DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
Plaintiffs: JAMES LARUE; SUZANNE T. LARUE; INTERFAITH ALLIANCE OF COLO.; RABBI JOEL R. SCHWARTZMAN; REV. MALCOLM HIMSCHOOT; KEVIN LEUNG; CHRISTIAN MOREAU; MARITZA CARRERA; SUSAN MCMAHON vs Defendants: COLORADO BOARD OF EDUCATION; COLORADO DEPARTMENT OF EDUCATION; DOUGLAS COUNTY BOARD OF EDUCATION; DOUGLAS COUNTY SCHOOL DISTRICT Movants: FLORENCE DOYLE; DERRICK DOYLE; ALEXANDRA DOYLE; DONOVAN DOYLE; DIANA OAKLEY; et al. **AND** Plaintiffs: TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD; MASON S. BARNARD vs Defendants: DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY SCHOOL DISTRICT RE-1 BOARD OF EDUCATION; COLORADO DEPARTMENT OF EDUCATION; COLORADO STATE BOARD OF EDUCATION	▲ **COURT USE ONLY** ▲

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BRIEF IN OPPOSITION TO MOTIONS FOR A PRELIMINARY INJUNCTION	

DEFENDANTS, Colorado State Board of Education and Colorado State Department of Education (hereinafter the "State Defendants"), by and through the Office of the Colorado Attorney General, hereby submit their combined response to Plaintiffs' preliminary injunction motions (the "Motions"). In further support thereof, the State Defendants state as follows:

INTRODUCTION

"[T]o provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending" the Douglas County School District adopted the Choice Scholarship Pilot Program (hereinafter the "Pilot Program") which provides scholarships to 500 Douglas County School District students which they may use to attend a private school of their choice from a list of schools approved by the school district. Enrollment is limited to those students who were enrolled in the Douglas County public school system in the previous year. Plaintiffs seek to enjoin this program on the grounds that it violates Art. IX, § 2, 3, 7, 8, and 15, Art. II § 4, and Art. V § 34 of the Colorado Constitution, the Public School Finance Act of 1994, and §§ 22-54-101 *et seq*., 2-32-101, and 22-32-122, C.R.S. (governing the subcontracting of

educational services), and a common law doctrine of ultra vires action. They ask for a preliminary injunction to prevent the children from starting at their new schools at the beginning of this school year.

ARGUMENT

A preliminary injunction is an "extraordinary remedy" intended to protect a plaintiff from suffering "irreparable injury" pending a decision on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982) (citations omitted). Although the decision to grant or deny a preliminary injunction is within the "sound discretion" of the trial court, such relief should not be "indiscriminately granted," but rather should be granted only "sparingly and cautiously" when the trial court is convinced of its "urgent necessity." *Id.* at 653 (citations omitted). Trial courts are generally reluctant to grant a preliminary injunction "where 'the actions complained of are those of departments of executive and legislative branches of government, in the exercise of their authority,'" because "equitable relief in the nature of an injunction constitutes a form of judicial interference with continuing activities." *Id.*, at 651 (citations omitted). To obtain a preliminary injunction, the moving party bears the burden of establishing *all* of the following "prerequisites" to such relief pursuant to C.R.C.P. 65(a):

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

Id., at 653-54 (citations omitted). If each prerequisite cannot be met, a plaintiff's request for a preliminary injunction should be denied. *Id.*, at 654 (citations omitted).

I. PLAINTIFFS DO NOT HAVE A REASONABLE LIKELIHOOD OF SUCCESS ON THE MERITS.

The Choice Scholarship Pilot Program is consistent with the provisions of the Colorado Constitution guaranteeing a free public education to the children of Colorado and with the provisions of the Public School Finance Act, C.R.S. § 22-54-101 *et seq.*, and other school finance legislation. The Colorado school system already makes routine use of private institutions, including religiously affiliated institutions, for the provision of educational services to special needs students, preschool students, college and graduate students, and secondary school students taking coursework at institutions of higher education.

A. STATE STATUTES EXPLICITLY AUTHORIZE THE SUBCONTRACTING OF EDUCATIONAL SERVICES, AND THERE ARE NUMEROUS IMPORTANT PROGRAMS ALREADY IN OPERATION UNDER THIS AUTHORIZATION.

Plaintiffs argue in the LaRue Seventh and Eighth Causes of Action and the Taxpayers First and Fourth Causes of Action that the Pilot Program violates the Public School Finance Act of 1994 and various state statutes. These claims are predicated largely upon the belief that state law prohibits a school district from using public funds to contract with a private school for the provision of educational services to public school students.[1] However, it is abundantly clear that state law does not prohibit a school district from contracting with private parties for these

[1] It should be noted that neither of the State Defendants have made any determination regarding whether, as ultimately implemented by Douglas County, the public school students participating in the Pilot Program will be eligible to be counted for purposes of the Public School Finance Act of 1994. Affidavit of Robert Hammond, attached as Exhibit A. So many unresolved details regarding Douglas County's implementation of the Pilot Program remain that no determination as to eligibility for funding could be given at this time. A final determination regarding whether or not students enrolled in the Pilot Program are eligible for public school funding will not be made by the Department until Douglas County's pupil count is audited, sometime in 2012.

purposes. Indeed, state law explicitly authorizes such public-private partnerships in many instances.

i. Section 22-32-122, C.R.S. Authorizes a School District to Contract with a Private School for the Provision of Educational Services to Public School Students.

