Institute for Justice
Litigation Backgrounder

Defending Parents' Right to Choose Their Children's Schools

Douglas County, Colorado's Innovative Scholarship Program Is Constitutional

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The Issue in a Nutshell

The Douglas County School Board enacted a pilot school choice program to determine whether providing greater choice to its residents yields benefits for its students similar to those realized by programs enacted in other states. The school district offers modest scholarships to 500 students that enable their parents to send them to private schools at a fraction of the cost of educating them in the Douglas County public schools.

The ACLU, Americans United for Separation of Church and State, and several Colorado organizations and taxpayers sued the school board, school district, Colorado Department of Education, and the state school board in two separate lawsuits to stop the program. Despite clear case law rejecting their claims, they allege that because some parents will choose religious schools for their children's education, the program violates the state constitution's prohibition on aid to religious schools. They also allege various violations of Colorado's education statutes for funding public education.

Representing four families who intend to use scholarships for their children, the Institute for Justice moved to intervene in both lawsuits to protect the interests of these and similar families. These families—and not the schools their children will attend—are the real beneficiaries of the Douglas County, Colo., school choice program. In trying to characterize these programs as a form of "aid" to the private schools rather than to parents, school choice opponents ignore the private and independent choice that parents make when selecting the best available education for their children from a range of educational options. It is parents—and not the government—who decide what school a child attends, and, importantly, the government neither encourages nor discourages parents from selecting a religious school. No child attends any of the choice schools without the free and independent choice of a parent. The Institute for Justice intends to defend the role of the parents as the beneficiaries of the program and as decision-makers independent of the school district and any other governmental body.

Those who have filed suit to block this program's implementation filed their lawsuits in state court in Denver and allege no federal constitutional violations. When it upheld a similar scholarship program that Ohio enacted for children in the Cleveland public schools, the U.S. Supreme Court essentially foreclosed any such claim, making it clear that a program such as Douglas County's is constitutional under the federal Constitution's Establishment of Religion Clause. The Institute for Justice believes that the Colorado courts will follow the lead of the Supreme Courts of Ohio and Wisconsin, which have interpreted their state constitutional religion clauses in a manner similar to the U.S. Supreme Court's reading of the Establishment of Religion Clause. Indeed, many years ago, the Colorado Supreme Court rejected an effort by Americans

United for Separation of Church and State to invalidate a Colorado higher education scholarship program that permitted students to use their benefits at religious colleges they selected.

Not only is the Douglas County school choice program constitutional, it also makes fiscal sense, saving taxpayers money they would otherwise have to spend to educate each child in the program.

The Douglas County Program

After an extended period of study that included several open meetings with the school community, the Douglas County School Board voted to initiate a pilot program for up to 500 students enrolled in its schools whose parents wished to transfer their children to private schools. Under the program, parents are eligible to receive a scholarship of up to either 75 percent of the state component of the cost of educating a student in Douglas County or the cost of tuition at the private school, whichever is lower. This year, the upper amount is expected to be $4,575. The average cost of educating the same student in the Douglas County public schools is more than $10,000. The scholarship families can apply to private schools participating in the program just as if they were using their own money, except they will receive a scholarship to help them defray the cost of attendance. The scholarship students will take the same state tests they would have taken had they remained enrolled in the Douglas County public schools.

Response to the announcement of the scholarship program was immediate and dramatic. District offices were swamped with calls from interested families. The cap of 500 students has been reached, and at least 27 private schools have asked to participate, with 19 having been approved as of June 2011. Of those 19, 14 are religious schools and five are non-religious.

What is unusual about the Douglas County program is that, unlike most of the modern school choice programs, it serves a middle class school district with well-regarded public schools. Eligibility is based on residence in the district, with no income cut-off and no requirement that the public schools the students would otherwise attend be inadequate or failing schools. In other words, interest in the program demonstrates that even in well-run districts with effective public schools, significant numbers of parents can be dissatisfied with the public schools or simply want additional choices for their children's educations. The families represented by the Institute for Justice (IJ) are typical of these families who want the ability to choose another school for their children.

