Your Honor.

1 not require that the student have that acceptance
2 before they submit to the lottery.

3 THE COURT: Okay. So in your scenario,
4 a kid applies, is successful in the lottery, gets the
5 opportunity. What if the school that they want to
6 attend is not on the private partner list? What if
7 they find a different school? Can they bring that
8 school to you?

9 THE WITNESS: Any private school is
10 welcome to apply. And so we actually had that
11 scenario where a student sought out a particular
12 school, who then inquired about becoming a partner
13 school.

14 THE COURT: Okay. So the private
15 partner schools, if I understand what I'm hearing,
16 they're entitled to use their own admission criteria
17 and qualifications in determining what students they
18 admit into those schools?

19 THE WITNESS: Yes.

20 THE COURT: And there's nothing that
21 the Douglas County schools or the Choice Scholarship
22 Program, Choice Scholarship charter school are doing
23 to preclude the private partner schools from making
24 those decisions.

25 THE WITNESS: No.

1 THE COURT: Anyone have any questions
2 in light of my questions for Dr. Fagen?

3 MR. HALL: No, Your Honor.

4 MR. BINDAS: No, Your Honor.

5 THE COURT: Mr. Douglas?

6 MR. DOUGLAS: No, Your Honor.

7 THE COURT: And last but not least,
8 Mr. Deihl.

9 Dr. Fagen, you may step down. If there's
10 no objection, she's excused or back to your seat.

11 Defense, call your next witness, please.

12 MR. HALL: Defense will call Terry
13 Martin.

14 THE COURT: Ma'am, would you raise your
15 right hand, please.

16 TERRY MARTIN,
17 having been first duly sworn to state the whole truth,
18 testified as follows:

19 THE COURT: Please be seated.

20 Ms. Martin, I'm going to ask that you do your best to
21 speak up at an audible level. Use the microphone in
22 front of you. You may adjust it to your comfort.

23 Make sure that you permit your questioner
24 to complete the question they're asking you before you
25 start to answer it. All right?

1 THE WITNESS: I will.

2 THE COURT: Thank you.

3 DIRECT EXAMINATION

4 BY MR. HALL:

5 Q. Ms. Martin, please state your name for
6 the record.

7 A. Terres M. Martin.

8 Q. Are you associated with Woodlands
9 Academy?

10 A. Yes, I am.

11 Q. And is Woodlands Academy a partner school
12 in the Douglas County Choice Scholarship Program?

13 A. Yes, it is.

14 Q. What is your role with Woodlands Academy?

15 A. I am the academic director, which means
16 that I specify and order curriculum materials, help
17 plan the overall program and curriculum map. I also
18 teach some classes: Latin, Greek, occasionally
19 intermediate math class or language arts and history
20 class, and karate.

21 Q. How long has Woodlands existed?

22 A. Seven years.

23 Q. Were you one of the people that founded
24 it?

25 A. Yes, I was.

1 Q. And can you just describe briefly what
2 type of school Woodlands is?

3 A. We are a non-sectarian private school.
4 And we're small. Some of that is by design. We would
5 certainly like to grow a little bit more. But a lot
6 of our vision includes smaller classes and a school
7 community that's a lot more personal. And so we're
8 very involved with the families of the students and
9 really see us as being a team working together, which
10 is difficult to achieve in a larger setting.

11 Q. Okay. Are there any specific educational
12 programs that you offer at Woodlands?

13 A. Overall, from grades 1 through 3, we use
14 the Calder curriculum. 4 through 8, we use core
15 knowledge as sort of our starting place. And we've
16 adapted it a little bit to fit our vision a little
17 more closely.

18 Q. So are you a 1 through 8 school?

19 A. Yes, we are.

20 Q. How many students does Woodlands have
21 total currently?

22 A. About 32.

23 Q. And how many of those are scholarship
24 students?

25 A. 12.

1 Q. What has Woodlands done to accommodate
2 this growth in this school year?

3 A. Well, since --

4 MR. LANGENDORF: Objection. Lack of
5 foundation.

6 THE COURT: Sustained.

7 Q. (BY MR. HALL) Ms. Martin, what was your
8 enrollment in the spring?

9 A. Our enrollment in the spring was -- let's
10 see. We had about 24 students. We've graduated eight
11 this year.

12 Q. Okay. And then you said that there are
13 12 scholarship students.

14 A. Yes.

15 Q. Is that significant growth for Woodlands?

16 A. It is significant growth. We've had an
17 enrollment in the low to mid-20s in most years, other
18 than I think our third year.

19 Q. Okay.

20 A. And so, yes, this is a significant
21 growth.

22 Q. Have you spoken with any of the families
23 of the scholarship students?

24 A. Yes, I have. And --

25 Q. And do you know whether the scholarships

1 are allowing these students to attend Woodlands?

2 A. Very definitely. I can give you one
3 example. There's a little girl who has wanted to
4 attend Woodlands since she was in kindergarten. Other
5 older sister was able to attend, because some family
6 friends were able to pay for her tuition for one year.

7 MR. LANGENDORF: Objection, Your Honor.
8 Hearsay.

9 THE COURT: It's not being offered for
10 the truth of the matter. I'm going to overrule it.

11 Q. (BY MR. HALL) Go ahead.

12 A. And so she had been wanting to attend,
13 but her family is on public assistance. And so
14 without that scholarship, they would not have been
15 able to. There's no possibility of her having been
16 able to attend.

17 Q. Okay. When did the scholarship students
18 enroll at Woodlands?

19 A. It's been an ongoing thing. Some, the
20 day that they were notified that they were scholarship
21 recipients, they were right there at Woodlands. And
22 others as recently as last week.

23 Q. Okay. And has Woodlands taken any
24 actions to deal with the scholarship students coming
25 in?

1 A. Yes, we have.

2 Q. What are you doing?

3 A. We are in the process of constructing two
4 additional classrooms. Materials were donated by one
5 of our parents. We're recarpeting. We've hired two
6 additional teachers. Because, since we are really
7 committed to the concept of a small classroom, having,
8 at this point, 18 students, possibly 20 with some
9 others I'm evaluating, in our primary program, it did
10 require that we split that program and bring on one
11 additional teacher. And with five students at the
12 intermediate level, that required another teacher
13 also. We couldn't just absorb them into the other
14 classes. So we've hired two additional teachers
15 because of the growth.

16 Q. Okay. And when is Woodlands' first day
17 of school?

18 A. Our first day of school is August 23rd.

19 Q. And has Woodlands done anything over the
20 summer to help the scholarship students especially
21 transition to Woodlands?

22 A. Yes. We've had different programs. We
23 put on a dinner theater, a play. And some of those
24 students were involved in that. And either they came
25 as part of the audience, which was a lot of fun for

1 them, or participated in the play, in the cast or on
2 the crew helping out.

3 We also have our own karate program in
4 the summer. And we've had scholarship students
5 participate in that. And they were very excited to
6 have done so. So they bonded and they made
7 friendships with other kids and are looking forward to
8 going to school the next year.

9 Q. Do you know Max Anderson, who is the son
10 of some of the intervenors in this case?

11 A. Yes, I do.

12 Q. And do you know what grade he's going
13 into?

14 A. He is going to be going into third grade.

15 Q. And did he come visit the school?

16 A. He did, towards the end of last year.

17 Q. In May or June?

18 A. It would have been in April. Early
19 April.

20 Q. Okay.

21 A. And so he did what we call shadowing. He
22 sort of tried on the school and attended all the
23 classes that he normally would be in. And he did that
24 for one week. So that way, he could go through the
25 whole cycle of classes. We have our Monday, Wednesday

1 classes are the same. Tuesday and Thursday. And then
2 Friday is different. That's a project day, and we
3 have some more of our specials on that day also.

4 Q. Okay. And Max Anderson is coming to
5 Woodlands, correct?

6 A. Yes, he is.

7 Q. Do you have students of the families do
8 anything to prepare for Woodlands' upcoming school
9 year?

10 A. It would depend on the particular
11 students. Sometimes there's a little bit of academic
12 preparation they might need.

13 Sometimes it's really just kind of
14 getting to know who we are and what The Woodlands
15 experience is like.

16 And this summer, we've had some parents
17 actually get involved in some of the ongoing extreme
18 makeover is what they're calling it. We had one
19 family, they were there all last weekend, all day
20 Saturday and all day Sunday, planting, putting in
21 plants, and just doing -- and painting and just
22 participating and being part of the team that way.
23 And that was really exciting.

24 Q. And again, Ms. Martin, do you know the
25 situations of these families from the scholarship

1 program?

2 A. Yes, I do.

3 Q. Do you have any idea as to how many were
4 able to come if this scholarship was stopped?

5 A. Probably none, unless we were able to
6 come up with some other scholarship funding for them.

7 Q. Does Woodlands have scholarship funding
8 for the scholarship students?

9 A. Right now, we don't, which is really
10 unfortunate.

11 Q. And if these 12 students had to leave
12 Woodlands, what sort of effect would that have on the
13 school?

14 A. On the school? Of course, the emotional
15 affect on the kids that have already bonded. We would
16 have to let go two teachers, which would certainly be
17 devastating for them. And very likely, one or more of
18 the three of us who founded the school would once
19 again go without salary, which is something we've done
20 frequently. But we are very committed to the school
21 and to our ideas of what education ought to be. We've
22 done that in the past. And if we had to do it again,
23 I suppose we would.

24 MR. HALL: Thank you. No further
25 questions.

1 THE COURT: Any questions, Mr. Douglas?
2 Anybody else? Cross-examination?

3 CROSS-EXAMINATION

4 BY MR. LANGENDORF:

5 Q. Good afternoon. My name is George
6 Langendorf, and I represent the plaintiffs in this
7 case.

8 Woodlands Academy is the only
9 non-sectarian private school in Douglas County; is
10 that correct?

11 A. I believe that's correct.

12 MR. HALL: Objection.

13 A. There are some others -- other
14 non-sectarian schools that are partner schools, as I
15 understand it. But I don't think they're physically
16 located in Douglas County.

17 Q. (BY MR. LANGENDORF) And you've used the
18 fact that you're the only non-sectarian private school
19 in Douglas County as a selling point for your school
20 in the past; is that right?

21 A. I don't know if we've used it as a
22 selling point. We've certainly used it as a
23 clarification of who we are.

24 Q. Okay. And tuition at the Woodlands
25 Academy is between 7 and 8 thousand dollars; is that

1 right?

2 A. The tuition is \$7,000 this year. We also
3 have a book and materials fee that varies depending on
4 the grade level.

5 Q. And the range of the book and material
6 fee would be about a thousand to \$1500?

7 A. Exactly. It's \$1500 for grades 1 through
8 3, and 1,000 for grades 4 through 8.

9 Q. So over and above the \$4,575 that would
10 make up the payments or scholarship or voucher from
11 the district, the families that -- the parents must
12 pay an additional 2 or 3 thousand dollars in tuition;
13 is that right?

14 A. That's correct. There would be an
15 additional amount due for tuition and also for the
16 fees, as it is if somebody goes to college and gets a
17 scholarship; it's not usually a full ride. But we
18 worked out some things with parents in the past where
19 maybe they can put in some time helping out in the
20 office to offset some of that. So we're willing to
21 work with them.

22 Q. Although, you don't offer financial aid,
23 right?

24 A. We're not in a position to do so directly
25 right now. We do have some of our parents applying

1 for scholarships through other sources, but we don't
2 really know the outcome of that, if they're going to
3 receive it or not.

4 Q. And you operate on a very narrow budget
5 at Woodlands, right?

6 A. Yes, we do.

7 Q. And for that reason, you have not pursued
8 accreditation for Woodlands Academy, right?

9 A. That's correct. It's expensive.

10 Q. And another thing that's expensive is
11 background checks for teachers. And you also haven't
12 done that; is that right?

13 A. That is not so. In some cases, we have.
14 If somebody is currently licensed, in those cases, we
15 often haven't. And if we -- if all of us on the
16 academic committee know the person personally, then we
17 have not always done so.

18 Q. And that's what you stated in your
19 application to participate in the program, that all of
20 the teachers were personally known to the parents or
21 staff, and for that reason you did not conduct
22 background checks on those teachers.

23 A. Right. Unless they were licensed. If
24 they were currently licensed, we did not do additional
25 background checks. We did express a willingness to do

1 so if the district would like us to do that.

2 Q. So for some teachers at Woodlands
3 Academy, you've not done a background check, because
4 you have personally known them, right?

5 A. Correct. For example, I didn't run one
6 on my son.

7 Q. Fair enough. And you testified, I think,
8 that 12 out of 32 students this year will be attending
9 Woodlands Academy under the scholarship program. Is
10 that right?

11 A. That's correct.

12 Q. And in your view, the 12 new students is
13 a benefit to Woodlands Academy, right?

14 A. Yes, it is. But it's a benefit to the
15 students also. I remember that after Max Anderson
16 shadowed that day, he went out and told his mother
17 that it was the best seven hours of his life.

18 So I think the students are benefiting
19 also.

20 Q. So in your view, both the students and
21 Woodlands Academy are benefiting from the program.

22 A. Very definitely. And I want to emphasize
23 that for the students, sometimes there just really
24 isn't another good option for them. Some students
25 can't learn in a large classroom. They really need a

1 smaller setting.

2 And I think some fundamental differences
3 in our philosophy are also very, very beneficial for
4 the students. We really work on their strengths and
5 encouraging, building up of those strengths in those
6 kids. If you --

7 THE COURT: Okay.

8 THE WITNESS: Is that enough?

9 THE COURT: It's way past enough.

10 Please just listen to his question and just answer the
11 question.

12 THE WITNESS: All right.

13 THE COURT: Thank you.

14 Q. (BY MR. LANGENDORF) Now, Woodlands
15 Academy has selected admissions criteria; is that
16 right?

17 A. Yes.

18 Q. So typically the students that are
19 admitted at Woodlands test above their grade level in
20 subjects like math and reading, right?

21 A. Sometimes. Not always. Not always. If
22 there's an area of strength and there's another area
23 that maybe isn't so strong, that's not going to rule
24 the student out by any means.

25 Q. But I think you stated in your

1 application that they either have to test above grade
2 level or show potential --

3 A. Or show the potential to do so, yes.

4 Q. Okay. Thank you.

5 And you also testified that Woodlands is
6 a very small school; is that right?

7 A. Yes.

8 Q. And Woodlands does not accept students
9 with serious disabilities; is that true?

10 A. That's correct. We just aren't equipped
11 to deal with a student with severe to profound
12 disabilities or challenges.

13 Q. So if you are the only non-sectarian
14 private school in Douglas County, and you don't accept
15 students with disabilities, then for a student with a
16 disability, the only private school he could attend in
17 Douglas County would be a sectarian school, right?

18 A. I don't necessarily know that. First of
19 all, a student with --

20 THE COURT: Ma'am, that's the answer.
21 You don't know.

22 THE WITNESS: Okay.

23 THE COURT: I'm sorry. I'm not trying
24 to be rude, but I have a limited amount of time to
25 complete the case. And in fairness to you, I didn't

1 give you the instruction I've been giving everyone
2 else, which is, listen to the question and just answer
3 that question. If somebody here wants to clarify
4 something, they all get a chance to do that. Okay?

5 THE WITNESS: Okay.

6 THE COURT: Thank you.

7 Q. (BY MR. LANGENDORF) Did anyone from
8 Douglas County school district or the school board
9 tell you that there was likely to be a lawsuit over
10 the scholarship or voucher program?

11 A. Not until after it happened, no.

12 MR. LANGENDORF: No further questions.

13 THE COURT: Any further
14 cross-examination? Any redirect, limited in scope to
15 that cross?

16 MR. HALL: No, Your Honor.

17 THE COURT: All right. Thank you.

18 Ms. Martin, thank you. I appreciate your time. And
19 if there is no objection, she's going to be excused.
20 Have a good day, ma'am.

21 Defense will call your next witness.

22 MR. LYONS: Defense calls John Carson to
23 the stand, Your Honor.

24 THE COURT: Mr. Carson, please come
25 forward and be sworn.

1 JOHN CARSON,
2 having been first duly sworn to state the whole truth,
3 testified as follows:

4 THE COURT: Please be seated.

5 Mr. Carson, my vision is failing, but I seem to recall
6 that you've been seated in the courtroom at varying
7 points in the trial today and yesterday. Is that
8 right?

9 THE WITNESS: That's correct.

10 THE COURT: Did you hear my
11 instructions to the other witnesses?

12 THE WITNESS: I did.

13 THE COURT: Do you understand them?

14 THE WITNESS: Yes, sir.

15 THE COURT: Do you think you can follow
16 them?

17 THE WITNESS: I will.

18 THE COURT: Please. Thank you.

19 Mr. Lyons, you may proceed.

20 MR. LYONS: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY MR. LYONS:

23 Q. State your name for the record, please.

24 A. John Carson.

25 Q. Do you have any duties and

1 responsibilities with the Douglas County school board,
2 Mr. Carson?

3 A. Yes. I'm the president of the school
4 board.

5 Q. And what, generally speaking, are those
6 responsibilities with that position?

7 A. We are a group of elected parents and
8 leaders in the community. Our job is to oversee the
9 school district, hire the superintendent, set the
10 policies, and make sure the financial affairs are kept
11 in order.

12 Q. How long have you been a member of the
13 school board?

14 A. Since fall of 2005. So I'm in my sixth
15 year.

16 Q. And when did you become president?

17 A. I became president in December of 2009.

18 Q. Do you have any children in the Douglas
19 County school system, sir?

20 A. I do. I have three children in our
21 schools.

22 Q. In which schools?

23 A. They are in our neighborhood schools:
24 Coyote Creek, Ranch View, and Thunder Ridge High
25 School.

1 Q. I'd like to direct your attention to the
2 summer of 2010 and ask you if at that time the board
3 undertook any sort of strategic planning for the
4 school district.

5 A. Yes. Each two years, there's a new board
6 constituted after each election. After our new board
7 was constituted in the fall of '09, and then moving
8 into early 2010, our first task was to pick a new
9 superintendent.

10 And we conducted a nationwide search to
11 do that. A very extensive process. But as part of
12 that, the board needed to decide what it wanted that
13 superintendent to do. And we settled on three broad
14 things that we were going to look for. A student --

15 Q. Can you explain what those three are,
16 please?

17 A. Yes. The first is to change the pay
18 system for teachers. Basically, to move away from a
19 tenure track type of system, and base compensation on
20 results in the classroom and pay teachers, good
21 teachers, a lot more than they make now.

22 The second main objective is to keep high
23 standards, but also come up with an effective way to
24 measure those internally within our system.

25 And the third is to offer universal

1 choices, we call it to our parents in Douglas County,
2 so that their children can attend virtually any school
3 of their choice that we feel meets a basic and solid
4 academic curriculum.

5 Q. With regard to the choice strategic
6 purpose, what did the school board undertake to do to
7 pursue that strategic idea?

8 A. We started with a task force. First
9 meeting was in June of 2010. We -- the members of the
10 board suggested members from the community for that
11 task force.

12 We took suggestions from our then acting
13 superintendent, who was interim superintendent. We
14 had members of his staff on the task force. We had
15 members of the teachers union on the task force. And
16 it was to look at ways to expand school choice in a
17 whole range of areas.

18 Q. Did members of the school board itself
19 serve on the task force?

20 A. Yes. There were two of us.

21 Q. And were there subcommittees of the task
22 force? And if so, how many?

23 A. There were seven subcommittees. We had
24 one for contract schools. We had one for this program
25 or what became this program. We called it the Option

1 Certificate Program at that time. We had one for
2 charter school expansion. We had one for neighborhood
3 school empowerment. We had an online learning one.
4 We had a partnership with home schools subcommittee.
5 And then we had an open enrollment reform
6 subcommittee.

7 Q. With respect to the subcommittee looking
8 at choice, do you know how often that subcommittee met
9 during, say, the summer of 2010 and middle of the fall
10 of 2010?

11 A. We typically met right before the main
12 committee meetings. We -- we generally held the main
13 meetings once a month at 7:00 o'clock. And our
14 subcommittee would occasionally meet at 6:00, 6:30.

15 Q. Were these subcommittee meetings of the
16 task force open to the public?

17 A. Yes.

18 Q. Minutes kept?

19 A. Yes. Well, we didn't keep actual
20 minutes, no. We kept basically documentation of what
21 was decided and so forth. And I kept records of
22 those.

23 Q. And was the work of the task force --
24 subcommittees of the task force regularly reported on
25 the school district's website?

1 A. They were. We used our Newsline report
2 that goes out to parents. We used our website. We
3 had regular information provided to the public.

4 Q. Did there come a time with regard to the
5 choice strategy that a recommendation or
6 recommendations were developed by the task force and
7 presented to the board for consideration?

8 A. Yes. By the fall of 2010, we were ready
9 to present to the school board. And I asked the
10 school board to convene and the superintendent to
11 convene a retreat on November 12th and 13th of 2010
12 for the sole purpose of hearing the recommendations of
13 the task force.

14 Q. What was the result of that retreat?

15 A. We had extensive presentations from each
16 of the subcommittee chairs. And we had a lot of
17 questioning, we had a lot of dialogue. And by the end
18 of the meeting, the board was -- felt strongly, we
19 wanted to proceed generally with those
20 recommendations.

21 Q. What was the next step that was taken by
22 the board?

23 A. At our board meeting on December 7th --
24 we meet twice a month, the first and third Tuesday.
25 That was the first Tuesday of the month -- we accepted

1 the recommendations of the task force, and we turned
2 them over to our superintendent and asked her to
3 develop programs to implement the recommendations.

4 Q. And was the result of that a draft
5 proposal or a policy?

6 A. The result of the superintendent's work,
7 yes, was the Blueprint for Choice.

8 Q. Was that made available for public
9 comment?

10 A. Yes. Extensively. We held public forums
11 all around our county. We put it on the website. We
12 took public comment at board meetings.

13 Q. And the public meetings around the
14 county, those were in February?

15 A. Yes. We had three of them. In our
16 school district, we basically have three areas; we
17 have Parker, we have Castle Rock, we have Highlands
18 Ranch. And we work hard to address each of those
19 constituencies.

20 So we had a forum at Ranch View Middle
21 School on February 22nd. That's in Highlands Ranch.
22 We had one at Cimarron Middle School in Parker on the
23 23rd. And we had one at Castle Rock Middle School in
24 Castle Rock on the 24th.

25 Q. Did these forums allow for public comment

1 and criticism both in support or in opposition to the
2 program?

3 A. Yes. We -- they were very well attended.
4 And the public was engaged, and we took a lot of
5 positive and negative comments.

6 Q. Do you know if Ms. Barnard, one of the
7 plaintiffs in this case, was asked to present at each
8 of these public forums the case for the opposition to
9 the program?

10 A. Yes. We were always very open and
11 willing to have the opposition present.

12 Q. After these public forums, when was the
13 policy next considered -- the draft policy, I should
14 say, next considered by the board?

15 A. Well, at that point, the superintendent
16 took the results of those forums, made some
17 adjustments, and she and I discussed -- my job as
18 board president is to coordinate scheduling with the
19 superintendent. And she informed me that we were
20 ready for a vote and the board's decision on March
21 15th.

22 Q. Was a vote taken?

23 A. Yes.

24 Q. And was it unanimous in support of the
25 recommendation or the draft policy, I should say?

1 A. Yes. We worked -- I worked extensively
2 with each of the board members and took a long time,
3 but we were able to get a unanimous vote and were very
4 pleased with that.

5 Q. And the policy that was adopted is
6 Exhibit 107 in this case?

7 A. It is -- that's policy JCB. I don't know
8 which exhibit it is, but, yes, I will accept that.

9 Q. From your perspective as president of the
10 board, Mr. Carson, were there particularly key
11 ingredients to the policy that were of interest to you
12 and other members of the board?

13 A. Well, the central focus of the policy and
14 that our board believed strongly in is two prongs.
15 One, we want to offer parents and children the
16 opportunity to find the school that fits their mission
17 and needs. We believe that range of choices should
18 span the spectrum of neighborhood schools where my
19 kids attend, traditional public neighborhood schools
20 and other board members' kids attend.

21 We also have 11 charter schools, and we
22 want to offer private schools to that menu of choices.

23 And so there's that part. And there's
24 also a fundamental belief on our board, very strong
25 belief, that we need more competition and choice in

1 public education, and that this competition and this
2 dynamic will improve the quality of all of the
3 schools, the neighborhood schools, the charter
4 schools, and the private schools.

5 And the end result will be a better
6 education for our kids. That's why we've enacted this
7 program.

8 Q. Was it of any particular concern to you
9 that the policy being religious neutral?

10 A. Well, we set that out from the start.
11 Our board was never had a religious motivation for
12 this program. We have always said it would be
13 religiously neutral. Any school that meets the basic
14 criteria of the program regarding academic standards
15 that are at least at the level of our neighborhood and
16 charter schools, that has teachers that meet the
17 requirements of no child left behind, which is the
18 charter school requirements, and that meets the
19 financial requirements we've laid out, those schools
20 will be admitted to the program.

21 Q. Was it important to you and other members
22 of the board to have tracking or administrative
23 measurements within this program, so that the quality
24 of education could be assessed on a regular basis?

25 A. Yes. We made that very clear on the

1 outset, that we're not interested in a program with no
2 accountability. We built into this through the
3 charter school structure, through the basic framework,
4 that these schools are going to be evaluated. We're
5 going to talk to the parents. We're going to do
6 tests, CSAP that we have to administer, but also the
7 tests that those schools administer. And we're going
8 to evaluate them.

9 Q. Was it important to the board to maintain
10 control over this program?

11 A. Yes.

12 Q. And do you believe the policy, in fact,
13 does that?

14 A. I do.

15 Q. All right. After the vote on March 16th,
16 did you give any directions to the staff to implement
17 this program?

18 A. I interact, as board president, with the
19 superintendent. That's the only employee I interact
20 with. And I directed her to implement the program for
21 this fall 2011, as the policy stated and the board had
22 decided.

23 Q. To the best of your knowledge, did the
24 staff begin the implementation process?

25 A. Yes.

1 Q. And did that include putting applications
2 for potential scholarship recipients on the website
3 and making them otherwise available?

4 A. Yes.

5 Q. All right. Did it include soliciting
6 interest from partnership schools and asking them to
7 apply so their qualifications could be assessed?

8 A. It did, yes.

9 Q. And that took place over what period of
10 time?

11 A. March, April, May, June. And we continue
12 to conduct all aspects of the program to fully
13 implement it.

14 Q. Has the board actively monitored the
15 implementation?

16 A. Yes. We certainly receive regular
17 updates from the superintendent.

18 Q. And how often again do you meet?

19 A. We meet twice a month generally.
20 Although we will occasionally have a special meeting
21 in addition if there's some important business.

22 Q. As you sit here today, is the program
23 implemented, so far as you're concerned?

24 A. Yes. I think it's implemented. You
25 know, we will continue to look at it, but it will --

1 it's under way, and the board is enthusiastically
2 supportive of it, continues to be very pleased with
3 the way it's progressed.

4 Q. Do you know, of the 500 positions
5 available under the program, how many are currently
6 filled?

7 A. Well, we have approved the full 500
8 allocation. We have a waiting list.

9 Q. And do you know, as you sit here today,
10 how many students have been confirmed as enrolled in
11 partnership schools for the coming school year?

12 A. Yes. I think the count most recently is
13 around 271.

14 Q. And have those 271 students received any
15 money from the school district in order to complete
16 their enrollment?

17 A. Yes. I believe 184, approximately, have
18 received the actual scholarship checks, have been sent
19 to their schools.

20 Q. Do you know how much money that is,
21 approximately?

22 A. I think it's just over \$200,000.

23 Q. And so far as you know, are scholarship
24 schools -- scholarship students, rather -- excuse
25 me -- continuing to enroll and be confirmed on an

1 ongoing basis?

2 A. Yes. That's under way.

3 Q. All right. In your view, do you think
4 the program has been a success so far?

5 A. Yes. It's -- you know, a principal
6 measurement of the success for me and for the board is
7 the response of parents. And it's been very positive.

8 Q. Do you think it's been a benefit to the
9 Douglas County school district as a whole?

10 A. I think it will be a tremendous benefit
11 for us. It is now. And I think it will accomplish
12 our goal of being the finest school district in the
13 state, and being able to offer parents -- we are very
14 excited about being able to offer parents the whole
15 range of education choices.

16 MR. LYONS: No further questions at this
17 time, Your Honor. Thank you.

18 THE COURT: Thank you. Any other
19 questions from any of the defendants now?
20 Mr. McCarthy, cross-examination.

21 MR. McCARTHY: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. McCARTHY:

24 Q. Good afternoon, Mr. Carson.

25 A. Good afternoon.

1 Q. I think you know, from sitting in the
2 courtroom, that my name is Michael McCarthy, and I
3 represent the taxpayers.

4 I don't want to distract you while you do
5 that.

6 A. I didn't do that very well.

7 Q. Those cups are dangerous, and they tend
8 to self-destruct. I think the judge warned us about
9 that.

10 THE COURT: It's not the cups, though.
11 It's the pitcher.

12 Q. (BY MR. McCARTHY) Mr. Carson, you've not
13 stated for the record here today what your -- you're a
14 resident of Douglas County obviously, aren't you, sir?

15 A. I am.

16 Q. What community do you live in in Douglas
17 County?

18 A. I live in Highlands Ranch.

19 Q. Okay. And also, sir, the record doesn't
20 reflect your background. And I'd just like to address
21 that very briefly if you don't mind.

22 I take it that in addition to your public
23 service, you've got a day job. Is that true?

24 A. I do, yes.

25 Q. How are you employed, sir?

1 A. I'm an attorney, and I am the general
2 counsel at Cherry Creek Mortgage Company.

3 Q. And how long have you been employed as an
4 attorney at Cherry Creek Mortgage?

5 A. I've been there about 16 months now.

6 Q. Okay. How were you employed before that?

7 A. I was at Snell & Wilmer law firm.

8 Q. And you were -- that's a firm that has
9 offices here in Denver. Were you a lawyer at Snell &
10 Wilmer here in Denver?

11 A. I was.

12 Q. And how long were you at Snell & Wilmer?

13 A. I was there a year.

14 Q. And before that -- let's do it this way.
15 I'll back up and just ask you. Tell me what your
16 educational training was following completion of
17 secondary school.

18 A. Well, I have a jurist doctorate. Well, I
19 have an undergraduate BA from the University of
20 Colorado in Boulder.

21 Q. And when was that awarded, sir?

22 A. When?

23 Q. Yes.

24 A. 1983.

25 Q. Okay. So you have a BA from the

1 University of Colorado awarded in '83. And then you
2 have a JD; is that right?

3 A. That's correct.

4 Q. And where was your law degree awarded?

5 A. University of Colorado at Boulder in
6 1987.

7 Q. 1987. Okay. And then can you just tell
8 the court just briefly what your employment history
9 was from the time that you completed law school in
10 1987.

11 A. Well, if we work backward from where you
12 just were, I was the regional director for a little
13 over seven years for the U.S. Department of Housing
14 and Urban Development here in Denver.

15 Q. And I'm sorry if I interrupt. You held
16 that position immediately prior, then, to when you
17 were employed at Snell & Wilmer; is that right?

18 A. That's correct.

19 Q. And so what were the years during which
20 you held that position, sir?

21 A. I held that position from December of
22 2001 to March of 2009.

23 Q. Okay. Is that a political appointment?

24 A. It is.

25 Q. And so were you appointed to that during

1 the Bush administration?

2 A. I was. And I was retained for several
3 months into the Obama administration.

4 Q. And so you were initially appointed by
5 President Bush for that position.

6 A. I was.

7 Q. So prior to that period of public
8 service, what did you do?

9 A. Well, prior to that, I worked over a
10 decade in Washington, D.C., on Capitol Hill. I worked
11 in the U.S. Senate and the U.S. House of
12 Representatives on congressional staff, committee
13 staff, and personal office staff.

14 Q. And for which congressmen or senators did
15 you work during that time in your service on Capitol
16 Hill, Mr. Carson?

17 A. I worked for three members of Congress.
18 I worked for United States Senator Robert Castien from
19 Wisconsin. I worked for Congressman Joe Knollenberg
20 from Michigan. And I worked for Congressman and
21 Senator Wayne Allard from Colorado.

22 Q. And Senator Allard was the last of those
23 engagements; is that correct?

24 A. That's correct.

25 Q. So did that period of service on Capitol

1 Hill -- was that the employment you engaged in
2 immediately after you graduated from CU law school?

3 A. No. My first job was at the Federal
4 Trade Commission. I did antitrust law for about 14
5 months. Didn't particularly care for that. And then
6 I went to the U.S. Chamber of Commerce for a couple of
7 years and did tax law. And then I went to Capitol
8 Hill for those 11-1/2 years.

9 Q. And you worked at the Chamber of Commerce
10 in D.C.; is that right?

11 A. Yes.

12 Q. Okay. Have you ever testified in court
13 before?

14 A. No, not in a courtroom. I've done some
15 depositions, but not -- never in a courtroom.

16 Q. You've given some depositions?

17 A. Yes.

18 Q. Have you taken depositions?

19 A. I don't believe so.

20 Q. Okay.

21 A. Not that comes to mind.

22 Q. So if you haven't taken a deposition, I
23 bet you've never tried a case, then, have you, sir?

24 A. No. I'm not a trial lawyer.

25 Q. So we've covered your employment history;

1 is that right?

2 A. Yes, pretty much. Pretty thoroughly.

3 Q. All right. Thank you.

4 A. Brings back a lot of good memories.

5 Q. Thank you for your patience on that, sir.

6 Under examination -- under direct
7 examination, you testified that you believe that the
8 Choice Scholarship Program has been a great success,
9 correct?

10 A. Yes.

11 Q. And it's true, is it not, Mr. Carson,
12 that it's your belief that if the Choice Program
13 proves successful and popular with parents, the
14 Douglas County school board intends to expand it?
15 Isn't that right?

