COURT OF APPEALS STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Denver District Court County Honorable Michael A. Martinez, Judge Case No. 2011CV4424 *consolidated with* 2011CV4427	
Defendants-Appellants: COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION, and **Defendants:** DOUGLAS COUNTY SCHOOL DISTRICT and DOUGLAS COUNTY BOARD OF EDUCATION 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; TAXPAYERS FOR PUBLIC EDUCATION; CINDRA S. BARNARD; MASON S. BARNARD **Intervenors:** FLORENCE AND DERRICK DOYLE; DIANA AND MARK OAKLEY; JEANETTE STROHM-ANDERSON AND MARK ANDERSON	▲ **COURT USE ONLY** ▲ Case No. 11CA1856 11CA1857
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OPENING BRIEF OF STATE APPELLANTS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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✓It contains 9.026 words.

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

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s/Antony B. Dyl

Signature of attorney or party

INTRODUCTION

Defendants-Appellants Colorado State Board of Education and Colorado Department of Education ("State Appellants"), through the Office of the Colorado Attorney General, submit this Opening Brief.

* * *

In this case, a small group of Plaintiffs (taxpayers, parents, and one student) challenges the "Choice Scholarship Program," which was unanimously adopted by the Douglas County School Board in March 2011. The program provides scholarships to pay tuition at private primary, middle, and high schools, including schools with religious affiliations, to improve educational opportunities for Douglas County students.

Plaintiffs assert that this program violates various provisions of the Colorado Constitution, as well as the Public School Finance Act of 1994. They make these arguments despite the dozens of similar public–private partnerships across Colorado that ensure educational opportunities for the state's schoolchildren at every level of the public education system, from preschool to postsecondary school. The trial

court, based on an incorrect understanding of the constitutional and statutory provisions that govern this case, agreed with Plaintiffs' arguments and permanently enjoined the Choice Scholarship Program. As a result, many other educational programs in this State, which are vital to the State's system of public schooling, are in danger.

STATEMENT OF ISSUES

Because of this case's complexity, the Defendants-Appellants have distributed among them the seven issues listed below. The State Appellants, in this brief, discuss issues I–V. Meanwhile, in their briefs, the District Defendants and Intervenor-Appellant Families discuss issues VI–VII. The State Appellants adopt and incorporate the other appellants' arguments by reference.

The issues are as follows:

I. Did the trial court err in holding Plaintiffs had standing to assert violations of the Public School Finance Act of 1994, § 22-54-101 *et seq*., C.R.S.?

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

III. Did the trial court err in holding the Choice Scholarship Program violated Article V, Section 34 (the Anti-Appropriation Clause) of the Colorado Constitution?

IV. Did the trial court err in holding the Choice Scholarship Program violated Article IX, Section 3 (the Public School Trust Fund Clause) of the Colorado Constitution?

V. Did the trial court err in its interpretation of the Contract Schools Statute, § 22-32-122, C.R.S.?

VI. Did the trial court err by, among other things, violating the First Amendment when it concluded the Choice Scholarship Program did not satisfy Article II, Section § 4 and Article IX, Sections § 7 and § 8 (the Religion Clauses) of the Colorado Constitution?

VII. Did the trial court err by ignoring the unchallenged legislative history on Colorado's "Blaine Amendments," which demonstrated they were enacted out of religious bigotry?

STATEMENT OF THE CASE

The Douglas County School Board unanimously adopted the Choice Scholarship Program (the "Scholarship Program" or "Program") on March 15, 2011. The Program provides scholarships for up to 500 Douglas County students, who may use the scholarships to pay tuition at qualified secular and religious private schools. The Program is funded, in part, by per pupil revenues distributed to the Douglas

County School District ("Douglas County" or the "District") under the Public School Finance Act, which the State Appellants administer.

Plaintiffs are a small group of Douglas County taxpayers and parents, as well as one student. They sued to enjoin the Program, arguing that it violates various provisions of the Colorado Constitution and the Public School Finance Act because it allows families to use public money to pay tuition at private schools with religious affiliations. Intervening in the suit were parents who support the Program and whose children received scholarships under it to attend secular or religiously-affiliated schools.

On July 5, 2011, Plaintiffs moved for an injunction. After a three-day hearing, the court, in an Order dated August 12, 2011, held the Program to be unconstitutional and permanently enjoined it. As the Intervenor Families explain in their brief, families of Douglas County students who had signed up for the Program for the 2011/2012 school year were forced to either withdraw their children from their chosen schools or bear the full financial burden of tuition.

The State Appellants appeal this ruling not only because it is legally incorrect, but because it threatens many other public–private educational partnerships across Colorado.

STATEMENT OF FACTS

For the sake of efficiency, the State Appellants incorporate by reference the fact statements in the other appellants' briefs. Here, however, the State Appellants describe some of the dozens of public–private education partnerships that are similar to the Scholarship Program and have been imperiled by the trial court's ruling.

Under existing law, school districts across Colorado frequently contract with private schools to provide educational services to public school students. The trial court—without explaining how or why—asserted that the Scholarship Program is unlawful because it is somehow different from these other public–private partnerships. Order at 67. It isn't. The trial court's erroneous ruling jeopardizes many longstanding educational programs at the preschool, primary, secondary, and post-secondary levels that enrich public education in

Colorado. Like the Scholarship Program, some of these programs use state per pupil funding to enable schoolchildren to attend qualified private schools, including schools with religious affiliations. Other programs use public funds to broaden the educational opportunities available to Colorado students, regardless of whether those opportunities come from secular or religiously-affiliated sources.

A. Preschool and Childcare

State Level. At the state level, the Colorado Preschool Program uses public funds to provide free preschool to eligible children at risk of academic failure. §§ 22-28-101 to 22-28-114, C.R.S. Through this program, participating school districts may contract with facilities associated with private and parochial schools. §§ 22-28-103(2), 26-6-102(1.5), C.R.S. *See also* Colorado Preschool Program: 2010–11 Handbook, at 24. Record, pp. 1829-88, 1855.

