

COLORADO COURT OF APPEALS
101 W. Colfax, Suite 800, Denver, CO 80202

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

Defendants-Appellants: DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION

and

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

and

Intervenors-Appellants: FLORENCE AND DERRICK DOYLE, on their own behalf and as next friends of their children, ALEXANDRA and DONOVAN; DIANA AND MARK OAKLEY, on their own behalf and as next friends of their child NATHANIEL; and JEANETTE STROMM-ANDERSON and MARK ANDERSON, on their own behalf and as next friends of their child, MAX

v.

Plaintiffs-Appellees: JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLORADO; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON

and

Plaintiffs-Appellees: TAXPAYERS FOR PUBLIC EDUCATION, a Colorado non-profit corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child.

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BRIEF OF AMICUS CURIAE

Dated: July 13, 2012

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 53(a): it contains 7,771 words.

s/ Elizabeth L. Harris

Elizabeth L. Harris, # 29556

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Federation of Teachers, an affiliate of the AFL-CIO, was founded in 1916 and today represents 1.5 million members in more than 3,000 local affiliates nationwide. AFT Teachers represent approximately 850,000 pre K-12 public school teachers, a majority of whom work in traditional public schools and many working in challenging urban districts. Since its founding, the AFT has been a major force for preserving and strengthening America's democratic commitment to public education and public service by championing educational improvement for urban schools, English Language Learners and other historically disadvantaged groups.

The American Association of School Administrators (AASA), founded in 1865, is the professional organization for more than 13,000 educational leaders in the United States and throughout the world. AASA members range from chief executive officers, superintendents and senior level school administrators to cabinet members, professors and aspiring school system leaders. As school system leaders, AASA members help shape policy, oversee its implementation and represent school districts to the public at large.

The resolution of this case is a matter of vital concern to the AFT, the AASA and their members. AFT has performed thorough reviews of market-based reforms that have been implemented in other public school systems to determine the impact on public schools. The AASA has studied the impact of the economic downturn on schools. Based on amici's combined research, amici oppose the Douglas County School District's Choice Scholarship Program ("CSP"). The CSP diverts scarce taxpayer dollars to private schools at a time when current funding commitments to Colorado's public schools are not being met and without any basis to believe that Douglas County students will reap an educational benefit from the program. The district court in this case properly held that the CSP violated the Colorado Constitution and the Public School Finance Act. If the decision is reversed, it is the AFT's and AASA's members who will bear the brunt of having to educate the most-expensive-to-educate students with even fewer resources. Amici curiae thus urge affirmance in this case.

ARGUMENT

I. THE CSP DOES NOT INCREASE CHOICE, PRESERVE DISTRICT RESOURCES, OR IMPROVE STUDENT ACHIEVEMENT.

A. Unlike Other Voucher Programs, The Primary Purpose of CSP Is “Choice” Solely For The Sake of “Choice.”

Douglas County School District (“DCSD”) Superintendent Elizabeth Fagen testified that the school district believes in “universal choice” and it is the “first priority” of the CSP. (Tr. 491-492.) DCSD School Board President, John Carson, testified that the board’s “fundamental belief” is that public schools need “more competition and choice.” (Tr. 597-598.) The policy justification for the CSP represents a significant departure from that of established voucher programs in Cleveland, Milwaukee and the District of Columbia:

- The Cleveland voucher program was enacted by the Ohio Legislature in 1995 to provide educational assistance to poor children in a “demonstrably failing public school system.” *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002). At the time, the Cleveland school district failed to meet any of the 18 state standards for minimal acceptable performance; only 1 in 10 ninth graders could pass a basic proficiency examination; and more than two-thirds of high school students either dropped or failed out before graduation. *Id.*
- At the time the Milwaukee Parental Choice Program (“MPCP”) was enacted in 1989, the dropout rate for the Milwaukee Public Schools (“MPS”) was higher than any other area in the state. *Davis v. Grover*, 480 N.W.2d 460, 469 (1992). Between 55-60 percent of MPS students did not graduate from high school in a six-year period. *Id.* at 470. The grade point average on a 4.0 scale for MPS students was 1.60 and just

1.31 for African-American students. *Id.* The MPCP was enacted to improve the quality of education for children of low-income families, initially restricting participation to children of whose family income did not exceed 175% of the federal poverty level. *Id.* at 463.

- President George W. Bush signed legislation creating the D.C. Opportunity Scholarship Program in 2004. At the time the legislation was passed by Congress in 2003, the graduation rate for D.C. Public Schools (“DCPS”) was 58.9 percent, while the percentage of children eligible for free or reduced lunch was 60.1 percent. *See* Swanson, “*Diplomas Count: An Essential Guide to Graduation Policy and Rates*,” June 2006. D.C. students had scored well below the national average on the National Assessment of Educational Progress, with more than 85 percent of students scoring at the “Basic” or “Below Basic” level. *See* Vance, “A Five-Year Statistical Glance at D.C. Public Schools: School Years 1996–97 through 2000–01,” February 2002. The program made 2,000 vouchers available to children who lived in households earning up to 185 percent of the federal poverty level (\$34,873 for a family of four in 2004).