16 A. I personally believe that, yes.

17 Q. Do you believe that your beliefs reflect
18 those of your colleagues on the board?

19 A. I would say generally. I think our mind
20 is that if this -- assuming this program is successful
21 and continuing to be as successful as we believe it
22 is, we would meet the demand of the parents and very
23 likely expand it. And we would first ask the
24 superintendent, of course, for her recommendation.

25 Q. You'd expand it, then, beyond the 500

1 students that you accepted into the program already,
2 right?

3 A. Likely, yes.

4 Q. And you expressed that view to others,
5 have you not, sir?

6 A. I probably have.

7 Q. Let me ask you, if I could, to look at
8 what's been marked -- it's not in evidence yet, but
9 I'd like you to examine it -- as Exhibit 126.

10 A. Is it up there?

11 Q. It's going to be hopefully soon.

12 A. Okay.

13 Q. Sir, that is, in fact, an e-mail from you
14 to a Mr. J. Kaplan, correct?

15 A. Yes.

16 Q. Can you please indicate who Mr. Kaplan
17 is?

18 A. Yes. He is actually -- just by
19 coincidence, he works at my place of business, and he
20 also has kids in the Douglas County school district.
21 So, you know, when he found out I was president of the
22 board, he had some questions for me.

23 Q. Understood. So Mr. Kaplan works at
24 Cherry Creek Mortgage currently.

25 A. He does.

1 Q. And let me just ask you to look at the
2 sentence, I think it's about four lines down that
3 begins, "If it is successful." Do you see that? You
4 write to your work colleague, Mr. Kaplan, "If it is
5 successful and popular with parents, we will then
6 expand." And that's consistent with the testimony you
7 just gave, right?

8 A. Yes.

9 Q. And then you go on to share with
10 Mr. Kaplan this view. "In fact, over time, the
11 program will be designed to improve the budget
12 situation of the district."

13 That's your view at the current time, as
14 well, is it not, sir?

15 A. Well, my view on this question is that,
16 you know, we've been told at times we didn't engage
17 enough. And one of the criticisms was that we were
18 going to drain resources from the district and from
19 the neighborhood schools, for example, where my kids
20 attend.

21 We designed a program, and asked the
22 superintendent to design a program, that would not
23 drain resources.

24 The program is not designed to make a
25 profit, but it is clearly designed to generate

1 sufficient funds to make it clear it won't drain any
2 resources.

3 Q. So, in fact, sir, if I could ask you to
4 answer my question. My question is, it's your belief,
5 is it not, that the program will be designed to
6 improve the budget situation of the district? You
7 want to do that, do you not, Mr. Carson?

8 A. I would not say that at this point. This
9 e-mail was written some time ago.

10 Q. So you've changed your mind about that
11 since --

12 A. No, I didn't change my mind.

13 MR. LYONS: Excuse me. Your Honor, could
14 he be allowed to answer the question that's asked?

15 THE COURT: Fair enough. Mr. McCarthy,
16 wait a little bit before you ask your next question.

17 MR. McCARTHY: I beg your pardon.

18 A. I haven't changed my mind. My mind is
19 basically that we make sure we generate enough revenue
20 to run the program, to assure the public it doesn't
21 drain resources. And if it has a side benefit of
22 improving the budget, I'm fine with that. But it's
23 certainly not a core interest of mine or the board's.

24 Q. (BY MR. McCARTHY) But let me just ask
25 you, sitting here today, do you believe that the

1 program, looking forward, will be designed, among
2 other things -- I recognize you have other objectives,
3 but among other things, to improve the budget
4 situation in the district?

5 A. I don't know that at this point in time.
6 We will be evaluating this our first year. And
7 certainly that's one of the issues we're going to
8 decide.

9 Q. But you certainly indicated that to
10 Mr. -- your work colleague, Mr. Kaplan, in December
11 2010. You don't deny that, do you?

12 A. I did, but I indicated that in the
13 context of discussions I had with him and his wife as
14 to their concerns that this program would drain money
15 from the district. And I wanted to make it clear to
16 them that it wouldn't.

17 Q. Well, one of the ways it won't drain
18 resources from the district is by improving the budget
19 in the district. Isn't that right?

20 A. I think, in this first year, I think we
21 demonstrated it will have a marginal improvement in
22 the budget.

23 Q. And, in fact, you were here when we
24 presented the pro forma cost information in
25 Exhibit 15. And your present projections are that the

1 district will realize approximately a \$350,000 surplus
2 based on your present estimates. Isn't that right?

3 A. Yes.

4 Q. And that would be one example, would it
5 not, sir, of how the budget situation of the district
6 could be improved? Isn't that true?

7 A. Yes.

8 Q. And let me ask you to go on and look at
9 this. You indicate to Mr. Kaplan, "One of the reasons
10 we are looking at this and other innovative ideas is
11 to attract more students to the Douglas County
12 schools."

13 Now, you indicated that to Mr. Kaplan in
14 December of 2010, correct?

15 A. Yes.

16 Q. And sitting here today, that still would
17 be one of the objectives of this program, of the
18 Choice Scholarship Program, is to attract more
19 students to the Douglas County schools; isn't that
20 right?

21 A. At this point, I would change that to
22 retain. We had a lot of discussions with the CEE,
23 with other districts, our superintendent did. We made
24 it very clear that our goal at this point is to retain
25 Douglas County students.

1 We lose a number of Douglas County
2 students to other districts, to other schools, and we
3 want to retain as many Douglas County students as we
4 can.

5 Q. But you would agree, would you not, sir,
6 that if this program proves to be popular, it would
7 serve to attract additional students to the Douglas
8 County school system in order to avail themselves of
9 this Choice Scholarship Program, right?

10 A. Well, as it's currently designed, you
11 cannot enroll in the program unless you are a current
12 Douglas County school district student, or have been
13 for the last year.

14 Q. But if those students came to Douglas
15 County and spent a year in the Douglas County schools,
16 they could then enroll in this program and seek --
17 seek enrollment in this program, correct?

18 A. Certainly.

19 Q. And to that extent, if the program is
20 popular, as you hope it will be, it will serve to
21 attract more students to the Douglas County schools
22 ultimately, correct?

23 A. I would gather it would, yes.

24 Q. Okay. And then you go on to observe to
25 Mr. Kaplan, "Under the state education funding system,

1 the more kids that a district has, the more funds and
2 the more funds the district receives."

3 And that's how you understand it works,
4 right?

5 A. I believe that is, yes.

6 Q. So if you're able to attract more
7 students, because this is a popular program --
8 right? -- and you choose to expand it, you could
9 increase the amount of money that comes to you from
10 the state. Isn't that right?

11 A. That's correct.

12 Q. And that would be a desirable objective
13 for you to accomplish, would it not, sir, as the
14 president of the Douglas County school board. Isn't
15 that true?

16 A. Not for the -- not for the money. It
17 would certainly be a desirable objective that we had a
18 level at the school district that more people wanted
19 to send their kids to.

20 Q. The Douglas County school district over
21 the last three years has experienced almost a 90
22 million dollar reduction in the amount of funds that
23 it receives from the state; isn't that right?

24 A. I will -- I don't have the exact numbers,
25 but we've taken severe budget reductions.

1 Q. Tens of millions of dollars; isn't that
2 right, sir?

3 A. Yes.

4 Q. And so from that perspective, given your
5 duties and responsibilities as the president of the
6 board, it would be a responsible thing to do to try to
7 find ways to attract more funds to the district.
8 Wouldn't you agree with that?

9 A. I would, yes.

10 Q. And if this program allows you to attract
11 more funds to the district, then you would -- you
12 would support that objective, would you not,
13 Mr. Carson?

14 A. Among other objectives, I would certainly
15 have no objection to it. But as I've said before, the
16 primary reason for this program is choice and
17 competition.

18 Q. But you go on to observe in your e-mail
19 to Mr. Kaplan, "We do not have a finite pot of money.
20 Our budget is dependent upon pupil growth."

21 You indicated that to Mr. Kaplan in
22 December, did you not, sir?

23 A. I did.

24 Q. And what you're saying when you say do
25 not have a finite pot, you're indicating that that pot

1 can be made to grow if you have a growth in pupils,
2 right?

3 A. Yes. Every school district in the state
4 operates under that system.

5 Q. Because you get your -- from the state,
6 anyway, you have what's been referred to here as PPR,
7 a per pupil revenue. Right?

8 A. That's correct.

9 Q. And what you get from the state, in
10 simplest terms, is the per pupil revenue times the
11 number of pupils, right?

12 A. Correct. We have other sources of
13 revenue, but that is the principal one.

14 Q. I'm sorry.

15 A. That's the principal source of revenue.

16 Q. So if you can -- if you can use this
17 program to grow the number of pupils, you can grow the
18 budget for Douglas County; isn't that right?

19 A. Yes. That's part of -- you know, we grew
20 1200 students this year. And we got more money for
21 that.

22 Q. And there's nothing, is there, sir,
23 beyond the discretion of the board with respect -- to
24 restrict the number of students that you choose to
25 allow into the Choice Scholarship Program? Isn't that

1 correct?

2 A. Ask me that again. I'm not sure.

3 Q. The number of students that are allowed
4 into the Choice Scholarship Program is a matter of the
5 discretionary authority of the Douglas County school
6 board. Isn't that correct, sir?

7 A. I would say generally, yes. But we have
8 demonstrated pretty clearly, through our
9 superintendents meetings, that we're going to work
10 very closely with the CEE to make sure that we're good
11 neighbors and that we run this program properly.

12 Q. Now, you've heard testimony in this court
13 from representatives of some of the private partner
14 schools, as you've been able to sit here today. Isn't
15 that right, Mr. Carson?

16 A. Yes. I believe I've heard three.

17 THE WITNESS: I'm going to do this a
18 little differently this time.

19 MR. McCARTHY: And I'll shut up while you
20 do it.

21 THE WITNESS: Well, then I'll pour a
22 whole bunch of water.

23 Q. (BY MR. McCARTHY) You know, do you not,
24 Mr. Carson, that the tuition charge at several of the
25 private partner schools that have been accepted into

1 the Choice Scholarship Program exceeds the \$4,575 that
2 is the amount of the voucher scholarships, correct?

3 A. Yes.

4 Q. And it is, in fact, the policy of the
5 Douglas County school board, as you adopted it in --
6 we call it Exhibit 107, but it's JCB -- that it is the
7 financial responsibility of the students' families to
8 make up the difference between the voucher payment and
9 the tuition charge by a private partner school,
10 correct?

11 A. That's correct.

12 Q. And so to that extent, the education that
13 those Choice Scholarship recipients, those
14 participants in the program receive -- the education
15 they receive is not free, is it, sir?

16 A. No. It's -- they do make up the
17 difference, yes.

18 Q. So they've got to pay for that right.

19 A. Correct.

20 Q. And so you heard, for example, Ms. Martin
21 testify here on behalf of Woodlands Academy that when
22 you add up the tuition of 7,000 and the costs for
23 books, it's \$8500 to go to Woodlands. You heard that,
24 did you not, sir?

25 A. I think that was about right.

1 Q. And so to the extent that a Choice
2 Scholarship student wants to go to Woodlands, their
3 family has to come up with another \$4,000 plus or
4 minus in order to go there, right?

5 A. Correct.

6 Q. And so to that extent, that education is
7 not free. Isn't that right, sir?

8 A. We made it very clear that any tuition
9 differential will be made up by the parents, unless
10 they're school lunch eligible. Then we have partnered
11 with some groups that will offer scholarships.

12 Q. Okay. And you've also made clear in your
13 policies that the private partner schools are not
14 obligated to make any changes in their educational
15 programs in order to participate, correct?

16 A. Correct.

17 Q. And you've also made clear that the
18 private partner schools have no obligation to change
19 their disciplinary policies in order to participate,
20 right?

21 A. That's correct.

22 Q. And that the sectarian or religious
23 private partner schools can require students from
24 Douglas County that had previously attended Douglas
25 County who want to attend a sectarian school under

1 this program -- they can be required to attend
2 religious classes, correct?

3 A. That's correct.

4 Q. And they can be required to attend, but
5 they're going to have to participate in religious
6 services; isn't that right?

7 A. Yes. We have the opt-out language.

8 Q. And there's no obligation for any of the
9 private partner schools to change their enrollment
10 policies, right?

11 A. Yes, that's correct.

12 Q. And they don't have any obligation to
13 change their employment policies, right?

14 A. That's correct.

15 Q. Okay. And, in fact, sir, you testified
16 here that the program, Exhibit 107, the JCB, is
17 religion neutral. But the policy does make clear in
18 many instances, and specifically calls out that
19 religious schools have no obligation to change their
20 religious or theological training. Isn't that right?

21 A. That's correct.

22 Q. And you make clear that religious schools
23 can participate in this program without having to
24 change their theological training or their theology
25 infused education, correct?

1 A. Correct. We are totally neutral on the
2 issue of religion.

3 Q. And they don't have to change their
4 policies either, right?

5 A. Correct. We want them to offer the
6 education they offer now. And the board is neutral on
7 issues such as religion.

8 Q. You've talked about, sir, and others have
9 talked about, the manner in which the Choice
10 Scholarship Program will be administered here today.

11 It's correct, is it not, Mr. Carson, that
12 the principal vehicle that the Douglas County school
13 district is going to use to administer the Choice
14 Scholarship Program is the Choice Scholarship school,
15 correct?

16 A. Yes. I'd say that's an accurate
17 statement, yes.

18 Q. And that school did not come into
19 existence until July 9th of 2010 -- 2011, sir. Isn't
20 that right?

21 A. Thereabouts. It was -- I believe it was
22 a meeting, I think, formally at the last board
23 meeting, yes.

24 Q. Because that was the meeting at which the
25 board did a second reading of the charter school and

1 brought it into existence; isn't that right?

2 A. Yes.

3 Q. And it was less than a month, right?

4 A. That's correct. Although, we authorized
5 the superintendent to develop that concept in March.

6 Q. Right. But it didn't come to fruition
7 and come into existence until July 9th, 2011, right?

8 A. Officially, yes.

9 Q. Okay. Sir, would you agree that Douglas
10 County, compared to other counties in Colorado, is one
11 of the most affluent counties in the state?

12 A. Yes. I think it is. But it is largely a
13 middle class county.

14 Q. And it's the case, sir, is it not, that
15 in order to participate in the Choice Scholarship
16 Program, there are no income qualifications? Right?

17 A. No.

18 Q. So you can participate in it if you're
19 rich or you're poor, right?

20 A. Yes. And that's one of the great
21 benefits, is that middle class families will be able
22 to afford a private school education if they choose
23 it, as will low income families.

24 Q. As will wealthy families, as well.
25 Right, sir?

1 A. Yeah. Well, they'll qualify for the
2 program. But, of course, they're able to afford that
3 now.

4 Q. Okay. And you have heard testimony here
5 today, I think, from Dr. Fagen and Dr. Cutter, as
6 well, that notwithstanding what the policy said about
7 the first payment being made of the Choice
8 Scholarships in July of -- I'm sorry -- in September
9 of 2011, that you decided to accelerate and make the
10 payment in July. Right?

11 A. I don't agree with the term "accelerate."
12 I just simply -- you know, the board gave her the
13 authority to make administrative adjustments. And I
14 think, as we all look back on that, school starts in
15 August, so we should have put that in the policy.

16 Q. Let me ask it to you differently, sir.
17 You ended up deciding -- the Douglas
18 County school board ended up deciding to make the
19 payments earlier than the September date that was
20 published in policy JCB, correct?

21 A. The superintendent made that decision.
22 But the board delegated that authority to her.

23 Q. You supported that decision, did you not?

24 A. I have really not expressed any opinion
25 on it. My view of it is, it only makes sense.

1 Q. Well, she checked with you before she
2 made those payments, did she not, sir?

3 A. No. I am very confident that -- I've
4 always told her that if she has issues, she needs to
5 check with me. But I've never had a discussion with
6 her about the timing of the payments.

7 Q. So you didn't know that the payments were
8 being made in very early July, contemporaneous with
9 the time that it was made? Is that your testimony
10 here today, sir?

11 A. No, that's not my testimony. We did
12 bring updates from the staff. But you asked me
13 whether the superintendent had asked me.

14 Q. Well, who told you?

15 A. Well, the staff sent us e-mails.

16 Q. Who on the staff told you?

17 A. Robert Ross, our board counsel.

18 Q. Well, I don't want to know anything more
19 about Mr. Ross' communication with you. But you had
20 contemporaneous knowledge of the fact that the
21 payments were being made in July -- in early July,
22 right?

23 A. Yeah. I think generally, yes.

24 Q. And that fact was not made public in
25 early July, right?

1 A. I honestly don't know the answer to that.

2 Q. So you don't know whether or not it was
3 made public in early July; is that right?

4 A. I don't -- I don't know.

5 Q. And you believe it's true, is it not,
6 sir? You didn't direct anyone to make sure that that
7 information was immediately made public, right?

8 A. I have not directed anyone on that issue.

9 Q. Okay. And, sir, did you direct anyone to
10 make sure that the private partner schools were
11 advised of the likelihood of litigation with respect
12 to this policy at the point in time you began
13 implementing it shortly after March 15, 2011?

14 A. I -- no, I've never directed the
15 superintendent -- again, I interact with the
16 superintendent. I don't direct her on day-to-day
17 issues like that.

18 Q. And so as far as you know, then, it's
19 true, is it not, that the board didn't direct the
20 superintendent to make sure that the private partner
21 schools were aware of the likelihood of litigation,
22 right?

23 A. I don't recall any of that, no.

24 Q. And you similarly -- the board didn't
25 direct the superintendent or other staff to make sure

1 that the participants in this program, the families,
2 knew that there was a likelihood of litigation with
3 respect to this program, correct?

4 A. Not to my recollection.

5 MR. McCARTHY: Your Honor, nothing
6 further.

7 THE COURT: Any other
8 cross-examination?

9 MR. MACDONALD: Just a very few, Your
10 Honor.

11 THE COURT: Okay.

12 CROSS-EXAMINATION

13 BY MR. MACDONALD:

14 Q. Good afternoon, Mr. Carson. My name is
15 Tim Macdonald. I represent the LaRue plaintiffs.

16 I think, in your cross-examination with
17 Mr. McCarthy, you indicated that one of your
18 objectives for the board was that you wanted to retain
19 as many Douglas County students as you could. Is that
20 right?

21 A. Yes.

22 Q. And you think that's one of the reasons
23 you support the program. You think it will help you
24 do that, correct?

25 A. That's correct.

1 Q. And what you're doing as part of the
2 program is sending money that Douglas County gets from
3 the state, the district gets from the state, and
4 sending that money to the private schools, and then
5 the kids go to private schools. Correct?

6 A. That's correct. That's the way the
7 program works, yes.

8 Q. And you understand that several of those
9 private school partners are not in Douglas County,
10 correct?

11 A. Yes.

12 Q. There are schools in Denver County,
13 right?

14 A. Yes.

15 Q. Arapahoe County?

16 A. Yes.

17 Q. El Paso County?

18 A. Correct.

19 Q. And so --

20 A. I believe. I'm not sure of that. I'll
21 take your word for it.

22 Q. And so in retaining -- in satisfying the
23 objective to retain as many students as possible in
24 Douglas County, you are sending kids to Denver County,
25 Arapahoe County, and El Paso County private schools,

1 correct?

2 A. I guess. We -- we want people to be able
3 to get the education they choose. It's not of great
4 concern to us whether they cross a particular line
5 somewhere.

6 Q. But for purposes of Douglas County, even
7 though they're going to private schools in these other
8 places, you get to retain the per pupil funding under
9 the plan, correct?

10 A. Well, in a sense, that -- that money is
11 given to the education of the student and our
12 administrative costs are retained, if that's what you
13 mean.

14 Q. And the students -- the students who are
15 attending the private school partners in Denver
16 County, Arapahoe County, and El Paso County, under
17 your program, are considered public school students of
18 Douglas County for purposes of receiving revenue from
19 the state, correct?

20 A. That's correct.

21 MR. MACDONALD: No further questions,
22 Your Honor.

23 THE COURT: Any redirect, limited in
24 scope to cross-examination?

25 MR. LYONS: None, Your Honor.

1 THE COURT: All right. That will
2 conclude the testimony of Mr. Carson. If there's no
3 objection, he may step down. Mr. Carson, thank you.

4 It's 5:20. And I know we got two clocks
5 on the wall. Don't ask me why we do. And they don't
6 always have the same time. And just so you know, the
7 clock that I use for my time to take a break is the
8 one on my computer, because it's the one I can see
9 best. So my clock says it's 5:20. I'm going to go
10 ahead and shut down for the day.

11 Before we do that, I want to know where
12 we are schedulewise. Mr. Lyons, who do you have left
13 to call?

14 I'll talk to you guys about a 9:00
15 o'clock matter I have. What I did -- and I knew you
16 were coming in on duty week. I always set things in
17 duty week anyway, because I like to stay busy. But
18 you guys came in, so I moved things either to
19 telephone hearings before you all get here or during
20 the lunch hour. I've also moved things to 8:30. Some
21 of them I haven't been able to move, and one of them
22 is the matter tomorrow morning at 9:00.

23 If I get a failure to appear, we'll be
24 ready to go at 9:00. If I get somebody here ready to
25 go, it may not be till 9:30 or so.

1 So I'm just hearing that we might be able
2 to move the other matter tomorrow at 9:00 to 8:30, so
3 come back tomorrow at 9:00 o'clock.

4 Mr. Lyons, I asked you a question. You
5 want to answer it for me, please?

6 MR. LYONS: I'll try, Your Honor. We
7 have Professor Glenn to testify tomorrow morning. We
8 have two other may-call witnesses that I'm going to
9 reconsider over the evening as to whether we're going
10 to call them or not. But Professor Glenn will be
11 called for sure.

12 My understanding is, the state intends to
13 call Senator King in the afternoon. And I don't know
14 that the morning will be taken up with Professor
15 Glenn. It might make sense, once he finishes
16 testifying, to have the rebuttal witness, Mr. Green --
17 and I'll try and keep those straight -- testify. And
18 we can spend the morning resolving the experts and
19 whatever other testimony by way of public witnesses.
20 And then we'll reconsider over the evening hour.

21 THE COURT: The reason I delayed my
22 ruling on the motion in limine and the other questions
23 that Mr. Macdonald had earlier was, you know, I was
24 evaluating your respective witness lists and I had
25 some concern about the timing and whether we're going

1 to be able to get them all in.

2 There's a number of ways that we can
3 proceed with that. Obviously, I'll tell the defense
4 the same thing I told the plaintiffs last night. Go
5 back, take a look at your witness list, reevaluate
6 what witnesses are actually witnesses you absolutely
7 have to have.

8 Also, rule 43(e) of the Rules of Civil
9 Procedure is a rule that I employ not regularly but it
10 can be utilized to allow for the admission of evidence
11 and testimony by way of affidavits and/or reports for
12 those witnesses that you maybe haven't gotten into but
13 you want to. So it will afford us more flexibility.
14 You might consider that, as well. Take a look at that
15 in terms of the applicability.

16 I wanted to make sure that we had a full
17 opportunity to consider the testimony of Mr. Glenn and
18 the rebuttal testimony to that. So that's what I'm
19 thinking in terms of what you have left on your
20 witness list.

21 I don't have the ability to go beyond the
22 schedule that I gave you guys when you were here a few
23 weeks ago, which is tomorrow at 5:00 o'clock.

24 MR. LYONS: Well, Your Honor, I think I
25 can speak for all of us. We're grateful that you

1 found the time that you have to accommodate us as well
2 as you have. And we'll do everything we can to fit
3 within that time frame.

4 But at the risk of wearing out my
5 welcome, let me also ask what your ideas might be with
6 regard to closing argument tomorrow. We've had a
7 discussion among ourselves about that, but at the end
8 of the day, given the time constraints, that's up to
9 you.

10 THE COURT: Well, you know, again, I
11 think that's going to depend on the time constraints.
12 I'd like to give you 30 minutes each side to divide
13 how you want to divide it as you did previously, and
14 everybody adhered to that pretty well. And I
15 appreciate that.

16 If I'm in a position where we have to use
17 the time we have to complete testimony, then I may
18 have you just do a written closing argument. That's
19 another way that I've done it in the past in
20 proceedings like this. You've definitely given me
21 some interesting issues to consider. At this point,
22 I'm interested to hear those witnesses that are left.
23 And then I'll be drafting findings of fact and
24 conclusions of law. Plus, I have to do a ruling on
25 the motion to dismiss, which may obviate all the rest

1 of it.

2 MR. LYONS: I think our intention would
3 be, Your Honor, to try to finish the testimony so that
4 you could hear closing arguments from us tomorrow.

5 THE COURT: That's the goal.

6 MR. McCARTHY: I agree with Mr. Lyons.

7 THE COURT: Whatever you need to do.
8 I'll commit to 30 minutes unless we don't have enough
9 time, and then I'll take it down to 20. It won't be
10 less than 20, though.

11 MR. McCARTHY: Thank you.

12 MR. LYONS: Thank you.

13 THE COURT: We'll leave it at that. So
14 go ahead and be here at 9:00. I can't imagine that
15 I'll be done before 9:00, even if I get this guy here
16 at 8:30. We'll see. There's nothing else. The court
17 will be adjourned. Thank you for your time.

18 WHEREUPON, the within proceedings were
19 recessed at the approximate hour of 5:25 p.m. on the
20 3rd day of August, 2011.

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23

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25

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) SS.
CITY AND COUNTY OF DENVER)

I, SHARON L. SZOTAK, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 11th day of August, 2011.

My commission expires June 10, 2012.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

 x Reading and Signing was not required.

1 DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
2 Denver, Colorado 80202

3 Plaintiffs:

4 JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF
5 COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM
HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA
6 CARRERA; SUSAN MCMAHON,

7 v. Case Number: 2011CV4424
Courtroom: 259

8 Defendants:

9 COLORADO BOARD OF EDUCATION; COLORADO DEPARTMENT OF
EDUCATION; DOUGLAS COUNTY BOARD OF EDUCATION; DOUGLAS
10 COUNTY SCHOOL DISTRICT,

11 Movants:

12 FLORENCE DOYLE; DERRICK DOYLE; ALEXANDRDA DOYLE;
DONOVAN DOYLE; DIANA OAKLEY; et al.

13 and

14 Plaintiffs:

15 TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD;
16 MASON S. BARNARD,

17 v. Case Number: 2011CV4427
Courtroom: 259

18 Defendants:

19 DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY
SCHOOL DISTRICT RE-1 BOARD OF EDUCATION; COLORADO
20 DEPARTMENT OF EDUCATION; COLORADO STATE BOARD OF
EDUCATION.

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REPORTER'S TRANSCRIPT - VOLUME III

The preliminary injunction hearing in the above-entitled matter resumed on Thursday, August 4, 2011, at 1437 Bannock Street, Courtroom 259, Denver, Colorado 80202, before the Honorable Michael A. Martinez.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Reported by: Sharon L. Szotak, RPR, CRR

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 I am now calling 11CV4424. Counsel and
4 parties are present. Are there any preliminary
5 matters before we get started?

6 MR. DOUGLAS: Your Honor, I have one very
7 brief preliminary matter, if I may.

8 THE COURT: I notice everyone says very
9 brief now. Let's see how you do, Mr. Douglas, with
10 your very brief matter.

11 MR. DOUGLAS: Thank you, Your Honor.

12 It's come to my attention that
13 Plaintiffs' Exhibit 18, which is one of the stipulated
14 exhibits for the hearing, was inadvertently left off
15 the list of stipulated exhibits that was given to Your
16 Honor. So I just wanted to make sure that the record
17 correctly reflected that exhibit, which is one of the
18 private school applications, all of which were
19 stipulated to, was actually admitted and in the
20 record.

21 THE COURT: Okay. The record will
22 reflect that. I don't have it on my little sheet, but
23 I'll add it.

24 MR. DOUGLAS: Thank you.

25 THE COURT: Anything else?

1 MR. BINDAS: Yes, Your Honor. I wanted
2 to apprise you of the fact that Ms. Diana Oakley, who
3 will be a witness this afternoon, will be stepping
4 into the courtroom sometime this morning, but she,
5 being a party in the case, being our representative
6 today, I don't believe it will be a problem, but I
7 wanted to alert you to that fact.

8 THE COURT: If she's a party, she has a
9 right to be here, so it's not a problem. Thanks for
10 the notice.

11 Anything else? All right. We're going
12 to continue now with the defense case in chief. And,
13 Mr. Lyons, we'll start with you. Please call your
14 first witness.

15 MR. LYONS: Thank you, Your Honor. I
16 would like to introduce my partner and colleague,
17 March Nussbaum, who will be examining our next
18 witness.

19 THE COURT: Good morning, Mr. Nussbaum.

20 MR. NUSSBAUM: Good morning, Your
21 Honor.

22 The Douglas County schools calls
23 Professor Charles Glenn as our next witness.

24 THE COURT: Give me just a moment.

25 Raise your right hand, please.

1 CHARLES L. GLENN,
2 having been first duly sworn to state the whole truth,
3 testified as follows:

4 THE COURT: Please be seated. I'm
5 going to take a moment to allow the plaintiffs to set
6 up a telephone connection so that their rebuttal
7 witness can hear the testimony of Professor Glenn. So
8 if you'll just stand down for a moment.

9 MR. NUSSBAUM: Your Honor, while we're
10 waiting for that, may I indicate a couple of
11 stipulations?

12 THE COURT: Absolutely.

13 MR. NUSSBAUM: The parties have
14 stipulated to the admissibility --

15 THE COURT: Hang on a second, so we can
16 get this goofiness out of the way.

17 (Pause in the proceedings.)

18 THE COURT: All right. Mr. Nussbaum, you
19 had a couple of matters you wanted to address.

20 MR. NUSSBAUM: Professor Glenn's
21 curriculum vitae, Exhibit HH, the parties have
22 stipulated to its admissibility.

23 THE COURT: Okay.

24 MR. NUSSBAUM: Exhibit LL and MM, two
25 articles from the Rocky Mountain News dated

1 respectively February 2, 1876, and March 17, 1876, the
2 parties have stipulated. This is actually -- each of
3 these are a two-page exhibit, Your Honor. The second
4 page of each is a difficult-to-read copy from
5 microfiche from that time, and the parties have
6 stipulated to the authenticity of the second page of
7 each of those exhibits.

8 THE COURT: Okay.

9 DIRECT EXAMINATION

10 BY MR. NUSSBAUM:

11 Q. Good morning, Professor Glenn. Would you
12 please state your name.

13 A. Charles Glenn.

14 Q. And how are you employed?

15 A. I'm a professor at Boston University.

16 Q. And how long have you been in that
17 position?

18 A. In September, it will be 20 years.

19 Q. What is your educational background?

20 A. I earned a bachelor's degree at Harvard.
21 Studied in California and Germany. Then earned a
22 doctor of educational administration and educational
23 policy at Harvard, and a PhD in religion and modern
24 culture at Boston University.

25 Q. And have you taught on the subject of

1 history and education?

2 A. I have. I've taught courses in the
3 history department at Boston University, and for more
4 than a dozen years, I've taught a history of education
5 course.

6 Q. Are you the author of articles and books
7 on the subject of history?

8 A. Yes.

9 Q. And what generally are the subject
10 matters that you've addressed in those books and
11 articles?

12 A. The two questions that have most
13 interested me have been the question of -- of the role
14 of the state in relation to schools, which I looked at
15 in a number of countries, and the issue of the
16 education of immigrants and members of minority
17 groups, and how the state has not protected their
18 rights.

19 Q. And have you also looked at certain
20 religious minority groups in that work?

21 A. I have, yes.

22 Q. Has your work also caused you to look at
23 the issue of the -- what I'm going to call the Blaine
24 movement?

25 A. Yeah.

1 Q. Or more broadly known by some as the
2 no-pay movement?

3 A. Yes.

4 Q. And have you written on those subjects?

5 A. I have.

6 Q. Take just a moment and look at Exhibit HH
7 that's just been admitted into evidence. And what is
8 this document?

9 A. This is my curriculum vitae. I want to
10 correct one thing briefly. I am no longer chairman of
11 the department. I stepped down a few months ago in
12 order to devote myself to teaching and completing a
13 series of books on the history of education.

14 Q. And I see this goes 35 pages, your
15 curriculum vitae. We are not going to go through it
16 all. But does this fairly accurately represent your
17 professional work and your academic work?

18 A. Yes, it does.

19 Q. I see you also serve on a number of
20 national and international boards focused on the issue
21 of education.

22 A. Yes.

23 MR. NUSSBAUM: Your Honor, I would move
24 to certify Professor Charles Glenn as an expert on the
25 history of education in the United States, and more

1 particularly on the social, religious, and political
2 history of the Blaine movement in Colorado and
3 nationally, and the broader movement to bar public
4 funds flowing to so-called sectarian schools.

5 THE COURT: Any objection to the
6 tender?

7 MR. MACDONALD: Your Honor, can I reserve
8 for cross, so we don't waste the time now?

9 THE COURT: Well, if you have voir dire
10 that goes to his qualifications, now would be the
11 time. If you just want to start your
12 cross-examination, then, of course, I wouldn't permit
13 that.

14 MR. MACDONALD: Part of the issue is the
15 characterization of Colorado's Blaine amendment and
16 what is a Blaine amendment, and that goes a lot to the
17 cross-examination. We don't dispute anything on his
18 CV, Your Honor, his background.

19 THE COURT: So the issue is his
20 qualifications at this point. So I'm going to treat
21 that as a non-objection. Any other objections? No.
22 All right. Thank you. The professor may offer his
23 opinions in the designated fields, and you may
24 proceed.