The Colorado Childcare Assistance Program assists low-income families with child care expenses. Using federal, state, and county tax revenues, parents may choose a child care facility that meets their

needs, including, when eligible, private and parochial schools. *See* § 22-28-103(2), C.R.S.; §§ 26-6-102(1.5) & (5.4), C.R.S.

Local Level. One example of a local level program is the Denver Preschool Program, which allows residents to apply tax-derived funds toward tuition at any licensed preschool provider that agrees to be involved in a quality improvement program or has been accredited by an approved national organization. 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. Denver Preschool Program Provider Agreement § II.4. Record, pp. 1471-4.

B. Primary and Secondary

Special Education. Under the Exceptional Children's Education Act, §§ 22-20-101, *et seq.*, C.R.S., school districts and Boards of Cooperative Educational Services may place special education students in private schools to provide them with a "Free and Appropriate Public Education" under the Individuals with Disabilities Education Act. Each student placed in a private school receives public funding. Record, pp.

1476-9. Like the Douglas County Choice Scholarship Program, this program "strive[s] to provide the best educational programs possible within limited resources," § 22-2-401(1)(b), C.R.S., and promotes a public–private partnership to "vastly improve the quality of each student's overall academic experience." § 22-2-401(1)(e), C.R.S. To this end, school districts frequently place students in approved "facility" schools, which may be operated by private or public agencies, including religiously-affiliated entities. Record, pp. 1475-9. State per pupil revenues are sent directly to the approved facility school by the Department of Education 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; Record, pp. 1476-9.

English Language Proficiency. The English Language Proficiency Act provides public funding for school districts, institute charter schools, and facility schools to implement English language proficiency programs. As under the Exceptional Children's Education Act, facility schools may include private and religious entities. § 22-24-

103(2.5), C.R.S.; § 22-2-402(1), C.R.S.; §§ 26-6-102(1.5) & 104, C.R.S.; 1 CCR 304-1.

College in High School Programs. At the high school level, the Concurrent Enrollment Programs Act and its predecessor, the Postsecondary Enrollment Options Act, allow students to earn high school and college credit simultaneously. §§ 22-35-101 to 112, C.R.S. Under these programs, public school students in grades 9–12 may use publicly-funded tuition benefits to pay for approved courses at eligible institutions of higher education, including private colleges. These publicly-funded tuition benefits flow through the Public School Finance Act, but participating institutions of higher education need not modify their curriculums in any respect.

The Early College Program similarly partners public high schools with private institutions of higher education. Through this program, public charter schools are established on college and university campuses. A substantial part of the students' coursework is through the college or university, which may be private. § 22-35-103(10), C.R.S. For example, Colorado Springs Early Colleges is a public charter school

associated with Colorado Technical University, which is private, and Southwest Early College High School is a public charter school associated with Colorado Heights University, another private university. Record, p. 1590.

Career and Technical Education. Under section § 23-8-102, C.R.S., an "education provider" may receive state funds for administering a career and technical education program. These education providers include in-district and out-of-district facility schools. §§ 23-8-101.5(5) and 103(2)(d), C.R.S. The program permits taxpayer funds to be spent at private—including religious—entities to provide students with educational opportunities they might otherwise have been denied.

Grant Programs for At-Risk Students. The Department of Education also administers grant programs benefitting K–12 public school students through public–private partnerships. Through the Expelled and At-Risk Student Services grant program, for example, the Department of Education funds school districts to provide services to expelled students and students who are at risk of academic failure.

These educational services may be provided by private schools. §§ 22-33-203(2)(c)(I) and 205(1)(b), C.R.S.

The Tony Grampsas Youth Services Program "provide[s] state funding for community-based programs that target youth and their families for intervention services in an effort to reduce incidents of youth crime and violence." § 25-20.5-201(1)(a), C.R.S. Eligible entities include, among others, non-profit organizations, institutions of higher education, local governments, and schools. § 25-20.5-201(4), C.R.S. These eligible entities provide a variety of services, including education.

Finally, the Colorado Comprehensive Health Education Act provides grants to fund health and wellness programs at public and facility schools. § 22-25-104(1), C.R.S. Parents may remove their children from objectionable portions of the program. § 22-25-104(6)(b), C.R.S.

C. Higher Education

College Opportunity Fund. Colorado is a national leader in public–private partnerships in higher education. Colorado's College Opportunity Fund ("COF") program provides a stipend for each eligible

Colorado undergraduate student to attend a public or participating private institution of higher education. § 23-18-102, C.R.S. The amount of the stipend may vary "annually based on the General Assembly's allocation to the College Opportunity Fund." COF Policy § 4.01. Record, pp. 1987-93, 1988. Students pursuing a professional degree in theology are not eligible to receive the stipend. § 23-18-102(5)(a)(II)(C.5), C.R.S. Students may, however, take religious classes from private religious institutions such as Colorado Christian University, Regis University, and the University of Denver. COF Frequently Asked Questions at 3. Record, pp. 1995-2003, 1997.

Other Programs. Many other programs apply state-funded financial aid to tuition at institutions of higher education, including private religious institutions. In general, these programs provide tuition assistance on the basis of need, merit, or work-study. *See* §§ 23-3.3-101, *et seq*., C.R.S. These programs include:

- the 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.

Standards for student eligibility vary for each program, but they all allow public funds to be spent at private institutions, including those with religious affiliations. *See* §§ 23-3.3-101, *et seq*., C.R.S.

SUMMARY OF THE ARGUMENT

This Court should reverse the trial court's judgment and remand for dismissal of Plaintiffs' unfounded challenge to the Choice Scholarship Program. The Public School Finance Act does not create a private right of enforcement, and Plaintiffs lack standing to bring their claim under the Act. Additionally, that claim—and each of Plaintiffs' other claims—fails on the merits. The Choice Scholarship Program and the dozens of other longstanding public–private education partnerships across Colorado, in serving to increase educational opportunities for the State's schoolchildren, are entirely constitutional and lawful.

ARGUMENT

I. Plaintiffs Lack Standing To Bring a Statutory Claim under the Public School Finance Act.

Standard of Review and Preservation. Standing is reviewed *de novo*. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). This issue does not arise as described in C.A.R. 28(k)(2)(i), (ii), or (iii). The trial court ruled upon the issue in its Order dated August 12, 2011. Record, pp. 2499-2502.