Douglas County demographics and its public schools bear little resemblance to these low performing school districts that failed to provide educational opportunities to their students.

The median household income in Douglas County is \$99,409, ranking sixth highest in the U.S. among counties with populations of 65,000 or more. The percentage of the population with incomes below the poverty level in 2010 was only 3.3%, one of the lowest in the nation. *See* Douglas County School District, *Financial Plan and Budget 2011-2012*. Castle Rock, Colorado: p. 41-42.¹

¹ Hereafter referred to as *DCSD Budget 2011-2012*.

Douglas County is also one of the most highly educated counties in the United States, with 95.7 percent of its adult population having earned a high school diploma or GED and 58.4 percent holding a college degree. *Id.*

Moreover, the evidence shows that Douglas County Public Schools have consistently provided a very high quality education to students in that county. In 2011 — just like every other year that state tests have been administered — DCSD performed far above the state average, **at every grade level and in every content area** that is tested on the Colorado Student Assessment Program (CSAP), which is designed to measure student achievement of the Colorado Academic Standards. *DCSD Budget 2011-2012*, p. 35; Colorado Department of Education, *2011 CSAP School and District Summary Results*, 2012. Douglas County students regularly score above both the state and national average on the ACT, which measures academic achievement in English, mathematics, reading, and science. The DCSD graduation rate for 2010 was 83.1 percent compared to state average of 72.4 percent. Between 2000 and 2009, the DCSD graduation rate ranged from 88.4 to 94.7, while the state average never exceeded 83.6 percent. *DCSD Budget 2011-2012* at p. 234.

Though the educational opportunity provided by DCSD public schools is plainly succeeding and first-rate, DCSD nonetheless implemented the CSP for the

stated purpose of providing parental “choice” and creating “competition” with the public schools. (Tr. 491-492, 597-598, 616.) According to the CSP Policy, the purposes of the program are “to provide greater educational choice for students and parents, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending.” (Ex. 1, Policy § A ¶ 3.) However, the program is not based on any quantifiable evidence that competition will improve education or lower the cost of education for either DCSD or the State of Colorado. Rather, the result of CSP would be to allow a few students to attend private, primarily religious schools while leaving DCSD schools with those students who are the most costly to educate.

B. The CSP Does Not Increase “Choice” For The Vast Majority of Students.

Although DCSD officials use the word “choice,” in practice the private schools choose the students, not the other way around. In Douglas County, as in other areas where voucher programs exist, private school operators decide whether they want taxpayers to subsidize their schools. They also decide how many, if any, voucher students they will admit. The evidence at the district court regarding the CSP demonstrates that relatively few students are truly able to choose their school.

According to a U.S. Department of Education (“USDE”) survey of urban private schools, up to 85 percent of schools would “definitely or probably not”

want to participate in a voucher program if they were required to accept “students with special needs, such as learning disabilities, limited English proficiency or low achievement.” *See* “Barriers, Benefits and Costs of Using Private Schools to Alleviate Overcrowding in Public Schools,” U.S. Department of Education, 1998. Similarly, private schools in Douglas County decide whether they wish to participate in the CSP. While USDE identifies 14 private schools that serve K-12 students in Douglas County, only nine of those private schools participated in the CSP. (Order at 8-9.) Choice is further limited when private schools participating in the CSP limit enrollment to certain grades; Cherry Hills Academy, a school participating in the CSP, limited their enrollment to certain grades because they decided they did not want to be subjected to NCLB’s criteria for grades 7 and 8. (Tr. 410). “Choice,” therefore, is controlled by the private schools.

The evidence from the district court confirmed that the payment of the scholarship on behalf of the student was contingent on being accepted at one of the private schools. (Order at 5; Ex. 1, Policy § D ¶ 6.) There are only five non-religious schools available to choose from in the program; three of the five are limited to grades 1-8, one is for gifted students only and the other is for special needs students. (Order at 9.) Significantly, the private schools are permitted to, and do in fact, use religious criteria to make enrollment decisions. (*Id.* at 6; Ex. 1,

Policy § E ¶ 3.f.) Testimony confirmed that Denver Christian Schools would not admit students who did not belong to its religious denomination and the Douglas County assistant superintendent for elementary education confirmed that several other private schools had taken the same position. (Tr. 324-326.) Only one high school student who received a scholarship was attending a non-religious school. (Order at 9.) In the CSP, therefore, “choice” depends on whether you are a member of a religious denomination that operates a school that participates in the program.