25 Q. (BY MR. NUSSBAUM) Professor, let's begin

1 and focus on your testimony in the pre-Civil War half
2 of the 19th century. What was the religious character
3 of popular schooling in the United States before the
4 Civil War?

5 A. It depended very much on the religious
6 character of local communities. Since schooling is
7 almost entirely under the control local communities.

8 So that in instances when a local
9 community was very homogenous, for example, a group of
10 German Lutheran immigrants, the local public school
11 was German Lutheran. In the more common case where
12 there were a variety of different Protestant groups,
13 the school generally practiced a generic
14 Protestantism.

15 In almost every case it appears that, for
16 example, the Bible was read both for instruction and
17 devotionally, prayer was often an aspect of schooling.
18 And nobody much questioned that for many decades.

19 Q. How were these local schools funded?

20 A. They were funded in small part from state
21 land grants. For example, the northwest ordinance,
22 Congress set aside a portion of the land in the -- in
23 Ohio, Illinois, Indiana, and so forth, for the support
24 of schools and a portion of the land for the support
25 of churches.

1 And when the Louisiana Purchase was made,
2 that provision to the schools was extended. Beyond
3 that, though, it was local taxpayers and to some
4 extent what was called rates paid by parents.

5 Q. And that funding, the public element of
6 that funding, flowed to those schools, even though
7 there was heavy religious content in the curriculum;
8 is that correct?

9 A. Yes. No question.

10 Q. Now, were there also some denominational
11 schools during the first half of the 19th century?

12 A. Yes. In the middle Atlantic states, most
13 schooling was provided by the churches, which were
14 quite ethnic often in their background. And so the
15 schools were largely denominational.

16 In New England and in the midwest, they
17 generally were town schools with a religious
18 character.

19 Q. And as a general proposition -- I
20 recognize there's exceptions and there's a lot of
21 history we will not have time to get into today, but
22 as a general proposition, were the arrangements of
23 public support for local schools, both those that were
24 overtly religious and those that were public but had
25 religious content -- was there controversy regarding

1 that funding, as a general proposition, before the
2 Civil War?

3 A. Very seldom.

4 Q. Let's turn to the period of time after
5 the Civil War. Were there concerns about the
6 intentions and influence of Catholics and the Catholic
7 Church in society and American -- pardon me. Let's
8 take before the Civil War.

9 Were there concerns about the intentions
10 or influence of Catholics and the Catholic Church in
11 society and in American education before the Civil War
12 and before what I'm going to call the Blaine amendment
13 debates of the 1870s?

14 A. Yes.

15 Q. Okay. And what were they?

16 A. In the 1830s, in response in large part
17 to developments in Europe at which the Papacy asserted
18 more authority over education, a number of books were
19 published, one by Samuel Morse, the inventor of the
20 telegraph, called, I think, Foreign Conspiracies
21 Against the Liberties of the United States, which was
22 predicting that the Catholic Church was sending
23 Jesuits in disguise to attempt to take over American
24 life.

25 Lyman Beecher, the noted Protestant

1 minister, wrote a book called A Plea for the West, in
2 which he argued that the Ohio Valley was in danger of
3 falling into Catholic hands because of -- the
4 Catholics were being more vigorous about promoting
5 schooling than were Protestants. And many others.
6 This was a very popular genre in those days.

7 Q. Who was Horace Bushnell?

8 A. Horace Bushness was a congregationalist,
9 theologian, pastor in Hartford, Connecticut, who
10 became famous with a book on christianity in which he
11 argued that in contrast with the usual Protestant view
12 at the time, the necessity of conversion, that
13 children could be educated in such a way that they
14 would grow up always being christian without any need
15 for conversion.

16 Q. If you would take a look at Exhibit II,
17 which is in the book there before you.

18 A. I'm finding JJ.

19 Q. II.

20 A. Oh, I'm sorry.

21 Q. It looks to me like a Roman II, but it's
22 II.

23 A. Yes. I have it.

24 Q. Okay.

25 MR. NUSSBAUM: Your Honor, I noticed, as

1 we were preparing for this, that the date of this
2 document was omitted from the front page of the
3 exhibit. And I don't know if I can, with your
4 permission, supplement that in the official exhibit
5 book.

6 THE COURT: Absolutely.

7 MR. NUSSBAUM: This will be the page 1 of
8 that exhibit.

9 Q. (BY MR. NUSSBAUM) So when was this book
10 published?

11 A. 1880.

12 Q. And if you'll open to the second page of
13 it, it refers to -- there at the bottom paragraph of
14 the page, does this refer -- what does this document
15 have in it, from pages -- the bottom of page 298
16 through page 303?

17 A. It is a -- it includes the text of a
18 public lecture which he gave in Hartford in 1853
19 addressing the question of the common school -- that
20 is, the public school -- and the threat to it imposed
21 by Catholic resistance.

22 MR. NUSSBAUM: Your Honor, I'd move for
23 the admission of Exhibit II.

24 THE COURT: Objection to II?

25 MR. MACDONALD: Your Honor, I guess I'm

1 going to object. I'm not sure if this is a learned
2 treatise, or what's the basis of --

3 MR. NUSSBAUM: 803.16, ancient document.

4 THE COURT: There's one we don't hear
5 very often. Does that satisfy you, Mr. Macdonald?
6 1853 --

7 MR. MACDONALD: That's pretty ancient,
8 Your Honor.

9 THE COURT: It's older than both of us.

10 MR. NUSSBAUM: In the rules of evidence,
11 20 years satisfies the ancient document requirement.

12 MR. MACDONALD: Other than the fact it's
13 an excerpt, Your Honor, we've never been provided the
14 full copy. It looks to me like it's many hundreds of
15 pages. We are on page 298. So with that reservation,
16 Your Honor.

17 THE COURT: Well, I don't know that the
18 rule of completeness applies. You're only offering
19 this excerpt; is that right, Mr. Nussbaum?

20 MR. NUSSBAUM: Yes, Your Honor.

21 THE COURT: It will be admitted on the
22 objection, sort of.

23 Q. (BY MR. NUSSBAUM) Professor Glenn, go to
24 page 301, and read aloud, if you would, the first full
25 paragraph of -- is it Pastor Bushnell? Is that how

1 they would address him at the time? Or Reverend
2 Bushnell?

3 A. Probably Dr. Bushnell.

4 Q. Okay. Dr. Bushnell's -- is this a speech
5 or sermon? What is this?

6 A. It was a public address. It was called a
7 fast day's sermon, which was not a church occasion.
8 It was a public -- when there was felt to be a need to
9 gather the people together to be addressed about some
10 pressing issue at the time.

11 Q. And before you read this, the date of
12 this speech or sermon was -- is 1853; is that correct?

13 A. 1853.

14 Q. If you'll read that paragraph, please.

15 A. "In this latter view, the withdrawing of
16 our Catholic children from the common schools, unless
17 for some breach upon their religion, and the
18 distribution of public moneys to them in schools apart
19 by themselves is a bitter cruelty to the children and
20 a very unjust affront to our institutions. We bid
21 them welcome as they come and" --

22 Q. Let me stop you there. Who's the "them"
23 in that sentence?

24 A. Catholics.

25 Q. Okay. Go ahead.

1 A. And obviously Catholic immigrants,
2 because "as they come."

3 "We bid them welcome as they come, and
4 open to their free possession all the rights of our
5 American citizenship. They, in return, forbid their
6 children to be Americans, penned them as foreigners to
7 keep them so, and trained them up in the speech of
8 Ashdod among us. And then to complete the affront,
9 they come to our legislatures demanding it as their
10 right to share in funds collected by a taxing of the
11 whole people, and to have these funds applied to the
12 purpose of keeping their children from becoming
13 Americans."

14 Q. As a historian, as you're looking at
15 this, what is going on in Dr. Bushnell speech, and
16 particularly this paragraph?

17 A. He is reflecting what was a common
18 concern that if Catholic children -- if immigrant
19 children were not persuaded somehow to be in the
20 common schools, which had a Protestant character,
21 which was assumed to be just a natural American
22 character, that they would not become real Americans.

23 Q. And when it refers to them as a bitter
24 cruelty upon the children, what does he mean by that?

25 A. Because they will not become real

1 Americans and be able to fit into American society.

2 Q. Thank you.

3 Let's turn, if we can, to the post Civil
4 War era of education in the United States. Did the
5 concern about Catholics and a Catholic Church in
6 relation to education in the United States change
7 after the Civil War?

8 A. Yes.

9 Q. How so?

10 A. There was a considerable revival of this
11 concern for three reasons, which were, if I may, just
12 in the interests of time, the first being that
13 increasingly immigrants, Irish and German immigrants
14 in particular, were becoming influential politically
15 in many northern cities. Often the mayors of northern
16 cities were being -- of immigrant background. And
17 this threatened the larger Protestant majority, who
18 saw this as a dangerous development.

19 Secondly -- and this is often ignored by
20 historians of American education -- there was a keen
21 awareness of the developments occurring in Europe at
22 the time. As I show in one of my books that was
23 published this spring, in a number of the countries in
24 western Europe, the 1860s and 1870s were a time of
25 bitter conflict between national governments seeking

1 to assert their control over the formation of citizens
2 and the Catholic Church seeking to maintain its role
3 educating children who were baptized.

4 Q. And was that the Catholic Church's
5 reaction to the government's movement in Europe?

6 A. Yes. And so, for example, in the famous
7 Syllabus of Errors in 1864 by Pope Pius IX --

8 Q. Okay. Go ahead.

9 A. -- spelled out a number of things which
10 the Catholic Church did not agree with in modern life.
11 And this included many of the features that -- that
12 liberals and most Americans indeed -- certainly most
13 American Protestants -- believed were central to the
14 qualities of American life.

15 Q. And did Pius IX in the 1864 Syllabus of
16 Errors speak about education to --

17 A. He did very specifically.

18 Q. And did he speak about government and
19 church with regard to education?

20 A. He rejected the idea that government had
21 a right to educate children and insisted that was the
22 responsibility of the church and the parents.

23 Q. Were there further statements -- and how
24 did that -- was that known in America, that he had
25 issued the Syllabus of Errors?

1 A. It, of course, occurred during the Civil
2 War, so there was not immediately that intention. But
3 after the war, it became the source of extensive
4 discussion, particularly as the Catholic hierarchy
5 began to, in its own writing, support those ideas.

6 Then in 1970 -- 1870 -- sorry -- when the
7 Italian government finally seized control of Rome, the
8 Pope famously called the Vatican council, which issued
9 the statement of Papal accountability, which caused
10 even more objection among many American Protestants.

11 James Garfield, the future president,
12 said in an election campaign in Ohio that it was the
13 same battle on both sides of the Atlantic, that
14 Americans were facing the same threat from the claims
15 of the Catholic Church, which -- which Europeans were
16 experiencing.

17 Q. And you said there was a third thing. So
18 you've mentioned the growing political power of
19 Catholics in the U.S., and you've mentioned this
20 tension between European governments and Rome's
21 reaction.

22 A. Right.

23 Q. The third thing that you said changed
24 after the Civil War?

25 A. The third -- and this is discussed

1 eloquently by Professor Green -- is that the
2 republican party found itself in serious trouble in
3 the 1870s. The effort at reconstruction in the south
4 encountered very strong resistance and increasingly
5 lacked support in the north. There were financial
6 scandals in the Grant administration. Republicans
7 lost control of the House of Representatives in the
8 1874 election. And clearly they were looking for a
9 new issue. In both statements by republican leaders
10 and in republican friendly publications like Harper's
11 Weekly, it was mentioned at the time that that new
12 issue was going to be the Catholic threat to the
13 common public school.

14 Q. And who was -- who was articulating this
15 as being a new issue for republicans in Harper's
16 Weekly? What was the data for that?

17 A. I'm sorry. I quoted that from Professor
18 Green's 1992 article. He cites that.

19 Q. Okay. And so what did -- so the
20 republicans saw this issue. What did they do with it?

21 A. Well, in -- in the summer of 1875,
22 President Grant made a very widely reported speech to
23 a group of union veterans, threatening that there
24 might be a new Civil War, not over race but over --
25 over religion, and that it was necessary that

1 Americans come together and resist the efforts to
2 divide the country by having what he calls sectarian
3 schooling.

4 He then followed this up in his annual
5 message to Congress in December, calling for
6 constitution --

7 Q. 1875?

8 A. 1875.

9 Q. December 1875. Okay.

10 A. Calling for a constitutional amendment to
11 the same effect. And also, by the way, requiring that
12 church-owned property be taxed.

13 Q. And was there a reaction to President
14 Grant's September 1875 speech? Was that the speech in
15 Des Moines that he gave?

16 A. Yes, it was.

17 Q. The Des Moines speech and his December
18 1875 address to Congress; was there public reaction to
19 that?

20 A. These were very widely reported, very
21 favorably reported, in the republican-leaning press
22 across the north, attacked in the Catholic press as
23 being an attempt to use Catholics as an election
24 gambit to strengthen the position of the republican
25 party.

1 Q. And what was the effect of his proposal
2 to tax church property on the Protestant majority in
3 the United States?

4 A. It was not included in Blaine's
5 amendment, which I'm sure we'll discuss in a minute,
6 but it was included, interestingly enough, in the
7 Colorado convention, which began in December 1875, as
8 one of the potential elements of the Colorado
9 Constitution.

10 Q. So with this -- as I understand it, Grant
11 mentions two things: One is taxing church property,
12 and the other is not allowing any government funds to
13 go to sectarian schools. Is that the language that he
14 used?

15 A. Right.

16 Q. And so what was the reaction to the first
17 proposal on the Protestant majority nationally?

18 A. However, as one might imagine, although
19 it was best reflected perhaps in the position of the
20 Protestant churches in Denver, which, according to
21 John Evans, the former governor of the territory, who
22 was their spokesman, he privately said they wanted to
23 oppose the taxes upon their churches, but they would
24 like to see them imposed on Catholic churches and
25 institutions. However --

1 Q. To see taxes imposed on the Catholic
2 institutions?

3 A. Yes. But not on the Protestant churches.
4 However, in the course of the convention,
5 that provision was dropped from the constitution.

6 Q. But the education provision survived.

7 A. Right.

8 Q. Who was Blaine?

9 A. He was a congressman from the state of
10 Maine, who had been the speaker of the house
11 nationally until the defeat of the republicans in
12 1874. But he continued as a member of Congress, with
13 an eye to winning the nomination, republican
14 nomination, for the presidency in 1876.

15 Q. And in 1876, was he still a member of the
16 House?

17 A. He was until he was -- he was appointed
18 to the Senate after the defeat of his effort to win
19 the republican nomination.

20 Q. Okay. In terms of -- you mentioned the
21 Grant scandals, the 1874 election, and you've also
22 mentioned these speeches. What was going on with
23 reconstruction and the republicans at this time? And
24 the time I'm looking at is 1875, 1876, nationally.

25 A. One of the books I published this spring,

1 in fact, is on the history of the education of African
2 Americans. And I discuss in some detail, but I will
3 not do today, the ways in which republicans found that
4 although the bloody shirt as they called it of the
5 Civil War and of accusing democrats of being -- of
6 being rebels and being against equal rights of African
7 Americans, that had favored, as a useful political
8 issue by the 1870s, and gradually the national and
9 northern support for doing right by African Americans
10 in the south faded away, so that by 1876, republicans
11 were prepared to make a deal, as, in fact, they did
12 after the election, to end reconstruction in the south
13 in exchange for the presidency.

14 Q. And then their new political issue would
15 be -- after that deal was made, did they have a --
16 what was their focus to be if it's not reconstruction?

17 A. Well, in effect, after 1876, the south --
18 that is, the white south -- was left to regulate in
19 some affairs, which meant that very quickly the system
20 was put in place depriving African Americans of all
21 their rights and much of the property they had gained.

22 Q. Professor Glenn, would you please turn to
23 Exhibit KK. What is this document?

24 A. This is a number of pages photocopied
25 from the congressional record of the Senate August

1 14th, 1876.

2 Q. And what is reflected in these pages?

3 Let me make the record clear. 5580 through 5580 --

4 pardon me -- 5593. Pardon me. That's not right.

5 5595. 5580 to 5595. What's going on in these pages?

6 A. I'm going to have to turn this way to be
7 able to see the small print.

8 Q. It is small print.

9 A. This is the debate about whether the
10 Senate should adopt some form of the constitutional
11 amendment which James Blaine had filed in the House,
12 and which had been reported out by the House.

13 MR. NUSSBAUM: There earlier was
14 circulated a copy of this exhibit that omitted pages
15 5594 through 95, so I hope everyone, including the
16 court's copy, includes those pages.

17 Your Honor, I would move for the
18 admission of Exhibit KK.

19 THE COURT: Any objection to KK?

20 MR. MACDONALD: No, Your Honor.

21 THE COURT: KK will be admitted without
22 objection.

23 Q. (BY MR. NUSSBAUM) Professor Glenn, you've
24 read this document before, haven't you?

25 A. Yes.

1 Q. And is the word "sectarian" used in this
2 document?

3 A. It is.

4 Q. What was the meaning of the word
5 "sectarian" during this time frame? And the time
6 frame I'm talking about is quite specific: 1875, 1876
7 time frame. What was the common meaning of that term?

8 A. Throughout the 19th century, sectarian
9 was not applied by religious groups to themselves.
10 That is, they never referred to themselves as being a
11 sect or as being sectarian. They never referred to
12 their own schools as being sectarian.

13 Sectarian was a put-down. As Richard
14 Bayer, professor at Cornell, has written, it was
15 always intended to convey a religious group which was
16 narrow, cut off from wider concerns, turned against
17 the wider society. So it was always an insult, and,
18 as I say, never used in a positive sense.

19 Q. And in this text here, how do you see it
20 being used to refer to --

21 A. It's used in two different ways. It's
22 used by the public to refer obliquely to Catholic
23 schools as sectarian. And in at least one instance,
24 it's used by a democratic senator to reflect the
25 Catholic view that the public schools were sectarian.

1 That is, that they had a religious character.

2 Q. Let's look at some actual passages of
3 text. And we'll come to that passage itself in a
4 moment. Go to page 5585, column 2, if you will. This
5 will be a little bit tedious, but I think we can get
6 through this.

7 In the third full paragraph, this is the
8 paragraph that begins with, "It is" --

9 A. "This is not a new idea"?

10 Q. No. Come down to the bottom of that
11 paragraph that begins with, "This is not a new idea."
12 Towards the bottom of that paragraph, do you see,
13 about six or eight lines up, it says, "Let my friend
14 bear it in mind" -- and this is a statement from
15 Senator Morton.

16 A. Right.

17 Q. "Let my friend bear it in mind, this is
18 offered in a country where today the majority in every
19 state are Protestants. It is offered in what may be
20 called a Protestant country." Do you see that
21 passage?

22 A. Yes, I do.

23 Q. Now, I want to ask you a question about
24 this and another passage, but let's look at them both
25 at the same time. Keep your finger on that one, and

1 go to page 5590, if you would. Column 2. The second
2 full paragraph there, I'm going to read most of it,
3 and let me read it, if you don't mind, and tell me if
4 I read this accurately. "The Catholics of the United
5 States" -- this is Senator Bogey. "The Catholics of
6 the United States have been opposed to free schools,
7 as stated by my friend from Indiana, as organized some
8 years ago. And why? For the reason that they were
9 sectarian. Even the very Bible, which was used in the
10 schools, was sectarian -- was a sectarian book,
11 without going into discussion whether the Protestant
12 or Catholic Bible be the correct one. These schools
13 were more or less sectarian, and this being so, there
14 is nothing strange or astounding or very remarkable
15 that those who believed in their religion should not
16 willingly sanction their children going where their
17 religion was not only untaught but where they were
18 really taught to believe it was not correct. There
19 was nothing strange in that. Hence, the Catholics
20 have opposed throughout the United States the levying
21 of public taxes for the purpose of maintaining public
22 schools organized on sectarian principles."

23 Is that the passage you were referring to
24 earlier?

25 A. Yes, it is.

1 Q. And what's going on in that passage?

2 A. Well, he is defending the view that
3 Catholics, in fact, had a right to object to their
4 children being expected to attend schools that, in
5 fact, were contrary to their own convictions.

6 Q. Go to page 5585, column 2. The fourth
7 full paragraph that begins with, "This is not a new
8 idea." And toward the middle of that paragraph do you
9 see, "It has been on the minds of our people for 100
10 years, but circumstances have occurred in the last 15
11 or 20 years proving that there is a danger and that
12 the time has come when this idea has been somewhat
13 nebulous in character, should receive distinct form
14 and enunciation and go into the fundamental law."

15 This is from Senator Morton. What is the
16 danger that he says has recently occurred in America?

17 A. The danger, as his remarks earlier
18 indicate, is the increasing claims of the Catholic
19 Church, as expressed in Papal documents, the position
20 of the hierarchy of the United States, and the
21 attempts of Catholics to obtain public support for
22 their own schools in some cases.

23 Q. Do you recall a presentation -- I could
24 quote it if necessary -- where Senator Edmunds says,
25 "to convince you that I am right in precisely what

1 this issue is" -- and what he's talking about -- well,
2 let's look at it. Let me go to that. It's on page
3 5587. Second column, third paragraph.

4 "Mr. President, to convince you that I am right in
5 precisely what this issue is." Do you see that?

6 A. Yes.

7 Q. What does he do, then, to convince the
8 present Senate that he's right in his argument? What
9 does he do?

10 A. He has the secretary of the Senate read
11 extracts from the Syllabus of Errors, the document
12 issued by Pope Pius IX.

13 Q. How could a Papal syllabus possibly be
14 relevant in a debate of the United States Senate over
15 the issue of education in the United States?

16 A. Well, this senator is making the claim
17 that it represents the intentions of the Catholic
18 Church toward the American system and the American
19 public school.

20 Q. Go to page 5589. The top right column,
21 first full paragraph. Would you read that into the
22 record, please.

23 A. This is Senator Bogey of Missouri.
24 "Mr. President, seriously, I think this discussion is
25 much to be deplored. I think I know the motive and

1 the animus which have prompted all this thing. I do
2 not believe it is because of a great devotion to the
3 principles of religious liberty. That great idea,
4 which is now moving the modern world, is used merely
5 as a cloak for the most unworthy artisan motives. The
6 African race has played its part in this country. The
7 negro is, for party purposes, in a manner dead, and
8 these gentlemen, knowing that this thing is played out
9 and that the bloody shirt can no longer call out the
10 mad bull, another animal has to be brought forth by
11 these matadors to engage the attention of the people
12 in this great arena in which we assume all to be
13 combatants. The Pope, the old Pope of Rome, is to be
14 the great bull that we are all to attack."

15 Q. What does it mean when he says -- when he
16 refers to the negro and say that this thing has played
17 out? What's he referring to there?

18 A. The support -- the way the republican
19 party had been able to gain support in earlier
20 elections since the Civil War by their support for
21 reconstruction and doing right by black former slaves
22 in the south.

23 Q. And when he says -- he refers to the
24 bloody shirt and says that the old Pope of Rome is to
25 be the great bull that we all attack, what's he

1 referring to there? What's that about?

2 A. Well, when he mentions the great -- the
3 great -- sorry. I'm losing my place. The great arena
4 in which we are all soon to be combatants, he's
5 referring to the presidential election of 1876, and
6 with the Pope and fears about the intentions of
7 Catholics would be used by republicans -- he was a
8 democrat -- as the way to rally the voters behind the
9 republican party.

10 Q. And what was the legislative proposal
11 that was to --

12 A. The Blaine amendment.

13 Q. Okay. Thank you.

14 Let's start in Colorado. How did the
15 timing of the Colorado debates over the Blaine
16 provisions in the Colorado Constitution relate to the
17 events occurring in the national movement?

18 MR. MACDONALD: Your Honor, if I can just
19 object to the characterizations of these as Blaine
20 amendments.

21 THE COURT: The record reflects your
22 objection. It's overruled.

23 A. The Colorado convention began in December
24 1875, the same month when President Grant made his
25 statement to Congress, his annual report, calling for

1 a constitutional amendment with those elements of
2 taxing church property and of forbidding public
3 sectarian schools, which within -- incorporated into
4 the initial proposals of the constitutional convention
5 here in Colorado. The timing was extremely close.

6 Q. (BY MR. NUSSBAUM) And were the folks in
7 Colorado aware of what was taking place in Des Moines
8 and Washington?

9 A. Very much so. There were reports in the
10 Rocky Mountain News, the Boulder paper and others on
11 these events. This was after the telegraph, of
12 course. The national news was very quickly and very
13 elaborately reported.

14 Q. Do you have any idea what was the
15 religious complexion of the delegates of the Colorado
16 State convention? Constitutional convention?

17 A. Scholars are different. Machebeuf,
18 the -- the Catholic vicar general, said that there
19 were no Catholic voices in the convention. Others
20 have suggested there may be two or three Catholics who
21 were delegates. And I'm not sure how to resolve that.

22 Q. Who is Machebeuf? Is this Joseph
23 Machebeuf you're referring to?

24 A. Yes.

25 Q. And who is he?

1 A. He had been sent by Bishop Langley of
2 Santa Fe to start the Catholic mission in the Colorado
3 territory several decades earlier, and he's generally
4 regarded as the founder of the Catholic Church in
5 Colorado.

6 Q. And did he eventually become the first
7 bishop of Colorado?

8 A. He did.

9 Q. Thank you.

10 Were the provisions that eventually made
11 it into the Colorado Constitution regarding religion
12 and education and funding -- were those provisions a
13 controversial subject during the state convention?

14 A. Very much so.

15 Q. And how do you know that?

16 A. Really, two primary sources. One is the
17 great number of petitions that were filed on both
18 sides on this particular issue, both supporting
19 including Blaine language in the constitution and
20 opposing including it.

21 Also because of the reporting of the
22 press at the time, which indicated that this issue was
23 so hot that it would be better to stay off it in order
24 to ensure that the constitution was adopted and
25 Colorado could become a state.

1 looks at four European countries and shows how their
2 models are quite different from the American models.
3 So this is my attempt at the American model. Two of
4 the 10 chapters are about religion. Chapter 3, I
5 believe it is, discusses the way in which the early
6 republic religion was often the basis of cooperation
7 in organizing education and other activities.

8 And then chapter 7 looks at the way in
9 the late 19th century it became a source of major
10 political conflict.

11 Q. Okay. And do you, in the first part of
12 the chapter, discuss the Blaine movement nationally?

13 A. I do.

14 Q. And in the second part of the chapter, do
15 you give a couple of different examples of how that
16 worked out at state levels?

17 A. Well, throughout the book, I use
18 different states. No historian tries to cover all the
19 states, so he's got to discuss Pennsylvania at length,
20 Connecticut, Virginia, Massachusetts, New York. In
21 this chapter, I used Colorado as an example, because
22 it was one of the four states that adopted Blaine
23 amendments the same year as the Blaine debate in
24 Congress.

25 Q. I see.

1 A. And so you can see the debate most
2 freshly in Colorado; I think, Texas. I forget the
3 other two.

4 Q. Come to about five pages from the end. I
5 see it's not paginated yet. But I see you write there
6 in the -- about five pages to account for the back,
7 the third -- fourth paragraph begins with the
8 statement, "Colorado is an interesting example." And
9 then you say, unlike Boston, New York, Philadelphia,
10 and so on. But Colorado is an interesting example.

11 Why did you find Colorado to be an
12 interesting example of this issue?

13 A. Interesting because, as I said in the
14 other paragraph, in a number of the eastern states
15 there were already very serious conflicts between
16 Catholics and Protestants; there were riots with many
17 people killed. That had not occurred in Colorado.

18 So the fact that -- although, there had
19 been a Trinidad war, as it's called, in southern
20 Colorado, which arguably was as Catholic as it was
21 religious, but -- so Colorado shows a particularly
22 clear case the way in which religion standing by
23 itself still was a decisive issue for both majority
24 and minority voters.

25 Q. And in the paragraph that follows, you

1 write, "The prejudice existed" -- "That prejudice
2 existed among the Protestant majority there can be no
3 doubt."

4 A. Are you referring to Colorado in that
5 sentence?

6 A. Yes.

7 Q. And why did you feel that there was
8 prejudice among the Protestant majority in Colorado?

9 A. Well, I begin by quoting from the Rocky
10 Mountain News, just as the convention started, an
11 article about the thieving reputation of Mexicans.
12 And I don't mention here, I think, that the Colorado
13 teachers association at its first meeting, also in
14 that time period, expressed deep concerns about the
15 character of the education Mexican, as they called
16 them, children were receiving.

17 I then go on to quote --

18 Q. Let me stop you there. We've been
19 talking about religion. Is there a time between -- do
20 you see a time between these comments about this in
21 Colorado and the whole Catholic thing?

22 A. The concern, I believe, was parallel to
23 the concern expressed about Irish immigrants, for
24 example, in Boston. That if they received an
25 education provided by Catholic teaching orders, let's

1 say, that education would not fit them to be real
2 participants in American life.

3 Q. Did the Boulder newspaper comment on
4 that?

5 A. It was trying very much to create
6 education for Mexicans in that time. And this was
7 clearly a concern. He was bringing in religious
8 orders to teach, and so forth.

9 Q. Let's turn, if we can, to Exhibit PP.
10 We'll come back to your chapter 7. What is PP?

11 A. This is the proceedings of the
12 constitutional convention here in Colorado.

13 MR. NUSSBAUM: Your Honor, I move for the
14 admission of Exhibit PP.

15 THE COURT: Any objection to PP?

16 MR. MACDONALD: No objection, Your Honor.

17 THE COURT: That will be admitted without
18 objection. You may proceed.

19 Q. (BY MR. NUSSBAUM) You had testified, I
20 think, that there was quite a bit of controversy in
21 Colorado regarding the Blaine provisions in the
22 Colorado convention. Is that evidenced in the
23 proceedings?

24 A. It is.

25 Q. And what evidence did you see in the

1 proceedings of that controversy?

2 A. Let me emphasize first, the proceedings
3 did not include a transcript of the debates, and so we
4 have to look mostly at the documents submitted as
5 evidence. And the proceedings do report the various
6 petitions submitted on both sides of the anti-aid or
7 Blaine language in the constitution, and that's a
8 frequent element, with hundreds of signatures
9 submitted on both sides.

10 Q. And turn to page 112, if you would, and
11 113 of the proceedings. Toward the bottom of the page
12 112 it says, "To the honorable, the constitutional
13 convention of Colorado." And then on the page that
14 follows, it has some signatures and names and so on.

15 What is this at the bottom of 112 and
16 continuing on to 113? What is that?

17 A. This is a petition submitted by delegates
18 from a number -- I believe 11. I counted them once --
19 of Protestant churches here in Denver that met to seek
20 to influence the deliberations of the convention.

21 Q. So these churches -- and do I see that
22 they're Presbyterian, Baptist, Methodist, Episcopal,
23 Christian, Congregational German Reformed, and so on?

24 A. Yes.

25 Q. They met and identified people to

1 represent them as delegates?

2 A. Yes. Particularly represent delegate
3 John Evans, who was the former territorial governor,
4 as their spokesman.

5 Q. And I believe earlier you had referred to
6 a George Evans. It's actually John; is that correct?

7 A. I'm sorry. John, yes.

8 Q. And what were they petitioning for, this
9 Protestant delegation, if you will?

10 A. Well, they made a number of claims. They
11 wanted the constitution to recognize the supreme ruler
12 of the universe in its preamble. They wanted it to
13 maintain the sabbath as a civil as well as a religious
14 holiday.

15 And then the third point was, "We believe
16 that the public schools should be provided by law and
17 kept free from sectarian influences." And also that
18 funds raised should not be diverted to other uses.

19 Q. Okay. And on page 113, in what's called
20 paragraph third, is that the section that talks about
21 funds not being diverted to --

22 A. Yes.

23 Q. -- other uses in the schools?

24 A. Right. And that the Bible should be
25 allowed to be used in the public schools.

1 Q. What's going on in that third paragraph?
2 Paragraph third, if you will.

3 A. It's addressing a cluster of the issues
4 that had been raised in the Blaine amendment. Three
5 distinct issues, really. One is that -- I'm asserting
6 that public schools were not, in fact, sectarian, even
7 though they were religious. But they were not
8 sectarian, because sectarian had a bad meaning.

9 Secondly, that the support raised, and
10 much of it from land sales from the state for public
11 schools, should not be diverted to funding Catholic
12 schools.

13 And thirdly, that the Bible should
14 neither be excluded nor required in the public
15 schools.

16 Q. So the petition from the Protestant group
17 was not anti-religious, was it?

18 A. No, of course not.

19 Q. But it was opposed to some aspect of
20 church and state.

21 A. Right.

22 Q. Specifically --

23 A. Yes.

24 Q. Specifically schooling or funding to
25 Catholic schools.

1 A. Yes.

2 Q. If you will, go to page 329 of the
3 proceedings.

4 A. Okay.

5 Q. And a third of the way down, it says,
6 "Address of the Right Reverend JP Machebeuf, Vicar
7 Apostolic of Colorado, to the Honorable Constitutional
8 Convention of Colorado." Do you see that?

9 A. Yes, I do.

10 Q. And this continues for several pages,
11 correct?

12 A. Yes.

13 Q. Now, you've read this document before?

14 A. I have.

15 Q. At the beginning -- after the second
16 paragraph it says, "I've had my home in this
17 territory. I came to Colorado very early in history.
18 I bore my share of its hardships."

19 And then in the next paragraph he says,
20 "I love Colorado."

21 What's going on in that, as you look at
22 this as a historian?

23 A. He's clearly concerned to answer the
24 charge that Catholics were disloyal citizens of the
25 United States and Colorado; that they did not want

1 their children, as Horace Bushnell said, to become
2 real Americans. He's saying, yes, we are real
3 Americans, we're as loyal as anybody, and our rights
4 are to be respected.