The Intervening Families

The parents of the four families on whose behalf IJ has moved to intervene in the two lawsuits are Florence and Derrick Doyle, Diana and Mark Oakley, Jeanette Strohm-Anderson and Mark Anderson, and Geraldine and Timothy Lynott. They seek intervention as defendants in the lawsuits to protect their interests in receiving the offered scholarships. Each family resides in Douglas County and has one or more children who have received scholarships and been accepted by a private school participating in the program. Each couple has their own unique reasons for wanting to transfer their children out of the public schools and into the private schools to which they have applied.

Florence and Derrick Doyle have three children: Dominick, who recently completed his sophomore year at Regis Jesuit High School, a Catholic high school in Aurora; and twins Donovan and Alexandra, who just completed eighth grade at Sagewood Middle School, a district public school. Florence and Derrick are very happy with the education that Dominick is

receiving at Regis and would like to send Donovan and Alexandra there for the 2011-2012 school year. Because Dominick was already at Regis when the program was enacted, he is ineligible for a scholarship. But Donovan and Alexandra are eligible and have received scholarships, and the district has approved Regis as a participating school for the program.

Florence and Derrick are attracted to Regis's small class sizes, challenging college-prep curriculum, strict discipline and Jesuit approach to education. Importantly, Florence and Derrick would like their children, whom they have raised Catholic, to go off to college with a strong spiritual background, which they will receive at Regis. Paying tuition for all three children to attend Regis would be a substantial financial burden that the scholarships for Donovan and Alexandra will help defray.

Diana and Mark Oakley have three children, all of whom attend Eagle Ridge Elementary, a district public school. Nathaniel (Nate) just completed sixth grade; Amber, fourth grade; and Joshua, first grade. Amber and Joshua are doing well at Eagle Ridge and the Oakleys are happy to keep these children in the public schools where they feel they are being well served. But Nate, who has Asperger's Syndrome, is not faring so well with his public schooling.

Nate attended first through fourth grades at a public school in Oklahoma, and Diana and Mark were very happy with the special education services and staff at his school there. While in Oklahoma, Nate had a paraprofessional in the classroom at all times. In the first and second grades, the paraprofessional was assigned to Nate exclusively; while in the third and fourth grades, he also worked with other students but was still in the classroom with Nate all day.

In 2008, Diana and Mark moved back to Colorado and enrolled Nate in Eagle Ridge Elementary for fifth grade. They immediately ran into problems. The administration at Eagle Ridge informed the couple that the school would not provide a paraprofessional for Nate. Not surprisingly, Nate did not do well, and Diana and Mark made the difficult decision to have him repeat fifth grade. Things did not improve the following year. In sixth grade, the school did provide a paraprofessional, but she was not devoted to Nate exclusively and was only in the classroom part time. Nate continued to struggle. Toward the end of sixth grade, after more than a year of relentless bullying, Nate was physically assaulted by a fellow student. After the incident, the school finally provided Nate a dedicated paraprofessional. If Nate remains in the public school system, however, he will attend Crest Hill Middle School next year, and the administration there has informed the Oakleys that he will not have a paraprofessional.

The Oakleys received a scholarship for Nate under Douglas County's choice program and he has been accepted by Humanex Academy for the upcoming school year. Humanex Academy is a small, non-religious private school that works with children with special needs and is a participating school in the program. Nate attended classes at Humanex as a guest for several days before the Oakleys applied and they were very impressed with everything about it, from its small size to the fact it uses only natural lighting, as artificial light can cause problems for students with Asperger's. Without the scholarship, however, sending Nate to Humanex will be financially impossible for the Oakleys.

Jeanette Strohm-Anderson and Mark Anderson have two sons: Max, who just completed second grade at Larkspur Elementary, a district public school; and Alex, who attended Larkspur and is an upcoming junior at Douglas County High School, also a district school. Jeanette and Mark have been very involved with Larkspur Elementary over the years, with Jeanette serving as vice president and president of the Larkspur Parent-Teacher Organization. They are, however, unhappy with aspects of Larkspur's curriculum, particularly in mathematics, where the school

follows "Everyday Mathematics," a controversial "reform" math approach. Max shows a keen interest and aptitude for math and science, and Jeanette and Mark would prefer that he be educated using the "Singapore Math Method," which places a strong emphasis on problem-solving and model drawing. They have applied for and been awarded a program scholarship, which they plan to use to send Max to Woodlands Academy, a small, non-religious private school that has been approved for participation in the scholarship program. Woodlands has a strong math and science curriculum and uses the Singapore Math Method. Jeanette and Mark are also impressed with the school's small class sizes and the passion of its teachers. Max spent two days sitting in on classes at the school and described his first day there as "the best seven hours of my life" and "the best math class I ever had."