Special education opportunities are also limited for students desiring to attend a private school through the CSP. The Policy states that participation in the CSP is viewed as a “voluntary parental placement in the private school for purposes of special education services and students will receive the level of services provided by the Private School Partner.” (Ex. 1 Policy at § D ¶ 7.i.) In other words, students who participate in the CSP waive their right to receive special education services from DCSD. (Tr. 250-251.) The academic director of the Woodlands School testified that the school could not accommodate special needs students. (Tr. 587.) Only one high school student was admitted to Humanex, the school for special needs students. (Order at 9.) This is consistent with data in other voucher programs:

- Only 1.5 percent of vouchers are in special education in the Milwaukee program, compared to 19 percent of the students enrolled in public schools. Matthew DeFour, “ACLU Alleges Milwaukee School Voucher Program Discriminates Against Disabled Students,” *Wisconsin State Journal*, June 7, 2011.
- In the District of Columbia, 21.6 percent of those families who reject vouchers did so because the private school options lacked the special needs services that their children needed. *Evaluation of the DC Opportunity Scholarship Program: Final Report Executive Summary*, U.S. Department of Education (2010). Significantly, 12.3% of students who accepted voucher but then withdrew, cited a lack of special needs services as the reason for leaving. *Id.*
- Only one-third of voucher schools accepted students with severe disabilities in the Cleveland vouchers program. Piet Van Lier, *Analyzing Autism Vouchers in Ohio*, Policy Matters Ohio (2008).

As in these other programs, special needs students in Douglas County are not afforded the same “choice” as other students.

Low-income students in Douglas County also lack “choice.” The CSP does not limit the program to students of low-income families, unlike most voucher programs. This means that “choice” favors those families that can afford the high tuition at the private schools. In 2010-2011, 6,502 DCSD students — or 10.6% of all students — qualified for free or reduced lunch. *See DCSD Budget 2011-2012*, p. 232. However, only 2.6% of the scholarships (13 of 500) were awarded to these low-income students. (Tr. 284.) The mother of a special needs student, who was awarded a CSP, testified that the tuition was \$17,900 per year at Humanex, the sole

school in the CSP specifically targeted to special education students costs. (Tr. 793). The family had to pay \$11,535 in addition to the voucher and financial aid awarded by Humanex to pay for the student's tuition. (*Id.*) The academic director of Woodlawn School testified that the tuition costs \$7,000 and there is a book and material fee of \$1,500 for grades 1-3 and \$1,000 for grades 4-8. (T. 583.) Valor Christian, where sixty-one DCSD students used their vouchers, lowered the amount of student aid by the amount of the voucher (\$4,575) to one of the students who received a CSP, forcing that family to look for admission at other schools. (Tr. 297-298.) Families that cannot afford to pay several thousand dollars for tuition in excess of the CSP voucher are excluded from the supposed "choice" offered by DCSD.

The Douglas County program attempts to operate like voucher programs initiated in other school districts, but it is not income based and leaves behind the neediest kids. Whether by design or otherwise, the CSP excludes low income students or those who have special needs and favors students from wealthy families who are members of the participating school's religious community. This is not the "universal choice" that school officials represent it to be. Significantly, the CSP will place additional strains on reduced education budgets.

C. The CSP Will Not Save DCSD Money And Diverts Education Funding From Students in DCSD And Other Counties.

A claimed purpose of the CSP is to “obtain a high return on investment of DCSD educational spending.” (Ex. 1, Policy § A ¶ 3.) However, the evidence adduced at the district court level and from other programs leads to the conclusion that vouchers are more expensive and cost taxpayers more money. The CSP, like other voucher programs, subsidizes private school tuition for students who would have attended private school without the scholarship, results in additional administrative costs, and leaves DCSD with the most expensive to educate students.

- 1. Taxpayers are subsidizing private school tuition for students who would have attended private school regardless of the CSP, reducing available funds in the state education budget.**

The evidence presented at the district court strongly suggests that Douglas County is subsidizing the education of children who would have attended private school anyway. This is consistent with the experience in other voucher programs.

- A study of the Milwaukee voucher program found that 23 percent of voucher students had transferred from the public schools, while 37 percent were already attending private school. John F. Witte, “The Market Approach to Education: An Analysis of America’s First Voucher Program,” 2000; Public Policy Forum, School Choice in Its Tenth Year,” April 5, 2000.

- A 2001 study found that 39 percent of students receiving aid through Cleveland's voucher program had previously been attending private schools or pre-schools, while only 21 percent had been enrolled in a Cleveland public school. Zach Schiller, "Cleveland School Vouchers: Where the Students Come From," Policy Matters Ohio (September 2001).
- A fiscal estimate prepared for the Pennsylvania Senate projected that if vouchers were enacted, more than 65 percent of all vouchers would go to students already enrolled in private schools, costing taxpayers \$225 million per year. Education Law Center, "Official Data on Senate Bill 1 Anticipates Most Vouchers Going to Students Already Enrolled in Private and Religious Schools," May 2011.