5 Q. On page 330, the following page, in the
6 first full paragraph -- let me read this. "We ask you
7 gentlemen of the constitutional convention to omit
8 from the constitution any clause which may forbid the
9 future legislative bodies of the state to deal with
10 the question of separate schools and denominational
11 education as to them may seem just. We don't ask the
12 insertion of any clause directing the solution of that
13 question by the legislature in our sense."

14 What is going on -- did I read that
15 accurately, first of all?

16 A. Yes.

17 Q. And what's going on in that request that
18 Bishop -- or Vicar Apostolic Machebeuf brings to the
19 convention?

20 A. He is, as I read it, asking that the
21 issue of support for schools that parents choose
22 reflecting their own religious convictions be
23 something that can be decided in the normal process of
24 democratic deliberation through the legislature and
25 not frozen for all time by being included in the

1 constitution.

2 Q. And why did the Blaine proponents want to
3 foreclose the issue by putting it into the
4 constitution?

5 A. Because they did not want it to be
6 subject to discussion and decision through the normal
7 process.

8 Q. And in the final paragraph on that page,
9 what's going on?

10 A. He, I think, makes a very eloquent
11 statement here. Would you like me to read it or --

12 Q. No. Just paraphrase it, in the interests
13 of time.

14 A. He is, in effect, saying, we have never
15 in this country, much less in Colorado, had an honest
16 debate about whether, in fact, it's appropriate to
17 fund schools on the basis of what parents want for
18 their children. And clearly we can't have that debate
19 right now, because matches are running so high. But
20 at some point in the future, he said, surely Americans
21 will be mature enough that we can, in fact, have that
22 discussion, and let's keep the door open so discussion
23 can occur then.

24 Q. Thank you.

25 I think you mentioned that the press was

1 reporting on this issue at the time.

2 A. They were.

3 Q. If you'll take a look, please, to
4 Exhibits LL. This is a two-page document. Can you
5 tell us what the -- what this is?

6 A. These are transcriptions from editorials
7 of the Rocky Mountain News, in this case February 2nd,
8 1876.

9 Q. And the second page, is it a
10 transcription, as well?

11 A. The second page is the original.

12 Q. Okay. And have you reviewed -- the
13 original is difficult to read because it's from
14 microfiche; is that correct?

15 A. Yes.

16 Q. And have you reviewed the original versus
17 the transcription?

18 A. I have, yes.

19 Q. Is the transcription accurate?

20 A. I found what I take to be one error.

21 Q. Okay.

22 A. And that is in the sixth line of the
23 transcription. The word "recite" should be "excite."
24 Otherwise, it is accurate.

25 MR. NUSSBAUM: Your Honor, I'd move for

1 the admission of -- well, one more foundational
2 question.

3 Q. (BY MR. NUSSBAUM) And does this
4 article or editorial from the Rocky Mountain News on
5 February 2, 1876, discuss the issue of the Blaine
6 amendments and the Colorado Constitution?

7 A. Yes.

8 MR. NUSSBAUM: I move for the admission
9 of Exhibit LL.

10 THE COURT: Any objection to LL?

11 MR. MACDONALD: Your Honor, no objection
12 to the second page. The first page, the
13 transcription, frankly, I find it -- we can't confirm
14 that it's exactly right. Professor Glenn testified
15 that he found a mistake just yesterday. So we would
16 stipulate to the admission of the second page.

17 MR. NUSSBAUM: We move for the admission
18 of both, Your Honor. As this goes through the record,
19 it will be helpful to --

20 THE COURT: Who did the transcription?

21 MR. NUSSBAUM: Your Honor, we began the
22 transcription. It's been reviewed by myself. The
23 young historian who did a lot of work for us, Craig
24 Levins, in court today, he has taken some look at
25 this. And then we had Professor Glenn look at it.

1 There's about three or four people in our office,
2 including myself, pored over the text to try to make
3 sure that it's accurate in all regards.

4 THE COURT: Objection goes to the
5 weight, not its admissibility. I will admit
6 Exhibit LL.

7 MR. NUSSBAUM: Thank you.

8 Q. (BY MR. NUSSBAUM) Does this article --
9 what does this article do, Professor Glenn?

10 A. In this article, the editorial writer
11 says on the one hand, we support the federal Blaine
12 amendment and we support the intention of the similar
13 effort in the Colorado constitutional convention.
14 However, our recommendation, for prudential reasons,
15 is that this issue not be forced in the convention
16 because of the likelihood of it arousing sufficient
17 opposition among Catholics to raise the possibility of
18 the defeat of the constitution and, therefore,
19 paralleling Colorado's admission as a state in 1876.

20 Q. Would you read the opening sentence,
21 please.

22 A. "With the passage of the constitution a
23 foregone conclusion, it is perhaps unnecessary to say
24 that this paper would hardly propose to, if only
25 ostensibly, gain say the Blaine amendment to the

1 federal constitution, or to even in appearance
2 controvert the doctrines enunciated in the Des Moines
3 speech of the president."

4 Q. And is this the same speech that you had
5 referred to --

6 A. Yes.

7 Q. -- earlier? And do you have any doubt
8 that the -- at least the Rocky Mountain News was
9 linking what was happening in Colorado precisely with
10 what was happening with President Grant and Blaine and
11 the Congress?

12 A. No doubt at all.

13 Q. And was there -- did you see any evidence
14 in the proceedings of the Colorado constitutional
15 convention that there was some extent that passage --
16 or acceptance of Colorado into the union would be
17 facilitated if it adopted Blaine-like provisions in
18 Colorado?

19 A. I think it's hard -- hard to find that,
20 because we have no transcript.

21 Q. Turn, if you will, to Exhibit MM. This
22 is another two-page document. Would you please
23 identify what this is.

24 A. It's an editorial from the Rocky Mountain
25 News on March 17th, 1876. A transcription and then a

1 photocopy of the original.

2 Q. And have you reviewed the transcription
3 as to whether it's an accurate transcription of the
4 original document?

5 A. Yes, I have.

6 Q. And do you find it to be accurate in all
7 regards?

8 A. I do.

9 MR. NUSSBAUM: Your Honor, I move for the
10 admission of Exhibit MM.

11 THE COURT: Mr. Macdonald, you maintain
12 the same objection?

13 MR. MACDONALD: Same objection.

14 THE COURT: Same ruling. MM will be
15 admitted.

16 MR. NUSSBAUM: Thank you.

17 Q. (BY MR. NUSSBAUM) What's the significance
18 of this date, March 17th, 1876? What's going on?

19 A. Oh, because the convention just finished
20 its work.

21 Q. That's the opening sentence. "It is
22 done." Right?

23 A. Right. It had not yet -- the
24 constitution had not yet been approved by the voters,
25 but the convention had finished its work and had

1 approved the text to be put before the voters.

2 Q. And what percentage of this article
3 commenting upon the constitution of Colorado is about
4 the Blaine issue? Just roughly.

5 A. I would judge almost all of it is
6 concerned with the Blaine language and its impact.

7 Q. And what do you see as the significance
8 of this document?

9 A. It's very interesting. The editorial is
10 saying, we opposed the inclusion of the Blaine
11 language in the Colorado Constitution, because we
12 thought it might imperil the approval of the
13 constitution. But it now appears that, in fact, we
14 were wrong; that the support which that language will
15 produce on the part of the majority of voters will far
16 more than offset any opposition.

17 And, in fact, he says, in taking the bull
18 by the horns and grappling with the school fund
19 question as it did, far more Protestants can begin to
20 vote for the constitution on account of this very
21 clause, that Catholics for the same reason would vote
22 against it. And many, no doubt, will vote for it for
23 the sake of the single clause alone. And at the very
24 end, "but it first seemed the weakest link in the
25 constitutional chain no doubt will prove as source of

1 strength to all the others."

2 In other words, this -- this provision is
3 going to carry the rest of the constitution with it,
4 because it will be so popular with the majority of
5 Protestant voters.

6 Q. Just like in Washington, it was a good
7 way to get votes. Is that fair?

8 A. That's what they are suggesting.

9 THE COURT: Mr. Nussbaum, is this a
10 good point for a break? I have a matter I have to
11 take up on the telephone.

12 MR. NUSSBAUM: Yes, it is, Your Honor.

13 THE COURT: All right. Let's take 15
14 minutes. Court's in recess.

15 (Recess taken, 10:15 a.m. to 10:47 a.m.)

16 THE COURT: Please be seated.

17 Professor Glenn, you can come back up,
18 grab a seat. And we'll pick up where we left off.

19 MR. NUSSBAUM: Thank you, Your Honor.

20 Q. (BY MR. NUSSBAUM) Professor Glenn, there
21 was a question I asked you shortly before closing as
22 to whether there was evidence in proceedings about an
23 understanding of some linkage between Colorado,
24 including the Blaine provisions, and having the
25 federal government accept Colorado.

1 We had a chance to speak about this over
2 the break, didn't we? Did you understand my question?

3 A. I misunderstood it. I thought you meant
4 on the part of delegates. Of course, we don't have
5 what they said or thought.

6 We do have a petition that's part of the
7 proceedings signed by a hundred citizens of Colorado
8 submitted by, by the way, a man with a German name,
9 which is interesting, because the Germans were very
10 strong republicans at that time, saying that they were
11 concerned that if the constitution did not include a
12 Blaine amendment type language, that that might
13 imperil Colorado being admitted as a state. In other
14 words, watching what was going on in Congress, being
15 concerned with the -- Congress might not agree to
16 admit Colorado if it had not adopted Blaine language.

17 Of course, only a few years later,
18 Congress did, in its enabling legislation for a number
19 of other states, require that they include Blaine type
20 language in their constitutions.

21 Q. Let's take another look at Exhibit NN,
22 which is chapter 7 of your book. And at the same
23 time, Professor, I'd like to look at Exhibit OO. I
24 don't think you need to pull them out. I'm not going
25 to ask you textual questions at this point.

1 A. All right.

2 Q. What is Exhibit 00?

3 A. Exhibit 00 is the bibliography of my
4 entire new book.

5 Q. And at the end of Exhibit NN, or
6 chapter 7, you have 54 footnotes, don't you?

7 A. No. I have 54 end notes.

8 Q. Thank you.

9 And are those 54 end notes there in the
10 shorthand form?

11 A. Yes. They are in usual style for
12 scholarly writing.

13 Q. So Exhibit 00 would allow someone to pull
14 the citation --

15 A. Anyone can look up any of those. For
16 example, I have a number of references to Green's 1992
17 article. And if you have looked at the bibliography,
18 you would see the full details of that article listed.

19 Q. Now, the book's being published by?

20 A. Continuum.

21 Q. Who is Continuum?

22 A. It's an international publisher based in
23 London and New York, which brings out about a hundred
24 titles a year, I think.

25 Q. Is it well recognized in academic

1 circles?

2 A. Very well recognized, yes.

3 Q. And does it have any standards as to what
4 it will publish?

5 A. They have an editorial board which
6 determines which projects they will accept.

7 Q. And how did it happen that they accepted
8 your book for publication?

9 A. Well, they had accepted my previous book,
10 which came out this spring, on the basis of, you know,
11 a detailed review and consideration. Having seen the
12 results of that, they're very pleased with it. And so
13 the review process went much quicker this time. They
14 still -- I had to give them an outline and
15 introduction. I gave about 10,000 words for them to
16 get an idea of what the book was going to be doing.
17 But I did not have to go through as detailed a
18 process.

19 Q. And your 10,000-word proposal, was it
20 reviewed by one person or --

21 A. No. By the editorial board.

22 Q. And they approved it?

23 A. They did. I have to say, they gave me a
24 contract, which I signed, which requires me to have
25 the total book in either by the end of August or by

1 the end of September. I forget which.

2 Q. And does it require them to publish it
3 when you do that?

4 A. Yes, I think so.

5 Q. And do you anticipate any material
6 changes in chapter 7 before publication?

7 A. The process which they follow is to send
8 it for text editing. Actually, most publishers have
9 it done in India now. And somebody goes through and
10 checks for commas and other kinds of errors like that.
11 But there's no editorial review on an established
12 scholar like me. They accept whatever I write.

13 Q. Have your previous books, including the
14 one published by Continuum, been treated as reliable
15 authorities?

16 A. Well, the one out in April is something
17 new that it's only beginning to be reviewed.

18 The Myth of the Common School, my first
19 book, has been cited very frequently. And Google
20 Scholar finds at least 130 citations in scholarly
21 publications. I was pleased to see that Professor
22 Green has been cited, as well.

23 Q. And in Exhibit -- when you cite to
24 authorities as footnotes, do you try to exercise
25 scholarly care in doing that?

1 A. Of course.

2 Q. Why is that important to you?

3 A. Well, a scholar's main asset is his
4 reputation. And that's very important to me, as it is
5 to any scholar. I don't expect to make much money on
6 writing a book, but it is a very important element of
7 my currency of academic life.

8 Q. And are you aware of any other
9 publications by established scholars that discuss the
10 relationship between the Blaine movement nationally
11 and what happened in Colorado?

12 A. I am not.

13 Q. And do the statements in chapter 7
14 represent your reporting on, and interpretation of,
15 data related to both the Colorado and the national
16 Blaine movements?

17 A. Yes.

18 MR. NUSSBAUM: Your Honor, I move for the
19 admission of Exhibits NN and OO, the bibliography for
20 chapter 7.

21 THE COURT: Any objection to NN?

22 MR. MACDONALD: Yes, Your Honor. We
23 object to the admission of both of these. They're, as
24 I understand them, an unpublished manuscript. I
25 believe the witness testified they're still in the

1 process of review and could change between now and
2 their publication. We also object on relevance, but I
3 understand the court's prior ruling on that.

4 MR. NUSSBAUM: Your Honor, we think these
5 are admissible both under 803.18, the learned treatise
6 exception to the hearsay rule, and under 807. I'll
7 address those separately.

8 Under 803.18, we recognize that the
9 normative document that would be admitted under that
10 is one that has been published, as counsel points out
11 in their objection. But the publication requirement
12 is simply a requirement to -- partially to establish
13 the circumstantial guaranties of trustworthiness that
14 underherd that exception.

15 We believe, given this scholar's
16 reputation, his history of publications, which are
17 numerous and numerous learned journals, his sitting on
18 boards both nationally and internationally, working in
19 this area, the fact that this document has been
20 approved by the editorial board in the lengthy
21 proposal that he made, the fact that they have
22 published his book before, the fact that there is no
23 pattern of substantial changes in his writings, also
24 the fact, Your Honor, that this witness, unlike most
25 situations when you're receiving a learned treatise,

1 is available for cross-examination, which gives a
2 great advantage to the plaintiffs that they would not
3 typically have when a learned treatise is put into
4 evidence.

5 Finally, Your Honor, we're trying to move
6 this along. There's a lot of history here. And I
7 think it would be a great aid to the court, especially
8 in the context of preliminary injunction proceeding,
9 to have this available to them.

10 THE COURT: Objection is overruled. NN
11 and OO will be admitted.

12 MR. NUSSBAUM: Thank you.

13 Q. (BY MR. NUSSBAUM) Just a few more
14 questions, professor.

15 What institution was, in your opinion,
16 the primary target of those who supported the Blaine
17 provisions in Colorado and nationally?

18 A. The Catholic Church.

19 Q. And were the public schools in Colorado
20 and nationally secular or religious in 1876?

21 A. There's abundant evidence that they were
22 religious in a sense that, under present
23 interpretations of the Blaine amendment, they might
24 well have been found to violate it. That is, they
25 incorporated the Bible, they incorporated prayer.

1 And, in fact, the fact that the Supreme Court was
2 finding the latest as of the 1950s that many American
3 public schools were doing both of those things
4 indicates that it was not just in the 1870s.

5 Q. And you're talking about the public
6 schools.

7 A. Right. Public schools.

8 Q. And were the Blaine provisions included
9 in the 1876 Colorado Constitution discriminatory?

10 A. Yes.

11 Q. How so?

12 A. Two ways. They knowingly discriminated
13 against Roman Catholics in their concern to educate
14 their children according to their own convictions.

15 And in a second way they discriminated
16 between schooling with a Protestant character and
17 schooling with a Catholic character.

18 MR. NUSSBAUM: Thank you. I have no
19 other questions, Your Honor.

20 THE COURT: Any further inquiry on the
21 plaintiffs now -- or defendants. Excuse me.

22 Cross-examination.

23 MR. MACDONALD: Thank you, Your Honor.

24

25

1 Your Honor, for purposes of preserving
2 the record, we did not want to make objections
3 throughout the testimony. We would move to strike the
4 testimony as irrelevant and lack of foundation, as we
5 set forth to incorporate the arguments in our motion
6 in limine. I understand the court's ruling on that.

7 THE COURT: You haven't lost your
8 record. You've made the record in the motion in
9 limine, Mr. Macdonald. Move along.

10 MR. MACDONALD: Thank you, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. MACDONALD:

13 Q. Good morning, Professor Glenn. My name
14 is Tim Macdonald. I represent the LaRue plaintiffs in
15 this case.

16 Let me first ask, you're being
17 compensated for your participation in this case; is
18 that right?

19 A. Yes.

20 Q. And, in fact, for your testimony today,
21 you're receiving \$2,000?

22 A. That's correct.

23 Q. Your work yesterday, you received \$1500?

24 A. For flying out to Colorado, yes. Leaving
25 my vacation in New Hampshire.

1 Q. You and Mr. Green.

2 And you're also being compensated at \$200
3 an hour for the prior work you did in getting ready;
4 is that right?

5 A. Yes.

6 Q. And about how much -- how many hours did
7 you spend prior to today getting ready for this
8 proceeding, sir?

9 A. I've been keeping a log, but I haven't
10 tried to add it up yet. So I would guess it's in the
11 range of 30 hours or so, but I'm not sure.

12 Q. And that's at \$200 an hour?

13 A. Yes.

14 Q. And when did you first talk to anyone
15 about school choice issues in Douglas County, sir?

16 A. Perhaps three weeks ago. I'm not sure
17 exactly.

18 Q. And who did you speak to?

19 A. With Martin Nussbaum.

20 Q. Anyone else?

21 A. We had one conference call with two of
22 his colleagues, but it primarily was with him.

23 Q. And did you consult with anyone in 2010
24 about what Douglas County was trying to do to create a
25 Choice Scholarship or an Option Certificate Program?

- 1 A. In the year 2010?
- 2 Q. That's right.
- 3 A. No.
- 4 Q. And until three weeks ago, did you know
5 anything about the Douglas County program?
- 6 A. Only what I had read online.
- 7 Q. Have you had any contact with anyone for
8 the Institute for Justice?
- 9 A. Not about this issue.
- 10 Q. About other issues?
- 11 A. In years past I have, but not for the
12 last five years or so, I suppose.
- 13 Q. Sir, how many newspapers were in
14 existence in Colorado in 1876? Do you know?
- 15 A. I have no idea. I have seen citations
16 from three of them: The Denver Times, Rocky Mountain
17 News, and the Boulder Times.
- 18 Q. And that's it?
- 19 A. That's it.
- 20 Q. And if I ask you whether there were more
21 than 10, would you know that?
- 22 A. I have no idea.
- 23 Q. You haven't looked for publications in
24 Colorado in 1876; is that right?
- 25 A. That's right.

1 Q. And have you, yourself, gone and reviewed
2 the three publications that you just mentioned?

3 A. No. I have reviewed photocopies of the
4 Rocky Mountain News. I've -- the other two, the
5 quotations I used are drawn from writing -- published
6 writing by others. Hensel's article about the
7 Colorado Constitution and so forth.

8 Q. And when you refer to Hensel, that's
9 Mr. Donald Wayne Hensel; is that right?

10 A. I think so.

11 Q. And that's an article in 1961, I think
12 you cited in --

13 A. Yes.

14 Q. And Mr. Hensel wrote a thesis that was
15 published in 1957, correct?

16 A. Right.

17 Q. And that's called A History of the
18 Colorado Constitution of the 19th Century?

19 A. Right.

20 Q. Have you reviewed that, sir?

21 A. Yes, I have.

22 Q. Do you think that's an authoritative
23 text?

24 A. Well, it has in it a lot of information
25 which I take to be accurate and significant to this

1 issue.

2 Q. Do you recall how many newspapers
3 Mr. Hensel refers to or cites in his scholarly work on
4 the Colorado Constitution in the 19th century?

5 A. I don't.

6 Q. But you, yourself, have only reviewed a
7 selection of articles from the Rocky Mountain News
8 from the time frame around 1876; is that right?

9 A. That's correct.

10 Q. And how many articles, sir, have you
11 reviewed from the Rocky Mountain News from the 1876
12 time period?

13 A. Well, I would estimate for you, 50 pages
14 of photocopy.

15 Q. And those were provided to you from
16 counsel?

17 A. Yes.

18 Q. Do you remember how many articles, sir?

19 A. Well, the articles are that many pages.
20 A number of them had various articles. Some of them
21 relevant, others not.

22 Q. And as part of your chapter that's now
23 been admitted as Exhibit NN, in which you discuss the
24 Colorado Constitution and its evolution, you didn't
25 deem it necessary to go and look for other articles

1 from the time of the passage and the debate over the
2 Colorado Constitution, sir?

3 A. No. My book is not about Colorado. I
4 used Colorado as an illustration on certain elements
5 in American education in the 19th century. And
6 typically it's someone like me, who covers a broad
7 scope of history, I rely heavily on reliable secondary
8 sources, as my bibliography will indicate.

9 Q. In your testimony -- in your direct
10 testimony, you referred to a number of times the
11 Blaine or Blaine-like provisions of the Colorado
12 Constitution. Do you recall that?

13 A. Yes.

14 Q. I just want to get a little more specific
15 about which provisions you were actually talking
16 about.

17 A. Okay.

18 Q. If we could do that. You're familiar
19 with Colorado Constitution article 9, section 7?

20 A. Yes.

21 Q. And is that commonly referred to as a
22 no-aid provision?

23 A. Yes.

24 Q. And in your view, that's one of the
25 Blaine type amendments?

1 A. Yes.

2 Q. And are you familiar with Colorado
3 Constitution article 9, section 8?

4 A. Yes.

5 Q. In your view, is that a Blaine amendment?

6 A. Yes. That's the one that forbids
7 sectarian content in -- in schools.

8 Q. It also provides, sir, does it not, no
9 religious test or qualification shall ever be required
10 of any person as a condition of admission in any
11 public educational institution of the state, either as
12 a teacher or student?

13 A. Yes.

14 Q. Is that anything like that in the Blaine
15 amendment, sir?

16 A. No.

17 Q. But yet you consider this a Blaine type
18 amendment.

19 A. Because of the forbidding of sectarian
20 content in schools.

21 Q. But the provision I just read, do you
22 consider that a Blaine type provision?

23 A. No.

24 Q. So part of article 9, section 8, in your
25 view, is a Blaine type provision, and part of it is

1 not. Is that right?

2 A. Yes.

3 Q. And how about article 5, section 34? Are
4 you familiar with that?

5 A. Yes.

6 Q. And that's no appropriation shall be made
7 that's not under the absolute control of the state,
8 roughly paraphrasing.

9 A. Right.

10 Q. And you consider that a Blaine type
11 provision; is that right?

12 A. It has the same intention, yes.

13 Q. But different language?

14 A. Different language. It's parallel to
15 Massachusetts constitutional anti-aid amendment which,
16 of course, I've been very close to, because that
17 specifically speaks to any -- any institution which is
18 not under the control of government, even though
19 Massachusetts, like Colorado, has frequently funded
20 such institutions.

21 Q. If you would just answer my questions.
22 Your counsel will have an opportunity to ask you
23 further questions, sir.

24 Just to make sure the record is clear,
25 would you consider the article 5, section 34 Blaine

1 type amendment, even though it has no language that's
2 similar to the Blaine amendment -- the federal Blaine
3 amendment?

4 A. It has the same intention.

5 Q. Different language?

6 A. Yes.

7 Q. And how about article 2, section 4 of the
8 Colorado Constitution? Are you familiar with that?

9 A. I am. That's less directly related, it
10 seems to me, than the federal Blaine debates.

11 Q. Okay. So you wouldn't consider -- you
12 wouldn't call that a Blaine-like amendment?

13 A. Not in the same sense.

14 Q. And how about article 9, section 3? Are
15 you familiar with that provision of the Colorado
16 Constitution?

17 A. No. You'd have to show it to me.

18 Q. Let me paraphrase it for you. Maybe it
19 will refresh your recollection. Public School Fund of
20 the state shall forever remain inviolate. Do you
21 recall seeing that?

22 A. I have read that, yes.

23 Q. It's a Public School Fund provision,
24 correct?

25 A. Right.

1 Q. And you wouldn't consider that a
2 Blaine-like amendment, would you?

3 A. Well, the intention is the intention of
4 the Blaine amendment. That is, that the Public School
5 Fund not be diverted to schools that are not a part of
6 the public school apparatus. Just like article 5,
7 section 34, they both have the same intention,
8 although the language -- they go at the issue in a
9 different way, but with the same intention.

10 Q. So if I understand your testimony, is it
11 your testimony that the intention of article 9,
12 section 3, and article 9, section 8 is to prevent the
13 public funds from going to private schools, including
14 religious schools? Is that what your testimony is?

15 A. I was talking about article 5, section
16 34.

17 Q. Okay. Excuse me. Let me rephrase the
18 question, then.

19 It's your testimony that article 5,
20 section 34 and article 9, section 3 of the Colorado
21 Constitution, the intention is to prevent public
22 funding going to private schools, including religious
23 schools.

24 A. Yes.

25 Q. And so -- and I'm not sure I heard the

1 answer, so I apologize if you did answer it. Do you
2 consider article 9, section 3, that the Public School
3 Fund shall forever remain inviolate, a Blaine
4 amendment, as you use the term?

5 A. I don't think you want me to explain, but
6 I can explain if you'd like me to.

7 Q. Well, first just -- if you could answer
8 the question. Do you consider it a Blaine amendment,
9 as you use the term -- as you used the term repeatedly
10 with Mr. Nussbaum in your direct?

11 A. I can't answer that accurately yes or no.
12 I have to answer it with a qualification.

13 Q. Please.

14 A. There are two different ways of
15 accomplishing the intentions of the Blaine movement,
16 if I can call it that. One way is to forbid funding
17 to sectarian education. The other is to -- for the
18 funding to education that's not under control of
19 government. They both achieve the same goal, but they
20 use different means of achieving that goal.

21 Q. The provision -- the public school
22 provision that it shall remain inviolate in article 9,
23 section 3, doesn't refer to religion at all, does it,
24 sir?

25 A. No.

1 Q. In fact, you would say the intention was
2 to prevent any money going to any private school; is
3 that right?

4 A. That's why I made the distinction I did.

5 Q. And you agree with that. You agree
6 that --

7 A. In 1876, almost all private schools in
8 Colorado were Catholic.

9 Q. You said almost. Not all of them,
10 correct?

11 A. I don't know whether there were some that
12 were not, but the majority were Catholic. And, in
13 fact, nationwide at that point, so that -- there are
14 two different ways of achieving the same goal. One
15 way is to forbid sectarian institutions from receiving
16 funds. The other is to forbid institutions not under
17 the control of government from receiving funds. They
18 both achieve the same Blaine goal, which is to
19 disqualify Catholic schools chosen by parents from
20 sharing in the public education fund.

21 Q. And if I understand your testimony,
22 you're saying these are essentially redundant
23 provisions because they do the same thing?

24 A. They do it in different ways.

25 Q. But you think they do the same thing.

1 You think they're redundant.

2 A. No. Because you could -- one of them is
3 more sweeping than the other. For example, the second
4 set would also forbid a totally non-religious private
5 school from receiving funds. So it is broader in that
6 respect than the first two.

7 Q. Let me ask a little bit about school
8 choice and vouchers, if we can. You have a long
9 history in supporting vouchers and that movement; is
10 that right?

11 A. No.

12 Q. Is it your view, sir, that the
13 bureaucratic constraints imposed by
14 government-operated schools systems are inconsistent
15 with good education?

16 A. You are quoting from a website. Do you
17 have the total text of that website? If so, I'd be
18 happy to read it.

19 Q. I'm simply asking you a question as to
20 whether --

21 A. No.

22 Q. If you can let me ask the question,
23 Professor Glenn.

24 -- whether you believe that the
25 bureaucratic constraints imposed by

1 government-operated school systems are inconsistent
2 with good education.

3 A. And I'm saying that you're taking half of
4 the sentence out of context.

5 THE COURT: Then if you disagree, tell
6 him that. It's either yes or no, sir.

7 THE WITNESS: I'm afraid, Your Honor,
8 it's not a question I could answer yes or no. I
9 believe that, in fact --

10 THE COURT: I didn't ask you to state
11 what you believe, sir. With all due respect, and the
12 time constraints we have, the way this works is, he
13 gets to ask you questions and you have to answer his
14 questions. If you agree with him, you can tell him
15 you agree with him. If you disagree with him, you can
16 tell him that. If your answer is yes, you can tell
17 him yes. If your answer is no, your answer is no.
18 Beyond that, please don't expand on your answer.
19 Okay?

20 A. I don't agree with the way you phrased
21 the question, so I can't answer it.

22 Q. (BY MR. MACDONALD) Sir, does that -- if I
23 refreshed your recollection that that's language from
24 your own book, *The Ambiguous Embrace* --

25 A. Have you the text there? I'd be happy to

1 see it.

2 Q. I do have it. I'll come back to it, in
3 the interests of saving time, sir.

4 Professor Glenn, do you believe the case
5 for charter school vouchers and other forms of
6 marketized education rest not only on educational
7 performance but also on the claims of freedom of
8 conscience?

9 A. Yes.

10 Q. And you are not for vouchers as a way for
11 some lucky children to escape from a bankrupt public
12 education system but as a way to transform that system
13 to abolish its choking monopolies and reshape it in
14 ways consistent with a free society?

15 A. Are you quoting me?

16 Q. Sir, it's a question as to whether or not
17 you are not for vouchers as a way for some lucky
18 children to escape from a bankrupt public education
19 system.

20 A. Yes.

21 Q. Instead, vouchers are a way to transform
22 that system and to abolish its choking monopolies and
23 reshape it in ways consistent with a free society. Is
24 that also your view?

25 A. Yes.

1 Q. You're a board member of the Council for
2 American Private Education; is that right?

3 A. Yes.

4 Q. And that council has joined in legal
5 briefs supporting school vouchers, including in
6 Arizona, correct?

7 A. To be honest, I don't know.

8 Q. You're an associate at the American
9 Center for School Choice; is that right?

10 A. Yes.

11 Q. The Council for American Private
12 Education on which you're -- of which you're a board
13 member is a -- has the objective of providing parents
14 with financial assistance to allow them to exercise
15 fully their right to choose their child's school,
16 religious, private or public. Correct?

17 A. Yes.

18 Q. You believe that school voucher opponents
19 use scare tactics based on unfounded stereotypes about
20 faith-based schooling?

21 A. Yes.

22 Q. You believe that graduates of Catholic
23 and Evangelical schools are, if anything, more
24 tolerant and academically ahead of graduates of
25 comparable schools, correct?

1 A. That's what the research suggests.

2 Q. And you believe that?

3 A. Yes.

4 Q. Your undergraduate degree is not in
5 history; is that right?

6 A. That's correct.

7 Q. Neither of your doctorate degrees are in
8 history?

9 A. No.

10 Q. Your other academic training is in
11 theology?

12 A. Some. My PhD is not, if that's what
13 you're referring to. Neither is my other doctorate.

14 Q. You spent years working in the
15 Massachusetts Department of Education; is that right?

16 A. Yes.

17 Q. 20 years, roughly?

18 A. Almost 21.

19 Q. I'd like to ask you a little bit about
20 your article, which is Exhibit NN. Do you have that
21 in front of you?

22 A. I do. It's not an article. It's a book
23 chapter.

24 Q. Thank you. Your unpublished book
25 chapter, correct?

1 A. Yes.

2 Q. It's not paginated, I don't think. My
3 copy is not. Is yours?

4 A. This one is paginated, yes.

5 Q. You have a different copy than I do.
6 Hopefully, the words are the same.

7 If you could turn to the second page of
8 the manuscript. In the second full paragraph you say,
9 "Four American Protestants, as for French
10 anti-clerical republicans, the Catholic Church, a
11 large and ramifying organization and also a source of
12 transcendent claims seemed a menacing limitation upon
13 national unity and progress." Do you see that?

14 A. Yes, I do.

15 Q. And is it your view, sir, that it was all
16 American Protestants held this view?

17 A. No.

18 Q. Some?

19 A. Some.

20 Q. How many?

21 A. Influential leading circles.

22 Q. Lots did not?

23 A. Not -- not as far as I'm aware of, but
24 influential leading circles.

25 Q. How about simply American Protestants

1 generally?

2 A. There were many, I'm sure, who had never
3 thought about it.

4 Q. If you'd turn to what is page 5, I
5 believe. The third full paragraph, you state, "What
6 agitated voters in the 1870s was the fear that the
7 Catholic Church was gaining political influence and
8 advancing demands upon an educational system." Do you
9 see that?

10 A. Yes, I do.

11 Q. And again, are you talking about all
12 voters, or some voters?

13 A. Many voters.

14 Q. On direct, you went through a series of
15 questions from Mr. Nussbaum about individuals from
16 history. Do you recall that? PreCivil War, post
17 Civil War?

18 A. Yes.

19 Q. The first was Samuel Morse; is that
20 right?

21 A. Right.

22 Q. Or you talked about Samuel Morse.

23 A. Correct.

24 Q. Do you know if Samuel Morse had any
25 direct influence in the historical scholarship of

1 literature on the Colorado Constitution, sir?

2 A. Whether Morse had influence on the
3 historical scholarship?

4 Q. It was a terrible question. Let me
5 restate it.

6 A. Please.

7 Q. In your review of the literature, does
8 Samuel Morse appear to have influenced the
9 constitutional debate in Colorado? Is he referenced?