Geraldine and Timothy Lynott have three children: Timothy, Jr., who just completed eighth grade at Sagewood Middle School, a district public school; Catherine, who just completed fifth grade at Legacy Point Elementary, also a district public school; and Chandler, a toddler. Even though Geraldine is a public school teacher, the Lynotts want Timothy, Jr. to attend Regis Jesuit High School because they like its small class sizes and rigorous college-prep curriculum. They are also attracted to the school's religious character; they would like the high school Timothy, Jr. attends to embrace the religious values they embrace at home. Regis has already been approved for the program and has accepted Timothy, Jr. But without financial assistance, the Lynotts will not be able to afford tuition at the school. If the program continues, the Lynotts plan to apply for a scholarship to send Catherine to Regis as well.

These four families demonstrate a wide array of reasons for wanting a scholarship for their children and for choosing the schools they prefer. All of them are very familiar with the district's public schools, and several have children they wish to continue sending to them. But each family has at least one child who they believe will receive a better education in a private school. In the cases of the Doyles and Lynotts, the schools they prefer are private religious schools that teach values consistent with these parents' faith. In the cases of the Oakleys and Andersons, the schools they prefer are non-religious private schools that provide a specific curriculum geared to the particular interests and needs of their children. In each case, the parents have made a deliberate and independent decision to seek a scholarship to send their children to the school of their choice.

The Lawsuits

Both lawsuits that were filed seek to prevent the families described above—and the hundreds of others who want to use their scholarships to choose a private school—from choosing the best educational options for their children. The first lawsuit filed, *Larue v. Colorado Board of Education*, focuses primarily on the fact that the program permits parents to select religious private schools; the second, *Taxpayers for Public Education v. Douglas County School District RE-1*, focuses on the fact that the scholarships would use state education funds. Each of the lawsuits includes claims made in the other one; they differ principally in their emphasis. Both lawsuits were filed in the District Court for Denver County, and IJ expects the court to consolidate these lawsuits into a single action.

Despite the large number of alleged violations, IJ is confident that none of them has legal merit. The complaints allege that the program violates four provisions of the Colorado Constitution involving religion: Article IX, section 7, which prohibits appropriating public money to private and religious schools;[1] Article II, section 4, which guarantees religious freedom and prohibits both compulsory support of any religious sect and preferences to any religious denomination;[2] Article V, section 34, which prohibits appropriations to private institutions not

under the absolute control of the state or to any denominational or sectarian institution;[3] and Article IX, section 8, which prohibits religious qualifications for admission to any public educational institution and prohibits teaching religious doctrines in any public school.[4] These provisions form the primary focus of the *Larue* complaint, filed by the ACLU and Americans United for Separation of Church and State, among others, but the *Taxpayers for Public Education* complaint (hereinafter the "*TPE* complaint") alleges similar violations of two of these provisions.

Significantly, three of the provisions were the subject of an earlier case brought in Colorado by Americans United for Separation of Church and State. In *Americans United for Separation of Church and State, Inc. v. State of Colorado*,[5] Americans United challenged a college scholarship program that permitted recipients to select religious schools, claiming the program violated Article II, section 4; Article V, section 34; and Article IX, section 7. The Colorado Supreme Court *rejected* Americans United's argument, holding that the "program is designed for the benefit of the student, not the educational institution."[6] The same is true under Douglas County's scholarship program, notwithstanding the cynical claim by school choice opponents that the program is really designed to advance religion.