The evidence from CSP is no different. For example, before the CSP was adopted in March 2011, 50 DCSD students who were entering ninth grade had already applied to Regis Jesuit High School for the 2011-2012 school year. (Tr. 548-549.) DCSD then awarded 37 CSP scholarships to ninth graders attending Regis. (*Id.*) Similarly, 50 CSP scholarships were awarded to ninth graders entering Valor Christian High in 2011-2012. (Tr. 550.) Superintendent Fagen acknowledged that a number of those students would have attended private school anyway. (Tr. 549, 551.) These 87 scholarships directed \$530,700 in state education funding to private schools. At a time when the 2011-2012 Colorado education budget was cut by \$228 million, DCSD should not be diverting precious state education funds away from public schools.

2. The CSP will not save DCSD money.

Regardless of the 25% of state funding that DCSD retains for each scholarship awarded, the CSP will not save DCSD money. The scholarship program does not allow for savings on fixed costs, requires additional administrative costs, and leaves DCSD educating the most expensive students.

When students leave public schools for private schools, they do not exit in an orderly manner that allows public schools to reduce costs easily by laying off staff, closing buildings or cutting bus routes. The 2001 study of Cleveland's voucher program found that students who left Cleveland public schools came from schools throughout the district, not from a small number of schools that the district could simply downsize or close. The study concluded that public schools were "losing [state aid] without a change in their overall operating costs." Schiller, "Cleveland School Vouchers: Where the Students Come From," Policy Matters Ohio (September 2001). A study of Milwaukee choice program for the 2001-2002 school year found that the 10,700 students using vouchers were spread out over 103 district schools. This averaged out to a loss of only about 19 students per school, making it so that public schools were unable to save money on fixed costs like building maintenance, staff salaries, school supplies, etc. *How Much Do Vouchers Really Cost?* People for the American Way Foundation (2002).

The CSP reduces revenue to the DCSD, but it does not reduce fixed costs. There are 77 schools in DCSD, meaning that the 500 students in the CSP would reduce enrollment by an average of 6.5 students per school. Superintendent Fagen testified that teachers would not lose their jobs because of the CSP. (Tr. 563.) Furthermore, enrollment in DCSD has been steadily increasing: total enrollment for pre K-12 was 59,932 in 2009-10; 61,465 in 2010-2011 and projected at 63,437 for 2011-12. *DCSD 2011-2012 Budget* at 232. Even if the CSP is expanded to allow more students to participate, the CSP cannot offset the increases in enrollment. Fixed costs like electricity or heating for a building do not go down if five or even ten students leave a school, and the cost of a teacher remains the same. The CSP does nothing to address fact. To the contrary, the CSP creates additional costs to administer the program and monitor the private schools, including staff and resources to track enrollment and attendance and administer state tests. (Tr. 116, 376-378, 551, 556.)

Experience in other states tends to confirm that voucher programs reduce revenue and, if anything, increase costs. A 2006 study of the Cleveland voucher program noted that states with voucher programs have had to set up new bureaucratic systems to get voucher payments to the schools, hire additional staff to audit the enrollment figures of voucher schools, and monitor schools to ensure

that they are financially and academically viable. When these additional administrative costs are factored in, the study found that the savings promised to taxpayers disappeared. *See* Clive Belfield, “The Evidence on Education Vouchers: An Application to the Cleveland Scholarship and Tutoring Program,” National Center for the Study of Privatization in Education, 2006. Furthermore, taxpayers end up paying for two parallel systems of education — one public and one private — that are responsible for oversight and regulation.

DCSD’s parallel system will cost \$361,199, according to Assistant Superintendent Cutter. (Tr. 378.) These CSP administrative costs would offset any potential savings from the CSP and actually drive total costs higher.

3. DCSD will have fewer funds to educate those students who require more resources.

Choice supporters claim that enrolling students in private schools will result in a savings to the taxpayer, since the cost of the voucher is generally lower than the “average” per-pupil cost. That overly-simplistic argument ignores the actual cost of education and the impact of the CSP on public schools in Douglas County. There are no “average cost” pupils; students either cost more or less to educate, regardless of the per-pupil funding amount provided by the state. There is no debate that students with special needs, English language learners (“ELL”), and talented and gifted students all cost more to educate than students who do not

require additional services. *See Lobato v. State of Colorado*, Case No. 2005-CV-4794 (Dist. Ct. Denver, December 9, 2009). According to DCSD, the cost of a special education student is 2 to 2.5 times the amount spent on students without disabilities. *DCSD 2011-2012 Budget*, p. 59. In a July 2009 Colorado Legislative Council Report, the average excess special education cost per student with disability in Colorado is \$9,895 above per pupil revenue.

While students requiring special resources are more costly to educate, vouchers are most often used by students who are less costly than average to educate. Ed Muir, “Winners and Losers: Tuition Subsidies and Enrollment in Private Schools.” (2000). As described above, DCSD has awarded very few scholarships to low income or special needs students, which is consistent with voucher programs in other jurisdictions. The result: DCSD is required to educate a disproportionately larger percentage of the students who are the most costly to educate thus driving the overall costs of the district substantially higher, not lower, as voucher advocates promise. A portion of the funds necessary to educate these students, however, has been awarded to a private school and is no longer available to DCSD.