* * *

As a preliminary matter, the Court need not even decide whether the Scholarship Program violates the Public School Finance Act of 1994. Plaintiffs lack standing to bring a claim under the Act, and for that reason alone, this Court must dismiss the claim. In coming to the opposite conclusion, the trial court made three legal errors.

First, the court construed the Act to create a personal enforcement right—something no other court has done in the nearly twenty-year history of the Act. Second, the court improperly relied on Plaintiffs' allegations rather than the evidence presented at the injunction

hearing, which showed that, far from suffering an injury in fact required to establish standing, Plaintiffs received a *benefit* from the Scholarship Program. Finally, the court imported inapplicable notions of taxpayer and regulatory standing into this case.

A. To Confer Standing, a Statute Must Grant Persons in the Plaintiff's Position a Right to Relief.

Standing is a threshold jurisdictional issue. *Id*. at 855. To establish standing, Plaintiffs must demonstrate (1) that they suffered an injury-in-fact and (2) that the injury affected "a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977); *see also Ainscough*, 90 P.3d at 855. The standing inquiry for statutory claims is different from the inquiry for constitutional claims: although taxpayers often may sue to vindicate provisions of the Colorado Constitution, status as a taxpayer does not automatically grant standing under a statute such as the Public School Finance Act. *See Olson v. City of Golden*, 53 P.3d 747, 753 (Colo. App. 2002) (distinguishing *Dodge v. Dep't of Soc. Serv.*, 600 P.2d 70 (Colo. 1979)).

The "question of standing to bring a statutory claim is essentially an inquiry into whether the subject statute can properly be understood as granting a right to judicial relief to persons in the plaintiff's position." *Anson v. Trujillo*, 56 P.3d 114, 117 (Colo. App. 2002). As a result, for statutory claims, the requirement that plaintiff's interest in the suit be "legally protected" applies with full vigor. *See Olson*, 53 P.3d at 750–53.

To determine if a statute creates a "legally protected interest," courts ask "(1) whether the statute specifically creates a right in the plaintiff; (2) whether there is any indication of legislative intent to create or deny such right; and (3) whether it is consistent with the statutory scheme to imply such a right." *Id.* at 752. Colorado courts repeatedly conclude that litigants lack standing under statutes that were not intended to grant similarly-situated individuals a right to sue:

- Bail bondsmen lacked standing to sue under a statute setting terms for bail because "statutory provisions concerning bail do not purport to vest any persons other than criminal defendants with any legal rights in the determination of the terms, amount, or conditions of bail." *Wimberly*, 570 P.2d at 539.

- Kennel clubs lacked standing to sue under the Animal Racing Act because they failed to produce "any evidence that the General Assembly intended to grant [them] a roving commission to police the legality of [Colorado Racing] Commission actions." *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1059 (Colo. 1980).
- Retail consumers of Microsoft Windows 98 lacked standing to sue under the Colorado Antitrust Act because, as indirect purchasers, they did not "independently ha[ve] standing under the Act." *Pomerantz v. Microsoft Corp.*, 50 P.3d 929, 934–35 (Colo. App. 2002).
- A taxpayer could not sue under the Urban Renewal Law because "[t]he relevant statutes contain no mention of enforcement of the various provisions." *Olson*, 53 P.3d at 752–53.

In some cases, the General Assembly will deem private enforcement rights to be important to the statutory framework, and will explicitly provide those rights. For example, a statute that permits "any person to bring an action in any court of competent jurisdiction against a public utility" for violating certain rules governing public utilities, grants a member of the public the right to sue. *O'Bryant v. Pub. Utils. Comm'n*, 778 P.2d 648, 654 (Colo. 1989). But unlike the Public Utilities Law at issue in *O'Bryant*, the Public School Finance Act does not contain a "citizen standing" provision. Nowhere does the Act suggest

that individuals like Plaintiffs are granted "a roving commission to police" school finances under the Act. *Cloverleaf Kennel Club*, 620 P.2d at 1059.

B. Contrary to the Trial Court's Unprecedented Ruling, Plaintiffs Lack a Protected Legal Interest Under the School Finance Act.

In one conclusory sentence, the trial court decided—for the first time in the history of the School Finance Act—that the Act grants students and their parents the right to sue: "Plaintiffs have successfully argued that their status as students in the . . . District, as well as parents to these students, confers a legal interest in the enforcement of the statutes enumerated in their claims." Order at 21–22. In making this unprecedented ruling, the court not only failed to analyze the language of the School Finance Act, it failed even to *cite* it. *See id*. The Act's plain language, however, shows that the General Assembly did not intend to confer on Plaintiffs the ability to personally enforce the Act in court.

The Act does not "specifically create[] . . . a right in" parents, students, or taxpayers to bring a claim in court. *Olson*, 53 P.3d at 752. To the contrary, it commits to the State Board of Education the "administration and enforcement" of the Act, § 22-54-120(1), C.R.S., and directs the State Board to create "reasonable rules and regulations" to that end. *Id.* These regulations, 1 CCR 301-39, establish "procedures for administration of the Public School Finance Act of 1994, including the procedures for revocation or withholding of school district accreditation for Act violations." *Id.* 2254-R-1.00.

One of these regulations, Rule 2.00, describes the procedures for violations of the Act, including written notice to the district, an opportunity for the district to respond, a hearing process in front of the State Board, and penalties. Nowhere in these regulations is there a provision permitting parents, students, or taxpayers to bring claims—before the State Board or in court—for alleged violations of the Act.

This statutory and regulatory structure dispels any "indication of legislative intent to create" an individual enforcement right. *Olson*, 53 P.3d 752. Indeed, any such right would be "[in]consistent with the

statutory scheme." *Id.* By investing the State Board with power to enforce the Act, the General Assembly indicated that parents, students, and taxpayers (and anyone else) could *not* sue in court for an alleged violation of the Act. When the trial court, without even *citing* the Act, judicially conferred enforcement rights on Plaintiffs, the court contravened the statutory and regulatory scheme and "intrud[ed] into matters which are more properly committed to resolution in another branch of government." *Romer v. Bd. of Cnty. Comm'rs*, 956 P.2d 566, 573 (Colo. 1998).