10 A. No. His influence was in the 1830s.

11 Q. And the same question. Who was -- what's
12 Beecher's first name, who wrote Plea for the West?

13 A. Now you're making me forget. I don't
14 remember.

15 Q. Okay. Well, let me just ask.

16 A. Okay.

17 Q. Have you seen evidence that Beecher was
18 referenced in the constitutional ratification process
19 and discussions in Colorado in 1876?

20 A. No. His influence again was in the
21 1830s.

22 Q. You didn't see any references in Colorado
23 in 1876?

24 A. 40 years later, no.

25 Q. You talked about Horace Bushnell,

1 correct? On direct?

2 A. Right.

3 Q. Have you seen any evidence that Horace
4 Bushnell appears in the discussions, debates of the
5 Colorado Constitution in 1876?

6 A. No.

7 Q. You mentioned President Garfield, and
8 comments or speeches that he made, in your direct with
9 Mr. Nussbaum. Do you recall that?

10 A. Yes.

11 Q. In your review of the historical
12 literature, have you seen any references that relate
13 to James Garfield in the ratification or debates on
14 the Colorado Constitution?

15 A. No.

16 Q. You also looked at the congressional
17 record on the debates over the Blaine -- the
18 federal -- actual federal Blaine amendment, correct?

19 A. Yes.

20 Q. And that's Exhibit KK. And Mr. Nussbaum
21 directed you to comments by Senator Morton. Do you
22 recall that?

23 A. Yes.

24 Q. And, sir, do you have any evidence that
25 Colorado -- anyone in Colorado was aware specifically

1 of Senator Morton's statements on the federal Blaine
2 amendment?

3 A. No.

4 Q. You also referenced, in your direct
5 testimony, Senator Edmunds. Do you recall that?

6 A. Yes.

7 Q. Were you aware of any -- you have -- or
8 are you aware of any evidence that anyone in Colorado
9 was aware of Mr. Edmunds' discussions and views on the
10 federal Blaine amendment? Anyone in Colorado was
11 aware of that?

12 A. No.

13 Q. Same question for Senator Bogey.

14 A. No.

15 Q. And if we could -- I think I had this
16 right. Senator Bogey was opposed to the federal
17 Blaine amendment; is that right?

18 A. Yes.

19 Q. And if we could just look at Exhibit KK,
20 at 5590, please. And I believe that Mr. Nussbaum had
21 you, or maybe he, himself, read in a section on --
22 where Mr. Bogey was speaking on the second column on
23 page 5590. Do you recall that?

24 A. Yes.

25 Q. And here Mr. Bogey, who opposed the

1 Blaine amendment -- do you know, sir, as a matter of
2 history, was Mr. Bogey himself Catholic? Do you know?

3 A. I don't know.

4 Q. He supported what your -- what you see as
5 the Catholic position again opposing the Blaine
6 amendment; is that right?

7 A. No. He supported the democratic
8 position.

9 Q. Democratic party?

10 A. Yes. I believe he was not Catholic. The
11 senator of New York was Catholic. Bogey, I believe,
12 stated somewhere in the transcript that he was a
13 Protestant, all four squared.

14 Q. So Mr. Bogey, a Protestant, was opposed
15 to the Blaine amendment.

16 A. Right. Because he saw it as oppressive
17 to Catholics.

18 Q. In his statements on the Blaine amendment
19 that are set out here in the congressional record,
20 he's using the term "sectarian" to refer to
21 Protestants; is that right?

22 A. He's to refer to the Protestant character
23 of public schools.

24 Q. So he -- let's make sure I understand it.
25 He's using the term "sectarian" to refer to the

1 Protestant character of public schools?

2 A. Public schools.

3 Q. He's not using sectarian here to mean
4 Catholic; is that right?

5 A. Correct.

6 Q. As part of the discussions in Colorado,
7 sir, are you aware that members of the constitutional
8 convention introduced resolutions calling for a rigid
9 separation of church and state, including a ban on
10 reading the Bible in school?

11 A. Yes.

12 Q. And those were -- as I understood
13 earlier, one of the issues that you identified in your
14 direct with Mr. Nussbaum was that at least some
15 Protestants wanted to prevent money to go to Catholic
16 schools, but also wanted to have the Bible read in
17 public schools.

18 A. Yes.

19 Q. Yet, in Colorado, there were those who
20 were supporting the provisions -- the religious and
21 education provisions of the Colorado Constitution, who
22 supported banning the reading of the Bible in the
23 public schools, correct?

24 A. Yes. So-called liberals.

25 Q. And you're aware, sir, that the Colorado

1 Constitution was -- excuse me. The no-aid provision,
2 article 9, section 7, is almost word for word
3 identical to the Illinois Constitution? You're aware
4 of that?

5 A. Yes.

6 Q. And the Illinois Constitution was
7 enacted -- and that provision, the no-aid provision in
8 Illinois, was enacted in 1870?

9 A. Yes.

10 Q. Sir, are you aware that several petitions
11 identified as being from Catholics called for
12 prohibiting a division of the Public School Fund? Are
13 you aware of that?

14 A. I find the report of that ambiguous. I
15 have difficulty interpreting it.

16 Q. And have you actually looked at the
17 report?

18 A. I have looked at the -- at the report of
19 the convention, yes.

20 Q. Well, let me see if I can help.

21 MR. MACDONALD: Your Honor, may I
22 approach?

23 THE COURT: Yes. Thank you.

24 Q. (BY MR. MACDONALD) Professor Glenn, I've
25 handed you an excerpt from Donald Hensel's 1957

1 thesis, A History of the Colorado Constitution in the
2 19th Century, that we discussed earlier. Do you see
3 that?

4 A. Right.

5 Q. You've reviewed this before, correct?

6 A. I have, yes.

7 Q. You think it's a scholarly work?

8 A. Well, it's -- it's a -- yes, it is a
9 doctoral dissertation.

10 Q. And you, sir, rely on Hensel in your own
11 forthcoming, to-be-published manuscript; is that
12 right?

13 A. I do. I quote him.

14 Q. Okay. And you think he's a reliable
15 source of the history, correct?

16 A. Yes.

17 Q. If you could turn to page 195. And down
18 at the bottom there is a footnote 43. Do you see
19 that?

20 A. I do.

21 Q. And it's a reference to the Los Animas,
22 Colorado Leader, November 5th, 1875, and a reference
23 to the Denver Daily Tribune, February 10th and 21st,
24 1876. Do you see that?

25 A. Yes, I do.

1 Q. And Mr. Hensel states there were several
2 petitions identified as being Catholic, which called
3 for prohibiting a division of the school fund. Do you
4 see that?

5 A. Yes, I do.

6 Q. If you'd look up on that same page, 195,
7 Mr. Hensel -- and I think in your testimony -- in your
8 direct testimony with Mr. Nussbaum, you talked about
9 the divide in Colorado at that time between southern
10 Colorado and the Front Range and northern part of
11 Colorado?

12 A. Right.

13 Q. And here Mr. Hensel says in the first
14 full paragraph, "Sentiment in southern Colorado was
15 perhaps not nearly as uniform as some of the delegates
16 assumed." Do you see that?

17 A. Yes.

18 Q. If you could turn to page 194, sir.
19 There's a discussion there about the section
20 prohibiting division of the Public School Fund, do you
21 see, in the reference to Boyles and to Henry Bromwell?

22 A. Are you talking about the first
23 paragraph?

24 Q. Yeah. The first paragraph, which starts
25 at the top of 194. Do you see that George Boyles

1 seeks to strike out the provision that would keep the
2 Public School Fund inviolate, because he contended
3 that public schools were still experimental and that
4 more than half the children in the east attended
5 private schools? Do you see that?

6 A. Yes, I do.

7 Q. And that several delegates vigorously
8 defended the ban?

9 A. Yes.

10 Q. And Henry Bromwell -- do you recall, in
11 reviewing the literature -- do you remember anything
12 about Henry Bromwell, sir?

13 A. No, I don't.

14 Q. Henry Bromwell here is quoted -- or
15 provided as saying that Henry Bromwell added that the
16 provision was basic to maintaining a system of popular
17 education. Right?

18 A. Yes. That's what he said.

19 Q. And there's no reference in here that
20 he's supporting that provision because he's
21 anti-Catholic, is there?

22 A. No.

23 Q. You don't have any evidence that he was
24 anti-Catholic; is that right?

25 A. No, I don't.

1 Q. If you could turn to page 196 of
2 Mr. Hensel's doctoral thesis. And down near the
3 bottom, they're discussing that they are barring --
4 that the provision that barred all sectarian tenets or
5 doctrines from the public schools. Do you see that
6 paragraph?

7 A. Yes, I do.

8 Q. And Mr. Hensel concludes, quote, the
9 convention rejected the assumption that Bible reading
10 was indispensable evidence that the schools were more
11 institutions. Do you see that?

12 A. Yes, I do.

13 Q. The carryover from 196 to 197 says,
14 "Another observer applauded the decision to let
15 religion be taught in the family circle, in the
16 church, and in the Sunday school." Do you see that?

17 A. Yes.

18 MR. NUSSBAUM: Your Honor, are there
19 questions in this, or just a reading of the document?

20 THE COURT: Little of both, it seems
21 like. Your objection is to form of the question? I'm
22 going to sustain the objection at this point.

23 MR. MACDONALD: Thank you. I'll move on,
24 Your Honor.

25 Before I move on, Your Honor, I'd like to

1 move the admission of Exhibit 149.

2 THE COURT: Objection to 149,
3 Mr. Nussbaum?

4 MR. NUSSBAUM: There is, Your Honor.
5 This is a master's thesis. It was not published. It
6 was not intended for publication. It's not by a
7 recognized scholar. There's no peer review or any of
8 that. A lot of us have written theses during our
9 master's exercises that are not being treated as
10 learned documents.

11 THE COURT: How does it meet the
12 criteria to be admitted, Mr. Macdonald?

13 MR. MACDONALD: Your Honor, I believe
14 that the witness has already testified he, himself,
15 relies on Mr. Hensel's work. He's testified it's a
16 scholarly work. And I believe he also testified it
17 was both, Your Honor.

18 THE COURT: He didn't say those things.
19 But does that give it enough to meet the standard
20 necessary to be qualified as a learned treatise or
21 otherwise be admissible as non-hearsay?

22 THE WITNESS: I relied on the published
23 article, not this --

24 THE COURT: I wasn't asking you, sir.

25 THE WITNESS: I'm sorry, sir.

1 MR. MACDONALD: Your Honor, I believe the
2 fact that Mr. Hensel -- excuse me -- Mr. Glenn himself
3 relies on the work of Mr. Hensel, said that he
4 believed it was a scholarly work, satisfies the
5 standard.

6 MR. NUSSBAUM: Your Honor, experts are
7 permitted to rely on documents that aren't otherwise
8 admissible into evidence. That doesn't make them
9 admissible.

10 THE COURT: Well, the rule provides
11 that it also applies to periodicals or pamphlets on a
12 subject of history. So the court will permit it and
13 find the objection goes to the weight, not its
14 admissibility. 149 is admitted.

15 Q. (BY MR. MACDONALD) If you could turn to
16 Exhibit LL. This was one of the Rocky Mountain News
17 articles that you referred to earlier. Do you have
18 that in front of you, sir?

19 A. Yes, I do.

20 Q. In this article -- I think you testified
21 about this on direct, but I just want to make sure the
22 record is clear. The Rocky Mountain News in this
23 editorial takes the position that Colorado should not
24 enact the no-aid provision or the provision to keep
25 the Public School Fund inviolate. Correct?

1 A. Yes.

2 Q. And in discussing that, in the middle of
3 the page, they say, "In the first place, the
4 legislature is fully competent to deal with the
5 question." Do you see that?

6 A. Yes.

7 Q. And that was something that you talked to
8 Mr. Nussbaum on direct exam, right? This question of
9 whether the debates about putting these education
10 clauses in the constitution was -- should be better
11 left to later democratic process.

12 A. Yes.

13 Q. And as I recall, I think you said left to
14 the normal process -- normal democratic process. Is
15 that right?

16 A. I don't know what my exact words were.

17 Q. Is that a fair characterization?

18 A. Yes.

19 Q. And you're not saying there's anything
20 inherently wrong about the democratic process putting
21 things in the constitution that the people want in the
22 constitution, are you?

23 A. No.

24 Q. And here the Rocky Mountain News is
25 talking about, in the rest of that sentence, "The

1 danger's far from conceivable for the majority in that
2 body being in favor of any measure that would detract
3 from the stability of the public school system as at
4 present constitute." Do you see that?

5 A. Yes.

6 Q. And based on your review of the
7 scholarship, you understand, sir, that there were many
8 delegates in Colorado who were concerned about the
9 stability of the public school system; is that right?

10 A. Concerned that the fund's not being used
11 for other than public schools, yes.

12 Q. And one of the reasons, based on your
13 review of the literature, is because they were
14 concerned about the stability of the public school
15 system if funds were taken out of it. Is that right?

16 A. That's what the editorial is saying.

17 Q. And you've seen that in your review of
18 the scholarship and Mr. Hensel's work?

19 A. That's not the way I interpret it.

20 Q. In the Colorado convention, I think you
21 talked on direct that there was originally a provision
22 to tax private schools and religious schools.

23 Correct?

24 A. To tax churches as well as schools.

25 Q. To tax churches and to tax religious

1 schools.

2 A. Yes.

3 Q. And the Colorado delegates decided not to
4 include that provision. They voted that down; is that
5 right?

6 A. Yes.

7 Q. They rejected that.

8 A. Yes.

9 Q. Sir, are you aware that not a single
10 newspaper south of the divide, as they say, in
11 southern Colorado, urged the defeat of the Colorado
12 Constitution?

13 A. I have no information.

14 Q. Don't know one way or another?

15 A. I don't know.

16 Q. And, sir, are you aware that there
17 were -- just one moment, please.

18 MR. MACDONALD: I'm trying to cut this
19 down, Your Honor.

20 Q. (BY MR. MACDONALD) Sir, you're aware that
21 no-aid provisions were enacted in states without
22 submitting to the Catholic populations, correct?

23 A. Yes.

24 Q. And Michigan in 1835?

25 A. Wisconsin, 1848.

- 1 Q. Sorry. Can you answer my question first?
- 2 A. Michigan in 1850, I think.
- 3 Q. If the record shows it in 1835, would you
4 disagree with that?
- 5 A. That's not my information, but --
- 6 Q. All right. You think Michigan in 1850?
- 7 A. I think Michigan, 1850.
- 8 Q. Wisconsin?
- 9 A. 1848.
- 10 Q. Okay. Indiana has a no-aid provision?
- 11 A. Right.
- 12 Q. When was that put in?
- 13 A. There were 13 states who did it before
14 1870. So -- I have notes on it, if you want me to
15 read them off.
- 16 Q. I don't. Do you know if Indiana's no-aid
17 provision was put in in 1851?
- 18 A. That sounds reasonable. That's just
19 1853.
- 20 Q. Do you know --
- 21 A. Sorry.
- 22 Q. Do you know if there was significant
23 anti-Catholic presence in Indiana or Wisconsin in 1848
24 or 1851? Do you know if that motivated their
25 inclusion of the no-aid provisions in their

1 constitutions?

2 A. I believe that it did.

3 Q. How about Michigan in whatever year they
4 put in the --

5 A. Yes.

6 Q. Your view is, anytime a state includes a
7 no-aid provision, it's motivated by anti-Catholic
8 animus? Is that your view?

9 A. Yes.

10 Q. Have you looked at the historical record
11 for each of those states?

12 A. No.

13 MR. MACDONALD: No further questions,
14 Your Honor.

15 THE COURT: Any other inquiry,
16 Mr. Deihl?

17 MR. DEIHL: No, Your Honor.

18 THE COURT: All right. Redirect,
19 limited in scope to cross-examination, please.

20 REDIRECT EXAMINATION

21 BY MR. NUSSBAUM:

22 Q. Professor Glenn, there were a number of
23 questions regarding kind of quantum of anti-Catholic
24 feeling that motivated the various Blaine movements in
25 the various states.

1 Did the Rocky Mountain News in Colorado
2 comment in its editorial on March 17th, 1886 -- 1876,
3 regarding what it believed would be the quantum of
4 sentiment about this?

5 A. Yes.

6 Q. And what was their view of that?

7 A. That the -- adopting the anti-aid
8 language would lead to far more support for
9 Protestants than it would to opposition from
10 Catholics.

11 Q. And did President Grant and Mr. Blaine
12 and the republican party make some assessment of the
13 quantum of sentiment regarding this issue?

14 MR. MACDONALD: Objection. Foundation.

15 A. Yes.

16 THE COURT: Well, overruled.

17 Q. (BY MR. NUSSBAUM) And what was their
18 views?

19 A. That this -- this was a winning issue for
20 the 1876 election.

21 Q. What was your doctoral thesis about?

22 A. It was what became the book The Myth of
23 the Common School, which Professor Green quotes
24 several times, which is a history of the relationship
25 of government, schools, and the religion issues in the

1 19th century.

2 Q. A history.

3 A. Yes.

4 Q. And there was questions to you about
5 Samuel Morse, and I believe it was Lyman Beecher,
6 Horace Bushnell, Senators Morton, Edmunds, and Bogey,
7 and whether there was actual record of their
8 statements in the proceedings in Colorado. Do you
9 remember that line of questions?

10 A. Yes, I do.

11 Q. And when you discussed what their views
12 were, were you simply trying to give evidence of the
13 national mood regarding these issues?

14 A. Of the national mood. And if I may add,
15 the national mood in the period when the earlier
16 anti-aid amendments were adopted, as well.

17 Q. And did you see that Colorado, as you
18 looked at the evidence in Colorado, that it was also
19 affected by the national mood in that era?

20 A. Absolutely.

21 Q. Okay. There were some questions on
22 cross-examination regarding a resolution in the
23 Colorado proceedings to ban the use of the Bible from
24 public schools.

25 A. Right.

1 Q. Do you recall the result of that
2 resolution?

3 A. I don't know. You'd have to remind me.

4 MR. NUSSBAUM: May I approach, Your
5 Honor?

6 THE COURT: Yes.

7 Q. (BY MR. NUSSBAUM) I'll draw your
8 attention --

9 MR. DEIHL: Your Honor, what -- we don't
10 know what he's showing the witness.

11 MR. NUSSBAUM: Be happy to show you.

12 THE COURT: The record should reflect
13 that he's attempting to refresh his memory with
14 something.

15 MR. NUSSBAUM: I'll lay the foundation.
16 I'm happy to show it to counsel.

17 THE COURT: Yes. You need to show it
18 to counsel.

19 You need to not break the phone.

20 MR. NUSSBAUM: Are you still there,
21 Professor Green? We dropped you. Hello.

22 THE COURT: Literally and figuratively.

23 MR. NUSSBAUM: Oh, he's here.

24 Q. (BY MR. NUSSBAUM) I'm going to show you
25 page 360 from the -- do you recognize this as the

1 proceedings from the --

2 THE COURT: Before you do that, you
3 need to show opposing counsel, Mr. Nussbaum.

4 MR. NUSSBAUM: Okay.

5 (Pause in the proceedings.)

6 MR. NUSSBAUM: Perhaps, Your Honor, we
7 may have counsel stipulate that on page 360 of the
8 proceedings, it shows a resolution was introduced that
9 reads as follows. "The Bible shall not be introduced
10 in any public school in this state for the purpose of
11 religious instruction."

12 And then it says, after a failed attempt
13 to amend, the question then recurring on motion of
14 Mr. Whyte to adopt the additional section and being
15 put, "It was not agreed to."

16 And so can we maybe stipulate that that
17 motion is put before the convention, and it was
18 rejected by the convention? Or do you want me to lay
19 the foundation?

20 MR. MACDONALD: I'd ask you to lay the
21 foundation.

22 THE COURT: You want him to ask the
23 witness about it?

24 MR. MACDONALD: Yes, Your Honor. The
25 reason I'm not sure I can stipulate to it is because I

1 don't know what else happened. This was just an
2 excerpt shown in --

3 THE COURT: You weren't there?

4 MR. MACDONALD: No.

5 THE COURT: Fair enough. You may
6 proceed, Mr. Nussbaum.

7 Q. (BY MR. NUSSBAUM) I'll draw your
8 attention, then, to page 360 of the proceedings of the
9 Colorado Constitution. And let me let you read the
10 text that's highlighted, if you will. Don't read it
11 aloud.

12 A. Yes.

13 Q. So was there a motion to the convention
14 from Mr. Whyte?

15 A. Yes.

16 Q. Regarding the use of the Bible?

17 A. Yes.

18 Q. And what did he move?

19 A. He moved that it not be used in public
20 schools for the purposes of instruction.

21 Q. And did the motion -- did the convention
22 adopt or reject the motion?

23 A. It rejected it.

24 Q. Thank you.

25 Finally, Professor Glenn, counsel asked

1 you questions regarding the Rocky Mountain News in its
2 February editorial opposing inclusion of the Blaine
3 language in the Colorado convention. Do you recall
4 those questions?

5 A. Yes.

6 Q. Did they also, in that editorial, oppose
7 or support the Blaine principle?

8 A. They supported the Blaine principle very
9 strongly.

10 Q. How could they support the Blaine
11 principle, yet oppose its inclusion in the Colorado
12 convention?

13 A. Because they said tactically or
14 strategically, it would be unwise to include anything
15 that might result in the constitution being voted down
16 and, thereby, imperiling the statehood.

17 Q. And by the time of its March 17th, 1786
18 editorial, did the Rocky Mountain News' analysis of
19 the political calculus change?

20 A. It had changed significantly.

21 Q. And what did it believe the political
22 calculus was before it went to a vote of the people?

23 A. That, in fact, the response had been so
24 positive to the adoption of the anti-aid amendment,
25 that it would materially contribute to the adoption of

1 the constitution.

2 MR. NUSSBAUM: Thank you very much.

3 Thank you for coming out here to testify.

4 THE COURT: Any recross? Limited in
5 scope, please. Which you already knew, but I say that
6 all the time.

7 RE-CROSS-EXAMINATION

8 BY MR. MACDONALD:

9 Q. Professor Glenn, are you aware that there
10 was a Catholic rally in support of eradication of the
11 Colorado Constitution?

12 MR. NUSSBAUM: Beyond the scope.

13 THE COURT: No. Overruled.

14 Q. (BY MR. MACDONALD) Shortly after the --
15 after the constitution was drafted and before
16 ratification, are you aware of that?

17 A. Yes.

18 MR. MACDONALD: Thank you. No further
19 questions.

20 THE COURT: Anyone else? No? All
21 right. That will conclude the testimony of this
22 witness. If there's no objection, he may step down
23 and be excused.

24 We still have Dr. Green on the line?

25 MR. BINDAS: It appears to be on, Your

1 Honor.

2 THE COURT: Well, the phone is on. Is
3 he there?

4 MR. BINDAS: Professor Green, can you
5 hear us?

6 MR. GREEN: Yes.

7 THE COURT: Did you want to take this
8 testimony out of order?

9 MR. MACDONALD: We would like to, Your
10 Honor, if that's permissible.

11 THE COURT: Okay. Any idea how long
12 you think it's going to take? I know it's not going
13 to be 10 minutes, but -- are we looking at three
14 hours?

15 MR. MACDONALD: No. I would hope it's
16 less than 45 minutes.

17 THE COURT: Okay. Well, let's see if
18 we can make some headway on it, then.

19 Professor Green, can you hear me?

20 MR. GREEN: Barely, Your Honor.

21 THE COURT: I'm kind of soft spoken,
22 so --

23 MR. GREEN: The battery on this phone is
24 dying on me, so -- it's been on for a couple of hours,
25 so I may have to try to call back on a cell phone that

1 has between one and two bars where I am at this point.
2 So I apologize if I --

3 THE COURT: Do you want me to take a
4 break now so you can recharge your phone and come back
5 after lunch?

6 MR. GREEN: That would actually help
7 quite a bit, because I think this phone would be more
8 alive than the cell phone.

9 THE COURT: Why don't we just do that.

10 MR. MACDONALD: That's fine, Your Honor.

11 THE COURT: We're going to do that,
12 Mr. Green.

13 MR. GREEN: Okay. Why don't you call me
14 back, then.

15 THE COURT: It's about five till noon.
16 Why don't we come back at 1:00 o'clock, and we'll
17 proceed then with the testimony of Professor Green by
18 telephone.

19 MR. MACDONALD: Thank you, Your Honor.

20 THE COURT: Court's in recess.

21 (Recess taken, 11:53 a.m. to 1:26 p.m.)

22 THE COURT: Please be seated. Good
23 afternoon. Back on the record in 11CV4424.

24 My understanding is, the plaintiffs have
25 opted not to call Dr. Green in rebuttal to the

1 testimony from Professor Glenn. Is that correct,
2 Mr. Macdonald?

3 MR. MACDONALD: That's correct, Your
4 Honor.

5 THE COURT: So we're going to continue,
6 then, with the defendants' case in chief. Mr. Blue is
7 standing.

8 MR. BLUE: Yes, Your Honor. The defense
9 calls Senator Keith King, please.

10 THE COURT: All right. Senator, please
11 come forward and be sworn.

12 SENATOR KEITH KING,
13 having been first duly sworn to state the whole truth,
14 testified as follows:

15 THE COURT: Please be seated, sir.

16 Now, Senator, as you get yourself
17 comfortable, there's a couple rules. Obviously,
18 you're out of your element down here. But some of the
19 similar rules will apply, and I'm sure you will
20 appreciate them.

21 Please do your best to speak up into the
22 microphone, and make sure you use it in response to
23 the questions that you are asked.

24 Also keep in mind that our proceedings
25 are being recorded by the court reporter. She only

1 has 10 fingers, so she needs you to wait until the
2 question is completed before you start to answer it,
3 and that way, we have a clear record of the
4 proceedings.

5 And the other thing I'm going to ask you
6 to do is please listen carefully to what you're being
7 asked on the question and answer just that question.
8 If there's something that needs to be clarified, then
9 Mr. Blue at a later point will be able to clarify that
10 for you or with you. Okay?

11 THE WITNESS: Very good.

12 THE COURT: Thank you. Mr. Blue.

13 MR. BLUE: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY MR. BLUE:

16 Q. Would you state your name for the record.

17 A. My name is Keith King.

18 Q. And you serve as state senator for what
19 district?

20 A. I serve as state senator for District 12.
21 It's the west side of Colorado Springs, Colorado.

22 Q. And how long have you been -- how long
23 have you served in the Colorado legislature?

24 A. I served eight years in the House, and
25 then I was out for two years. And now I'm back in the

1 Senate. So I've been in a total of 11 years.

2 Q. And have you been involved in education
3 legislation?

4 A. A lot. I have worked on a lot of bills.
5 I probably carried 40 to 60, maybe as many as 70
6 bills. They call me the amendment king. So I have
7 done literally dozens and dozens of amendments on
8 education bills.

9 Q. And you have served on or chaired the
10 education committee?

11 A. I've served on the education committee.
12 I was vice chair. I was majority leader. And as
13 majority leader, I couldn't chair a committee, so I
14 have not chaired the education committees.

15 Q. And for how many years have you served on
16 education committees?

17 A. Probably all the years in the House
18 except for one, the first year I was majority leader.
19 And then all the years in the Senate.

20 Q. Thank you.

21 Now, do you have another job outside of
22 your legislative work?

23 A. I do. I'm also the administrator of
24 Colorado Springs Early Colleges. It's a charter
25 school I founded when I got out of the House and

1 didn't think I'd go back into the Senate. And so it's
2 going into its fifth year this fall.

3 Q. And what is Colorado Springs Early
4 Colleges?

5 A. Colorado Springs Early Colleges is a
6 charter school that's authorized by the Charter School
7 Institute, and it's a school that specializes in
8 helping high school students get a college degree
9 while they're still in high school. So we've based
10 our curriculum on the junior college or community
11 college model, try to move the kids as quickly as
12 possible into concurrent enrollment and give them an
13 associate's degree.

14 The most remarkable -- and maybe I
15 shouldn't talk too much -- was, we had one girl this
16 year graduate from Colorado Technical University with
17 a four-year college degree from high school.

18 Q. You mentioned concurrent enrollment. Can
19 you describe what that is, please?

20 A. Concurrent enrollment is the opportunity
21 for public schools across the state of Colorado to
22 allow kids to take college courses while they're still
23 in high school.

24 At Colorado Springs Early Colleges, we
25 have like 170 kids taking courses full-time at Pike's

1 Peak Community College on a regular semester basis.
2 We have probably 200 students taking college courses
3 at Colorado Technical University. We co-share their
4 campus.

5 And so the concept behind concurrent
6 enrollment is, if it's the exact same curriculum, and
7 you have an opportunity to give both high school
8 credit and college credit, you can take the exact same
9 course -- like Algebra 2, for example, is typically in
10 three level college level courses. And so you can
11 take that and get college credit, be able to get a
12 transcript from a college or university, wherever
13 you're going, and also fulfill the school credit.

14 Q. Is Colorado Technical University a
15 private entity?

16 A. It is. It's a private entity. It's a
17 publicly -- it's part of the Career Corporation, and
18 they're publicly traded on the New York Stock
19 Exchange.

20 Q. And does COS -- I'm sorry. Does the
21 Colorado Springs Early Colleges -- COS is the acronym
22 for that?

23 A. No. CSAP? Colorado Springs Early
24 Colleges?

25 Q. What is COS the acronym for? I

1 apologize.

2 A. COS?

3 Q. Yeah.

4 A. CTU would be Colorado Technical

5 University, Colorado Springs Early Colleges is -- we

6 call it CSEC.

7 Q. CSEC. That will work. Does CSEC have a

8 contract with CTU?

9 A. It does. We co-share the location. So

10 what we do is, Colorado Springs Early Colleges teaches

11 the curriculum of Colorado Technical University. We

12 hire the professors, the adjunct professors. They

13 teach the curriculum of CTU. And so they're our

14 employees and they're also qualified by CTU to be able

15 to teach their courses. So we work collaboratively

16 together.

17 Q. And what is the tuition rate that you --

18 A. CTU matches the curriculum cost or the

19 tuition cost of the community college system in

20 Colorado. So last year it was 96 dollars, I think,

21 and 35 cents. This next year, it's going to be

22 \$105.85 per credit hour.

23 The students can also take courses at

24 UCCS. And UCCS this next year is going to be around

25 \$350 per credit hour.

1 Q. And do your students have dual enrollment
2 in those universities?

3 A. Correct. They are enrolled both at CTU,
4 UCCS, and Pike's Peak Community College. And they
5 also are enrolled with our school. We use the per
6 pupil revenue, the PPR, of the money that we get from
7 the state to pay their tuition and books when they go
8 to the college or university.

9 Q. And does CSEC receive -- so it does
10 receive the per pupil funding, then?

11 A. It does.

12 Q. And it uses that funding to pay CTU for
13 its services?

14 A. Correct. It's \$6100 this next year. It
15 was about \$6500 last year.

16 Q. I'd like to shift over. Do you know what
17 education management organizations are?

18 A. Yes, I do.

19 Q. And do you know what educational service
20 providers are?

21 A. Yes, I do.

22 Q. Okay. What are education management
23 organizations or EMOs?

24 A. There's typically several things that
25 people use to contract services for in schools. And

1 these are traditionally found mainly in charter
2 schools. You have for-profit organizations. Those
3 would be organizations like Mosaic, Imagine, K-12
4 Education. They are for-profit companies that
5 typically contract for services.

6 Then you have nonprofit companies that
7 also contract for services and provide services inside
8 the school districts across the state of Colorado and
9 specifically charter schools. And they are contracted
10 to maybe provide the entire range of services from the
11 perspective of education, or they might just be
12 special education. But they have specific missions,
13 and they typically always have contracts between who
14 they work with.

15 Q. And so you mentioned during that that
16 they sometimes will provide the entire package. So
17 when you say the entire package, do you mean that they
18 run the school completely from soup to nuts?

19 A. Well, in a charter school, you have to
20 have a governing board, so they would not be the
21 governing board. But underneath the governing board,
22 there would be a contract -- GO is another company
23 that contracts with schools in Colorado Springs, for
24 example. And so the governing board has a contract
25 that manages the educational process and the

1 educational philosophy of the school.

2 Edison is another one that was contracted
3 totally to do the entire operations.

4 Q. So do these organizations hire the
5 teachers?

6 A. Yes. In many cases, they do. Sometimes
7 it's a collaborative arrangement. But in a lot of
8 cases, they are not hired by the -- they contract the
9 hiring to the EMO.

10 Q. And do EMOs often -- do they control the
11 curriculum and write the curriculum?

12 A. Yes. They have a particular philosophy
13 that they typically do -- K-12 Education, for example,
14 delivers online instruction, and that's the philosophy
15 that they have. Other ones, the Mosaic, will be more
16 of a traditional type of delivery system. Edison will
17 have a different delivery system.

18 But they fundamentally contract the
19 services to the school board or the charter school to
20 fulfill those services while they are educating at the
21 school.

22 Q. And you had mentioned that the teachers
23 are often hired directly by the EMOs. Are all the
24 employees in the school hired by the EMOs at times?

25 A. At times that can be done. Other times,

1 you might contract services out for janitorial to a
2 different contractor as opposed to the EMO. But many
3 times they hire out the entire operation of the
4 school.

5 Q. So to reverse it a little bit, there are
6 times with EMOs where none of the employees of the
7 schools are school district employees.

8 A. Correct.

9 Q. And does the PPR funding help pay for
10 this?

11 A. PPR funding, in the case of Colorado
12 Springs, the college virtually pays for the entire
13 portion of it. There's also categorical funding that
14 is available to schools like for special education,
15 transportation, career, technical education, those
16 times of things.