Denver District Court Judge Sheila Rappaport recently held that the Colorado public school finance system is unconstitutional because it “falls short of

providing sufficient funding to meet the mandate of the Education Clause and standards-based education.” *Lobato, supra*, at 181. In light of the “severe underfunding” described in that decision, DCSD should not be permitted to exacerbate the problem by subsidizing private school tuition with state education money.

D. There Is No Evidence That The CSP Will Improve Education in Douglas County.

Appellants argue that in some unspecified way, the CSP will improve education by creating “competition.” There is, however, no evidence to support that and several studies of voucher programs indicate that the opposite is often true.

First, there is no legitimate basis to measure the supposed “competition” for which Appellants argue. Colorado public schools are required to report student attendance and demographic information; grade-level and school scores on annual state assessments; achievement data by grade, gender, ethnicity, socioeconomic status, disability and language proficiency; annually report teacher qualifications to parents; release data on student discipline, suspension and expulsion; comply with open records and open meetings laws; and publicly disclose school and district budgets and finances. Private schools make no such disclosures and are exempted from other state education standards. As the district court noted:

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

(Order at 15.) Private schools are not held to the same standards as DCSD schools and are not accountable to the public.

Second, there are several published studies that call the results of voucher based programs into serious question. These studies show that the achievement of students with vouchers is no better and sometimes worse than that of comparable public school students.

- A September 2002 General Accounting Office report that reviewed 78 privately funded school voucher programs that used family income as their only eligibility criteria and permitted families to use their award at nearly any private school concluded, "there is no significant difference in achievement gains between voucher users and nonusers." "School Vouchers: Characteristics of Privately Funded Programs," U.S. General Accounting Office, 2002, p.17.
- The third annual evaluation of the Cleveland voucher program by the Ohio Department of Education found that between 1998-2002 there was no "consistent, significant difference in achievement between scholarship and public school students by the end of third grade" in any subject.

- A March 2011 study by the Wisconsin Department of Public Instruction found that students in the Milwaukee school choice program performed worse than those enrolled in MPS and in the state in math. “2010-2011 MCPC Student Performance,” Wisconsin Department of Public Instruction (2011). The results showed some private schools with less than 20% of their voucher students scoring proficient or better in math or reading. Even when compared against economically disadvantaged kids in MPS schools, the “choice” students fell short of those who tested at least “proficient” in math. *Id.*

There is simply no evidence that the CSP will improve student performance of either students enrolled in private schools or those who remain in the public schools.

Colorado private schools are not required to comply with NCLB and there is no public data on the performance of current private school students on the CSAP. Furthermore, the schools participating in the CSP have only agreed to have CSP scholarship students — not the entire student population — take the CSAP state tests. (Ex. 1, Policy § C ¶ 9.) Because there is no public disclosure of academic achievement, budgetary, or faculty qualifications from participating private schools, there is no ability for parents or the public to make objective comparisons between the DCSD and private schools. Without this information, there is no way to conclude that private school choice is going to spur competition between the public school system and private schools resulting in better educational outcomes. In stark contrast to the unfounded free-market competition theories supported by

the Appellants, the record is clear that DCSD schools are exceptional; state education resources should not be diverted from public schools to promote untested ideology.

II. THE CSP VIOLATES THE PUBLIC SCHOOL FINANCE ACT, AND IS NOT AUTHORIZED BY THE SCHOOL CONTRACT STATUTE, BECAUSE IT USES STATE PUBLIC SCHOOL FUND MONEY TO PAY FOR STUDENTS' PRIVATE SCHOOL EDUCATION

But even without the data establishing that programs like the CSP fail to deliver benefits to students and school districts, the CSP is indefensible as a legal matter. The CSP violates the Public School Finance Act and runs afoul of the school contracting statute.

A. The Colorado Constitution Mandates A System of Public Education For Elementary And Secondary School Students.

The education clause of the Colorado Constitution provides for “the establishment and maintenance of a thorough and uniform system of free public schools throughout the state” COLO. CONST. art. IX, § 2. That provision is a mandate to the state to provide a complete and uniform system of public education for Colorado’s elementary and secondary school students. *Lujan v. Colorado State Bd. of Education*, 649 P.2d 1005, 1027 (Colo. 1982) (Erickson, J., specially concurring).

The mandate has a corollary: implicit in the obligation to establish a system of public schools is a prohibition against the establishment of a system of non-public schools financed by the state. *Simmons-Harris v. Goff*, 711 N.E.2d 203, 212 (Ohio 1999) (observing that mandate to establish public schools is equally a prohibition on establishing non-public schools). Thus, neither the state nor the individual school districts may establish and maintain a parallel system of private education funded with public dollars.

B. The Public School Finance Act Implements The Constitutional Mandate by Allocating Taxpayer Money to School Districts For The Provision of Public Education.