Section 22-32-122(1), C.R.S., states, in relevant part:

> (1) Any school district has the power to contract with another district or with the governing body of a state college or university, with the tribal corporation of any Indian tribe or nation, with any federal agency or officer or any county, city, or city and county, or with any natural person, body corporate, or association *for the performance of any service, including educational service, activity, or undertaking which any school may be authorized by law to perform or undertake.*

Id. (emphasis added). This broad grant of statutory authority to school districts encompasses the authority to contract with private schools for the provision of a public education to public school students. This plain, unambiguous language authorizes the Pilot Program.

If a statute is ambiguous, the court may determine the intent of the General Assembly by considering the statute's legislative history and the problem addressed by the legislation. *Rowe v. People,* 856 P.2d 486 (Colo. 1993). In this case, the General Assembly amended this section to specifically authorize local boards to contract with private schools to provide educational services. HB 93-1118. The legislative history of HB 93-1118 indicates that the intent of the Bill was to overturn a legal opinion of the Attorney General's Office that would have done just what Plaintiffs seek to do here; prohibit state funding of public school students who were attending a private school under a contract between the private school and the local school district:

> I think you can see that what we're really doing is, here again, opening educational opportunity for children. And the little district that wrote the letter…talks about one kind of example where

> contracting, which is what this Bill asks, very simple, it just says, 'school boards have the ability to contract with the non-public schools.' It has to be non-sectarian and good for educational services. This school district wanted to contract with a private school for a few … children where parents wanted them to go, the school districts wanted them to be able to go. The attorney general informal opinion told them they couldn't do it, that the school (unintelligible) allowance, it didn't happen. And so this Bill would allow it to happen… The purpose for it is to be sure that we extend as many opportunities as we can for students and services under the public school purview and the elected officials themselves make the decision as to whether they want the contracting or not.

Explanation of the Bill by Its Sponsor, Representative Fox, House Education Committee, February 1, 1993.[2] This intent was expressly set forth in testimony regarding HB 93-1118 before the Senate Education Committee, where the intent of the Bill was explained as allowing a school district to contract with a private school to handle some of their students. Senate Education Committee, March 11, 1993. *See also* Fiscal Note on HB 93-1118, attached hereto as Exhibit A (stating the bill was intended to authorize school districts to contract with private schools to provide educational services).

Based on the legislative history of HB 93-1118, and the problem that the legislation was intended to address, there can be no doubt that the statutory language in § 22-32-122(1), C.R.S. includes the authority to contract with a private school for the placement of public school students at that school for purposes of receiving a publically-funded education.

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[2] The "nonsectarian" language in the testimony and in the fiscal note does not appear in either the bill itself or in the statute; it is likely a reference to various restrictions on contracting with "pervasively sectarian" schools that existed in the law prior to their repeal after such restrictions were declared unconstitutional by the 10th Circuit Court of Appeals in *Colorado Christian University v. Weaver,* 534 F.3d 1245 (10th Cir. 2008).

ii. Numerous Colorado Statutes and Programs Authorize The Use of Public Funds, Including Public School Finance Act Funds, for the Provision of a Public Education at Private Institutions.

In addition to § 22-32-122(1), C.R.S., numerous other statutory programs specifically authorize the use of public funds to provide a public education through contracts with private educational entities. The very existence of these programs puts to rest the allegation that no such funding is allowable under state law or the Public School Finance Act. Should Plaintiffs' radical interpretation of the law be accepted by the Court, many if not all of these widespread and important programs would be jeopardized.

a. Preschool Programs

1. *Colorado Preschool Program*, §§ 22-28-101 to 114, C.R.S. The Colorado Preschool Program provides free preschool to eligible, at-risk children through participating school districts and partnering community sites. A participating school district can contract with a child care agency to provide the district's preschool program. § 22-28-107(1)(e), C.R.S. A "child care agency" includes facilities associated with private and parochial schools. *Id.*; §§ 22-28-103(2), 26-6-102(1.5), C.R.S. *See also* Exhibit B at 24: "The district may contract out its entire program to community providers (*e.g.*, Head Start or private child care facilities) with proper support and monitoring." The Colorado Preschool Program is funded through the Public School Finance Act and is administered under the Public School Finance Unit. § 22-28-104(3), C.R.S. In the 2009-2010 school year, 20,160 children were supported by this Program in 169 school districts. Exhibit C, at 3.[3]

[3] Denver also runs its own preschool program for all students, although this is not funded through Public School Finance Act. *Denver Preschool Program* (Den. Mun. Code §§ 11-20 to

b. Elementary and Secondary (K-12) Programs

1. *Exceptional Children's Educational Act,* §§ 22-20-101 to 118, C.R.S. The Exceptional Children's Educational Act ("ECEA") provides financial assistance for costs associated with children with disabilities. Pursuant to the ECEA, a school district may place a student in an "eligible facility" (i.e., an approved facility school), which can be "a day treatment center, residential child care facility, or other facility licensed by the department of human services pursuant to section 26-6-104, C.R.S., or a hospital licensed by the department of public health and environment pursuant to section 25-1.5-103, C.R.S." § 22-2-402(3). *See also* § 26-6-102(2.5), C.R.S. (2010) (defining "child care centers" to include any center "operated in conjunction with a public, private, or parochial college or a private or parochial school").

There are 59 approved facilities schools providing residential or day treatment. Fifty-seven of those 59 schools are operated by private agencies and serve 1,517 pupils, with an additional 92 students served by public agencies. Affidavit of Kama Linscome, Exhibit F; *see also*, Approved Facilities Schools, Exhibit F. If a child is placed by a district in a private approved facility school, state per pupil revenues are sent directly to the approved facility school by CDE for the cost of the pupil's education, and the approved facility school can then bill the child's school district of residence for the remaining cost of the pupil's education. 1 CCR § 301-8, 2220-R-9.03(2)(a)(ii)(B); *see also* 2220-R-8.03. Private approved facility schools are also eligible to receive public education funding under the *Tony Grampsas Youth Services Program,*

11-22; 53-27(g); 53-98(k)). All licensed preschool providers—for-profit, non-profit, public, private, home-based, religious, and regardless of location (inside or outside Denver)—are eligible to participate. For the 2009-2010 school year, 5,921 students and 164 preschool providers participated. About forty of the participating preschools are religious. Exhibit E.