17 There's federal funding that comes in.
18 But PPR is the main source of funding for all this.

19 Q. So total program funding goes to pay the
20 EMOs for the work they're providing?

21 A. Correct.

22 Q. Are you aware of the College Opportunity
23 Fund?

24 A. I am. I carried the bill on the
25 legislature.

1 Q. Can you tell us what the Colorado
2 Opportunity Fund does?

3 A. The Colorado Opportunity Fund, in
4 essence, takes state dollars and gives it to the
5 recipients of the students who are going to be going
6 to the higher ed institutions, the 28 higher ed
7 institutions in the state of Colorado.

8 So it was done to, in essence, create an
9 enterprise opportunity for higher ed across the state
10 of Colorado. And by doing so, we had to fund -- when
11 we carried the bill, we had to fund students. We
12 could no longer fund institutions.

13 Q. Are you familiar with the Choice
14 Scholarship Program that's been implemented by Douglas
15 County?

16 A. Yes, I am.

17 Q. And could you compare the College
18 Opportunity Fund and the Choice Scholarship Program?

19 MR. DEIHL: Your Honor, I object. Calls
20 for an opinion. As this witness has indicated, he's
21 not qualified as an expert to talk about that.

22 THE COURT: Well, I took it as a
23 factual inquiry. But I'll sustain it as to the form
24 of the question and ask you to rephrase it.

25 Q. (BY MR. BLUE) Senator King, do you think

1 there are similarities between the College Opportunity
2 Fund and the Choice Scholarship Program?

3 A. Yes.

4 MR. DEIHL: Same objection.

5 THE COURT: Overruled.

6 Q. (BY MR. BLUE) Could you describe some of
7 those similarities for us here?

8 A. Yes. When we started the College
9 Opportunity Fund, we made public institutions eligible
10 for the funding; the 28 higher ed public institutions
11 in the state of Colorado.

12 Also, we had originally created
13 opportunities for students to use the College
14 Opportunity Fund at three private institutions in the
15 state of Colorado. And that was Colorado College,
16 Regis, and DU. And subsequent to that, Colorado
17 Christian University, I also carried legislation to
18 help allow them also to participate. There was a
19 lawsuit that was on that particular issue, and now COF
20 also be used at Colorado Christian University.

21 Q. And just to clarify, so under COF, state
22 funding goes to these schools?

23 A. Correct. And the way we define -- well,
24 correct.

25 Q. Okay.

1 A. I was going to define in-state tuition
2 for you.

3 Q. I don't think we need to go into in-state
4 tuition.

5 So are you aware of any other
6 public-private partnerships in Colorado education
7 specific to school districts?

8 A. Yeah. One of the first amendments I ever
9 did to the School Finance Act when I went into the
10 House was what I called at the time education orphans.
11 And education orphans is a -- it continues to be
12 funded, actually, today. It's been a successful
13 program. It is worth about a half a million dollars.

14 In my particular House district at the
15 time, Myron Stratton Homes was a residential treatment
16 facility. And the court would adjudicate what they
17 would call abandoned kids, kids that had been abused,
18 parental rights denied or taken away from kids that
19 were in K-12 education. And many times, they were
20 being sent to Myron Stratton Homes, and they had an
21 excess cost to educate these kids.

22 So I worked with the superintendent of
23 schools, Cliff Brookhart, to try and solve an issue of
24 helping Myron Stratton take care of the excess costs,
25 because the per pupil revenue wasn't covering that.

1 And so we set aside half a million dollars for
2 residential treatment facilities. And virtually all
3 of those are private. I think there's about 60 of
4 them in the state of Colorado, and 56, 57 of them are
5 private schools. And it's been a very successful
6 program to serve the most needy students that we have
7 really in the state of Colorado.

8 Q. And are some of the private institutions
9 religious?

10 A. As far as I know, there is one that is
11 religious in the Denver area. I think it's St. --
12 St. Martin's. It's affiliated with the Catholic
13 religious order.

14 Q. Are you aware of -- are contract schools
15 another public-private partnership?

16 A. They are.

17 Q. And could you give some examples of some
18 contract schools?

19 A. Well, typically contract schools are
20 inside the district where it might be a special
21 district as far as a contract school to accomplish a
22 certain type of activity. They're typically not
23 charter schools, but they might be a particular
24 service, like a preschool service that they might want
25 to fulfill.

1 So the district contracts with the
2 schools. DPS also has some contract schools for
3 specific needs. Maybe it's --

4 Q. What is DPS?

5 A. Denver Public Schools.

6 Q. And do you know some of the contract
7 schools that DPS has?

8 A. As far as I know, DPS has three of them.
9 One has about --

10 Q. Do you have the names, by chance?

11 A. One is a Spanish name. I --

12 Q. Is it Esquilla -- I can't even say it
13 myself. I apologize. I'm not even going to begin to
14 try, because I don't speak Spanish, so -- do you know
15 the other two?

16 A. I'm familiar with Esquela, but the other
17 two -- I think, at one time, there was more than one.
18 And I think there might be just two left. There are
19 possibly the three.

20 Q. May private schools through this contract
21 school program provide complete education packages to
22 schools?

23 A. They do.

24 Q. Is that what DPS has done?

25 A. They have, yes.

1 Q. And does DPS or other school districts
2 who have contract schools receive per pupil funding
3 under the Public School Finance Act for students
4 attending those contract schools?

5 A. They do.

6 MR. BLUE: No further questions, Your
7 Honor.

8 THE COURT: Any further inquiry from
9 the defendants? Cross-examination?

10 MR. DEIHL: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. DEIHL:

13 Q. Good afternoon, Senator King.

14 A. Good afternoon.

15 Q. My name is Colin Deihl. I represent
16 Taxpayers for Public Education. Nice to meet you.

17 A. Nice to meet you.

18 Q. Now, the students in your school in
19 Colorado Springs -- and I apologize. What's the name
20 of that school?

21 A. Colorado Springs Early Colleges. It's
22 one of five early colleges in the state of Colorado.

23 Q. Okay. The students in Colorado Springs
24 Early Colleges are authorized to get this concurrent
25 enrollment under the Concurrent Enrollment Program

1 Act, correct?

2 A. That's correct.

3 Q. And that's a state statute, right?

4 A. That's correct.

5 Q. Is that also known as the Ascent Program?

6 A. Ascent is one of the many concurrent
7 enrollment programs. So it was a specific program
8 inside the concurrent enrollment. They're in the
9 process of blending these after the passage of House
10 Bill 1319.

11 Q. And that statute defines the terms under
12 which a student can participate in that program,
13 right?

14 A. That's correct.

15 Q. And you follow that statute in your
16 school in Colorado Springs?

17 A. I do follow the statute. But I will tell
18 you --

19 Q. If you could just answer my question. I
20 don't need any explanation. Thank you.

21 A. I do not have to follow the statute in
22 Colorado Springs Early Colleges.

23 Q. That was going to be my next question.
24 So you also have a college, correct?

25 A. No. We're a high school.

1 Q. You have a high school, and then there's
2 a technical college associated with that, correct?

3 A. Colorado Technical University is where we
4 are located at. But it's one of several institutions
5 where we send the kids.

6 Q. And a school -- the charter school
7 receives money under the Charter School Act, right?

8 A. Correct.

9 Q. And there is also moneys that are
10 legislated by the legislature for this concurrent
11 enrollment program, correct?

12 A. Well, the money that we use to expend for
13 the kids going to Pike's Peak, UCCS or CTU is the per
14 pupil revenue, PPR, that we get from the state of
15 Colorado.

16 Q. And you get that money because you're a
17 charter school under the state of Colorado, right?

18 A. Correct. We are authorized by the
19 Charter School Institute.

20 Q. If we could look at Exhibit R, please.
21 I'm sorry. I did this yesterday. Exhibit 119. It
22 was Exhibit R to the motion for preliminary
23 injunction. I'm not going to do it again today.

24 THE COURT: Feel free to confuse us at
25 any time. Exhibit 119, right?

1 MR. DEIHL: 119, Your Honor.

2 Q. (BY MR. DEIHL) And if we can take a look
3 at page 6, please. If we can scroll down. I'm sorry.
4 Wrong page. Grant, distribution, and other
5 assistance. Do you see that? Senator King, do you
6 see this document?

7 A. Yes, I do.

8 Q. You're familiar with the Long bill, are
9 you not?

10 A. I am.

11 Q. And this is a section entitled "Grant
12 Programs Distributions and Other Assistance"? Do you
13 see that?

14 A. Yes, I do.

15 Q. And then a couple pages into this
16 document -- two pages later is listed facility
17 schools. Do you see there's a separate line item for
18 facility schools?

19 A. Correct.

20 Q. And facility schools receive funding
21 under the assistance to public schools grant programs
22 distributions and other assistance. Facility schools
23 funding line item; isn't that correct?

24 A. I don't see the end of that line, but
25 that could be where education orphans, for example,

1 receive their funding. It's part of the School
2 Finance Act philosophy, but they probably have several
3 line items.

4 Q. But it's a separate line item, correct?

5 A. Correct.

6 Q. Okay. And all of these programs that you
7 talked about on direct examination are authorized by
8 specific state statute, right?

9 A. Correct.

10 Q. Your school in Colorado Springs has a
11 building that you use, right?

12 A. We lease a building.

13 Q. Okay. The students attend that building,
14 and then they have their concurrent classes at the
15 university, right?

16 A. Correct.

17 Q. What is your salary, as administrator of
18 the Colorado Springs Early Colleges?

19 A. I make \$65,000 a year. And I do not take
20 the salary while I'm in legislative session. So my
21 salary for the year is \$43,333.

22 Q. Thank you.

23 The College Opportunity Fund that you
24 spoke about --

25 A. Correct.

1 Q. -- the money from that fund goes to
2 higher education, correct?

3 A. It goes to higher education. But while
4 students are taking concurrent enrollment while they
5 are still in high school, COF also is used for that
6 particular funding of those courses. It's a total
7 part -- in-state tuition includes the stipend and the
8 portion from the general assembly. So it is used both
9 for kids in high school while they're still attending
10 high school and when they're out of high school.

11 Q. And again, that's authorized by a
12 specific statutory provision in the Colorado statutes,
13 right?

14 A. That's correct.

15 MR. DEIHL: I don't have anything
16 further, Senator King. Thank you for your time.

17 THE COURT: Mr. Langendorf, do you have
18 questions?

19 MR. LANGENDORF: I do, Your Honor.

20 THE COURT: Please don't repeat
21 Mr. Deihl.

22 MR. LANGENDORF: Your Honor, as a
23 preliminary matter, I'd like to move to strike Senator
24 King's testimony, because it goes to programs not at
25 issue in this litigation.

1 THE COURT: Motion is noted. Motion is
2 denied. You may proceed.

3 CROSS-EXAMINATION

4 BY MR. LANGENDORF:

5 Q. Good afternoon, Senator King.

6 A. Good afternoon.

7 THE COURT: Pretty efficient, huh?

8 THE WITNESS: I thought I was giving
9 pretty good testimony. Sorry you don't like it.

10 THE COURT: It's not personal.

11 Q. (BY MR. LANGENDORF) Don't take it
12 personally.

13 Senator King, I represent the LaRue
14 plaintiffs in this matter. It's nice to meet you,
15 sir.

16 A. Nice to meet you.

17 Q. Now, you testified that high school
18 students that attend CSEC -- I can call it CSEC?

19 A. Correct.

20 Q. -- can attend college course -- can
21 attend college, right?

22 A. Correct.

23 Q. And you offer both on-campus and
24 off-campus versions of the college attendance program,
25 right?

1 A. Correct.

2 Q. And for the on-campus version, those
3 classes are held on the grounds of CSEC; is that
4 right?

5 A. They're held on the grounds of CSEC at
6 the Springs Business Park. Springs Business Park has
7 two tenants. It has Colorado Springs Early Colleges
8 and it has Colorado Technical University.

9 So when the kids -- we have -- a portion
10 of our facility is for college prep programs, getting
11 the kids ready for college courses. Then they walk
12 across the parking lot and take the college courses at
13 the Colorado Technical University.

14 Q. So it's in the same office park?

15 A. Yes. It's in the same office park.

16 Q. Okay. And for the on-campus college
17 courses, all of the professors are hired by CSEC,
18 right?

19 A. All the -- let me clarify. We do some
20 master courses during the school day. And all those
21 professors are hired by us and also qualified by CTU.
22 A lot of our students, to complete an associate's
23 degree or a four-year degree like Jenna Rock, started
24 attending quarter courses on a quarter system. Those
25 courses typically start at 5:00 o'clock at night and

1 go till 11:00 o'clock at night. And we do not hire
2 those professors.

3 Q. So for the -- for the on-campus courses
4 you hire -- with the exception of those professors,
5 you hire the professors to come.

6 A. Correct.

7 Q. Okay. And so the off-campus college
8 credit courses. The only students that are eligible
9 for those courses are juniors and seniors without
10 special permission. Is that right?

11 A. No. They are eligible if they qualify --
12 they take the Accuplacement test. And if they qualify
13 and we cannot offer them the course work at CTU, they
14 can go as 9th graders or 10th graders or 11th or 12th
15 graders to Pike's Peak Community College or UCCS.

16 Q. Even the off-campus courses?

17 A. Correct. I am right now trying to get a
18 9th grader admitted to UCCS for specifically a French
19 class.

20 Q. So it takes a special situation for a 9th
21 or 10th grader to be able to attend the off-campus
22 courses, right?

23 A. They have to pass the Accuplacement test.
24 We want mostly 9th and 10th graders to take courses at
25 CTU. But if the course work is not offered at CTU --

1 it's a technical school -- then we allow the kids to
2 go to Pike's Peak and UCCS.

3 Q. But generally speaking, the idea is that
4 the 9th and 10th will take the on-campus courses.

5 A. Correct.

6 Q. Thank you.

7 And all of the off-campus students must
8 sign an off-campus college contract that spells out
9 the agreement between the students and their parents
10 and CSEC, right?

11 A. Correct. Concurrent enrollment.

12 Q. And one of the reasons for that is to
13 make sure that the student understands his obligation
14 to attend the course off campus and to do exactly
15 what's expected of him. Is that right?

16 A. Correct.

17 Q. And so, for example, if the student does
18 not attend the off-campus course, then in some
19 instances the student would have to reimburse CSEC for
20 that cost, right?

21 A. If they do not pass the course. Now,
22 there's two requirements in the contract. One is,
23 they attend the classes. And the other is that they
24 pass the course.

25 Q. And you mean get a grade of C or higher?

1 A. Correct.

2 Q. And so when a student is attending an
3 off-campus course at a private institution, it's fair
4 to say that there is apparatus in place to monitor
5 that student and the education he's receiving and his
6 performance?

7 A. Correct. There is a contract that we
8 function under.

9 Q. Okay. And CSEC itself does not tolerate
10 any discrimination; is that right?

11 A. It does not.

12 Q. That includes religious discrimination.

13 A. That's true.

14 Q. And none of the colleges that we've
15 spoken about here, Pike's Peak or CTU, discriminate on
16 the basis of religion; is that right?

17 A. That's correct.

18 Q. And speaking of CTU, you testified, I
19 think, that several hundred students attend CTU
20 classes?

21 A. Correct.

22 Q. Now, the off-campus portion -- students
23 that attend off-campus classes at CTU, that number is
24 much smaller. It's more like in the range of 20
25 students; is that right?

1 A. We had eight students receive associate
2 degrees from CTU this last year. So all those kids,
3 through completion of their courses, had to attend the
4 courses.

5 Q. So it's actually a fairly small fraction
6 of your enrollment?

7 A. Probably 20 kids attending at any one
8 time. The evening courses --

9 Q. The off-campus courses.

10 A. Oh, the off-campus courses at CTU? I'm
11 sorry.

12 Q. Yes.

13 A. Yeah, about 20. But they're on campus.
14 They're on the same Springs Business Park. So the
15 off-campus schools are Pike's Peak and UCCS.

16 Q. Okay. And I think you testified that you
17 are aware of the basic parameters of the Douglas
18 County voucher or Choice Scholarship Program?

19 A. Correct.

20 Q. And you're also familiar with the charter
21 act -- the Colorado Charter School Act?

22 A. I am.

23 Q. And under that act, the district -- local
24 school district provides 100 percent of the per pupil
25 revenue to the -- to the charter school, minus 5

1 percent of administrative costs, right?

2 A. Up to 5 percent.

3 Q. Up to 5 percent.

4 A. Correct.

5 Q. And then the local school district has
6 the ability to contract -- excuse me. The charter
7 school can then contract with the local school
8 district for additional services, right?

9 A. Typically, special education -- that is
10 correct -- is what they contract back. They buy an
11 insurance policy and contract special ed back to the
12 school district.

13 Q. So the usual practice is that the charter
14 school, what they use the contracting for is for
15 special education? That's what you're saying?

16 MR. BLUE: Objection. Form of the
17 question.

18 THE COURT: Overruled.

19 A. That's typical.

20 Q. (BY MR. LANGENDORF) Okay. And in that
21 scenario, the local school district cannot charge more
22 than a reasonable rate for the services it's
23 providing, right?

24 A. Charge the students a service?

25 Q. I'm sorry. Charge the charter school.

1 A. Oh.

2 Q. It can't charge more than the value of
3 the services it's providing, right?

4 A. Correct.

5 Q. It's not like the local school district
6 can overcharge the charter school for the special
7 education services, for example.

8 A. Well, that's highly debatable, because
9 special education is underfunded at the federal level.
10 And many school districts want to charge a pretty
11 exorbitant amount of dollars for special education
12 services to be delivered under the insurance model, so
13 it can be as much as 6 to 8 hundred dollars per pupil.

14 But it's -- many times it's debated
15 whether that's reasonable.

16 Q. So as a general proposition, the contract
17 must be for a reasonable price, but there's some
18 controversy as to what a reasonable price is in the
19 special education realm. Is that right?

20 A. Correct. And typically the charter
21 school has very little power to negotiate the
22 fairness.

23 Q. And so a local school district could not
24 contract with a charter school and then use excess
25 money -- could not overcharge a charter school and use

1 the surplus to fund other public schools in the
2 district?

3 MR. BLUE: Objection. Lack of knowledge,
4 Your Honor.

5 THE COURT: Overruled.

6 A. No. I disagree. Because a charter
7 school is required to give special education services
8 to a student and maybe, maybe not have severe need
9 students at the charter school, and yet the insurance
10 model is based upon the entire funding of the entire
11 district on the needs of the students.

12 And because the students could be severe
13 needs students in other schools, they do overcharge
14 many times, and it's very unfair. And sometimes, in a
15 way, they do charge charter schools for the
16 appropriate full amount.

17 Q. (BY MR. LANGENDORF) So I think we may
18 have gotten off course. I really didn't mean to focus
19 on special education.

20 A. Okay. Fine.

21 Q. But I take your point to be that in that
22 scenario, it can be unfair when the charter school is
23 overcharged for the services?

24 A. Correct.

25 Q. And just so we're clear, not talking

1 about special education, if a school district
2 contracts with a charter school for services, the
3 school district cannot overcharge the charter school
4 and take the extra money and use it to pay for the
5 other public schools in the school district, right?

6 A. No. I disagree with that. They are
7 characteristically using that money across the entire
8 spread of the school district. So if they take more
9 money back from the charter school for specific
10 services that are allocated to them, then they do
11 spread that cost across the school district.

12 Q. It's not your understanding that there's
13 a provision in the Charter School Act saying that the
14 school district must charge the charter school the
15 actual cost of the services it provides?

16 A. I'm very familiar with it. I was the one
17 that tried to offer that provision in the act. But
18 the reality of it is, the services that are forced on
19 charter schools across the state of Colorado to be
20 bought back are not at the discretion of the charter
21 school. And the discretion of the charter school has
22 services that sometimes they don't need or are not
23 required to have at their school because of the
24 population of the kids that they are serving at their
25 school.

1 And because of that, many times the
2 buybacks are in excess of the cost at that individual
3 charter school. And so as a result, the charter
4 school does help in many cases the rest of the funding
5 of the district.

6 Q. And you think that's unfair; is that
7 right? To the charter school?

8 A. It should be at cost.

9 Q. It should be at cost. And while we're on
10 the topic of charter schools, the charter school
11 application must contain a description of the school's
12 educational program and curriculum; is that right?

13 A. Correct.

14 Q. And are you aware that the charter school
15 application for the charter school in this case does
16 not contain a description of the charter school's
17 education and curriculum?

18 A. Well, it would depend -- I'm not aware of
19 that, no.

20 Q. Okay. But if it didn't -- if the charter
21 school application in this case did not contain such a
22 description, that would be inconsistent with the
23 Charter School Act, right?

24 A. There should be some educational
25 methodology that's going to be used by the charter

1 school as it educates its kids.

2 Q. And that educational methodology should
3 be described in the charter school application, right?

4 A. It should. And it could vary from school
5 to school depending upon whether it's an elementary
6 school, middle school, or a high school. It could
7 have various different types of educational
8 philosophies that it would use throughout the program.

9 Q. That the charter school would use.

10 A. Correct.

11 Q. And the charter school application is
12 also supposed to contain a description of the content
13 standards for the school to use, which are specific
14 statements of what a student should know or be able to
15 do relative to a particular academic area?

16 A. Correct. I think, specifically, they
17 have to meet state standards.

18 Q. And are you aware that the charter school
19 application at issue in this case did not contain
20 that?

21 A. I did not read that portion of it.

22 Q. And if it did not, that would be
23 inconsistent with the Charter School Act?

24 A. Yes.

25 Q. And the charter school application must

1 also state that the instruction and assessment at a
2 charter school will be aligned with Colorado's
3 contents and standards. Is that true?

4 A. They would.

5 Q. And are you aware that the charter school
6 application in this case doesn't state that?

7 A. No. But I'm sure the kids would have to
8 take the CSAP. It is my understanding in all the
9 schools that are under this charter.

10 Q. But that's different than -- okay.

11 And is it your understanding that the
12 charter school application should describe all core
13 content areas plus supplemental or elected areas that
14 there will be in the charter school?

15 A. You're talking about the educational
16 program?

17 Q. I'm talking about the application
18 requirements, that the application describe the core
19 content areas that are going to be taught at the
20 charter school.

21 A. Yeah. It should talk about how they're
22 going to educate the kids. What processes are we
23 going to use to educate the kids, how they're going to
24 get their education, that type of stuff.

25 Q. And you're aware that the -- are you

1 aware that the charter school application in this case
2 doesn't do those things?

3 A. No, I'm not.

4 Q. And if it did not do those things, would
5 that be inconsistent with the Charter School Act?

6 A. It would be inconsistent, but it would
7 also give an opportunity for the charter applicant and
8 the district to make a decision on how to resolve
9 those particular issues.

10 Q. I think you managed -- you mentioned
11 educational management organizations or EMOs?

12 A. Correct.

13 Q. Is that right? And some of those that
14 you mentioned are Edison and Mosaic; is that right?

15 A. Correct. Management.

16 Q. And they deliver online instruction?

17 A. K-12 is the online instruction format
18 that delivers online education.

19 Q. And it's right, isn't it, that the online
20 education -- online education in Colorado cannot be
21 religious or faith-based? Is that your understanding?

22 A. That's correct.

23 Q. And as far as concurrent enrollment goes,
24 all of the programs under the concurrent enrollment
25 umbrella are designed to help high school students get

1 into college or study at the college level; is that
2 right?

3 A. Correct.

4 Q. So there's no -- the concurrent
5 enrollment umbrella is limited to those -- to the high
6 school students; is that right?

7 A. Correct.

8 Q. You discussed the -- what you call the
9 Education Orphan Acts?

10 A. Correct.

11 Q. And I apologize. I'm not sure -- is that
12 part of the Exceptional Children's Education Act?

13 A. Well, when I carried the amendment, I'm
14 not for sure where it went into statute, but I carried
15 it onto the School Finance Act. So I'm assuming it's
16 under the general area where the School Finance Act is
17 described in state statute. I can't quote the exact
18 state location, but it would be something within the
19 School Finance Act section.

20 Q. So you don't know whether it's part --
21 currently part -- under the rubric of the exceptional
22 children's act or --

23 A. Are you talking about special ed?

24 Q. I'm asking you what -- yeah -- whether
25 those are under the same umbrella?

1 A. Well, they would be under the same
2 umbrella, because a lot of kids that are education
3 orphans also need special education, and that service
4 is provided to them at residential treatment
5 facilities.

6 Q. And the education and residential
7 treatment facilities cannot be religious in nature.
8 Is that your understanding?

9 A. They cannot -- it's my understanding that
10 they cannot teach religious instruction. The one I
11 talked about in Denver -- there is one in Denver that
12 is by a Catholic order. That's the only one I know
13 of. But they do not do religious instruction.

14 Q. They don't do that, because they can't do
15 that, right?

16 A. They're prohibited by the -- I think the
17 Department of Human Services is the department that
18 works with them, and also the Department of Education.

19 MR. LANGENDORF: Thank you, Senator. No
20 further questions.

21 THE COURT: Redirect, limited in scope
22 to cross-examination?

23 MR. BLUE: No, sir.

24 THE COURT: Senator King, from one
25 Colorado Springs westsider to another, have a nice

1 day.

2 THE WITNESS: Thank you very much.

3 Appreciate it.

4 THE COURT: If there's no objection,
5 the senator will be excused. Call your next witness,
6 please.

7 MR. BINDAS: Your Honor, the defense
8 calls Mrs. Diana Oakley.

9 THE COURT: All right. Ma'am, would
10 you raise your right hand, please.

11 DIANA OAKLEY,
12 having been first duly sworn to state the whole truth,
13 testified as follows:

14 THE COURT: Please be seated.

15 DIRECT EXAMINATION

16 BY MR. BINDAS:

17 Q. Good afternoon, Mrs. Oakley. Would you
18 please state your name for the record.

19 A. My name is Diana Oakley, O-a-k-l-e-y.

20 Q. And where do you live, Mrs. Oakley?

21 A. I live in Highlands Ranch, Colorado,
22 which is in Douglas County.

23 Q. Thank you. And can you tell us a little
24 bit about your family, please?

25 A. I have been married for 15 years to Mark

1 Oakley, and I have three -- we have three children.

2 Nathaniel is 13, Amber is 10, and Joshua is 8.

3 Q. And do you work outside the home,

4 Mrs. Oakley?

5 A. Yes.

6 Q. And where do you work?

7 A. I work -- I'm an oncology nurse. I work

8 at Cancer Care Center, Cypress Hematology and

9 Oncology.

10 Q. How about your husband? Does he work

11 outside of the home, as well?

12 A. Yes, he does.

13 Q. Where does he work?

14 A. Mark works at Westinghouse Electric

15 Company.

16 Q. Here in Colorado?

17 A. No. He is in South Carolina.

18 Q. And if you don't mind my asking, why

19 does -- why does Mark work in South Carolina?

20 A. Mark was unemployed for two years prior

21 to this employment in South Carolina. It was the only

22 job he could find.

23 Q. I'd like to get back to your children.

24 And we'll start with Amber. What grade is Amber in?

25 A. Amber is in fifth grade.

- 1 Q. And where did she go to school last year?
- 2 A. Eagle Ridge Elementary.
- 3 Q. Is that a Douglas County public school?
- 4 A. It is.
- 5 Q. And are you and Mark happy with Amber's
- 6 progress at Eagle Ridge?
- 7 A. Very happy with Amber's progress.
- 8 Q. And will she be going to Eagle Ridge this
- 9 coming school year?
- 10 A. She will.
- 11 Q. And what grade is Joshua in?
- 12 A. Joshua is going into second grade.
- 13 Q. Okay. And where did he go for first
- 14 grade?
- 15 A. He went to Eagle Ridge Elementary.
- 16 Q. Again, public school?
- 17 A. A public school in Douglas County, yes.
- 18 Q. And were you and Mark happy with Joshua's
- 19 progress?
- 20 A. Very happy with Joshua's progress, yes.
- 21 Q. And will he be going back there for
- 22 second grade?
- 23 A. Yes, he is there.
- 24 Q. And how about Nate? What grade is Nate
- 25 in? Or -- I'm sorry -- Nathaniel. Would you prefer

1 that I call him Nathaniel or Nate?

2 A. I like Nathaniel.

3 Q. Okay. And what grade is Nathaniel in?

4 A. Nathaniel is going into second grade this
5 year.

6 Q. Okay. And where did Nathaniel go to
7 school last year?

8 A. In sixth grade, he was at Eagle Ridge
9 Elementary.

10 Q. And were you and Mark satisfied with
11 Nathaniel's progress at Eagle Ridge?

12 A. No, we were not.

13 Q. Why not?

14 A. Nathaniel has a diagnosis of Asperger's
15 syndrome, which is -- falls on the autism spectrum,
16 and requires a different kind of education. And we
17 were not happy with his progress. He was not
18 academically proficient. Socially, he was -- he was
19 bullied. We are not happy -- we were not happy with
20 Nathaniel's education.

21 Q. Can you tell me what Asperger's syndrome
22 is, and perhaps describe its symptoms?

23 A. Asperger's syndrome falls on the autism
24 spectrum. If you were to think of the spectrum as a
25 hot and warm and cold spectrum, Asperger's falls -- or

1 is on the cold side of autism. So it's a verbal
2 autistic child or adult. There are adults with
3 Asperger's.

4 And it is a -- when I've tried to
5 describe how Nate feels due to his Asperger's, I try
6 to ask an adult to imagine being in a Las Vegas casino
7 and having the flu and having a temperature of 103
8 degrees. And there's people -- there's bells and
9 whistles and lights. You're achy. There's people
10 smoking. You don't -- you don't know what time it is.
11 You can't -- you can't wrap your mind around somebody
12 asking you to deal with money. There is some drunk
13 people next to you that are acting like jerks.

14 It is all-encompassing for him. When he
15 is overstimulated, that is how he feels.

16 Q. So is it correct to say that these are
17 all kind of like a sensory overload that --

18 A. Well, he does have a sensory processing
19 disorder. That is, most Asperger's -- all autistic
20 have a sensory disorder.

21 Q. And how does Nathaniel's Asperger's
22 syndrome affect his performance in school?

23 A. Nathaniel doesn't learn the way other
24 children learn. When he is inside of those four
25 walls, he does not fit. He doesn't understand social

1 cues. He is not -- again, he's not academically
2 proficient, because he's required to study topics that
3 he is not interested in. And -- I'm sorry, Michael.
4 Say that again. How does it affect his --

5 Q. His performance. I think you've done a
6 good job answering that.

7 A. Well, then on CSAPs he is not proficient,
8 according to a state mandated test.

9 Q. CSAP is an acronym that stands for?

10 A. Colorado State aptitude.

11 Q. It's state testing to gauge --

12 A. I'm sorry.

13 Q. Okay. And one more question related to
14 Asperger's syndrome. How does it affect Nathaniel's
15 interactions with his classmates?

16 A. Nathaniel oftentimes will melt down in
17 class, again, because he's in that Las Vegas casino
18 and is so overstimulated and doesn't know how to --
19 how to bring himself back down or back into his skin,
20 and he'll melt down.

21 He'll fall on the floor. He's 13 years
22 old, and so, you know, he will fall on the floor
23 around his classmates. He is not -- he doesn't
24 understand social cues. He thinks that if a kid is
25 sitting across the lunch table from him and takes his

1 lunch from him, that the kid is his friend, which
2 happens a lot. I pay for other kids' food a lot.

3 And he is -- he doesn't learn the way --
4 he doesn't fit inside of a public school box. He
5 can't -- he just doesn't learn that way.

6 Q. And has Nathaniel had any safety issues
7 at school?

8 A. Nathaniel was assaulted on school
9 grounds. He was hit with a pair of nunchucks.

10 Q. Mrs. Oakley, are you familiar with the
11 Individuals with Disabilities Education Act?

12 A. Yes.

13 Q. And if I use the acronym IDEA, would you
14 associate it with that?

15 A. Yes.

16 Q. Did Eagle Ridge provide any educational
17 services to help Nathaniel under that?

18 A. Yes. A Nate has -- I'm sorry.

19 Q. Go ahead.

20 A. Nate has an IEP, which is an individual
21 education program.

22 Q. And were you satisfied with those
23 services last year?

24 A. No.

25 Q. Okay. Will Nathaniel be attending public

1 school next year?

2 A. No.

3 Q. Why not?

4 A. He doesn't fit inside those lines.

5 Q. Where will you be sending Nathaniel for
6 school next year?

7 A. I want to send Nathaniel to the Humanex
8 Academy.

9 Q. Is that a private school?

10 A. It is.

11 Q. Referring back to the IDEA very briefly,
12 are you familiar with the term "free and appropriate
13 public education" as it's used under the IDEA?

14 A. Yes.

15 Q. And is it your understanding that while
16 Nathaniel was at Eagle Ridge, he was entitled to
17 receive a free and appropriate public education?

18 A. He was entitled to a free and appropriate
19 education. He received a free education, but it was
20 not appropriate.

21 Q. Okay. I should say he was entitled to
22 what the district would deem a free and appropriate
23 public education; is that correct?

24 A. The district would deem, but not what
25 parents would deem.

1 Q. Is it also your understanding that by
2 removing Nathaniel from public school and placing him
3 in a private school, that he will forego his right to
4 a free and appropriate public education?

5 A. Yes.

6 Q. And you've still chosen to take Nathaniel
7 out of the public school system?

8 A. Yes.

9 Q. Why will you forego that right to a free
10 and appropriate public education in?

11 A. Because at the free and appropriate
12 public education place, his safety was compromised,
13 which is not appropriate. He was not academically
14 proficient. That's not appropriate.

15 Q. Have you and Mark applied for a Choice
16 Scholarship under the Douglas County Choice
17 Scholarship Program for Nathaniel?