The Public School Finance Act of 1994 (the “Finance Act”) implements Article IX, section 2’s mandate to provide elementary and secondary school students with a public education. C.R.S. § 22-54-102(1). Funding under the Finance Act works in this way:

- The Finance Act sets a minimum per pupil funding level for all school districts, known as the statewide base. C.R.S. § 22-54-104(3.5).
- The statewide base amount is adjusted for each school district based on various factors such as cost-of-living, enrollment, and at-risk student population differences. C.R.S. § 22-54-104(3).
- These adjustments create a per pupil funding level for each school district, referred to by the parties in the district court as “per pupil revenue” or “PPR.”
- A school district’s total funding is determined, generally, by multiplying the PPR by its funded pupil count. C.R.S. § 22-54-104(2)(a).

The total funding amount comes from a combination of state and local sources of revenue. C.R.S. § 22-54-106. Ordinarily, state aid makes up the difference between a school district's total funding and the district's own share, which is derived from local tax revenue. *Id.* Pursuant to the Finance Act, state money earmarked for public education is placed into the "state public school fund" and disbursed to the school districts by the state Board of Education. C.R.S. §§ 22-54-114, 115.

Funds allocated under the Finance Act and distributed from the state public school fund must be used for public education for elementary and secondary school students:

For each budget year, the provisions of this section shall be used to calculate for each district an amount that represents the *financial base of support for public education in that district*. Such amount shall be known as the district's total program. The district's total program shall be available to the district *to fund the costs of providing public education*, and, except as otherwise provided in section 22-54-105, the amounts and purposes for which such moneys are budgeted and expended shall be in the discretion of the district.

C.R.S. § 22-54-104(1)(a) (emphasis added).

C. The CSP Violates The Finance Act Because The DCSD Uses Money Allocated Under The Finance Act And Distributed From The State Public School Fund to Fund Students' Private Education.

Funding provided under the Finance Act is to be used “to fund the costs of providing public education.” But here is how the President of the Douglas County School Board explained the program he helped to develop: the “way the program works,” John Carson testified, is that the DCSD takes the per pupil revenue distributed by the state under the Finance Act, “send[s] that money to the private schools,” and “then the kids go to private schools.” (Tr. 628.) An assistant superintendent of DCSD confirmed that the “whole function” of the CSP is “to make an opportunity for students to go to [private] schools.” (Tr. 239.)

The State Appellants (the “State”) defends the CSP against accusations that the program violates the Finance Act by insisting that the school district has broad discretion to “use public funds to pay private entities to increase educational opportunities” for students. (State Brief at 29.) But its defense is a non sequitur.

A school district can contract with private entities, including private schools, to provide educational services that support and enhance the education of the school district’s *public school students*. What a school district cannot do — what is expressly prohibited by the Finance Act — is spend money earmarked for public education to educate *private school students*. Yet, as the president of the school

board and the district superintendent acknowledged, that is the precise purpose of the CSP: to use public funds to send children to private school and, in that way, to fund the costs of providing a private education for the children in the CSP.

The CSP students receive a private education. Though the DCSD created a “Choice Scholarship Charter School,” (the “CSP school”) in which the CSP students enroll, the CSP school is “simply a mechanism to count ... private school students as public school students for purposes of state funding.” (Tr. 217 (testimony of Robert Hammond, State Commissioner of Education); *see also* Tr. 262 (testimony of Christian Cutter, Asst. Superintendent, describing CSP school as an “agent of accountability”).) The Commissioner’s admission is consistent with the district court’s findings that:

the Choice Scholarship School exists only on paper [T]he Choice Scholarship School has no buildings, employs no teachers, requires no supplies or books, and has no curriculum. The Choice Scholarship School is merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program.

(Order at 6, ¶ 25.)

CSP students apply to and are accepted into a private school based on the private school’s own admissions criteria. (*Id.* at 5, ¶ 18.) Once enrolled in the private school, students attend the private school “exclusively,” and are therefore “private school student[s]” at the particular school of enrollment. (Tr. 393

(testimony of Robert Bignell, Superintendent, Cherry Hills Christian); *see also* Tr. 217-18 (Commissioner of Education explaining that students in CSP will “attend private schools”); Tr. 788 (parent of CSP student explaining that child will not be attending public school but instead will enroll in one of the CSP private schools).) Assuming the students satisfy the private school’s graduation requirements, the CSP students graduate, and receive a diploma, from the private school. (Tr. 238.) If the CSP students leave prior to graduation, they must enroll in another school. They cannot go the CSP school to be educated — there is no CSP school.

The CSP students do not receive a “public education” from the private schools; they receive a private education. The state of Colorado has promulgated a uniform standard for public education to be implemented by the various school districts under the supervision of local boards of education. (Order at 14, ¶ 55.) But the private schools are exempt from these standards. The private schools participating in the CSP teach their own curriculum using their own textbooks and materials. They are not required to meet accreditation or other public school accountability mandates or to adopt the DCSD educational goals or pedagogical policies. (*Id.* at ¶ 57.) The private schools do not adhere to DCSD anti-discrimination policies and are free to implement their own rules regarding discipline, suspension and expulsion. (Tr. 252-54.) The DCSD does not provide

any services to the students enrolled in the private schools, including special education services; as a result, students in the public schools and students in the CSP private schools are treated differently. (*Id.* at 250-51.)