Public policy supports this conclusion. The trial court's ruling would allow any group of parents, students, or taxpayers to sue a school district to overturn the district's funding decisions. This broad interpretation of the School Finance Act will create a flood of lawsuits and transform the courts into the budgetary supervisors of the State's school districts. In the contentious arena of public school finance, boards of education often decide to spend money in ways that some families may disagree with. Whether it is constructing or closing schools; hiring or firing administrators and teachers; negotiating with unions; or

buying textbooks, parents often have strong views on a district's spending decisions. To permit small groups of disgruntled parents to take these claims to court would violate separation of powers principles and waste judicial and educational resources.

The trial court's ruling that Plaintiffs have a "protected legal interest" under the Act and have the right to enforce it in court is entirely unfounded and must be reversed.

C. Plaintiffs Lack an Injury in Fact: the Evidence at the Injunction Hearing Established that Plaintiffs Would *Benefit* from the Scholarship Program.

In addition to improperly construing the School Finance Act to create broad private enforcement rights, the trial court also erred in concluding that Plaintiffs have suffered an injury in fact. Rather than considering evidence adduced at the three-day injunction hearing, the court accepted Plaintiffs' factual allegations as sufficient to demonstrate standing. *See* Order at 21 (making "findings" based upon the "injuries asserted by Plaintiffs"). This was improper.

The elements of standing "are not mere pleading requirements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[1] They are "an indispensable part of the plaintiff's case," and each "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id*. Here, whether Plaintiffs adequately demonstrated an injury in fact must be evaluated on the factual record developed at the injunction hearing. *See id.* ("At the pleading stage, general factual allegations . . . may suffice . . . . [However,] at the final stage, those facts (if controverter) must be supported adequately by the evidence adduced at trial.").

At the three-day hearing, Plaintiffs failed to introduce any evidence that they suffered an injury in fact. To the contrary, the undisputed evidence showed that the Scholarship Program—because it allows Douglas County to reduce expenses and retain a portion of state funds for the benefit of students who do *not* take part in the Program—

[1] Colorado courts "frequently consult federal cases for persuasive authority" on issues of standing. *Greenwood Vill. v. Pet'rs for Proposed City of Centennial*, 3 P.3d 427, 436 n.7 (Colo. 2000).

would financially benefit the District in the amount of $350,000. Tr. 374:2-375:20. This money would directly benefit Plaintiffs because the children of parent plaintiffs—and the one student plaintiff—will remain in the traditional District schools. Indeed, alleviating the recent K–12 funding cuts was one specific goal the District realized by enacting the Program. Tr. 375:25-379:22. While Plaintiffs *alleged* that the District would be harmed financially and thus District students would suffer, Record, p. 20–21, Plaintiffs produced no evidence to substantiate these allegations at the hearing.

The court ignored this evidence and instead based its finding of on injury in fact on an alleged "diversion" of funds away from public schools. But Assistant Superintendent Dr. Christian Cutter testified that the District calculated the "break even" point for the Program to be 200 students. Order at 16 (¶ 65); Tr. 363:10-23. Because 500 students signed up for the program for the 2011/2012 school year, Douglas County more than broke even—it received a net financial benefit. *See* Tr. 377:12-379:20. Thus, the court's reliance on alleged "diversion" of funds was legally erroneous because it ignored the uncontroverted

evidence, and it was therefore factually unsupported. Plaintiffs failed to prove an injury in fact.

D. Taxpayer and Regulatory Standing Do Not Apply Here.

In concluding that Plaintiffs have standing under the School Finance Act, the trial court also relied on two inapplicable standing doctrines.

First, the court failed to distinguish between taxpayer standing to bring *constitutional* claims and a plaintiff's standing to bring claims under a particular *statute*. Improperly relying on Plaintiffs' status as taxpayers, the court found that Plaintiffs were "injured" due to the "prospect of having millions of dollars of public school funding diverted to private schools." Order at 21. But while such allegations may be sufficient to confer taxpayer standing for *constitutional* claims, *Barber v. Ritter*, 196 P.3d 238, 246–47 (Colo. 2008), they are not a sufficient basis for *statutory* claims, *Olson*, 53 P.3d at 750–52. Plaintiffs' status as taxpayers is entirely irrelevant to the question of standing under the School Finance Act.

Second, the court erred when it relied on "administrative action" cases in which merely the "'threat[] to cause' an injury" is sufficient to establish injury in fact. Order at 20–21 (citing *Bd. of Cnty. Comm'rs v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003)).

Douglas County is not an "administrative agency." It is a local school district created under Article IX of the Colorado Constitution. And the Scholarship Program is not a "regulation" governing an industry's activities. It is an affirmative educational program designed to "provide greater educational choice . . ., improve educational performance through competition, and obtain a high return on investment." *E.g.*, Record, p. 357. Here, no regulatory scheme "'threatens to cause' an injury" to a regulated industry, as it did in the regulatory standing case the trial court relied on. Order at 20 (citing *Bd. of County Comm'nrs*, 81 P.3d at 1122). The trial court erred when it imported the doctrine of regulatory standing into this case.

II. The Scholarship Program, Like Other Public–Private Partnerships, Complies with the School Finance Act By Using State Funds to Support Educational Opportunity.

Standard of Review and Preservation. This Court reviews *de novo* the legal question of the proper interpretation of the School Finance Act. *See Sperry v. Field*, 205 P.3d 365, 367 (Colo. 2009). This issue does not arise as described in C.A.R. 28(k)(2)(i), (ii), or (iii). The trial court ruled upon the issue in its Order dated August 12, 2011. Record, pp. 2531-2536.