Moreover, since *Americans United* was decided, there has been a series of U.S. and State Supreme Court cases upholding school choice programs with similar reasoning. In *Zelman v. Simmons-Harris*,[7] the U.S. Supreme Court upheld an Ohio scholarship program because it was neutral with respect to religion and any money that flowed to a religious school did so only as the result of the private, independent choice of parents. The Wisconsin and Ohio Supreme Courts came to similar conclusions in upholding scholarship programs under their respective state constitutions in *Jackson v. Benson*[8] and *Simmons-Harris v. Goff*.[9] The Colorado courts will look to these cases, as well as the Colorado Supreme Court's decision in *Americans United*, in reviewing and likely upholding the Douglas County program.

Hiding Behind the Bigotry of the Blaine Amendments

An additional reason for expecting this outcome is the increasing recognition that provisions such as Article IX, section 7, and part of Article V, section 34, do not have their origins in benign efforts to mimic the federal Establishment Clause at a time before it had been held by the U.S. Supreme Court to apply to the states. Rather, these state "Blaine Amendments" were forced upon many states by the federal Congress as a condition of statehood. The congressional majorities that failed to attain the super-majority required in both houses of Congress to pass a federal Blaine Amendment had more than sufficient votes to require, through enabling legislation, that new states include these provisions in their constitutions as a pre-condition for statehood. Thus, every state admitted to the Union after 1875, including Colorado, has a Blaine Amendment in its state constitution.

These amendments are named after then-Speaker of the U.S. House of Representatives James G. Blaine of Maine. He modeled his federal constitutional amendment on an early version enacted by Massachusetts in 1855, after the viciously nativist and anti-Catholic Know-Nothing Party swept control of the state government a year earlier. That enactment was designed to rebuff efforts of the Catholics of Massachusetts to obtain direct subsidies for their schools equal to those provided to the "public" schools, which were nondenominationally Protestant in orientation and inhospitable to Catholics. This had led the Catholic Church to establish its own schools, and, in turn, to the Massachusetts proto-Blaine Amendment's prohibiting any aid for so-called "sectarian" schools. As a plurality of the U.S. Supreme Court explained in *Mitchell v. Helms*, the federal Blaine Amendment used "sectarian" as a code word for Catholic and has "a shameful

pedigree . . . born of bigotry" that "should be buried now."[10] The same is true of the state Blaine amendments that were forced on states as a condition of statehood.

The anti-Catholic origins of such state constitution religion provisions counsel great caution in extending their reach beyond what the federal Religion Clauses prohibit. In particular, where a program, such as Douglas County's, clearly passes federal constitutional muster as a religiously neutral program of student assistance by which non-governmental actors make independent choices of where to use their government benefits, the Colorado courts should not allow these provisions to discriminate against families that choose a religious school for their children's education.

Educating Children through Choice

The complaints in the two lawsuits also allege violations of several provisions of the Colorado Constitution not related to religion. These are Article IX, section 2, which requires the Legislature to establish and maintain a thorough and uniform system of free public schools throughout the state;[11] and Article IX, section 15, which provides for the organization of public school districts to control instruction in the public schools of their districts.[12] Both complaints also allege that the scholarship program violates the Public School Finance Act of 1994 by allowing the use of public funds to pay for attendance at private schools,[13] and that the Douglas County School Board has no authority to enact such a program.[14]

Nothing the Douglas County School Board has done in enacting its school choice program, however, violates the state's responsibility to operate a system of free public schools open to all. The board has merely supplemented the existing system of schools with enhanced opportunities for its residents to exercise their constitutional right to send their children to private schools. The program is purely voluntary and the public schools remain fully available to all families not choosing to use the scholarships. Nothing in Article IX, section 2 or 15, implies that the state of Colorado or Douglas County is limited to supporting solely a public school system and cannot also provide educational options for parents who select a private education for their children—especially when that choice saves taxpayers a substantial portion of the expense of educating these children through the public schools to which they would otherwise be assigned. The state has a legitimate interest in ensuring the education of all children within its jurisdiction, and it has the authority to aid families who choose to educate their children in private schools.