§ 25-20.5-201 to 205, C.R.S.; the *State Assistance for Career and Technical Education*, § 23-8-101 to 105, C.R.S.; and the *Colorado Comprehensive Health Education Act,* §§ 22-25-101 to 110, C.R.S.

In addition to services provided by these facility schools, under the ECEA 55 disabled students are currently placed by their school district or Board of Cooperative Educational Services ("BOCES") in other private schools for the purposes of providing these public school students with a "Free and Appropriate Public Education" ("FAPE") under the ECEA. Statewide, a total of twelve school districts and BOCES have placed public school students in eight private schools, including Humanex, which is one of the participants in the Pilot Program. Affidavit of Mary Greenwood, Exhibit G.

2. *Gifted and Talented Students*, § 22-26-101 *et seq,* C.R.S. Gifted and talented students may have their educational needs paid for by the state. § 22-26-103(1), C.R.S. The Department of Education can use funds for and contract with any private for-profit or nonprofit agency, organization, or institution approved by the Department for education services. The Department of Education may also use funds to "provide tuition assistance to qualified students." § 22-26-105(a), C.R.S. For fiscal year 2007-2008, 54,705 students were identified as gifted and talented. Exhibit H at 1. Forty-nine of 55 participating administrative units offered online courses, and several offered college-dual credit courses as part of their gifted and talented programs. *Id.* at 6, 7.

3. *Concurrent Enrollment Programs.* The Concurrent Enrollment Programs Act ("CEPA"), §§ 22-35-101 to 112, C.R.S., provides the opportunity for students to earn high school and college credit simultaneously. Students in grades 9-12 are eligible to receive a tuition

benefit to be applied toward tuition for approved courses at a participating institution of higher education, including eligible private colleges and universities. § 22-35-103(12), C.R.S.; Exhibit I. Like the Pilot Program, the tuition benefit is funded by per pupil operating revenue. § 22-35-105(2)(a), C.R.S. Participating students are included in the funded pupil count of a school district or the accounting district if the students are enrolled in a charter school authorized by the Charter School Institute ("CSI"). *Id.* Participating districts must execute cooperative agreements with the institutions of higher education where students desire to take coursework. Additionally, CEPA also includes a special program to enable high school students to take a fifth year of classes if they complete or are on schedule to complete at least 12 credit hours of post-secondary course work by the end of their 12th grade year. Accelerating Students Through Concurrent Enrollment ("ASCENT"), § 22-35-108, C.R.S.; Exhibit J. The funds for ASCENT also flow through the Public School Finance Act. § 22-54-103(5.2), C.R.S. Thus, like the Pilot Program and the ECEA, CEPA allows for a public school student to apply state tax dollars toward tuition at a private institution.

In addition to CEPA, the Post Secondary Enrollment Options Act, § 22-35-101 *et seq,* ("PSEO"),[4] allows public high school juniors and seniors who are under the age of 21 to enroll in courses at institutions of higher education. With "total program" funds that flow through the Public School Finance Act, § 22-35-105(2)(a), C.R.S. (cross-referencing § 22-54-103(7), C.R.S.), the school district pays the student's tuition so long as the courses count toward high

[4] House Bill 09-1319 repealed and re-enacted the Post Secondary Enrollment Options Act and renamed it the Concurrent Enrollment Programs Act. However, school districts may still provide concurrent enrollment services through the PSEO until 2012.

school graduation. Exhibit K. In the 2009-2010 academic year, two private institutions of higher education, the Iliff School of Theology and Jones International University, participated in the PSEO. Iliff is a private, graduate-level religious institution of higher education associated with the United Methodist Church. See http://www.iliff.edu/index/learn/the-iliff-experience/mission-vision/. In 2009-2010, sixteen students from Center High School in Saguache County enrolled in PSEO and took courses at Iliff. Exhibit L. Jones International University is a private for-profit, on-line university. See http://www.jiu.edu/schools. In 2009-2010, seven students from four different high schools took courses at Jones International through PSEO. *Id.* Thus, the PSEO allows public school students to select private, including religious, institutions at which to take college-level courses, and the school district pays for the tuition from "total program" funding.

Finally, like the Pilot Program, the Early College Programs are charters schools set up on college campuses where students take a substantial part of their coursework at the partner institution. § 22-35-103(10), C.R.S. For example, Colorado Springs Early Colleges is a public charter school associated with Colorado Technical University, a private university. Exhibit M. Similarly, Southwest Early College High School is a public charter associated with Colorado Heights University, a private university. In each case, public charter schools contract with a private institution of higher education at which students take college-level courses, paid for from "total program" funding.

4. *Expelled and At-Risk Student Services,* § 22-33-205, C.R.S. Expelled and At-Risk Student Services ("EARSS") is a grant program administered by the Department of Education. It is intended "to assist in providing educational services to expelled students and students at risk

of expulsion." Exhibit N at 3. Through EARSS, the Department of Education funds school districts across the state to provide services to expelled students and students who are at risk. These educational services may be provided by private, nonparochial schools. § 22-33-203(2)(c)(I) and 205(1)(b), C.R.S. The statute expressly provides that "[a]ny expelled student receiving educational services shall be included in the expelling school district's pupil enrollment as defined in section 22-54-103(10) [of the Public School Finance Act]." § 22-33-203(2)(c)(II), C.R.S. In 2010-2011, grants were extended to sixty-five schools/facilities/boards of cooperative education, ten of which are private. Exhibit O.