* * *

Even if Plaintiffs had standing to bring a School Finance Act claim, the trial court erred in concluding the Scholarship Program violates the Act. The court found the Program upsets the Act's "funding balance" by "inappropriately tapp[ing] resources from other Colorado school districts," resulting in an "increased share of public funds to the Douglas County School District rather than to other state school districts." Order at 56. That is, the trial court believed that students who elect to participate in the Scholarship Program are improperly

"counted" under the Act: "Even though the scholarship recipients will not spend any amount of time . . . in a Douglas County public school, . . . [the] District intends to obtain the full per pupil funding amount from the state for each scholarship student." *Id.* at 55.

The court is mistaken for at least two reasons. First, the court's conclusion that the State Board violated the Act was premature. The State Board has not yet made the determination whether it will fund the Program—something it has the authority to do under the School Finance Act. But more importantly, the court invaded the policy-making authority of the State Board in concluding the Program violates the Act, and it failed to understand that the Scholarship Program is similar to many other education programs across the state, all of which use public funds to pay for services provided by private entities.

Putting aside the merits of the question under the School Finance Act, the court acted prematurely. As the court noted in its Order, Commissioner of Education Robert Hammond testified "that the state has not determined whether or not it will fund the Scholarship Program." Order at 15, ¶ 60. Whether Douglas County "intended" to

receive funding—which is all the trial court found—is irrelevant to whether the Act was actually violated, *i.e.*, whether Douglas County in fact received funds it should not have. Moreover, the State has mechanisms to recover funds improperly paid to school districts, and the court expressly noted as much. *Id.* ¶ 61. In other words, the School Finance Act system is working: the State Board will, after careful deliberation, determine whether state funds may be spent on the Scholarship Program.

By attempting to shortcut the State Board's consideration of the matter, the court's decision improperly invaded the province of a coordinate branch of government. Whether any particular set of students is properly "counted" for purposes of the Finance Act is committed to the Department of Education—not to the judiciary. *See* § 22-54-120(1), C.R.S.; 1 CCR 301-39. Nothing in the Act or the regulations indicates that courts should decide whether a district is receiving an "appropriate share" of Finance Act funding. That is why no case law discusses "appropriate funding balance" under the Act; the question is not committed to the judicial branch at all.

More fundamentally, however, the court's order misunderstands that Colorado law has long permitted districts to use public funds to pay private entities to increase educational opportunities. The Act specifies that "the amounts and purposes for which [Act] moneys are budgeted and expended shall be in the discretion of the *district*." § 22-54-104(1)(a), C.R.S. (emphasis added). Under this delegation of authority, Douglas County had the right to create the Scholarship Program as one of its school choice options for families.

This is no different from a school district choosing to contract directly with a private school to provide a complete educational program, *e.g.*, § 22-32-122(1), C.R.S., a practice Plaintiffs have not challenged. Likewise, under existing law, public charter schools may contract with private corporations to provide a complete package of educational services. § 22-30.5-104(7)(b), C.R.S.[2] As explained above in

[2] According to a report for the Colorado Department of Education, nine percent of Colorado charter schools are run by private non-profit or for-profit Education Management Organizations. Dick M. Carpenter and Krista Kafer, *A Typology of Colorado Charter Schools*, at 11 (January 2009), available at http://www.cde.state.co.us/cdechart/download/typologyreport_012709.pdf.

the Statement of Facts, these are just two of the numerous public–private partnerships that already exist throughout the public education system in Colorado. In each of these examples, the district or charter school receives Finance Act funding for students but then pays some portion of that funding to a private school or entity in exchange for the educational services provided.

Far from upsetting the trial court's vague notion of the Act's "funding balance," these programs are precisely within the contemplation of Colorado law, and they occur throughout the Colorado public education system. *See, e.g.,* 1 CCR 301-39, Rule 2254-R-5.02 (providing that "[a] pupil shall be 'enrolled' if such pupil attends school . . . in a district . . . which purchases comparable instructional services for such pupil"); 1 CCR 301-39, Rule 2254-R-5.15(1) (allowing districts to count "[a] pupil receiving education services from another entity through a purchase agreement"); 1 CCR 301-39, Rule 2254-R-5.15(3) (allowing districts to count "[a] pupil for whom a district either pays or receives any amount of tuition").

The trial court's error can be traced to a mistaken notion that "public schools" are an end in themselves. They are not. Our system of public schools is the means by which local school districts and charter schools achieve the end of educating children. Nothing in the School Finance Act prohibits Douglas County from creating another public–private partnership whose end is educating children.

Just as it did when it erroneously construed the Finance Act to confer standing on Plaintiffs, the court improperly assumed it could intrude in policy decisions by school districts and the Department of Education. The trial court should have heeded the Colorado Supreme court's caution in *Wimberly*. Instead, it "exceed[ed] . . . judicial authority" and "invade[d] the fields of policy preserved to the legislative arm or the realm of administrative discretion lodged in the executive branch." *Wimberly*, 570 P.2d at 538 (citation omitted).

III. The Scholarship Program Does Not Use Public School Lands Trust Income and Therefore Does Not Violate Article IX, Section 3.

Standard of Review and Preservation. "The interpretation of a constitutional provision is a question of law [that appellate courts]

review *de novo*." *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 964 (Colo. App. 2006). This issue does not arise as described in C.A.R. 28(k)(2)(i), (ii), or (iii). The trial court ruled upon the issue in its Order dated August 12, 2011. Record, pp. 2540-2543.

* * *

In Colorado, a tiny fraction of public school funding—less than two percent[3]—comes from a public school land trust fund that was established at the State's founding. Under Article IX, Section § 3 of the Colorado Constitution, income from the trust must be spent on "maintenance of the schools of the state." Plaintiffs argue that the Scholarship Program, by using state-level school funding, unconstitutionally diverts income from this trust to pay for private education services.

[3] *See* Tr. at p. 473:1 (testimony of Leanne Emm) (funding from the public school land trust amounts to $101 million out of a total budget of more than $5.2 billion); *see also Brotman v. East Lake Creek Ranch*, 31 P.3d 886, 888 (Colo. 2001) (for fiscal year 1999–2000, income from the school lands fund was $42 million out of a total budget of over $5 billion).