Nor does it make sense to argue that the program violates the Public School Finance Act when that Act already allows school districts to contract directly with private schools to provide educational services to public school students, such as when a district contracts with a private school to provide educational services to a child identified as having special needs under the Individuals with Disabilities Education Act (IDEA) and Colorado's own special education laws. Districts sometimes satisfy their obligation to provide a free and appropriate public education for such students by placing them in privately run programs via contract. They do so for a simple reason: it can be far-cheaper than providing for a placement in the public schools themselves. Such contracts do not render the private school providing the services a public school, yet districts use funds under the Public School Finance Act to pay for services under those contracts.

Finally, the very provision quoted in the *Larue* complaint's eighth cause of action—C.R.S. section 22-32-122—on its face authorizes the district to contract with private entities for the performance of educational services "which any school may be authorized by law to perform or undertake." Although the families seeking to intervene are not the authorities charged with the interpretation of these statutory provisions, the State Department of Education and the State

Board of Education, who are named defendants in the complaints, are in fact charged with the interpretation and administration of these laws. As such, these government educational entities' views are entitled to deference by the courts. Doubtless, given the salience of these issues and the very open and public nature of Douglas County's consideration of this program, the board did not proceed without discussing these topics with the relevant state officials.

Litigation Team

The lead attorney in this case is IJ Washington Chapter Senior Attorney Michael Bindas. Assisting Bindas are IJ Senior Attorney Richard Komer and IJ Arizona Chapter Executive Director Tim Keller.

The Institute for Justice is the nation's leading legal advocate for school choice with a long history of successfully defending choice programs from legal challenge. The Institute helped win a tremendous victory for school choice before the U.S. Supreme Court when the Court upheld the Cleveland scholarship program against a federal Establishment Clause challenge in *Zelman v. Simmons-Harris* in 2002. The Institute also helped secure a victory earlier this year in *Arizona Christian School Tuitioning Organization v. Winn*,[15] in which the U.S. Supreme Court turned back an Establishment Clause challenge to Arizona's tax credit scholarship program on standing grounds. IJ helped successfully defend Milwaukee's school choice scholarship program before the Wisconsin Supreme Court, the Cleveland scholarship program before the Ohio Supreme Court, various Arizona school choice programs before Arizona courts, and the Illinois tax credit school choice program before the Illinois appellate courts.

For more information, or to arrange an interview with the Institute for Justice and the school choice parents it represents, please contact:

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[1] *Larue* complaint—first cause of action; *TPE* complaint—fifth cause of action.
[2] *Larue* complaint—third cause of action.
[3] *Larue* complaint—fifth cause of action; *TPE* complaint—sixth cause of action.
[4] *Larue* complaint—second cause of action. The *TPE* complaint does not allege an Article IX, section 8, violation, presumably because of the obvious fact that participating private schools are in fact *private* and not public schools.
[5] *Americans United for Separation of Church and State, Inc. v. State of Colorado*, 648 P.2d 1072 (Colo. 1982).
[6] 648 P.2d at 1082. The program at issue in *Americans United* excluded so-called "pervasively sectarian" colleges in an effort to comport with the U.S. Supreme Court's jurisprudence interpreting the federal religion clauses, which, at the time, had not yet clearly distinguished between direct aid to institutions and aid to individuals that incidentally benefits the institutions

they choose. Federal case law was subsequently clarified by *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002), which held that for true student assistance programs, it does not matter whether the schools chosen by the recipients are "pervasively sectarian" or not. This, in turn, led the U.S. Court of Appeals for the Tenth Circuit to hold that it violated the First Amendment of the U.S. Constitution for Colorado to exclude "pervasively sectarian" colleges from the program. *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir. 2008).

[7] 536 U.S. 639 (2002).

[8] 578 N.W.2d 602 (Wis. 1998).

[9] 711 N.E.2d 203 (Ohio 1999).

[10] 530 U.S. 793, 828-29 (2000) (plurality); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 719-21 (2002) (Breyer, J., dissenting).

[11] *Larue* complaint—fourth cause of action; *TPE* complaint—first cause of action.

[12] *Larue* complaint—sixth cause of action; *TPE* complaint—second cause of action.

[13] *Larue* complaint—seventh cause of action; *TPE* complaint—first cause of action.

[14] *Larue* complaint—eighth cause of action; *TPE* complaint—fourth cause of action.

[15] 130 S. Ct. 3350 (2011).