5. *Colorado Childcare Assistance Program,* §§ 26-2-801 to 806, C.R.S. The Colorado Childcare Assistance Program assists low-income families with child care expenses. The benefit amount varies depending on certain factors, and the funds come from federal, state, and county tax revenues and parent fees. Parents may choose a child care facility that meets their needs, and the county of the child's residence pays the facility the benefit amount. An eligible child care facility may be associated with private and parochial schools. *See* §§ 22-28-103(2); 26-6-102(1.5), (5.4), C.R.S. From July 2007 through June 2008, 37,131 children received benefits through the program statewide, representing 23,014 families. Exhibit D at 1.

c. Higher Education Programs

Although not funded through the Public School Finance Act, Colorado's higher education system includes several programs which provide funding for private education, and these have withstood legal challenge. *Americans United for Separation of Church and State Fund, Inc. v. State,* 648 P.2d 1072 (Colo. 1982). These include the College Opportunity Fund, § 23-18-102, C.R.S., ("COF") which provides a stipend for each eligible undergraduate student in Colorado

who applies for the stipend and registers to attend a state or participating private institution of higher education. Exhibit P, COF Policy § 4.01. The private institutions where students can attend include Colorado Christian University, Regis University, and the University of Denver. Exhibit Q, COF Frequently Asked Questions at 3. All of these are religious institutions. *See Colorado Christian University v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (recognizing religious nature of these institutions, and mandating the inclusion of such religious institutions in the COF Program).

d. Conclusion.

As the numerous examples outlined above indicate, state law does not prohibit a school district from using public funds to contract with a private school for the provision of educational services to public school students, and indeed state law explicitly authorizes the provisions of state-funded educational services to both public school students and to higher education students in numerous instances. The principle beneficiaries of these programs are low income and disabled students, and they, not the 500 kids in Douglas County, would be the principle victims if the court were to strike this type of program down. Additionally, § 22-32-122(1), C.R.S., as amended by the General Assembly in 1993, also explicitly authorizes a local school district to contract for the placement of public school students at private schools, and to pay for such placement with public funds.

B. THE PILOT PROGRAM IS CONSISTENT WITH ARTICLE IX, § 2 OF THE COLORADO CONSTITUTION, WHICH ONLY REQUIRES THE GENERAL ASSEMBLY TO ESTABLISH AND MAINTAIN A SYSTEM OF FREE PUBLIC SCHOOLS.

Plaintiffs Taxpayers' First Cause of Action and Plaintiffs LaRues' Fourth Cause of

Action are predicated upon Art. IX, § 2 of the Colorado Constitution, which states:

> The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a *thorough and uniform system of free public schools throughout the state*, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year.

(Emphasis added) (the "Education Clause"). Plaintiffs allege that the Pilot Program violates the Education Clause by establishing a dual system of publicly funded education through which some students receive an education in public schools, while other students receive an education in private schools. Plaintiffs misconstrue the intent of the Education Clause.

Plaintiffs appear to read into the Education Clause's "thorough and uniform" clause a requirement that all of the state's public schools be absolutely identical in form and structure. However, that is not the case. By its clear wording, the Education Clause merely "requires the General Assembly to establish and maintain a school system." *Skipworth v. Bd. of Educ. of Woodland Park Sch. Dist. RE-2*, 874 P.2d 487, 488 (Colo. App. 1994); *Cline v. Knight*, 111 Colo. 8, 137 P.2d 680, 684 (1943)(the Education Clause mandates provision of opportunity for a free education). As the Colorado Supreme Court held in *Lujan v. Colorado State Board of Education*, 649 P.2d 1005, 1025 (Colo. 1982), "Article IX, section 2 of the Colorado Constitution is satisfied if thorough and uniform educational opportunities are available through state action in each school district." The Education Clause is not a mandate for absolute uniformity in educational services, limited to government-run schools, but rather a mandate that the General Assembly ensure each school age child the opportunity to receive a free education.

Id. at 1018. Beyond the provision of educational opportunities in each school district, the *Lujan* court determined that this provision was not intended to prevent school districts from establishing programs exceeding this standard: "While each school district must be given the control necessary to implement this mandate at the local level, this constitutional provision does not prevent a local school district from providing additional educational opportunities beyond this standard." *Id.* at 1025.

The "thorough and uniform" clause represents the floor, not the ceiling, of public education in Colorado. In *In re Kindergarten Schools*, 18 Colo. 234, 32 P. 422 (1893), the Colorado Supreme Court held that the Education Clause does not forbid the legislature from establishing a kindergarten program for children under the age of six. *Id.* at 422. The Court held that the Education Clause required affirmative action on the part of the legislature, but was "in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so." *Id*. at 423.

Similarly, in *School Dist. No. 16 in Adams County v. Union High School No. 1*, 25 Colo. App. 510, 139 P. 1039 (Colo. App. 1914), *rev.'d on other grounds* 60 Colo. 292, 152 P. 1149 (1915), the Colorado Court of Appeals determined that a statute allowing a high school age pupil to attend a high school outside of the boundaries of his school district at district expense if the district of residence did not provide a high school did not violate the Education Clause, stating, "[T]he constitutional mandate as to uniformity is violated in spirit, if not in letter, if some provision is not made by statute whereby pupils possessing the necessary qualifications, but residing in the less favored districts, are denied the privilege of high school education at public expense." The Court of Appeals found that, if anything, the legislative provision under

consideration was "enacted for the purpose and has the effect of producing uniformity in the system of free public schools and equality of privilege." *Id.* at 1040. Likewise, the Pilot Program, if anything, supports uniformity in the provision of public education and equality of privilege by increasing the choices available for those students who are not being well served in their current educational environment and may not be able to afford private school on their own. Indeed, the Pilot Program balances the constitutional obligation of the state to provide a free education with the constitutional right, long recognized by Colorado's courts, of parents to direct the education of their children:

> The parent has a constitutional right to have his children educated in the public schools of the state. Colo. Const. art. IX, § 2. He also has a constitutional right … to direct, within limits, his children's studies.