The trial court agreed, finding that trust income "will ultimately end up being disbursed to non-public schools" under the Program because money from the trust "flows into total public school funding." Order at 63. In other words, the trial court concluded that income from the public school land trust infects the 98% of state-level public school funding that does *not* come from the trust, requiring the entire pool of money to be spent strictly on maintaining "schools of the state." If upheld, the trial court's legal conclusion would fundamentally alter school funding in the State of Colorado.

A. Under Basic Trust Law, Restrictions on Trust Income Do Not "Infect" Other Income.

The terms of a trust may restrict the ways in which trust income is spent. RESTATEMENT (THIRD) OF TRUSTS § 49; § 15-1-403(1)(a), C.R.S. (trustee shall administer a trust in accordance with the terms of a trust). But beneficiaries may spend non-trust income without regard to the terms of the trust: trust income does not "infect" all other income sources such that, by virtue of receiving restricted trust income, all other income sources are now similarly restricted.

The trial court overlooked this basic proposition of trust law when it assumed that school land income, "which flows into total public school funding, will ultimately end up being disbursed to non-public schools." Order at 63. This erroneous conclusion calls into question every statutory scheme in which school districts pay private entities for their services. If the trial court's interpretation is correct, then Article IX, Section prohibits a litany of longstanding funding arrangements in Colorado, including contract schools, § 22-32-122, C.R.S., facility schools, § 22-2-402(3), C.R.S., and charter schools paying education service providers, like Edison Learning, Imagine Schools, or KIPP, § 22-30.5-104(7)(a) & (b), C.R.S.

In each of these cases, School Finance Act funds are paid to private entities for educational purposes. Yet, under the trial court's radical "infected funds" theory, each of these arrangements violates Article IX, Section 3. In view of the number of statutes the General Assembly has passed over the decades, each of which would allegedly violate this provision under the "infected funds" theory, the trial court's reading of the Colorado Constitution cannot be correct.

B. Under the Program, Twenty-Five Percent of State-Level Funds are Retained by Douglas County, Indicating that No Trust Funds are Used.

Douglas County retains 25% of the state-level funds for each pupil who enrolls in the Scholarship Program. Tr. 363:10-20. This fact alone should have led the trial court to conclude that the small fraction of public trust funds included in total state-level school funding are not spent on the Program, but are retained by Douglas County.

The Scholarship Program is entitled to a presumption of constitutionality. After months of open, public hearings, it was passed unanimously by Douglas County, a Colorado school district with constitutional authority to educate children in its jurisdiction. *See* Colo. Const. Art. IX, § 15; *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1021 (Colo. 1982) (discussing Colorado's "philosophy of local control" for public education); 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").

Under Colorado law, there is a "presumption that governmental bodies adopt legislation intending compliance with constitutional requirements." *Denver Pub. Co. v. City of Aurora*, 896 P.2d 306, 318 (Colo. 1995). Regulatory bodies also receive this presumption. *Orsinger Outdoor Adver., Inc. v. Dep't of Highways*, 752 P.2d 55, 61 (Colo. 1988). The presumption means that "the party attacking [the enactment] must establish its unconstitutionality beyond a reasonable doubt." *Trinen v. City & Cnty. of Denver*, 53 P.3d 754, 757 (Colo. App. 2002). "If an enactment can reasonably be construed so as to harmonize it with the constitution, that construction should be preferred." *Id*. at 757.

By assuming, without evidentiary support, that public school land trust income "will ultimately end up being disbursed" to partner schools under the Program, the trial court ignored its duty to presume the Scholarship Program to be constitutional. The court should have presumed that the less than two percent of state-level school funding attributable to trust income was withheld as part of the 25% of state-level funds retained by Douglas County under the Program. Instead, the court presumed the opposite, unreasonably interpreting the

Colorado Constitution in a way that invalidated a program properly enacted by Douglas County, a body that is constitutionally vested with power over local education policy.

IV. The Scholarship Program Does Not Violate the Anti-Appropriation Clause of Article V, Section 34, and the Public Purpose Exception Applies Here.

Standard of Review and Preservation. "The interpretation of a constitutional provision is a question of law [that appellate courts] review *de novo*." *Harwood*, 141 P.3d at 964. This issue does not arise as described in C.A.R. 28(k)(2)(i), (ii), or (iii). The trial court ruled upon the issue in its Order dated August 12, 2011. Record, pp. 2536-2540.

* * *

Article V, Section 34 of the Colorado Constitution forbids legislative appropriations "to any person . . . not under the absolute control of the state, nor to any denominational or sectarian institution or association." The trial court found that the Scholarship Program violates this proscription. Order at 57–60. In doing so, the court again misconstrued fundamental legal principles. First, it mistakenly applied

Section 34 to a local school district, although longstanding precedent holds that it applies only to the *state* government. Second, the court misapplied an important qualification of Section 34, which allows private persons to receive state money that has been spent for a "public purpose."

A. Article V, Section 34 Applies Only to the State Legislature, not to Local School Districts.

The trial court erred, first, by concluding that Article V, Section 34 applies to Douglas County at all. It does not. This was settled long ago by the Colorado Supreme Court. *Williamson v. Bd. of Comm'rs of Arapahoe Cnty.*, 46 P. 117 (Colo. 1896).

In *Williamson*, the General Assembly passed a law requiring counties to pay for the treatment of "habitual drunkards." *Id.* at 117. In dismissing a challenge under Section 34, the Colorado Supreme Court noted that this provision, like all of Article V, "had in contemplation the disbursement of state funds only, and their disposition *by the state* in its corporate capacity." *Id.* at 118 (emphasis added). The court remarked that if this provision were intended to apply to actions by cities,

counties, school districts, or other political subdivisions it "would have said so in express terms," as do other provisions of the Colorado Constitution. *Id.*

Williamson remains good law for the proposition that Section 34 "refers only to state funds," not local expenditures. *Lyman v. Town of Bowmar*, 533 P.2d 1129, 1136 (Colo. 1975). Yet the trial court concluded that Section 34 applies to Douglas County simply because some funding through the School Finance Act, which Douglas County uses in carrying out its duty to oversee local instruction, comes from the State. Order at 57.