The CSP uses money allocated under the Finance Act and distributed from the state public school fund to pay for students' private education. The CSP therefore violates the Finance Act.

D. The School Contract Statute Does Not Override The Finance Act And Authorize The Expenditure of State Public School Funds For Private Education.

The State contends that the school contract statute, C.R.S. § 22-32-122, authorizes the DCSD's payments to the private schools, many of which are religious. Its reliance on that statute is glaringly misplaced.

The school contract statute provides:

Any school district has the power to contract with another district or with the governing body of a state college or university ... or any county, city ... or ... body corporate, or association for the performance of any service, including educational service, activity, or undertaking which any school may be authorized by law to perform or undertake. Such contract shall set forth fully the purposes, powers, rights, obligations, and responsibilities, financial or otherwise, of the parties so contracting and shall provide that the service, including educational service, activity, or undertaking be of comparable quality and meet the same requirements and standards as would be necessary if performed by the school district.

C.R.S. § 22-32-122(1).

The State focuses exclusively on the word “any” as a modifier for “educational services” but ignores the limiting language that follows. Any contracted-for educational services must be performed for the benefit of the school district’s public school students, must be services that the contracting school district would be authorized by law to perform itself, and must be comparable to the services that the contracting school district would be required to offer if it had the resources.

The CSP cannot satisfy the statutory criteria. The point of the school contract statute is to allow a school district to provide educational services to its own students (that is, public school students) that it does not have the resources to provide. That is how the Superintendent of the DCSD understands the statute:

[M]any contract schools are associated with students who have needs that exceed what the district provides. Perhaps [a] blind student would be a good example, or a student with ... a chemical dependency, for example, that would need some sort of program that the district does not have expertise in might be examples of programs that we would contract with to provide the educational services for those students while they’re undergoing a treatment program or whatever the case may be.

(Tr. 503 (testimony of Elizabeth Fagan, Superintendent of DCSD).)

The school district, then, can contract with other entities to ensure that DCSD students are receiving the educational services necessary to succeed in

public school. But a school district cannot “contract” with a private school to pay the costs of a student’s private education.

The following example illustrates the distinction. The DCSD could contract, under the school contract statute, with a private organization to teach Mandarin as part of the public education offered to students in various Douglas County high schools. The DCSD could use its per pupil revenue to pay the organization’s foreign-language teachers. But if a student later decided that the public school Mandarin program was inadequate and left her public high school to enroll in a private foreign-language immersion school, DCSD could not pay part of the student’s private school tuition (to cover the costs of Mandarin instruction) because the services would no longer benefit a public student.

The State’s position is that the CSP operates like the Douglas County high schools in the above example. According to the State, the CSP students are public school students enrolled in a public charter school and the charter school contracts for educational services from the private schools, much like the high schools contracted with the foreign-language organization. But that argument fails on two levels.

First, as explained above, the CSP school is not an ordinary public school and the CSP students do not receive a public education from DCSD. The CSP

school is not contracting for educational services as part of an overall plan to deliver a public education to its students. Instead, the CSP students exclusively attend private schools and receive a private education. Thus, the contracted-for services — paid for with public funds — do not benefit public school students.

Second, even if, as the State maintains, the DCSD is simply “choosing to contract directly with a private school to provide a complete educational package” (State Brief at 29) to students in the CSP school, the educational package provided by the 23 private school participants must be a package that could be taught at any Douglas County public school and must meet the standards set by the state and local school boards. And clearly that is not the case.

Sixteen of the private schools are religious schools that require students to attend religious services as part of their “educational package.” (Order at 9-10, ¶¶ 35, 41.) The curriculum at those schools is generally faith-based. (*Id.* at 12, ¶ 45.) The DCSD cannot contract with the private schools for religious education any more than it can contract with a church to send priests into Douglas County public schools to lead prayers and teach religious concepts like creationism. Those services are not authorized by law, *see Engel v. Vitale*, 370 U.S. 421 (1962); *Edwards v. Aguillard*, 482 U.S. 578 (1987), and thus such a contract is disallowed by the school contract statute.

The State does not cite a single case to supports its position that Colorado’s school contract statute (or any other state’s equivalent statute) authorizes a voucher program. Nor does it reference a single program authorized under the school contract statute. Each of the dozen or so programs listed in the State’s brief are authorized under separate statutes. (State Brief at 6-12.)

The school contract statute does not override the Finance Act to allow school districts to “contract” for services that benefit private school students. The Court should avoid a reading that undermines the complex financing scheme articulated in the Finance Act. *See In re Regan*, 151 P.3d 1281, 1290-91 (Colo. 2007) (in construing statute, courts should attempt to harmonize any potentially conflicting provisions). And, in any case, the statute certainly does not allow the DCSD to do what it says it is doing: contracting for religious education for public school students.