Zavilla v. Masse, 112 Colo. 183, 147 P.2d 823, 825 (1944). *See also*, *People ex rel. Vollmar v. Stanley*, 81 Colo. 276, 255 P. 610, 614 (1927).

Other states have reached the same conclusion. In *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 711 N.E.2d 203 (1999), the Ohio Supreme Court was confronted with the question of whether Ohio's school choice program (which in many aspects is similar to the Pilot Program) violated Art. VI, § 2 of the Ohio Constitution, which, in language remarkably similar to Colorado's own Art. IX, § 2, required the Ohio General Assembly to provide for "a thorough and efficient system of common schools throughout the state." Plaintiffs in the Ohio case argued that this provision prohibited the establishment of a system of nonpublic schools financed by the state.

The Ohio Supreme Court rejected this argument, finding that the School Voucher Program was consistent with the state's obligation to public education:

> Private schools have existed in this state since before the establishment of public schools. They have in the past provided and continue to provide a valuable alternative to the public system. However, their success should not come at the expense of our public education system or our public school teachers. We fail to see how the School Voucher Program, at the current funding level, undermines the state's obligation to public education. The School Voucher Program does not violate this clause of Section 2, Article VI of the Ohio Constitution.

Simmons-Harris, 711 N.E.2d at 212.

Similarly, the Wisconsin Supreme Court rejected a challenge under the Wisconsin version of the Education Clause in *Davis v. Grover*, 166 Wis.2d 501, 480 N.W.2d 460 (1992). There the Wisconsin Supreme Court held that the Milwaukee Parental Choice Program, which permitted children from low-income families to attend private schools with public monies, did not violate Art. X, § 3 of the Wisconsin Constitution, which obligates the legislature to provide for the establishment of free public schools which shall be "as nearly uniform as practicable". *Id.* The plaintiffs in that case argued that, by offering a character of instruction that is different from that of public schools, the Milwaukee program violated the "uniformity" clause.

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

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

Id. at 474. The Wisconsin Supreme Court reaffirmed its holding in *Davis* after the Milwaukee program was amended to expand the program and to include sectarian schools. Finding that Art. X, § 3 "provides not a ceiling but a floor upon which the legislature can build additional opportunities for school children in Wisconsin", the Court held that in amending the School Choice Program, "the State has merely allowed certain disadvantaged children to take advantage of alternative educational opportunities in addition to those provided by the State under art. X, § 3." *Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602, 628 (1998).

Likewise, the Pilot Program merely allows children access to alternative educational opportunities, effectively expanding the educational opportunity of Colorado's children. It in no way deprives any child of the opportunity to attend a public school, should he or she choose to do so. Like in Wisconsin, the Education Clause provides a floor, not a ceiling, in respect to publicly funded educational opportunities. *See In re Kindergarten Schools*, 32 P. at 423. The Pilot Program represents a Colorado school district providing its students with a broader range of educational opportunities, and is thus fully consistent with the spirit of Colorado's constitution.

C. THE PILOT PROGRAM DOES NOT VIOLATE ARTICLE IX, § 3 OF THE COLORADO CONSTITUTION BECAUSE ALL THE INCOME FROM THE PUBLIC SCHOOL FUND IS TRANSFERRED TO THE SCHOOLS OF THE STATE.

Plaintiffs Taxpayers' Third Cause of Action alleges a violation of Art. IX, § 3 of the Colorado Constitution, which states in relevant part:

> The public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state, and shall be distributed amongst the several counties and school districts of the state, in such manner as may be prescribed by law.

Plaintiffs allege that under the Pilot Program, Douglas County will fund the program out of moneys derived, in part, from transfers of income from the Public School Fund. Therefore, Plaintiffs contend that income from the Public School Fund is being used to pay for private education in contravention of Art. IX, § 3. As set forth below, Plaintiffs misconstrue the constitutional requirements of the Public School Fund.

When Colorado entered the Union, Congress provided in the 1875 Colorado Enabling Act that the federal government would grant two sections of land in each township to the new state "for the support of the common schools." 18 Stat. 474 (1875); Enabling Act § 7, C.R.S. (2010). Proceeds from such sales must be put in a permanent school fund, the interest from which the state must spend in support of the common schools. Enabling Act, § 14, C.R.S. (2010). These provisions became Art. IX, §§ 3, 9, and 10 of the Colorado Constitution.

Today, income for the Public School Fund accounts for only a very small percentage of total public school funding in Colorado. All interest derived from the investment of the Public School Fund is credited to the "State Public School Fund" or the "Public School Capital Construction Assistance Fund," § 22-41-102, C.R.S. It is the "State Public School Fund" that provides an ongoing source of revenue for the state's share of districts' total program funding and other educational programs. According to HB10-1376, pages 31 and 32 footnote d (the 2010 "Long Bill"), moneys from the State Public School Fund accounted for only $101,825,876 out of a total appropriation of $3,772,524,442 to fund the public schools of the state through public school finance, or approximately 2.7% (*See* Exhibit R).