This approach misunderstands the structural nature of Section 34, which restricts state legislative power, not the spending of state funds by whatever political subdivision happens to receive them. A school district is not the State; it is a political subdivision. *See Bagby v. Sch. Dist. No. 1, Denver*, 528 P.2d 1299, 1302 (Colo. 1974). A district does not have the power to bind the State or draw upon the property of the State. Although, like almost all political subdivisions, some of its money comes from the State, that does not make it subject to Section

34. By the trial court's logic, receiving state money would cause every other section of Article V to apply to Douglas County—as well as to every other city, town, county, and school district in Colorado. This has never been true, and the trial court erred in reaching this conclusion.

B. The Public Purpose Exception to Section 34 Applies to the Scholarship Program.

The second, independent reason the trial court erred in applying Section 34 is that the public purpose exception applies to the Scholarship Program.

Beginning with *Bedford v. White*, the Colorado Supreme Court has recognized that if an appropriation serves a "public purpose, the incidental fact that the recipients are private persons does not violate [Section 34]." 106 P.2d 469, 476 (Colo. 1940). The "public purpose" doctrine was refined in *Americans United for Separation of Church and State v. Colorado*, where the court required that "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." 648 P.2d 1072, 1086 (Colo. 1982).

So, for example, in the case of *In re Interrogatory Propounded by Governor Roy Romer*, the court upheld state legislation that permitted paying a private company, United Airlines, financial incentives of up to $115 million for the proposed construction of a maintenance facility. 814 P.2d 875, 879, 881 (Colo. 1991). In its analysis under Section 34, the court concluded that the General Assembly had identified two "public purposes" supporting the payout to the private airline: business development and enhancement of the state aviation system. *Id.* at 884.

Here, the Douglas County Board of Education identified three discrete and particularized public purposes of the Scholarship Program: (1) providing greater educational choice for students and parents to meet individualized student needs, (2) improving educational performance through competition, and (3) obtaining a high return on investment of educational spending. Record, p. 2020. These are "no less legitimate or particularized" than the public purposes approved by the court in *In re Interrogatory Propounded by Governor Roy Romer* and the

long line of cases it cites. Just as in *Americans United*, 648 P.2d at 1086, here there is an "overriding public purpose" that supports the Scholarship Program: improving education.

The trial court, however, confused whether the Scholarship Program serves discrete public purposes (which it clearly does) with the church–state issue of whether there is a "risk of religion intruding into the secular educational function." [4] Order at 59 (quoting *Americans United*, 648 P.2d at 1084). The trial court also erred in concluding that the Program "violates the blanket prohibition enumerated in Article V, Section 34 that forbids state funds from being provided to any denominational or sectarian institution or association." Order at 60. The court was mistaken in its analysis.

The *Americans United* court considered, and rejected, the argument that Section 34 invalidates scholarship programs that can be applied to "denominational or sectarian institution[s] or association[s]." In *Americans United*, the court took pains to describe the

[4] As the District Defendants explain in their brief, the trial court improperly inquired into whether the Scholarship Program presented a risk of religious indoctrination. Dist. Def. Br. at p. 27.

"denominational" and "sectarian" nature of Regis College, a private, Catholic college run by the Society of Jesus. 648 P.2d at 1076–77. The court upheld the use of scholarship funds at Regis in the face of a Section 34 challenge; and nothing in the opinion suggests the court overlooked the clause in Section 34 that forbids certain direct appropriations to religiously-affiliated institutions. *See id.* at 1085 n.9.

A much earlier case supports the conclusion that Section 34 does not forbid state spending merely because a religious institution might be a recipient. *See In re Constitutionality of Substitute for Senate Bill No. 83 (In re Benedictine Sisters Bill),* 39 P. 1088 (Colo. 1895), *overruled on other grounds by Bertrand v. Bd. of Cnty. Comm'rs*, 872 P.2d 223, 225–26 (Colo. 1994). In that case, a bill was proposed in the General Assembly to appropriate money for the reconstruction of a building owned by the Benedictine Sisters at Cañon City, which had been destroyed during the State's construction of the Hog Back Tunnel. *Id.* at 1088–89. The appropriation was challenged as a violation of Section 34, but the court rejected the challenge, finding that it satisfied the public purpose of paying compensation for the taking of private property. *Id.*

at 1089. The court held that "[t]he mere fact that the association or institution for whose benefit [an] appropriation is made is or may be sectarian does not make the appropriation one which the constitution inhibits." *Id.*

The same is true here. The fact that students in Douglas County may choose to use funds from the Scholarship Program at religiously-affiliated schools does not violate Article V, Section 34.

V. The Contract Schools Statute Supports Douglas County's Authority to Contract with Private Schools Through the Scholarship Program.

Standard of Review and Preservation. This Court reviews the trial court's interpretation of the contract schools statute *de novo*. *See Nat'l Farmers Union Prop. & Cas. Co. v. Estate of Mosher*, 22 P.3d 531, 533 (Colo. App. 2000). This issue does not arise as described in C.A.R. 28(k)(2)(i), (ii), or (iii). The trial court ruled upon the issue in its Order dated August 12, 2011. Record, pp. 2545-2548.

* * *

The Contract Schools Statute, § 22-32-122, C.R.S., grants school districts the authority to enter into contracts to ensure school children

receive adequate educational services. The court concluded that the Statute, despite its broad language, does not provide Douglas County with the authority to contract with private schools through the Scholarship Program. Order at 65–67. The court's analysis is wrong on three counts.

First, the unambiguous text of the Statute authorizes the Scholarship Program. Second, although the Statute's unambiguous text is dispositive, the legislative history also supports the validity of the Program. Third, the uncontested evidence presented at the injunction hearing confirms Douglas County's broad contracting authority under the Statute.

A. The Unambiguous Text of the Contract Schools Statute Authorizes the Scholarship Program.

When interpreting a statute, a court first must give effect to the ordinary meaning of its words, because "it is presumed that the General Assembly meant what it clearly said." *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000). The ordinary meaning of the Contract Schools Statute

unambiguously provides school districts with broad authority to contract with private schools to provide educational services:

> Any school district has the power to contract . . . with any . . . 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.