E. The Programs Listed by The State Either Do Not Implicate or Do Not Violate The Finance Act.

The State’s brief includes a long list of educational programs at the preschool, primary, secondary and post-secondary levels that, according to the State, would necessarily fall with any adverse ruling against the CSP. (State Brief at 6-12.) The entries on the list are easy to distinguish from the CSP because the

referenced programs either do not receive funds under the Finance Act or do not use funds allocated under the Finance Act to support students' private education.

The State concedes that some of the programs on its list are not funded under the Finance Act through distributions from the state public school fund. (State Brief at 6: "some of these programs use state per pupil funding to enable schoolchildren to attend qualified private schools"). Those programs, then, have nothing to do with the issue here. If the problem is that the Finance Act prohibits the school district from using its per pupil revenue to fund costs of private education, it hardly seems relevant that other programs, which are not funded with per pupil revenues, contract with private schools.

The nine higher education programs mentioned in the State's brief (College Opportunity Fund, Colorado Student Grant Program, the Colorado Graduate Grant Program, the Colorado Leveraging Educational Assistance Partnership Program, the Supplemental Leveraging Educational Assistance Partnership Program, the Centennial Scholars Program, the Colorado Graduate Scholars Program, the Dependents Tuition Assistance Program, and the Work-study Program) are not funded under the Finance Act with funds distributed from the state public school fund. The Finance Act allocates money for students in grades pre-K to 12 only.

The Denver Pre-School Program also does not receive funds allocated under the Finance Act or distributed by the state public education fund. The Denver Pre-School Program is a sales tax-funded initiative in Denver County that was passed by voters in 2006. Revenue raised from the sales tax goes to families in the form of tuition credits. See <http://earlyeducation.dpsk12.org/tuition-and-billing/tuition-and-tuition-assistance-2/>, visited July 11, 2012.

Of the remaining six programs, five do not ordinarily involve contracts with private school facilities. The Concurrent Enrollment Programs Act is the exception.

Under the Concurrent Enrollment Programs Act, public high school students take college classes and earn high school and college credits at the same time. C.R.S. § 22-35-104(a)(1). The school district pays tuition for the college class, up to a certain amount. C.R.S. § 22-35-105(3)(a). The program is a classic example of a school district contracting for services that enhance its public school students' educational experience. The school district is not using state public school funds to pay for a student's private education; the funds are used for the student's public high school education.

English language proficiency programs (C.R.S. § 22-24-101 et seq.), career and technical educational opportunities (C.R.S. § 23-8-101 et seq.), special

education services (C.R.S. § 22-20-101 et seq.), and the expelled student services program (C.R.S. § 22-33-203) offer particularized educational services through the school districts. Generally, the services are available in the student's own school or a neighboring school district. Under those circumstances, no portion of the school district's per pupil revenues are paid to a private entity and thus the programs are irrelevant to the State's argument.

Occasionally, a public school student is placed in a facility — a day treatment center or residential facility — where he or she is nonetheless entitled to receive the services provided through those programs. In those cases, the school district contracts with an “approved facility school” to provide the educational services to the school district's students. The State claims that these arrangements are identical to the CSP and, if the CSP violates the Finance Act or is impermissible under the school contract statute, all of the programs that offer educational services to students in facility schools must likewise be dismantled. The comparison does not hold up.

Unlike the CSP students, public school students placed in “approved facility schools,” C.R.S. § 22-2-402, do not receive a private education. The students at facility schools remain the responsibility of a public school district and the district

is obligated to provide the students with a public education. *See* 1 CCR 304-1, 222-R-3.01.

To be eligible for public school funding, facility schools must be approved by the Facility Schools Board. C.R.S. § 22-2-407. The approval process requires that the facility school agree to implement a standard curriculum and accountability measures adopted by the Facility Schools Board. 1 CCR 304-1, 222-R-3.01. The facility school's curriculum must adhere to the state model content standards for core subjects. C.R.S. § 22-2-406(1)(a). In other words, a public school student placed in a facility school receives a standard public education ultimately approved by the state board of education. The school district contracts with the private facility school to ensure the provision of an adequate public education. It does not use per pupil revenue to provide the students with a private education.

The same is true for the Colorado Pre-School Program. Although the school district can contract with a head start agency or a private child care agency for provision of the pre-school program, C.R.S. § 22-28-109(1), the agencies all deliver standardized program services developed in accordance with state regulations. C.R.S. §§ 22-28-109(2), 22-28-108(1) and (2). The agencies are not

free to follow their own curriculum or rules; the private agencies cannot, for example, incorporate faith-based instruction into their program services. (Tr. 486.)

The State, therefore, gets no mileage out of its parade of horrors. The referenced programs do not use Finance Act funds for the provision of private education. And thus those programs will continue no matter the outcome of this case.

CONCLUSION

For the reasons stated above, amici curiae respectfully request that the Court affirm the decision of the district court.

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