Art. IX, § 3 only requires that interest and other income from the Public School Fund "shall be expended in the maintenance of the schools of the state, and shall be distributed

amongst the several counties and school districts of the state, in such manner as may be prescribed by law." The Pilot Program is not funded directly out of the Public School Fund, but from monies distributed to Douglas County School District. Nor does the Pilot Program in any way alter the distribution of such moneys among the school districts of the state. Rather, income from the Public School Fund becomes just one component part of the $3,772,524,442 Long Bill appropriation that funds the total program funding of the public schools of the state. *See* Exhibit R. Once the money is distributed, the Pilot Program represents a decision by one school district, Douglas County, to implement an educational pilot program aimed at assisting its students to take advantage of a wider range of educational alternatives. Article IX, § 3 places no restraints on the use of such monies after such moneys have been transferred to the districts, and, per § 22-54-104(1)(a), C.R.S. "….the amounts and purposes for which such moneys are budgeted and expended shall be in the discretion of the district."

In this case, all of the interest and income derived from the Public School Fund is distributed to the school districts of the state under the Long Bill in accordance with the requirements of Art. IX, § 3. The Pilot Program has absolutely no effect on such distribution. Thus, the requirements of Art. IX, § 3 are being complied with. Additionally, nothing in Art. IX, § 3 limits the authority of a public school district, once it receives such moneys, to establish educational programs for their pupils and to fund them through the Public School Finance Act moneys distributed for that purpose.

D. ARTICLE IX, § 15 DOES NOT PRECLUDE DOUGLAS COUNTY FROM ADOPTING THE PILOT PROGRAM

Plaintiffs argue in the LaRue Sixth Claim for Relief and the Taxpayers Second Claim for Relief that the Pilot Program violates Article IX, § 15 of the Colorado Constitution, the "local control" requirement. To the contrary, the program—which was adopted by a duly-elected county board of education after months of deliberation and public input from local electors—is the very essence of local control. Section 15 provides that:

> The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.

Neither the text, context, or judicial interpretation of Article IX, § 15 support Plaintiffs' argument that this provision should be read as a prohibition against the creation, by local school districts, of innovative local educational programs like the Pilot Program

It is clear from the language of the constitutional provision that there is no limitation in section 15 on the local school board's authority; the language is that of empowerment, not prohibition. Plaintiffs thus are asking the Court to read an unexpressed limitation into this section. Essentially, Plaintiffs argue that Article IX, § 15 should also be read to limit the local school district's authority to adopt programs and create alternative schools to programs and schools that are owned and operated directly by school district personnel.

The Colorado Supreme Court, however, has interpreted section 15 not as forbidding local school districts from creating their own schools, but only as forbidding the State from unduly interfering with the way local districts choose to operate schools funded with locally-raised

revenue. Only where a law has the effect of "usurping the local board's decision-making authority or its ability to implement, guide, or manage the educational programs *for which it is ultimately responsible*" does a state law violate Section 15. *Board of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, 649 (Colo. 1999)(emphasis added). The Pilot Program, however, represents not a usurpation of the local board's decision-making authority, but a discretionary exercise of that authority. Thus, no violation of section 15 is involved in the creation of the Pilot Program.

Another way to analyze local control is that the local control requirement is a shield against attempts by the state to arrogate local decision-making authority – not a sword by which to attack the results of that local decision-making authority. As the Colorado Supreme Court has explained, local control "distribute[s] decision making authority … to each district" and thereby serves as "a means of guarding against excessive state involvement in education policy." *Owens v. Colorado Congress of Parents, Teachers and Students,* 92 P.3d 933, 939 (Colo. 2004)(internal quotation marks omitted); *id.* at 941 n. 8. At issue in *Owens* was whether the Colorado Opportunity Pilot Program (a state-wide school voucher program similar to the Pilot Program at issue here) violated the local control provisions of § 15. Under the program, the parents of eligible students accepted into a private school would receive assistance payments from the school district. A substantial amount of funding for the program came from local tax revenues, and the district had *no authority* in connection with the payments. *Id.* at 937. The Supreme Court held that the program violated § 15 because *it deprived school districts of control of locally-raised funds*: "Control over locally-raised funds allows local electors to tailor educational policy to suit the needs of the individual districts, free from state intrusion. Without control over

locally raised funds, the representative body mandated by our state constitution loses any power over the management of public education." *Id.* at 935-936. It is therefore unsurprising that the "local control" challenges that Colorado courts have considered have almost always involved challenges to state laws that allegedly usurp local decision-making authority—not local laws that supposedly "abdicate" that authority, as Plaintiffs contend the Pilot Program does. *See* TPE Mot. Prelim. Inj. 10, 12.

In this case, Douglas County has exercised its constitutional authority to control locally-raised funds in a manner that, true to the *Owens* case, "allows local electors to tailor educational policy to suit the needs of the individual districts, free from state intrusion." *Owens,* 92 P.3d. at 935. Thus, the Pilot Program represents precisely what the Colorado Constitution contemplates: the representative body charged by our constitution with control of instruction within the school district has properly exercised its power over the management of public education in that District by the adoption of an innovative local educational program. The Pilot Program is funded, at least in part, with locally raised funds under the authority and control of the local school board, and therefore does not violate local control as did the legislation struck down in *Owens*.

E. THE PILOT PROGRAM COMPLIES WITH ARTICLE IX, § 7; ARTICLE II, § 4; AND ARTICLE IX, § 8 OF THE COLORADO CONSTITUTION.

In the interests of space, the State of Colorado adopts Douglas County School District's arguments in opposition to LaRue's First, Second, and Third causes of action and to Taxpayers for Public Education's Fifth cause of action, dealing with the religion clauses of the Colorado Constitution. These arguments are powerfully supported by case law. The state will simply

point out how Plaintiffs' efforts to reinterpret the Colorado Constitution could bring it into conflict with the Constitution of the United States.