§ 22-32-122(1), C.R.S. (emphasis added). This text allows a district to contract for *any* educational service. "'[A]ny' connotes a lack of restriction or limitation," *Woellhaf v. People*, 105 P.3d 209, 216 (Colo. 2005), and is unambiguous. *See*, *e.g.*, *People v. Bergen*, 883 P.2d 532, 538 (Colo. App. 1994) (rejecting the argument that the term "any witness" was ambiguous).

In light of this broad and unambiguous language, the trial court erred in limiting the applicability of the Statute to "particular" services. Order at 66–67. Nothing in the Statute suggests Douglas County is prohibited from contracting with private schools to increase educational opportunities for its students. To read the Statute's language otherwise ignores the Colorado Constitution's delegation of local educational

control to school districts. Colo. Const. Art. IX, § 15; *Lujan*, 649 P.2d at 1021.

As the Colorado Supreme Court has explained, "[i]f [a] statute is 'clear and unambiguous,' we must interpret it as written. Only when the statute is unclear or ambiguous may we look beyond the words of the statute to legislative history or rules of statutory construction." *People v. Goodale*, 78 P.3d 1103, 1107 (Colo. 2003) (internal citations omitted). Because the Contract Schools Statute contains no ambiguity relevant to this case, the issue is resolved: the Scholarship Program is authorized by the Statute.

B. The Legislative History of the Statute Supports Its Unambiguous Language and Validates the Scholarship Program.

Even though the text of the Contract Schools Statute is unambiguous, the trial court ventured into an analysis of the Statute's legislative history. Order at 65. This was unnecessary and contrary to case law. *Goodale*, 78 P.3d at 1107. Moreover, the court misread the legislative history and ignored some key aspects of it—most

significantly, successive draft versions of the legislation. *See People v. Summers*, 208 P.3d 251, 255 n.2 (Colo. 2009) ("It is appropriate for us to consider successive drafts of legislation in discerning intent behind a statute."). These draft versions confirm that the Scholarship Program falls within the Statute's scope.

As the trial court acknowledged, "[T]he original House version of H.B. 93-1118 sought to allow such outsourcing to private schools for educational services, [but] the Senate felt that the House bill had 'really taken a wrong turn' and revised its language significantly." Order at 66. The "significant" revision recognized by the trial court would have prohibited public schools from "contract[ing] with a private school to provide *all* educational services rendered to select students." Order at 66. In particular, that revision to that draft bill would have provided that "[i]t is not the intent of the General Assembly that any school district should use the provisions of this subsection (3) to enroll the students of any independent school and then contract with such independent school for the provision of educational services to such children." House Bill 93-1118, Am. 3d House Reading, p. 2, ln. 15-19.

The trial court failed to recognize, however, that this text was later stricken from the bill and was never enacted. § 22-32-122, C.R.S. (1993); *see also* H.B. 93-1118, Am. 2d and 3d Senate Reading, as enacted (omitting such provision). With this prohibition stricken, the legislation as ultimately enacted tracked "the original House version of H.B. 93-1118," which, as the trial court recognized, "sought to allow such outsourcing to private schools for educational services." Order at 66.

The trial court erred in ignoring this evidence, and in particular the later bill revisions. *See Town of Orchard City v. Bd. of Delta Cnty. Comm'rs*, 751 P.2d 1003, 1005 (Colo. 1988) (explaining that "amendments made by the Senate Local Government Committee which led to [a statute] were critical and demonstrate that the General Assembly contemplated [a certain statutory requirement], but then decided to abandon the requirement. This court will not ignore the General Assembly's substantial revisions of a bill . . . ."); *Haines v. Colo. State Personnel Bd.*, 566 P.2d 1088, 1090 (Colo. App. 1977) (finding a statutory interpretation "unpersuasive" when successive draft bills

revealed that "the General Assembly considered and ultimately rejected" the language relied upon by the proponent of the interpretation). By ignoring final revisions to the bill as ultimately enacted, the trial court disregarded key pieces of evidence revealing the legislative intent behind the Contract Schools Statute.

Without acknowledging these portions of the legislative history, the trial court quoted comments made regarding later rejected text to conclude the 1993 amendment was intended to "merely allow school districts to contract for particular educational services not offered by the public schools, such as foreign-language instruction." Order at 67. This statement was drawn from an introductory statement of a single Senator, not from the legislative declaration or even a committee report. As demonstrated by successive drafts of the legislation, the legislative history supports the authority for the Scholarship Program.

C. The Uncontested Evidence at Trial Supports an Interpretation of the Statute Allowing the Scholarship Program Contracts.

Finally, the uncontested evidence at the injunction hearing regarding the legislative understanding and intent behind the Contract Schools Statute strongly supports Douglas County's position. Tr. 758:20–25.

According to Senator Keith King, school districts currently use the authority of the Contract Schools Statute to "provide complete education packages to schools," similar to what the Scholarship Program attempted to provide. The existence of these contract schools, which provide *all* education services to students, was confirmed by the testimony of the Commissioner of Education Robert Hammond. Tr. 225-9. And the State Board of Education has promulgated rules recognizing that the Statute permits these arrangements: "[a] pupil shall be 'enrolled' if such pupil attends school . . . in a district . . . *which purchases comparable instructional services for such pupil*." 1 CCR 301-39, Rule 2254-R-5.02 (emphasis added); *see also* 1 CCR 301-39, Rule

2254-R-5.15(1) (allowing districts to count "[a] pupil receiving education services from another entity through a purchase agreement"); 1 CCR 301-39, Rule 2254-R-5.15(3) (allowing districts to count "[a] pupil for whom a district either pays or receives any amount of tuition").

Plaintiffs failed to produce any evidence to the contrary. The evidence at the three-day injunction hearing therefore confirms that the Contract Schools Statute authorizes school districts to enter into contracts with private entities for "complete" education services. The trial court failed to heed these uncontested facts and improperly concluded that the Statute prohibited Douglas County from enacting the Scholarship Program.

CONCLUSION

The Court should reverse the trial court's judgment and remand for dismissal of Plaintiffs' claims.

DATED this 16th day of April, 2012.

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