18 A. Yes, we have.

19 Q. And did you receive a scholarship for
20 Nathaniel?

21 A. Yes, we have.

22 Q. And have you and Mark chosen a school for
23 Nathaniel for the upcoming school year?

24 A. Yes, we have.

25 Q. And that school would be -- I'm guessing

1 I know the answer to this already.

2 A. The Humanex Academy.

3 Q. Can you tell us what Humanex Academy is?

4 I know it's a private school, but does it have a
5 special focus or --

6 A. It is a fabulous place to go. It is --
7 they do curtail to special needs kids. They have some
8 dyslexic kids, some other Asperger kids. The
9 teacher-to-parent -- or teacher-to-student ratio is
10 five to one. It is an awesome place.

11 Q. Is Humanex Academy a religious school?

12 A. No.

13 Q. And why did you -- briefly, why did you
14 select Humanex for Nathaniel?

15 A. Nathaniel has shadowed students there two
16 separate times, and he is excited to be there. He's
17 actually excited about school. When he was there, and
18 I watched him in a classroom, he -- I could tell that
19 he was comfortable. The other kids didn't treat him
20 like he was a freak. And, you know, his shoulders
21 came down -- or his ears came down from his shoulders,
22 and he was excited to be there.

23 Q. Are there particular aspects of this
24 school's curriculum that factored into your and Mark's
25 decision to choose this school for Nathaniel?

1 A. Yeah. There is a couple things that we
2 like. One of them being that they follow a parent --
3 or follow a love and logic model.

4 Mark and I have raised the kids under a
5 love and logic parenting model, and which gives kids
6 lots and lots of choices and the ability to make wise
7 decisions and be competent in their decisions. That
8 is one of the number one things that we are really
9 excited about.

10 They'll curtail his -- his second thing
11 would be that they'll curtail his curriculum to him.
12 Another trait of an Asperger kid and autistic kids, as
13 well, is, they usually focus on one subject, and will
14 almost to an obsession. And Nate likes World War II
15 history. He likes -- well, he wants to be a marine
16 biologist. And he likes to talk about parasites.

17 And if, inside of that context, you could
18 teach Nate -- you can teach Nate anything inside of
19 that context, because you're talking about the thing
20 he loves. So we are -- I mean, the Humanex school
21 meets and exceeds that goal.

22 Q. Are there any particular aspects -- this
23 is an unusual question. Are there particular aspects
24 about the school building itself, the Humanex school
25 building, that factored into your and Mark's choice of

1 that school for Nate?

2 A. There is. There is. The actual building
3 has mostly natural lighting. There is -- it's a very
4 quiet school. There's only 50 students there. There
5 are -- Nate -- how do I explain this?

6 When we first walked into the school to
7 take a tour, it was like the Las Vegas casino was just
8 left right outside. It was amazing to be in that
9 building.

10 Q. And why would something like natural
11 lighting or quiet be important for Nathaniel?

12 A. Again, with sensory disorder, Nathaniel
13 can get overstimulated very easily. He can -- he can
14 hear somebody tapping a pencil in another room and not
15 realize that it's getting to him and pushing his
16 buttons.

17 And, you know, it's a very quiet place.

18 Q. Have you enrolled Nathaniel at Humanex
19 yet?

20 A. Yes.

21 Q. And when did you do that?

22 A. July of this year.

23 Q. Did you ever -- did you or Mark ever feel
24 coerced or compelled by the school district to select
25 Humanex for Nathaniel?

1 A. No.

2 Q. Did you or Mark ever feel coerced or
3 compelled by the school district to choose a religious
4 school for Nathaniel?

5 A. No.

6 Q. Did you or Mark -- I'm sorry. Strike
7 that.

8 Did anyone from the school district ever
9 tell you or Mark that there were advantages to
10 choosing a religious school for Nathaniel?

11 A. No.

12 Q. How much is the tuition at Humanex?

13 A. \$17,900.

14 Q. And how much of that will be covered by
15 the Choice Scholarship that Nathaniel receives?

16 A. \$4,575.

17 Q. Have you received any assistance from
18 Humanex itself?

19 A. Yes. They gave us \$2,000.

20 Q. \$2,000. And so roughly what would be the
21 difference between the total tuition and the portion
22 of the tuition which would be covered by the Douglas
23 County scholarship and the 2,000 that you've received
24 in assistance?

25 A. \$11,535.

1 Q. And were you and Mark able to simply
2 write a check for that amount?

3 A. No.

4 Q. How will you and Mark pay for that
5 difference?

6 A. We've had to take out a line of credit on
7 our house.

8 Q. Why did you have to take a line of credit
9 on your house?

10 A. We simply do not have that amount of
11 money lying around.

12 Q. Have you and Mark had to pay anything --
13 any amount to Humanex yet?

14 A. Yes. We had to pay testing fees and an
15 entrance fee, which was \$750.

16 Q. Is that fee refundable?

17 A. No, it is not.

18 Q. If the Choice Scholarship Program is
19 enjoined, will you and Mark be able to keep Nathaniel
20 at Humanex?

21 A. No, we will not be able to do that.

22 Q. Why not?

23 A. We don't have enough money to pay for his
24 tuition.

25 Q. If the program is enjoined and you're not

1 able to send him back to Humanex, does that mean you
2 would send him back to public school?

3 A. No.

4 Q. And why will you not send Nathaniel back
5 to public school?

6 A. His safety has been compromised. He's
7 not academically efficient. He's not happy there.

8 Q. So if the program's enjoined and you
9 won't send Nathaniel back to public school, what will
10 you and Mark do for his schooling this upcoming school
11 year?

12 A. We -- although we remain very optimistic,
13 we have thought we would have to home school Nate.

14 Q. And who will home school Nate?

15 A. I'll have to home school Nate, because
16 Mark is in South Carolina.

17 Q. But you mentioned earlier that you work
18 outside of the home; is that correct?

19 A. I do.

20 Q. And how many days in a typical week do
21 you work?

22 A. I work Monday through Thursday.

23 Q. And what hours on a typical day?

24 A. 7:30 to 6:00 typically.

25 Q. And Mark works in South Carolina.

1 A. He does.

2 Q. How will you home school Nate if you're
3 gone four days during the week and Mark's in South
4 Carolina?

5 A. I am going to have to home school him
6 nights and weekends. I also have a niece that might
7 be able to help out a little bit. I don't know.

8 Q. And would home schooling be a burden on
9 your family?

10 A. It would be a huge burden on everybody in
11 our family.

12 Q. And do you think Nate would -- Nathaniel
13 would enjoy being home schooled?

14 A. Nathaniel would not enjoy being home
15 schooled.

16 Q. Why not?

17 A. Well, I asked him this morning, what do
18 you think about that? And he said, There's too many
19 distractions here. You know, my toys and my games and
20 all this stuff. And he said, there's too many
21 distractions here.

22 Q. Do you have -- do you believe that if
23 Nathaniel were told that he is going to be home
24 schooled, do you think that would sit well with him?
25 Would he take that well?

1 A. No, he would not. No, he would not.

2 Q. I'd like to get back to the Individuals
3 with Disabilities Education Act very briefly. And
4 I'll represent to you the plaintiffs have maintained
5 in their briefing that there is a mechanism by which
6 you and Mark could place, on your own accord,
7 Nathaniel in a private school and then seek
8 reimbursement from the school district to cover that
9 money. Are you familiar with such mechanism under the
10 IDEA?

11 A. Yes, I am.

12 Q. Did you ever investigate that mechanism
13 or that procedure?

14 A. Yes, we did.

15 Q. Did you ever pursue that procedure?

16 A. Pursue meaning -- we did hire an
17 applicant for Nathaniel, and went to this school
18 during an IEP meeting, and tried to hash out
19 information.

20 When we met with her later, asking if we
21 can use that mechanism, it would entail hiring a
22 lawyer. It would be a very lengthy process. While
23 Nate's in school, we've paid for the tuition, lengthy
24 process, with little likelihood that that would be --
25 that we would retain -- or get money from the

1 district.

2 Q. Do you and Mark have any desire whatever
3 to sue the school district?

4 A. I do not want to sue the school district.

5 Q. Do you or Mark have the money to hire an
6 attorney to sue the school district?

7 A. We do not have the money to hire an
8 attorney.

9 Q. Now, I'll ask you one last question,
10 Mrs. Oakley. What do you, as Nathaniel's mom, believe
11 the best educational option for your son is?

12 A. I think the best educational option for
13 Nathaniel is at the Humanex Academy.

14 MR. BINDAS: No further questions, Your
15 Honor.

16 THE COURT: Cross-examination?

17 MR. DEIHL: Very briefly, Your Honor.

18 THE COURT: There's that phrase again.
19 Mr. Deihl, go right ahead.

20 CROSS-EXAMINATION

21 BY MR. DEIHL:

22 Q. Mrs. Oakley, my name is Colin Deihl.
23 Nice to meet you.

24 A. Hi, Colin.

25 Q. You spoke of your efforts to hire an

1 advocate for Nathan meet with the Douglas County
2 school district to get an appropriate education for
3 him, and that that didn't work, correct?

4 A. Correct.

5 Q. Did Douglas County inform you that you
6 were entitled to receive a free and appropriate public
7 education for Nate, even if that meant they had to pay
8 for Nate to go to private school?

9 A. Did they inform me of that?

10 Q. Yes.

11 A. No.

12 MR. DEIHL: I have no further questions.
13 Thank you.

14 THE COURT: Any redirect limited to
15 that brief cross-examination?

16 MR. BINDAS: No, Your Honor.

17 THE COURT: All right. Ms. Oakley,
18 thank you for your patience and your time today.

19 THE WITNESS: Thank you.

20 THE COURT: You may step down.

21 Defense, call your next witness, please.

22 MR. LYONS: Your Honor, we have two
23 witnesses remaining who are listed, but I have good
24 news. We're not going to call one of them,
25 Mr. Rudolph. And with respect to the other, which is

1 a representative of Valor High School, we have taken
2 the court's suggestion and would present his testimony
3 by a limited affidavit, which I have given to counsel,
4 and would tender it to the court.

5 This is provided for by local rule of
6 practice 121, section 1-5, subsection 2, which deals
7 with motion practice in hearings such as this.

8 THE COURT: Okay. Is he presently
9 available?

10 MR. LYONS: He is not, Your Honor.

11 THE COURT: All right. So does that
12 conclude the defense evidentiary presentation?

13 MR. LYONS: It does. I'd like to tender
14 the affidavit and have it marked as an exhibit.

15 THE COURT: Let's mark it as an exhibit
16 so it's in the record. I believe you're up to HHH.

17 MR. LYONS: I think that's correct, Your
18 Honor. I might just double-check.

19 THE COURT: Go right ahead.

20 MR. LYONS: I think that's right.
21 Defendants would offer Exhibit HHH.

22 THE COURT: Any objection to
23 Exhibit HHH?

24 MR. DOUGLAS: Yes, Your Honor. We would
25 object as hearsay. I understand that under rule

1 43(e), which Your Honor referenced the other day, it
2 says, when a motion is based on facts not appearing of
3 record, the court may hear the matter on affidavit to
4 be presented by the respective parties."

5 This motion, our preliminary injunction
6 motion, is based on facts appearing on the record over
7 the next three days, a very extensive record. This
8 witness is a local witness. The school is in
9 Highlands Ranch. And defendants, until today, said
10 they may or may not call him. And then just today
11 said, well, we have an affidavit and handed it to us.
12 The first time we saw it was less than five minutes
13 ago.

14 If the affidavit had been given to us
15 last Friday, we could have considered whether to
16 subpoena him for cross-examination. I was prepared
17 today to cross-examine him and would like to
18 cross-examine him. And I believe I have a right to
19 cross-examine him on this information that's contained
20 in the affidavit. There's no reason he can't be here
21 live. And I think he should either be here live or
22 not present testimony. So we do object.

23 THE COURT: Mr. Douglas, typically my
24 practice is to -- in this scenario is to either have
25 mutual presentation of affidavits by 43(e) or

1 submission of partial testimony by affidavit with the
2 opportunity to cross-examine. That's why I asked if
3 he's present.

4 Nonetheless, reviewing the rule and
5 understanding my own discretion and your objection,
6 I'm going to overrule the objection. I'll accept the
7 affidavit for the limited purpose that it's been
8 offered.

9 That concludes the defendants'
10 evidentiary presentation. Is there any rebuttal
11 testimony?

12 MR. McCARTHY: Your Honor, no rebuttal
13 testimony.

14 THE COURT: Okay. Why don't we do
15 this. Since I expect that you all wanted to complete
16 these proceedings with sterling closing arguments, I'm
17 going to take a recess and let the court reporter
18 regain her finger faculties. And then we'll come
19 back, let's say, in about 20 minutes. And we'll get
20 started with closing arguments. So about 3:00
21 o'clock. Court's in recess.

22 (Recess taken, 2:37 p.m. to 3:05 p.m.)

23 THE COURT: Please be seated.

24 Returning to the record in 11CV4424. The
25 court has heard all the presentation of evidence.

1 We're going to proceed to closing arguments. Before I
2 do that --

3 (Pause in the proceedings.)

4 THE COURT: Mr. McCarthy, I've read the
5 bench memorandum that you gave me yesterday, so I have
6 just a couple questions about it.

7 Your instincts were correct. I'm not
8 inclined to change my mind, but I did want to get some
9 additional record briefly.

10 On the question of the appropriate burden
11 of proof, and in particular the inquiry that's being
12 made, I recognize the case is styled as a rule 65
13 preliminary injunction. And for the reasons I
14 previously stated, in citing the Allen case, my
15 assessment was that realistically the proceedings this
16 week were directed toward a request for relief that
17 was more in line with the mandatory. So that was the
18 record I made before.

19 MR. McCARTHY: Understood, Your Honor.

20 THE COURT: And so the information you
21 provided to me in this bench memorandum -- I'm sure
22 counsel for the defense has seen it -- is not
23 inconsistent with what you've said before. But I
24 wanted to make sure that I'm not missing something
25 here, and that my recollection was the complaint

1 sought declaratory relief, specifically a declaration
2 by the court that the provisions -- or that the Choice
3 Scholarship Program in Douglas County is
4 unconstitutional on any number of grounds, and also
5 fails to comply with the statutory criteria, not the
6 least of which is the Public School Finance Act.

7 MR. McCARTHY: That's correct, Your
8 Honor.

9 THE COURT: I've spent the better part
10 of three days now, and with you and your colleagues'
11 wonderful efficiency, which I will applaud in this
12 case, to get through all of the stuff that we've
13 heard. But I've heard a wealth of evidence and
14 testimony on these issues, including the
15 constitutionality claims, and I understand you're
16 rebutting or supporting your ability to have
17 ultimately success on the merits of the claim at
18 trial.

19 I'll go back to my initial inquiry in
20 terms of when I made my initial record, which was,
21 what relief are you seeking that I can't address in
22 this proceeding? And I'll give you a point of where
23 I'm coming off from.

24 My concern is, this situation cries out
25 for a resolution ASAP, for you all and your clients

1 and the concerns that have been raised in this case,
2 and these folks and their clients and the concerns
3 that have been raised in their case. It's a
4 difficult, challenging environment.

5 And so I understand that typically you
6 come in on this type of matter and you file a
7 preliminary injunction, and we have a brief hearing
8 and I make a ruling, and if it's granted, somebody has
9 some relief, take that up. Occasionally the Supreme
10 Court will take a look at it, either by way of a rule
11 21 or otherwise, or there will be some additional
12 appellate review. But ultimately, the matter comes
13 back down for another hearing, evidentiarywise.

14 But my assessment was, there wasn't
15 anything in a subsequent evidentiary hearing that I
16 wasn't going to hear in this case. Perhaps more of
17 it, which would then subject it to an assessment of
18 whether it be cumulative evidence beyond what I've
19 already heard.

20 Does that make sense? I might not be
21 being clear. I wanted to make sure I'm not missing
22 something. You put in your brief -- your
23 memorandum -- bench memorandum -- excuse me -- the
24 specifics of what you were claiming and the
25 distinction between the preliminary injunction relief

1 that you hope with the lesser burden of proof rather
2 than my intention to evaluate the evidence in this
3 case under the higher burden of proof.

4 Am I missing something there? Is there
5 something else that you would introduce at trial
6 beyond the evidence we've heard in this case?

7 MR. McCARTHY: Your Honor, the way I
8 would respond to the question is that because there
9 hasn't been any discovery of significance yet, there
10 may well be additional information.

11 But to get more to the point of what
12 you're saying, the reason we submitted a bench
13 memorandum to the court is because we have some
14 concern that the Colorado appellate courts, frankly,
15 with the Allen case, has created some confusion and
16 ambiguity.

17 THE COURT: Thank you.

18 MR. McCARTHY: Welcome to the world, I
19 guess.

20 Has created some confusion and ambiguity
21 about the standard that applies to a mandatory
22 injunction. And what we were trying to -- what we
23 were trying to share with the court is that the nature
24 of the relief that we seek here is not causing -- it's
25 not like a busing case, if you will, where, you

1 know -- or a case where -- the court's probably
2 familiar with the situation where the state was sued
3 over the system for distributing welfare gains, where
4 there was ongoing supervision by the court, where, you
5 know, you, Your Honor, would have to overlook the --
6 as they called it, the dismantling of the system.

7 That's not the relief that we're seeking
8 here. And we believe that properly interpreted, under
9 the facts of Allen, which would have required the city
10 to do stuff, to build culverts, that the higher
11 standard applies to those kinds of injunctions. And
12 this injunction is not that kind of injunction, and it
13 should, therefore, not be subject to that higher
14 standard. So that's a real critical point that we're
15 making.

16 The related point, but it's a different
17 one, relates to -- I guess it's the notion of judicial
18 conservation of resources, for lack of a better word,
19 which is sort of -- you know, to use a baseball
20 analogy, it's sort of hit and miss their pitch. And
21 what we have -- what we have presented to the court is
22 a motion for preliminary injunction that seeks to
23 preserve the status quo, that is prohibitory in
24 nature. And what we are saying to the court is,
25 please stop this now.

1 And the thing that I think probably every
2 lawyer in this courtroom realizes is that, in all
3 likelihood -- and I know the order's going to be
4 written to discourage anybody who loses from trying to
5 do this, but in all likelihood, somebody's going to
6 appeal. Somebody's going to appeal the preliminary
7 injunction ruling. And so for that reason we think
8 that it is truly prohibitory. It's preservation of
9 the status quo so that we don't go further down this
10 road.

11 So I don't know if that's helpful at all,
12 Your Honor, but I'm trying to -- I'm trying to
13 address, actually, I think, the confusion that the
14 Allen case has created for all of us in trying to
15 determine what the standard is.

16 Having said all that, we respect the
17 court's ruling. And if the court, after reflecting
18 further upon hearing final argument, closing argument,
19 decides that that's the standard that you need to
20 apply, we're going to argue it to you. I mean,
21 that's --

22 THE COURT: That's why I'm talking
23 about it now.

24 MR. McCARTHY: And I appreciate that,
25 Your Honor. We're going to argue it to you on the

1 assumption that you're going to hold us to a high
2 standard. So we gave you the bench memo, Your Honor,
3 just to ask that you reflect on this and give some
4 consideration to potential confusion that we think
5 that Allen has created.

6 THE COURT: Okay.

7 MR. McCARTHY: I hope that's helpful.

8 THE COURT: I think it is. Mr. Lyons,
9 did you need a word on that issue?

10 MR. LYONS: Well, Your Honor, what the
11 plaintiffs are trying to do here is put a square peg
12 in a round hole. This is not about preserving the
13 status quo. The status quo ended on March 15th when
14 this program was adopted and began to be implemented.

15 It's in implementation now. They want an
16 order to stop the program. That's not preserving the
17 status quo. That's point number one.

18 Point number two, I disagree that there's
19 confusion in Allen. The facts may be different, but
20 the test in Allen is, what is the effect of the relief
21 you seek. The effect they seek -- the relief they
22 seek in their complaint is declaratory judgment, that
23 this CSP program is unconstitutional. That's exactly
24 the same relief, by way of effect, that is sought by
25 this injunction. Allen couldn't be clearer.

1 You have to prove that by clear and
2 certain evidence. And it's only granted in rare
3 circumstances. I think that's where we are.

4 THE COURT: Okay. Well, I appreciate the
5 additional words and the opportunity to reflect
6 Mr. McCarthy provided me. So it is an interesting
7 question, and we'll find out soon enough what you all
8 think about it.

9 So I am prepared to hear closing argument
10 if counsel are ready to proceed. Mr. Douglas, you're
11 sitting on the edge of your chair.

12 MR. DOUGLAS: Thank you, Your Honor. We
13 are ready to proceed.

14 THE COURT: All right. You have 30
15 minutes. Divide it how you will. Do you know how you
16 want to divide it?

17 MR. DOUGLAS: Yes. I'm planning to
18 divide it equally. 15 minutes, myself and
19 Mr. McCarthy.

20 THE COURT: Fair enough. You may
21 proceed.

22 MR. DOUGLAS: Thank you, Your Honor. And
23 I would like to again thank the court for making this
24 much time for hearing this important case. I'm going
25 to use my time this afternoon to discuss the merits of

1 the plaintiffs' claim under the primary religion
2 clauses of the Colorado Constitution in light of the
3 evidence that was presented over the past few days.

4 Mr. McCarthy is going to discuss some of
5 the other claims and also the other factors that the
6 court must consider in reaching its decision.

7 And what we've seen over the last few
8 days is that there's a reason that no other school
9 district in the last 135 years in Colorado has tried
10 to do what Douglas County is attempting to do with
11 this program. And that's because the evidence
12 overwhelmingly demonstrates the multiple ways in which
13 this program violates the Colorado Constitution.

14 And what I'm very interested in over the
15 last few days is that in the end, the underlying facts
16 supporting these violations were not really disputed
17 by the defendants during the course of the hearing.
18 And I want to talk about that in a little bit of
19 detail right now.

20 I want to turn first to the elements of
21 article 9, section 7 of the Colorado Constitution, and
22 just break it down.

23 "No school district shall pay from any
24 public funds or moneys whatever" -- it's not disputed
25 that we have a school district paying with public

1 from the increased enrollment from the program will
2 help support Lutheran in making payments towards a 10
3 million dollar loan that comes from a bank that's
4 actually part of the Lutheran Church.

5 Again, this evidence was not disputed.
6 And those are -- those are the elements. That's it.
7 That's article 9, section 7. That's clear and certain
8 evidence of a violation of article 9, section 7.
9 Under any standard applied by the court, we meet that
10 standard.

11 Now, the defendants' response to this is
12 exactly what I said it would be in opening. They say
13 that since the checks are made out with the parents'
14 names on them, there is no violation, even though the
15 checks can only be restrictively endorsed by the
16 parents over to the school.

17 But what did the evidence show on that
18 point? The evidence from Dr. Cutter was that the only
19 reason the district makes the checks out to the
20 parents is to try to get around the constitution.
21 There's no other reason, he said, behind that policy.
22 And there was no evidence to the contrary.

23 Dr. Cutter also said that the reason the
24 checks are mailed to the schools, even after they put
25 the parents' names on them, is so the district can

1 make sure the money gets where it is intended to be.
2 Those are his words. The district is paying the
3 school. That's what it intends to do, and that's what
4 it does. Putting the parents' names on the checks is
5 an obvious and intentional ruse done for the sole
6 purpose of trying to find a loophole in the
7 constitution. And if that's all it takes to get
8 around such a blatant violation of article 9,
9 section 7, then that provision is meaningless.

10 Article 2, section 4, no person shall be
11 required to attend or support any ministry or place of
12 worship, religious sect, or denomination against his
13 consent. Again, the evidence clearly established that
14 state taxpayer dollars are going directly to churches,
15 and some of these schools are part of churches, and
16 also schools that are directly controlled by churches.
17 That's undisputed, and that constitutes compelled
18 support.

19 It's also undisputed that almost all of
20 the private school partners compel attendance at
21 religious worship and other services. Now, all the
22 other evidence that was presented about the religious
23 instruction that is infused in these schools'
24 programs, curriculum, and all their activities also
25 relate to this provision and article 9, section 8.

1 But I want to talk specifically now
2 about article 9, section 8. I'm sorry. Article 9,
3 section 7. All three of those provisions are related
4 to the evidence about the curriculum and religious
5 instruction. But article 9, section 8, specifically
6 states you cannot have a religious test for
7 qualification as a condition of admission. You cannot
8 have a requirement to attend or participate in any
9 religious service whatsoever. And no sectarian tenets
10 or doctrines shall ever be taught in the public
11 school.

12 Now, again, the evidence that all that is
13 going on is undisputed. It wasn't challenged, and
14 there was no contrary evidence.

15 You heard specific testimony and evidence
16 about how these schools discriminate in enrollment
17 decisions on the basis of religion, and how that is
18 specifically permitted under the program policy for
19 them to be able to do that.

20 And as I just mentioned, these schools
21 also require attendance at religious services, and the
22 opt-out provision in the program says they still have
23 to go to the services. They can just sit quietly.
24 And the evidence was overwhelming that a religious
25 document is the foundation for the entire curriculum

1 in some of these schools.

2 So the only thing in dispute on this one
3 is whether these are public school students. Douglas
4 County wants to say, well, even though we're getting
5 the money for them, because we're counting them as
6 public school students, they're really private school
7 students, so this -- this section of the constitution
8 doesn't apply.

9 But the evidence shows that Douglas
10 County set up a charter school, the one with no
11 building, no classrooms, no teachers, no books,
12 nothing at all relating to the education of students.
13 A charter school that the program students do enroll
14 in so they can be counted for the state money. That's
15 a public charter school of Douglas County.

16 And I do want to clear up one quick point
17 of confusion that I think came out during Dr. Fagen's
18 testimony about the charter school enrollment. If we
19 can put up Exhibit 5, please. This is in evidence.
20 This is the Choice Scholarship application. That's
21 the charter school that's been created that the kids
22 are going to enroll in and the program be administered
23 through this school.

24 If we look at page 8, near the bottom, it
25 lists the enrollment policy. It says, "To be eligible

1 for enrollment in CSS" -- the Choice Scholarship
2 school, the charter school -- "a student must qualify
3 and receive a DCSD Choice Scholarship" -- so they have
4 to get one of the vouchers -- "be accepted and attend
5 a private school partner."

6 So it is a condition of enrollment in the
7 charter school that administers the program that
8 you've been accepted and attend one of the private
9 schools. And those are the private schools that
10 openly discriminate in their admissions, and
11 extensively teach the students religious doctrine.

12 We even saw an e-mail from Denver
13 Christian Schools, it's Exhibit 87, saying that they
14 would try to steer families away during the
15 application process if the families don't share the
16 school's religious beliefs.

17 And Dr. Cutter testified that that's just
18 fine under the program policy. In fact, he heard
19 similar thoughts from other superintendents at some of
20 these religious schools. Subjecting public charter
21 school students to religious indoctrination and
22 enrollment discrimination is a third clear and certain
23 violation of the Colorado Constitution.

24 And defendants' own expert, Dr. Glenn,
25 testified that the language of these provisions in the

1 Colorado Constitution was intended to keep public
2 funds from going to private and religious schools.
3 And that's exactly what Douglas County is trying do.

4 Now, Dr. Glenn went on to say that he
5 believes there was anti-Catholic sentiment behind
6 actually five separate Colorado Constitution
7 provisions 135 years ago. And defendants asked this
8 court to essentially repeal those provisions of the
9 Colorado Constitution based on Dr. Glenn's testimony
10 about what he believes was in the minds of those
11 framers 135 years ago, despite the fact that we don't
12 even have a transcript of what was talked about.

13 But more importantly, defendants cite no
14 legal precedent or authority for such a radical
15 request. And the evidence that was presented is
16 speculative, at best, about the motives of these
17 particular individuals who framed this constitution.

18 But, Your Honor, one of the great things
19 about our constitution is that it is a living
20 document. It can be amended or supplemented. In
21 fact, every election cycle we've seen how easy it is
22 to at least put an amendment on the ballot in this
23 state. And there are specific procedures for doing
24 that.

25 Asking this court to throw out five

1 sections of the Colorado Constitution is not one of
2 those procedures, and that's not what this case is
3 about.

4 Article 9, section 7, along with the
5 other provisions in question, have been the law of the
6 land for over a century. And this program violates
7 the specific and detailed prohibitions against public
8 funding of religious schools and the teaching of
9 religious doctrines in those schools that were
10 included in that original constitution.

11 So what else do the defendants say when
12 faced with this plain language that prohibits exactly
13 what they're trying to do? They claim that federal
14 cases such as *Zelman versus Simmons Harris* have
15 already decided this case and control this court's
16 decision. Once again, if you can't win the fight
17 you're in, try to pick another fight.

18 First of all, there's no federal
19 constitutional claim in the complaint in this case.
20 There are multiple claims relating to multiple
21 separate specific religion clauses in the Colorado
22 Constitution, each of which is far more detailed and
23 specific than the First Amendment. And as to those
24 Colorado provisions, Colorado law controls. *Zelman*
25 has no application in this case.

1 It's the Americans United decision we
2 need to look at, the Colorado Supreme Court. And
3 based on the evidence before the court, the Americans
4 United decision strongly supports a finding that this
5 program violates the Colorado Constitution. I noted
6 for the court in opening statement the key factors
7 from the Americans United decision, which related to a
8 number of things: The lack of control of the colleges
9 that were involved in that program by churches and
10 religious faiths, the fact that the colleges were
11 providing a non-religious education to their students,
12 and that there was, quote, little risk of the grant
13 money, the public money seeping over, as they said,
14 into religious instruction or other activities or
15 religious activities, and specifically there was no
16 religious bent in the curriculum. And what Your Honor
17 heard over the last few days could not be more
18 different.

19 These private partner schools, many of
20 them are entirely religious, have no secular component
21 at all.

22 Dr. Cutter admitted that many schools
23 embed religious studies in all aspects of their
24 curriculum, and even participating schools. And the
25 school materials themselves, the applications, the

1 websites, only a fraction of which were shown to the
2 court during the trial -- they are all in evidence.
3 They demonstrate the all-encompassing nature of
4 religious instruction at these schools.

5 One quick example that we did look at, in
6 Exhibit 88, the Rock academy states, "We integrate
7 faith into every aspect of our school day."

8 And the evidence showed more than just
9 religious instruction as in a Bible or in a theology
10 class. Mr. Bignell and Mr. Gehrke and the school
11 exhibits in evidence discuss the extensive religious
12 aspects of the program.

13 Mr. Gehrke at Lutheran High even
14 described his school as a ministry that provides
15 ministry to the students. A ministry of the Lutheran
16 Church. And part of providing ministry is an attempt
17 to convert the students to the Lutheran religion.

18 So under the analysis of Americans
19 United, the factors that the court considered and how
20 the evidence applies to those facts strongly supports
21 a finding that plaintiffs have met their burden of
22 establishing clear and certain violation of the
23 Colorado Constitution.

24 Now, speaking of that all-encompassing
25 instruction, I think the story of the opt-out

1 provision that we heard a lot of evidence on really
2 goes to the heart of what is going on with this
3 program. Originally, and again solely as an attempt
4 to try to get around constitutional problems, the
5 district proposed that the program students would be
6 able to opt out of both religious services and
7 religious instruction at these schools.

8 What the private schools bought, the
9 religious schools said that proposal is not going to
10 work. They said religious beliefs and instruction are
11 such an indivisible part of everything that goes on in
12 our schools, that would be a deal breaker. A number
13 of them said that, and we saw the evidence of that.

14 But as Dr. Cutter testified, it was very
15 important for Douglas County to get the religious
16 schools to participate. So the district agreed to the
17 watered down opt-out that exists today, which is not
18 much of an opt-out, according to the district's
19 attorney, Mr. Ross.

20 And in the end what this means is that
21 the program students, if they want a voucher, have to
22 sit through religious instruction and faith woven into
23 everything that goes on in these schools. And they
24 still have to attend the religious services, although
25 they can sit quietly, as long as they don't call

1 attention to the fact that they're not actively
2 participating.

3 So under those circumstances, if we want
4 to talk about choice -- and that's much of what the
5 defendants want to talk about -- under those
6 circumstances, parents are left with little, if any,
7 actual choice.

8 The evidence demonstrated the extremely
9 limited number of non-religious schools at any level.
10 And at the high school level, other than Humanex
11 Academy serving a very limited number of special needs
12 students, there is not a single non-religious school.

13 So out of the 58,000 students in Douglas
14 County public schools, the ones who do not share the
15 religious beliefs of the private schools in the
16 program, which are almost exclusively schools of the
17 christian faith, they have little to no choice. At
18 the high school level, they have no choice at all.

19 And not only do they have no choice,
20 they're not welcome at many of the schools, because
21 they don't share the same religious beliefs.

22 And again, for the parents who want to
23 send their children to these schools, they have every
24 right to do that, but public taxpayer funds cannot be
25 used to fund it.

1 The program is unconstitutional. The
2 evidence is clear, and the underlying facts are not
3 disputed. We understand that it will not be an easy
4 decision for Your Honor to issue an order that would
5 stop the program, and we do not make that request
6 lightly.

7 Mr. McCarthy is going to discuss the
8 balance of the equities. But in the face of such
9 clear specific constitutional provisions that prohibit
10 exactly what the district is trying to do, it cannot
11 be allowed to go forward.

12 Thank you.

13 THE COURT: Thank you, Mr. Douglas.

14 MR. McCARTHY: Your Honor, Michael
15 McCarthy, appearing for taxpayers and the Barnards.
16 First I'm going to address, Your Honor, under the
17 Rathke standard and the clear and certain direction
18 that you provided briefly, the likelihood of success
19 on the merits on the principal claims that relate to
20 the non-religious issues.

21 And specifically, Your Honor, those
22 claims are article 9, section 2, requiring a thorough
23 and uniform and free public education. Article 9,
24 section 3, requiring that state school lands funds not
25 be used for anything other than public schools. And

1 article 9, section 15, which requires that local
2 control be exerted.

3 Your Honor, in my opening statement, I
4 pointed out to the court that what we believe the
5 evidence would show is that the factors -- the facts
6 that are critical to our burden would not only be
7 clear and certain, that they would be undisputed.