As explained in the Douglas County School District Response, Art. II, § 4 and Art. IX, § 7 do not forbid the Pilot Program and are entirely consistent with the Federal Constitution and current U.S. Supreme Court precedent. If this Court were to depart from the Colorado Supreme Court's approach and embrace the Plaintiffs' radical interpretation of Art. II, § 4 or Art. IX, § 7, it could create potential conflict with the Free Exercise Clause of the First Amendment of the Federal Constitution. These needless conflicts can be avoided simply by adhering to the well-settled interpretations of Art. II, § 4 and Art. IX, § 7.

The Colorado Supreme Court has historically recognized that a state constitution cannot limit a right otherwise granted under the federal Constitution. Indeed, in *Americans United*, the Colorado Supreme Court read Art. II, § 4 to embody the same values of free exercise and governmental non-involvement secured by the First Amendment and to echo the same principle of constitutional neutrality. Thus, the Court noted that barring a large group of students from public benefits solely because of their independent election to pursue educational opportunities in a church-related institution would implicate the Free Exercise Clause of the United States Constitution. That is one of the reasons why the Colorado Supreme Court has long adopted an interpretation of Art. II, § 4 and Art. IX, § 7 that does not risk coming into conflict with the Free Exercise Provision. *Americans United*, 648 P.2d at 1082; *Colorado Christian University v. Weaver*, 534 F.3d 1245, 1255 (10th Cir. 2008).

Fortunately, on their face, Art. II, § 4 and Art. IX, § 7 require no such conflict. Moreover, Colorado Supreme Court precedent not only counsels interpreting Art. II, § 4 and Art.

IX, § 7 in a manner that avoids conflicts with the Federal Constitution, it affirmatively embraces Federal Establishment Clause jurisprudence as an interpretive guidepost.

F. THE PILOT PROGRAM DOES NOT VIOLATE THE "ANTI-APPROPRIATION CLAUSE" OF ARTICLE V § 34 BECAUSE THE PILOT PROGRAM FALLS WITHIN THE PUBLIC PURPOSE EXCEPTION.

The LaRue Fifth Cause of Action and Taxpayers Sixth Cause of Action are predicated upon Art. V, § 34 of the Colorado Constitution, which prohibits appropriations to corporations not under the absolute control of the State. Art. V, § 34 (the Anti-Appropriation Clause") states in relevant part:

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

Plaintiffs contend that the Pilot Program violates Art. V, § 34 because it amounts to an appropriation made for educational purposes to persons, corporations, and communities not under the absolute control of the state, and to denominational and sectarian institutions. This argument fails because the Pilot Program serves a valid public purpose.

Initially, the only "appropriation" alleged here is an appropriation by the General Assembly to the Department of Education, not to any private school. Thus, by its clear terms Art. V, § 34 does not apply here. Moreover, insofar as the Pilot Program contains an "appropriation" to anyone, it would be in the form of the assistance provided by a school district to the parents of an eligible child attending a participating nonpublic school. *See*, *Americans United for Separation of Church and State Fund, Inc. v. State*, 648 P.2d 1072, 1083 (Colo. 1982) (Educational scholarship program not an appropriation to help support sectarian schools, since

aid designed to assist the student, not the institution). However, even if the complete lack of any appropriation to any nonpublic school were not fatal to this claim, Plaintiffs' claim must fail, because this assistance to parents provided by the Pilot Program falls squarely within the Public Purpose Exception to the Anti-Appropriation Clause.

The Public Purpose Exception to the Anti-Appropriation Clause was recognized in *Bedford v. White*, 106 Colo. 439, 106 P.2d 469, 476 (1940), where the court held that a statute authorizing judicial pensions to individuals was a form of compensation for commendable service rendered to the public rather than a benefit to the individual recipient, and thus did not violate the constitution because it served a valid public purpose. In discussing the Public Purpose Exception to the Anti-Appropriation Clause, the Colorado Supreme Court has stated that to come within the Public Purpose Exception, "the legislation must evince a discrete and particularized public purpose which, when measured against the proscription of Article V, Section 34, preponderates over any individual interests incidentally served by the statutory program." *In re Interrogatory Propounded by Gov. Roy Romer on House Bill 91S-1005,* 814 P.2d at 883 (quoting *Americans United*, 648 P.2d at 1086).

In *City of Aurora v. Public Utilities Com'n of State of Colo.*, 785 P.2d 1280 (Colo. 1990), the Colorado Supreme Court said that the determination of what is a public purpose is primarily for the relevant legislative body (in this case, the local school board) to make:

> The test is whether the power, if exercised, will promote the general objects and purposes of the municipality, and of this the legislature is the judge in the first instance; and unless it clearly appears that some constitutional provision has been infringed, the law must be upheld.

Ginsberg v. City and County of Denver, 164 Colo. 572, 436 P.2d 685, 688 (1968). Moreover, the modern trend is to expand and liberally construe the term "public purpose". *Id.* at 688.

In this case, the Douglas County School Board has articulated a "discrete and particularized public purpose" as required by *Bedford*. According to the Policy, "The purposes of the Choice Scholarship Program are to provide greater educational choice for students and parents to meet individualized student needs, improve educational performance through competition, and obtain a high return on investment of DCSD educational spending". Policy, Exhibit S. Promotion of education is a "particularized and discrete" public purpose. In *Americans United*, the Court upheld a scholarship program providing grants to students to attend private colleges against an Anti-Appropriation Clause challenge, finding that financial assistance to individual students was a valid public purpose. *Id.* at 1085. Furthermore, the Court found that the recipient of the appropriation did not always have to be a public entity. *Id.* Finally, the Court found that the legislation evinced a discrete and particularized public purpose because the program was intended to help Colorado in-state students attend institutions of higher education. *Id.* at 1086.[5] Thus, under the reasoning of *Americans United* and *Bedford*, the Pilot Program does not violate Art. V, § 34 of the Colorado Constitution.

[5] Additionally, it should be noted that, in reviewing the Wisconsin school choice program, the Wisconsin Supreme Court also found that educational choice constituted a valid public purpose. *See Jackson v. Benson*, 218 Wis.2d 835, 578 N.W.2d 602, 630 (1998).

II. THERE IS NO DANGER OF A REAL, IMMEDIATE, AND IRREPARABLE INJURY WHICH MAY BE PREVENTED BY INJUNCTIVE RELIEF, AND THERE IS A PLAIN, SPEEDY, AND ADEQUATE REMEDY AT LAW.

A preliminary injunction is an "extraordinary remedy" intended to protect a plaintiff from suffering "irreparable injury" pending a decision on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 651 (Colo. 1982) (citations omitted). "[G]enerally, irreparable harm has been defined as 'certain and imminent harm for which a monetary award does not adequately compensate.'" *Gitlitz v. Bellock*, 171 P.3d 1274, 1279 (Colo. App. 2007) (citation omitted). The alleged injury in this case as against the State Defendants is a payment of money—money which can certainly be recovered by the State Defendants should the courts ultimately decide that the Pilot Program was invalid. This is a textbook example of a situation for which "there is a plain, speedy, and adequate remedy at law."

The first payment of state money to the school districts each year is based on the projected student count prepared by the Legislative Council. These estimates are recalculated in December after the school districts conduct their formal pupil counts on October 1 and certify them to the state. Affidavit of Leanne Emm, Exhibit T; 1 CCR 301-39, 2254-R-3.00. The state then mechanically applies the official pupil count to the school funding formula to determine the state share of the payments. *Id.* These procedures will not be affected by the Pilot Program.

Douglas County School District, like all large districts, is subject to an annual audit, and if the state determines that the money was inappropriately distributed then there is an administrative process for recovering the funds. Exhibit T; 1 CCR 301-39, 2254-R-8.00. [6] The

[6] 1 CCR 301-39, 2254-R-8.04 ("If the Department determines that a district or an eligible facility has received payment of funds greater than the amount to which the district or eligible facility is

final determination on the Douglas County program will probably be complete some time in 2012. Exhibit T. The Department of Education has no procedure for challenging the pupil count provided by the school district prior to the official audit or outside the administrative process created by statute, and it has no discretion in its initial payments to deviate from the mathematical formula provided by the Public School Finance Act. *Id.* The State is not yet in a position to determine whether these pupils should be included in the pupil count, and there are several outstanding implementation issues. Affidavit of Robert Hammond, Exhibit U.

The Taxpayer Plaintiffs can suffer no irreparable injury because any unlawfully expended money will be recovered by the State, and the ability to recover the money also provides an adequate remedy at law.

III. THE GRANTING OF A PRELIMINARY INJUNCTION WILL NOT SERVE THE PUBLIC INTEREST AND IS NOT SUPPORTED BY A BALANCE OF EQUITIES.

Because, as explained above, the State is guaranteed to recover any money unlawfully expended under the Pilot Program and because the existence of the Choice Scholarship Pilot Program will not affect the mechanical process for determining the initial allocation of funds to the school districts, there is no public interest to be served by enjoining the State from funding the program and thus no equity to balance. Balanced against this non-interest is the interest of the participating students in receiving the education they have chosen, the interest of Douglas

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entitled, the district or eligible facility shall be responsible for repayment to the Department within 30 calendar days from the date of said determination."); 1 CCR 301-39, 2254-R-8.06 (Districts have a right to appeal this determination to the Commissioner.)

County School District in increasing its education offerings, and the interest of the State of Colorado in the orderly administration of its Public School Finance system.

IV. A DECISION TO ENJOIN THIS PROGRAM WILL DISRUPT THE STATUS QUO OF THE STATE SCHOOL FINANCE SYSTEM.

Granting the motion for preliminary injunction would cause enormous disruption to the status quo of the provision of education in Colorado, *cf. Rathke v. MacFarlane,* 648 P.2d at 654, not just for the students in the Pilot Program, but for the many students and others involved in the numerous other state education programs discussed in Section I(A)(ii) of this Response. If, for example, the Court were to adopt LaRue's Sixth Cause of Action which challenges the Pilot Program because it "transfers control of education provided by public funds away from the directors and into the hands of private individuals not elected as required by Article IX, Section 15", or their Seventh Cause of Action which states that the "use of public school monies to pay for individual students' tuition at private schools contradicts the letter and purpose of the Public School Finance Act", these legal theories could also apply to programs which subcontract to provide services to special education students, which send secondary students to institutions of higher education at district expense, and which provide preschool services to literally tens of thousands of families. The continued existence and viability of these programs would be thrown into a state of legal uncertainty and confusion. This massive disruption of the status quo is reason enough to deny the motion. *See Rathke,* 648 P.2d at 654.

CONCLUSION

For the foregoing reasons, the State Defendants respectfully requests that this Court deny Plaintiffs' Motions.

DATED this 22nd day of July, 2011.

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CERTIFICATE OF SERVICE

This is to certify that on July 22, 2011, I served a true and correct copy of the foregoing **BRIEF IN OPPOSITION TO MOTIONS FOR A PRELIMINARY INJUNCTION** upon the following:

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