8 Your Honor, as to these claims under
9 sections 2, 3, and 15 of article 9, the testimony that
10 you've heard, the evidence that you have seen
11 demonstrates that the facts are undisputed, that
12 Douglas County does not provide a uniform and free
13 education to the children that are involved in this
14 program.

15 Specifically, Your Honor, the court was
16 able to hear directly from Dr. Cutter and from
17 Mr. Carson that the students that are involved in this
18 program who go to schools where the tuition exceeds
19 the amount of the scholarship program do not get a
20 free education. If we were moving for summary
21 judgment, Your Honor, we'd be entitled to summary
22 judgment on those grounds. We are certainly entitled
23 to an injunction. The facts are undisputed that
24 Douglas County does not afford these students a free
25 education.

1 Similarly, Your Honor, the state's
2 witnesses have said that the -- they've said it not
3 only in their brief, they said it on the stand under
4 oath and the documents establish that the moneys that
5 go to Douglas County as part of their per pupil
6 revenue include the state land funds, the state school
7 funds moneys, which must be kept inviolate, which can
8 be used only for public schools.

9 The witnesses said, well, we don't know
10 what happens to that money once it goes to Douglas
11 County. And the record doesn't establish that it does
12 anything other than all the rest of the money does
13 when it goes to Douglas County. And like -- these
14 dollars are not earmarked. They're commingled with
15 all the other dollars that Douglas County gets from
16 its general fund -- allocation from the state, and
17 those moneys go directly, to the extent that they're
18 included, to these private schools. And by virtue of
19 that, article 9, section 3 is violated.

20 And finally, Your Honor, section 15, the
21 requirement for local control, what this case presents
22 is an example of the abdication of local control.
23 What the Douglas County school board here has done is,
24 they have abdicated. They have washed their hands.
25 They have turned over the programs concerning the

1 educational core curriculum to the private students.

2 The court has heard that.

3 I emphasized, Your Honor, in opening
4 statement, and Exhibit 107 on its face will show that.
5 107, the court can see and heard from the witnesses --
6 Dr. Cutter admitted it. Dr. Fagen admitted it. And
7 Mr. Carson, the president of the board, admitted it.
8 The education program, the enrollment policy, the
9 employment policy, the discipline and suspension
10 policy, all of those are completely abdicated and
11 turned over to the private schools. And it's
12 undisputed in the record before the court. There's
13 nothing to contradict that in the record that the
14 court has seen.

15 For that reason, Your Honor, we have
16 satisfied for these claims not only the clear and
17 certain standard. Indeed, Your Honor, the record
18 shows here the facts are undisputed -- they're
19 undisputed in terms of those violations.

20 We turn now, Your Honor, to the issues of
21 balancing the equities and the status quo. And what
22 this really shows, Your Honor, is, when we get to this
23 point of the proceedings, that the hardest job in the
24 room belongs to the person with the black robe. The
25 balancing of the equities in this situation is

1 difficult. We acknowledge that, because we
2 acknowledge that there will be dislocations. There
3 will be dislocations, though, because the status quo
4 was manipulated by Douglas County, because they did
5 everything they could to get out of the blocks as
6 quickly as they could and try to change the facts on
7 the ground.

8 And the court was able to see that again
9 in Exhibit 107, where they said their first payment
10 was going to be made in September. And what they did
11 is, without telling anybody, they started paying out
12 the money in July. They pulled the families in, they
13 pulled the schools in. They created reliance. And
14 now they turned that reliance around and say, you
15 can't change the status quo that we have, in fact,
16 manipulated. Well, the case law says, look at the
17 last peaceable condition that existed between the
18 parties. That last peaceable condition was March
19 14th, 2011, the day before they adopted this policy.

20 And in terms of us acting quickly, Your
21 Honor, the discussions of everything that occurred
22 prior to that time, there was nothing to enjoin before
23 the policy was created on March 15th. And then what
24 the court has heard in terms of the vehicle, the
25 critical mechanism that Douglas County was going to

1 use in order to administer this program, was a Choice
2 Scholarship school. The court heard that from
3 Dr. Fagen; they heard it from Dr. Cutter; they heard
4 it from Mr. Carson. It was the Choice Scholarship
5 school that is the vehicle to accomplish this. And
6 the Choice Scholarship school didn't even come into
7 existence until July 9th.

8 There is no status quo issue in this
9 case. Those facts are undisputed, Your Honor.

10 And in terms of the balance of equities
11 here, I think some of the most compelling evidence
12 that the court heard in that probably came from
13 Mr. Carson yesterday. When I questioned him about
14 what it was that limited the ability of the Douglas
15 County school board to expand this program, to make it
16 bigger, to bring yet more families into it, to bring
17 yet more schools into it. And what Mr. Carson said --
18 and you'll remember the e-mail that Mr. Carson wrote
19 to his colleague at Cherry Creek Mortgage where he
20 said, if this program is successful, we're going to
21 grow it.

22 Now, he tried to back-pedal away from
23 that statement, Your Honor, but you saw it there in
24 writing. And he also said that the only thing that
25 limits their ability to do that is the discretion of

1 the Douglas County school board.

2 So, Your Honor, in terms of the equities,
3 we ask the court to stop this now before they pull yet
4 more families and yet more schools into this.

5 Yes, there are hardships that flow from
6 this. There's no doubt about this. There are
7 hardships to families. We heard just this afternoon
8 compelling testimony from Diana Oakley about the
9 hardships on her family that's involved with this.

10 Well, the response that we have there,
11 Your Honor, is that the Oakleys' tuition at Humanex
12 should be paid by the federal money that Douglas
13 County gets in order to cover special needs children.
14 And you heard her testimony. Nobody at Douglas County
15 told Mrs. Oakley that she could get that covered by
16 federal funds from Douglas County. Just like Douglas
17 County didn't tell anybody that there was litigation
18 likely here.

19 You heard Dr. Cutter answer my questions.
20 You heard Mr. Carson answer those questions. Well, of
21 course, we didn't tell anybody there was litigation.
22 We didn't tell the schools. We didn't tell the
23 parents. Because what Douglas County has done here
24 is, they have pressed the envelope, under article 9,
25 as far as they can.

1 For those who are interested in
2 preserving public education in this state, unharmed by
3 those who wish to push money to private schools, they
4 have gotten in their face as far as they can, Your
5 Honor. And they will keep that. They will keep
6 pressing that envelope unless you stop them.

7 They will keep growing this program, Your
8 Honor, unless you stop them.

9 There's going to be an appeal taken from
10 this either way. And so what we are here today to ask
11 the court to do is to not be distracted by the talk
12 about other programs that are going to be collateral
13 damage. Those programs aren't before this court.
14 Many of those programs involve federal money, but
15 they're not here to be adjudicated, and they shouldn't
16 be considered in deciding whether or not the equities
17 balance in favor of this.

18 What the court, we beg you to take into
19 account is that these program -- they talk about the
20 Blaine amendments infecting the Colorado Constitution.
21 Well, this concept will go viral to a degree to those
22 school districts that want to do it.

23 And what we hear over and over again,
24 Your Honor, is choice. Choice, choice, choice. Well,
25 Your Honor, choice is not the preeminent

1 constitutional value in this state. Choice is an
2 important value, but there are other values and there
3 are more important values. And the values that are
4 embedded in our constitution reflect the fact that we
5 have a social contract in terms of all of us being in
6 this together, to have the strongest possible public
7 school system that we could have.

8 And so we ask Your Honor to enter a
9 preliminary injunction, stop this now. There will be
10 appellate review. Let that appellate review occur,
11 but stop it before yet more families are brought into
12 it, more schools are brought into it, more school
13 districts are brought into it. And let's find out
14 what the constitution really requires.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. McCarthy.

17 Mr. Douglas.

18 MR. HALL: Thank you, Your Honor. Your
19 Honor, I'll discuss the merits of the claims, and then
20 Mr. Lyons will speak, and Mr. Bindas.

21 THE COURT: Do you have a plan on how
22 you want to divide your time, Mr. Hall?

23 MR. HALL: I'm going to take about 15
24 minutes. And then they're going to take less than
25 that.

1 THE COURT: Go ahead.

2 MR. HALL: Thank you. The Choice
3 Scholarship Program provides yet another educational
4 choice to families in Douglas County. Parents may
5 choose from this option or an array of other options.

6 If they choose it, and if they receive a
7 scholarship, then they have a further choice. They
8 may choose from among the partner schools.

9 Receiving a scholarship is in no way
10 contingent upon a child being accepted into a private
11 school. Dr. Fagen testified to this directly in
12 response to your question, Your Honor. She's been
13 charged with implementing this program by the board.
14 She also testified that the program is religiously
15 neutral. And in all material respects, the program is
16 identical to the numerous programs for education in
17 Colorado from pre-K to higher ed. You heard testified
18 during this three-day hearing. All of these programs
19 like the Choice Scholarship Program are religiously
20 neutral and have government money flowing to religious
21 and non-religious organizations.

22 Plaintiffs have from time to time tried
23 to distinguish a few of these programs, but their
24 distinctions are empty. For if article 2, section 4
25 means, as plaintiffs suggest, that no taxpayer

1 dollar -- no taxpayer shall be required to pay taxes
2 that eventually end up supporting a ministry, then all
3 of these programs violate this provision.

4 Likewise, if article 9, section 7 means
5 that no governmental body may ever pay anything that
6 results in aid to a church, then all these programs
7 must come off the books. That these programs remain
8 on the books strongly suggests that the plaintiffs'
9 interpretation of them is incorrect.

10 Both parties agree that Americans United
11 is the most closely analogous Colorado case regarding
12 the religion clauses. Americans United time after
13 time after time noted that the state grants in that
14 case were designed to aid the student. And as a
15 result, any aid to Regis College was only incidental
16 and an irrelevant by-product.

17 In the language of article 9, section 7,
18 the state funds were not in aid of Regis College.
19 They were in aid of the student.

20 Now, plaintiffs try and work with
21 Americans United by relying on these other factors.
22 Those factors in Americans United are attributable to
23 two interrelated things. First, in writing the state
24 aid statutes at issue in that case, the legislature
25 was relying on United States Supreme Court precedent

1 at that time. It's right up front at the outset of
2 the opinion.

3 The court says, on the beginning of page
4 1075, quote, in an attempt to conform to First
5 Amendment doctrine developed by the United States
6 Supreme Court, the statutory grant program expressly
7 excludes the institutions which are, quote, sectarian
8 and theological. End quote.

9 To underscore this same point, in the
10 middle of that sentence, the court drops the footnote,
11 footnote 1, and gives a long discussion of legislative
12 history, including a quote from the latest sponsor.
13 And that quote is, "We do have some recent Supreme
14 Court decisions on this particular question." And the
15 key words are "pervasively sectarian."

16 The Americans United court then
17 discusses the six pervasive sectarian factors from the
18 statutes at issue in that case. Again and again, it
19 draws on those factors throughout its opinion.

20 The second piece that generates these
21 other factors that plaintiffs rely on is the Americans
22 United court itself relied on U.S. Supreme Court
23 precedent at that time. Hence, there's a long
24 discussion about statute clause in cases like Romer
25 and Tilton and Hunt. These two things explain the

1 other factors plaintiffs would like you to rely on.

2 However, now in 2011, the foundations for
3 these other factors have completely disappeared. As
4 I'll discuss in a minute, First Amendment
5 jurisprudence in the school area moved on to Mueller,
6 Witters, Zavrilla, and most importantly Zelman.

7 Second, the 10th Circuit in Colorado
8 University expressly overruled the pervasive sectarian
9 statutes and approach on which these other factors
10 were based. Indeed, the 10th Circuit found that such
11 inquiries into a school's religious views both
12 constitutionally unnecessary and offensive. The 10th
13 Circuit wrote, quote, the First Amendment does not
14 permit government officials to sit as judges of the
15 indoctrination quotient of theology classes.

16 These points I'm making now about these
17 other factors in Americans United are not mine.
18 They're a mere summary of what the 10th Circuit talks
19 about in Colorado christian. The principles that
20 remain from Americans United are government neutrality
21 and student choice. And the Choice Scholarship
22 Program embodies both of them.

23 Now, note further that when Americans
24 United looked to the closest First Amendment
25 precedent, that was not unique under Colorado law.

1 Far from it. Rather, in every Colorado appellate
2 court case interpreting our state's religion clauses,
3 our courts have looked to the closest federal
4 precedent and interpreted our religion clauses in
5 harmony with the First Amendment. The cases,
6 Zavrilla, Young life, Conrad 1, Conrad 2, Freedom From
7 Religion Foundation and Americans United, just to name
8 a few, all take this approach.

9 Now, plaintiffs ask you to disregard this
10 precedent and strike out in a new direction. That new
11 direction takes you into the Blaine thicket. You
12 heard the testimony today from Professor Glenn,
13 anti-Catholic and anti-immigrant, bias has left a
14 stain on our constitutional history, which our courts
15 up to now have not followed.

16 And rather than follow the plaintiffs
17 into that unchartered territory, this court should
18 follow Colorado precedent, and that means looking to
19 Zelman. There the United States Supreme Court
20 addressed a materially indistinguishable elementary
21 and secondary school Choice Program. The Zelman court
22 upheld that Ohio program, because there is no
23 constitutional bar to, quote, neutral government
24 programs that provide aid directly to a broad class of
25 individuals who, in turn, direct the aid to religious

1 schools or institutions of their own choosing. Close
2 quote.

3 Similarly, when, quote, parents are the
4 ones to select a religious school as the best learning
5 environment for their child, the circuit between
6 government and religion is broken.

7 The payment mechanism in Zelman, like the
8 Choice Scholarship Program, is to make the checks
9 payable to the parents, who then endorse them over to
10 the chosen school. The point of that whole exercise
11 is parent choice. It's the parents that are making
12 the choice.

13 Zelman is also instructed on the facts.
14 For instance, in Zelman, 96 percent of students
15 attended religiously affiliated schools. The court
16 found this fact constitutionally irrelevant, saying,
17 quote, the constitutionality of a neutral educational
18 aid program simply does not turn on whether and why in
19 a particular area at a particular time most private
20 schools are run by religious organizations or most
21 recipients choose to use the aid at a religious
22 school. Close quote.

23 I'll make one more point on the religion
24 clauses. It's about article 9, section 8. It forbids
25 imposing religious tests as a condition of admission

1 into any public school.

2 Again, Your Honor asked this question
3 directly to Dr. Fagen: Does Choice Scholarship
4 Program do that? And she answered directly, no, it
5 doesn't. A student may receive a scholarship without
6 regard to religion and without regard to being
7 admitted to any of the schools.

8 And you heard the testimony clearly from
9 both Mr. Carson and Dr. Fagen that she was directed by
10 the board to implement this program.

11 Article 9, section 8 also forbids public
12 schools from requiring attendance or participation in
13 religious services or teaching sectarian tenets.
14 Neither the Choice Scholarship school nor any other
15 public school in Douglas County does either of these
16 things. It does not require attendance at religious
17 services, and neither is it teaching any sectarian
18 tenets. Religious partner schools do these things if
19 a student chooses them. And the evidence is
20 undisputed that the partners are private schools, and
21 that students may choose these things if they want to.

22 The evidence has been clear throughout
23 that there's no compulsion sending any of these
24 children to any religious schools.

25 Now to turn to the school finance

1 control provisions. I want to begin with article 9,
2 section 2. The language that plaintiffs put up in
3 opening in the PowerPoint says this: The general
4 assembly shall provide for the establishment and
5 maintenance of a thorough and uniform system of free
6 public schools.

7 Note that 9.2's actor is the general
8 assembly. It is the one that owes a duty to maintain
9 a thorough and uniform system of free public schools.

10 Plaintiffs have repeatedly tried to
11 conflate this duty of the legislature with not even a
12 local school district but with one individual school
13 program, the Choice Scholarship Program. They argued,
14 in essence, that since the scholarship program isn't
15 comprehensive in every way they could imagine, it
16 wasn't thorough. And again, the duty is about
17 maintenance of a school system, not one school
18 program.

19 The testimony has been that Douglas
20 County has over 80 traditional public schools, 11
21 charter schools, two online schools, among other
22 options. The Choice Scholarship Program is simply one
23 more choice. If it has any effect on Douglas County
24 schools as a whole, it benefits them.

25 Now, it just so happens, as this court

1 well knows, that genuine article 9, section 2
2 litigation is happening down the hall in the Lobato
3 case. There there are proper plaintiffs talking about
4 whether the general assembly has fulfilled its duty to
5 provide a thorough, uniform system of free public
6 schools. This is not a 9.2 case.

7 If parents want to choose a scholarship
8 program, they can, like other options they can choose.

9 Article 9, section 3. First, we maintain
10 plaintiffs lack standing to bring this claim. On the
11 merits, 9.3 is fundamentally about protecting the
12 statewide Public School Fund from raiding by the
13 general assembly when statewide the entire text of
14 9.3, which is somewhat long, makes that clear.

15 Also, the enabling statute contemplated
16 in 9.3, 22-41-101 and following, if you read that,
17 that also makes clear that what this is about is
18 making sure that funds aren't diverted from the Public
19 School Fund to other parts of the state budget.

20 There is nothing that prohibits districts
21 from spending this money to purchase services from
22 private entities, including private schools. Once
23 distributed to districts, school districts have the
24 discretion, under the Public School Finance Act,
25 22.54-104(1)(a) to spend the moneys as they wish,

1 including paying private schools.

2 And we looked at numerous statutes where
3 this happens again and again and again. If plaintiffs
4 are correct about the interpretation of 9.3, all of
5 those statutes must come off the books.

6 Even if plaintiffs' unprecedented
7 traceability argument about somehow interest from this
8 fund was actually quite small, less than 2 percent,
9 makes its way to a private school, there's
10 unconstitutional action, recall, the percentage is
11 less than 2 percent. That was the testimony. Douglas
12 County holds back 25 percent of the funds.

13 Legislation must be presumed
14 constitutional and, therefore, it must be presumed, if
15 we're going to go down this road, that that tiny
16 fraction of the moneys is withheld within the 25
17 percent.

18 Which brings us to article 9, section 15,
19 local control provision. The cases in this area do
20 just two things. First, local school districts are
21 the actors primarily responsible for providing
22 education to children. Lujan, Owens, Booth, and many
23 other cases emphasize that education initiatives are
24 to come from the bottom up in Colorado. We heard the
25 commissioner of education testify to that effect.

1 Local school boards elected by local
2 voters have the constitutional authority and
3 responsibility, under article 9, section 15, to
4 develop programs to educate children.

5 The second thing these cases teach us is
6 that the tension in this area is between local school
7 districts and the state. 9.15 cases are about whether
8 the state has encroached too far into local control.
9 Plaintiffs offer another novel theory or
10 interpretation of 9.15 calling it abdication of
11 authority. But this is wrong for at least four
12 reasons. First, no case law supports it.

13 Second, plaintiffs' theory is exactly
14 backwards. Douglas County has absolute control over
15 this program. Douglas County school choice task force
16 developed it. The Douglas County administration
17 refined it. The Douglas County board adopted it. The
18 Douglas County board may amend the policy at any time.
19 This is total control, not an abdication of control.

20 Third, Dr. Fagen testified that Douglas
21 County has at least equivalent, if not greater,
22 control over the partner schools than over charter
23 schools. In both cases, charter schools and partner
24 schools, the district decides who to partner with. In
25 both cases, districts have a contract with those

1 schools. In both cases, the districts hold the
2 schools accountable to achieving at least as good or
3 better educational results as traditional schools. If
4 not, the districts have the authority to terminate the
5 relationship.

6 Fourth, Colorado cases make this point
7 even stronger. The Supreme Court in Booth held that
8 the state board may require a school district to
9 negotiate with a charter applicant until a charter
10 school is created. And the court of appeals in
11 Boulder Valley said that the state can create another
12 system of schools, charter schools authorized by a
13 state charter authority, without a 9.15 violation.

14 If the state can require districts to
15 accept charter schools on terms not set by the schools
16 themselves -- not set by the districts themselves,
17 then it cannot be a violation of 9.15 if a district
18 creates its own program and puts in place control
19 mechanisms at least as strong as with charters.

20 Your Honor, I'll end with this principle
21 of local control, because this case is the embodiment
22 of local control. Douglas County took the Owens
23 decision to heart. There is no constitutional nor
24 statutory impediment for the Choice Scholarship
25 Program. Plaintiffs cannot carry their burden on the

1 merits.

2 THE COURT: Thank you, Mr. Hall.
3 Mr. Lyons.

4 MR. LYONS: Thank you Your Honor. I'm
5 going to pick up with the other Rathke standards and
6 move forward from there, because, as the court knows,
7 all of the Rathke standards must be satisfied in order
8 for this court to enter an injunction.

9 Let's take irreparable injury. The
10 plaintiffs have presented no evidence whatsoever of
11 irreparable injury to the individual plaintiffs, let
12 alone to the organizations for plaintiffs in this
13 case, other than a generalized interest in
14 constitutional issues. That's insufficient as a
15 matter of law.

16 You have to find next that these
17 plaintiffs lack an adequate remedy at law. Well, I
18 think the state of Colorado directs witnesses.
19 Mr. Hammond and Ms. Emm demonstrated that there is an
20 extensive process to audit all the school districts in
21 the state and to true up, as may be necessary, to
22 correct any financial difficulties. This was not
23 mentioned at all by the plaintiffs.

24 Nor was the next standard you must find,
25 and that is that the injunction does not disserve the

1 public interest.

2 I'd ask you to think about two things in
3 that regard, Your Honor. First, the testimony of
4 Dr. Fagen about what the effect of an injunction at
5 this stage would be on a district and its students
6 that are not in the program. The 58,500 students in
7 the 100 schools of Douglas County. She testified
8 about the impact of returning the CSP students at this
9 point back to Douglas County on classroom size, on
10 split sections, on teacher ratios, as well as the fact
11 that the charter schools from which many of these CSP
12 recipients have now left are full and would not be
13 available to them and they could not return. That's
14 an element of public interest that you must consider.

15 You must also consider, we submit, under
16 the rubric of public interest, the collateral damage,
17 as I called it in opening statement, on the other
18 similar programs where public money, state and
19 federal -- but let's just focus on state -- finds its
20 way into private schools through partnerships, much as
21 Senator King testified to.

22 What happens to those programs and the
23 students and families involved in those programs?
24 It's more than collateral damage. It's damage to the
25 public interest.

1 And then you come to balancing of the
2 hardships. And I agree with Mr. McCarthy, as I
3 frequently do, anyway, that this is perhaps the most
4 difficult thing for you to do. On the one hand, on
5 the plaintiffs' side of the ledger, we have a handful
6 of disgruntled taxpayers and two organizations who
7 didn't even bring a witness to testify to this case,
8 claiming a generalized interest in constitutional and
9 statutory issues.

10 On the other side of the ledger, you have
11 500 students and families that are involved in this
12 CSP program, 271 of which are already paid, enrolled,
13 and participating as we stand here today, having paid
14 well over \$200,000 to the partnership schools. You
15 have next 23 partnership schools, four of whom
16 appeared here: Cherry Hills Community, Lutheran,
17 Valor, and Woodlands. They all testified what the
18 financial impact would be on them and their students,
19 ranging from 50 to maybe 60 thousand dollars on the
20 low end to well over \$600,000 per year.

21 I remember the testimony of Ms. Martin
22 from Woodlands as to what would happen to her school.
23 And I think the adjective she used was devastated.
24 Teachers being fired, a third of the enrollment being
25 turned away.

1 And last, but certainly by no means
2 least, is the impact on the families. We heard from
3 Mrs. Oakley today. Plaintiffs apparently would have
4 you ignore that circumstance and say, well, she's got
5 a remedy, she can go hire a lawyer and sue Douglas
6 County in order to try and get the services she could
7 otherwise get under this program.

8 I'd suggest to Your Honor if you want to
9 look for real irreparable injury, look to the Oakley
10 family.

11 Let me end with this: From the ancient
12 law of equity, equity aids the vigilant; equity does
13 not aid the invalid. This program was adopted on
14 March 15th. The evidence is clear that there were
15 plaintiffs in this litigation who were involved in the
16 entire process and well aware of it at the time it was
17 adopted.

18 But what happens? The district begins,
19 on March 16th, to implement the program that's now
20 operating? Nothing. We know from Ms. Barnard that
21 she consulted with a lawyer as soon as March 30th. No
22 suits filed in March. No suits filed in April. The
23 program is operating on the website, perfectly open
24 and transparent. No suits filed in May. It's not
25 until the end of June that a lawsuit's filed.

1 Plaintiffs waited over three months. And
2 I will freely concede, Your Honor, if they had filed
3 in a timely fashion, we'd be sitting here with a
4 different argument and a different set of
5 circumstances for you to consider. But we are not.
6 Equity aids the vigilant, not the invalid. Thank you.

7 THE COURT: Thank you, Mr. Lyons.
8 Mr. Blue.

9 MR. BLUE: Thank you, Your Honor.

10 I'm here to reiterate a point or to
11 elaborate on a point from Mr. Hall regarding First
12 Amendment jurisprudence and how Colorado traditionally
13 has followed federal law regarding its religious
14 clauses in the Colorado Constitution.

15 Plaintiffs ask you to return to the
16 Colorado jurisprudence pervasively sectarian analysis
17 that has been used in the past under the U.S.
18 Constitution. The problem for plaintiffs is that this
19 argument was made by my office on behalf of the state
20 of Colorado to the 10th Circuit in 2008.

21 Now, frankly, I was in the room that day
22 and I watched our solicitor general make that
23 argument, and I watched him lose it. The 10th Circuit
24 rejected the exact statutory provision that plaintiffs
25 rely on in Americans United. That provision was a

1 Colorado student incentive grant program determination
2 of eligibility, now appealed because of that decision.

3 This court should interpret Colorado
4 Constitution -- if this court were to interpret the
5 Colorado Constitution in the way plaintiffs request,
6 it risks putting the Colorado Constitution in
7 violation of the United States Constitution. And the
8 court should interpret the Colorado Constitution so as
9 not to conflict in that manner.

10 Thank you.

11 THE COURT: Thank you, Mr. Blue. Last,
12 but not least, is Mr. Bindas.

13 MR. BINDAS: Thank you, Your Honor. I've
14 just got a little bit to say. Everyone else has used
15 my best material.

16 So I'll start briefly by just discussing
17 the balancing of the equities. You heard, Your Honor,
18 less than an hour from Diana Oakley and the harm that
19 will befall her family if this program is enjoined.
20 An injunction would effectively force Nate Oakley out
21 of Humanex Academy, the one school that will best meet
22 his special needs, where he'll have a chance to thrive
23 and where he'll be safe.

24 And an injunction will put Mrs. Oakley's
25 family in an unbelievably difficult situation of

1 figuring out how to home school their son. As
2 Mrs. Oakley testified, that's going to be incredibly
3 difficult and burdensome on her family and harmful to
4 Nate.

5 This is one story, Your Honor. There's
6 499 other stories like that. As Mr. Lyons so
7 eloquently put it, on the other side, you've got a
8 generalized interest of taxpayers who don't want
9 scholarships going to families who can then make a
10 private and independent choice of where to use that
11 scholarship. This is a close on the equities, Your
12 Honor.

13 And a few points I'd like to make on
14 success, Your Honor. I'll reiterate something that
15 Mr. Hall mentioned, and that is Zelman. The
16 percentages there are overwhelming. 82 percent of the
17 participating schools were religiously affiliated. 96
18 percent of the students selected to those religiously
19 affiliated schools. The plaintiffs made the same
20 arguments they make here. And the court summarized
21 their arguments. Respondents claim you should attach
22 constitutional significance to the fact that 96
23 percent of scholarship recipients have enrolled in
24 religious schools. They claim that this alone proves
25 parents lack genuine choice. The court rejected that

1 argument, or in the court's words, flatly rejected
2 that argument. And I'll requote something Mr. Hall
3 quoted from the opinion.

4 According to the court, the
5 constitutionality of a neutral education aid program
6 simply does not turn on whether and why, in a
7 particular area at a particular time, most private
8 schools are run by religious organizations or most
9 recipients choose to use the aid at a religious
10 school.

11 Now, the plaintiffs, Your Honor, say,
12 don't look to Zelman, don't look to Zelman. That was
13 the federal constitution, First Amendment. Now, we
14 say you have to interpret Colorado religion clauses
15 consistent with the First Amendment. That to read it
16 more restrictively would cause significant federal
17 constitutional problems and would require this court
18 to, as Mr. Hall put it, wade into the Blaine thicket.

19 What's the plaintiffs' response to that,
20 Your Honor? We don't have Blaine amendments here. We
21 bought our stuff from Illinois before Blaine even
22 offered his amendment. Right. Let's look to
23 Illinois, Your Honor. Let's see what the Illinois
24 Supreme Court has to say about how it interprets the
25 Illinois Constitution's religion clauses.

1 I'm quoting from People versus Falby,
2 727, Northeast 2d, 200, page 207. "The restrictions
3 of the Illinois Constitution concerning the
4 establishment of religion have been held to be
5 identical to those imposed by the First Amendment to
6 the United States -- to the Constitution of the United
7 States. Thus, any statute which is valid under the
8 First Amendment is also valid under the Constitution
9 of Illinois."

10 One year later, Your Honor, in Tony
11 versus Bauer, the Illinois Court of Appeals relies on
12 that case to uphold the School Choice Program.

13 Finally, Your Honor, interpreting the
14 Colorado Constitution's religion clauses any other way
15 would run afoul of the Colorado Supreme Court's
16 consistent approach of interpreting those clauses in
17 harmony with, not at loggerheads with, the First
18 Amendment. The court should follow that consistent
19 approach, which allows an educational aid program like
20 Douglas County's, a program that is neutral with
21 respect to religion and that operates on a truly
22 private and independent choice of parents like Diana
23 Oakley.

24 Thank you, Your Honor.

25 THE COURT: Thank you, Mr. Bindas.

1 MR. McCARTHY: Your Honor, I believe I
2 sat down with about 90 seconds left. Being the
3 plaintiff and -- I'm testing your patience, Your
4 Honor.

5 THE COURT: I'll give you a brief
6 rebuttal.

7 MR. McCARTHY: Thank you very much, Your
8 Honor.

9 Two quick points, Your Honor. In terms
10 of the irreparable harm and the service to the public
11 interest, the defendants talked disparagingly about
12 the fact that irreparable harm and the service to the
13 public interest flows from the vindication of
14 constitutional rights. That's the law in this state,
15 Your Honor. Irreparable harm can be presumed from the
16 violation of constitutional rights.

17 In particular, we point the court to
18 Fortner against Kuzar, 992 P 2d 697, and a federal
19 case interpreting constitutional provisions, Evans
20 against Romer, 1993, Westlaw, 19678.

21 Those and other authorities establish
22 that irreparable harm and service to the public
23 interest can be presumed from the violation of a
24 constitutional right.

25 The second point that we would make, Your

1 Honor, goes to the reliance that the defendants place
2 upon the federal constitutional provisions. And what
3 we would say there, Your Honor, is that what they are
4 trying to convince this court to do is to take the
5 free exercise clause and put it on steroids, and to
6 take that clause and to interpret it in a way that has
7 been far more aggressive than it has ever been
8 interpreted before.

9 And in particular, Your Honor, in this
10 case, they're asking a judicial officer of this state,
11 sworn to uphold this constitution, to, as a practical
12 matter, not conform the constitution to what they
13 think the federal free exercise clause does. Their
14 interpretation would require you, Your Honor, to
15 advocate the provisions of section 9 of our
16 constitution. And that, Your Honor, you should not
17 do.

18 Thank you very much.

19 THE COURT: All right. Thank you,
20 Mr. McCarthy.

21 Mr. Hall, I'll note you should be
22 cautious with your references to Lobato. You will
23 note I was reversed on that decision.

24 Thank you all for your presentations.
25 Your professionalism is refreshing, and efficiency is

1 welcome.

2 Unlike that present case, we're done in
3 three days, not five weeks. Of course, we don't have
4 the issues they have to discuss.

5 Let me give you a time frame of where we
6 are. Again, I understand the import of the issues and
7 the potential impact of the decision. I think you
8 all, as practitioners, recognize that the practical
9 reality is that -- I don't often like to admit this,
10 but this court serves as effectively a speed bump to
11 the Supreme Court. So I will do my best to get a
12 decision out on this matter. I do contemplate writing
13 a written opinion on it. And I suspect it will be
14 sometime next week. I do have a five-day trial
15 starting next week, so it's going to be interesting
16 how I'll get that done, but I will get it done
17 sometime next week.

18 We'll give you all a courtesy call when
19 you can expect the order to be hitting your electronic
20 services. But I'm confident that what we will have in
21 your respective proposed findings will assist us in
22 drafting an order that addresses the issues raised in
23 this matter.

24 I will ask you to sign a receipt for the
25 exhibits you've submitted. For the original exhibits,

1 please keep them consistent with my pretrial order.
2 Particularly for purposes of appellate proceedings,
3 that will be important.

4 Is there anything else I can help you
5 with today?

6 MR. McCARTHY: Nothing further, Your
7 Honor.

8 THE COURT: From the defense?

9 MR. LYONS: No, Your Honor. Except, I
10 think, from all of us, thanks to you and your staff
11 for the way we've been treated the last three days.

12 THE COURT: Well, you're always
13 welcome.

14 MR. McCARTHY: Join in that.

15 THE COURT: Have a good day. Thank you
16 very much. Court's adjourned.

17 WHEREUPON, the within proceedings were
18 adjourned at the approximate hour of 4:20 p.m. on the
19 4th day of August, 2011.

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) SS.
CITY AND COUNTY OF DENVER)

I, SHARON L. SZOTAK, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 11th day of August, 2011.

My commission expires June 10, 2012.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

 x Reading and Signing was not required.