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<tr><td>DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO
City and County Building
1437 Bannock, Denver, CO 80202</td><td>▲ COURT USE ONLY ▲</td></tr>
<tr><td>Plaintiffs: JAMES LARUE, et al.,
v.
Defendants: COLORADO BOARD OF EDUCATION, et al.,
Intervenors: FLORENCE DOYLE, et al.,

AND

Plaintiffs: TAXPAYERS FOR PUBLIC EDUCATION, et al.,

v.

Defendants: DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al.</td><td>Case No.: 11cv4424
Combined with:
Case No.: 11CV4427

Courtroom: 259</td></tr>
<tr><td colspan="2">ORDER</td></tr>
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THIS MATTER is before the Court on Motions for Preliminary Injunction filed separately by Plaintiffs James Larue, *et al.* and Taxpayers for Public Education, *et al.* (collectively, "Plaintiffs").[1] Defendants Douglas County Board of Education and Douglas County School District, Colorado Board of Education and Colorado Department of Education (collectively, "Defendants"), and Intervenors Florence and Derrick Doyle, *et al.* (collectively, "Intervenors") filed their respective Responses on July 22, 2011. Plaintiffs filed their respective Replies on July 25, 2011. A three day hearing was held beginning on August 2, 2011. Testimony was taken and exhibits were received. Also ripe for the Court's consideration is Defendants' Motion to Dismiss filed on July 22, 2011 and joined by Intervenors on July 26,

[1] On July 11, 2011, Case No. 11cv4427 was consolidated into Case No. 11cv4424.

2011. Having reviewed the briefs, the exhibits, the relevant authorities, and considered the credibility of the witnesses, the Court now makes the following findings of fact and conclusions of law:

I.
FINDINGS OF FACT

A. THE CREATION OF THE CHOICE SCHOLARSHIP PROGRAM

1. Beginning in June 2010, the Douglas County School District assembled a School Choice Task Force ("Task Force") consisting of seven subcommittees and approximately 80 members, including members of Plaintiffs in this case. The Task Force held a series of public meetings to discuss a range of school choice options for the Douglas County School District.

2. In approximately November 2010, the Task Force produced the *Blueprint for Choice* which was subsumed into the Douglas County School District's Strategic Plan.

3. In December 2010, the Task Force presented plans for the Choice Scholarship Pilot Program ("Scholarship Program") to the Douglas County Board of Education. *See* Oversight Comm. Mtg., Feb. 10, 2011 (Ex. 76). Dr. Elizabeth Celania-Fagen ("Dr. Fagen"), the Superintendent of Douglas County School District, testified during the injunction hearing that the Scholarship Program is one of approximately 30 strategies subsumed into the *Blueprint for Choice* to ultimately improve choice for parents and students in the district.

4. On March 15, 2011, the Douglas County School Board approved the Scholarship Program for the 2011-2012 school year as part of the larger *Blueprint for Choice* and Strategic Plan. *See* Choice Scholarship Program ("Policy") (Ex. 1).

5. Prior to approval of the Scholarship Program on March 15, 2011, the staff of the Colorado Department of Education met on multiple occasions with Douglas County School District staff regarding the structure of the Scholarship Program. *See*, *e.g.*, Jan. 5, 2011 mtg. notes (Ex. 69); February 10, 2011 mtg. minutes (Ex. 76); March 7, 2011 mtg. notes (Ex. 90).

6. At these meetings, the Colorado Department of Education advised the Douglas County School District on the legality of the Scholarship Program and how to structure the Scholarship Program so as to receive "per pupil" funding under the Public School Finance Act. *See*, *e.g.*, Jan. 5, 2011 notes (Ex. 69) (discussing funding and other issues including "church/state" problems, "excessive entanglement," and legal challenges associated with forming a charter school to administer the Program); March 7, 2011 notes (Ex. 90) (discussing use of charter school structure, special education, geographic

limitations, and other issues). At the injunction hearing, Robert Hammond ("Mr. Hammond"), the Colorado Commissioner of Education, confirmed that, at the January 5, 2011 meeting, the Colorado Department of Education did not intend to block the implementation of the Scholarship Program. He additionally acknowledged that at the time he made this statement, he had no documents outlining the Scholarship Program.

7. Dr. Fagen and her administration began implementing the Scholarship Program on Wednesday, March 16, as directed by the Douglas County School Board for the 2011-2012 school year.

B. THE CHOICE SCHOLARSHIP PROGRAM

8. The purposes of the 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 [Douglas County School District] educational spending." *See* Policy § A ¶ 3 (Ex. 1). The Scholarship Program allows qualified scholarship students to attend the private school (also referred to as "Private School Partner") of his or her choice, with scholarship funds provided to reduce the overall cost of tuition.

9. If a student is selected to participate in the Scholarship Program and is accepted at a participating Private School Partner, the Douglas County School District pays the private school, via a restrictively-endorsed check to the recipient's parents, 75% of the "per pupil revenue" that it receives from the state of Colorado, currently estimated at $4,575 for 2011-2012, or the private school's actual tuition fee, whichever is less. *See* Executive Summary to the Choice Scholarship Program ("Exec. Summary"), at 2 (Ex. 1). Dr. Fagen, Dr. Christian Cutter ("Dr. Cutter"), the Assistant Superintendent of Elementary Education of the Douglas County School District, and John Carson ("Mr. Carson"), the President of the Douglas County School District Board of Education, corroborated the amount of the tuition payments at the hearing and testified that the Douglas County School District will retain the other 25% as "administrative costs."

10. Under the Scholarship Program, Douglas County School District pays participating Private School Partners by check in four equal installments throughout the school year. For each payment, Douglas County School District issues a check payable to the order of the parent or guardian of each scholarship student and sends that check directly to the Private School Partner at which the student is enrolled. The parent or guardian of the student is required to endorse the check for the sole use of paying tuition at the Private School Partner. *See* Policy §§ B ¶ 8, C ¶ 4, D ¶ 7.c (Ex. 1).

11. The parent or guardian of a student participating in the Scholarship Program is responsible for all tuition, costs and fees in excess of the amount provided by the Choice Scholarship that may be assessed by the Private School Partner. *See* Policy § D ¶ 7.h (Ex.1).

12. Dr. Cutter and Mr. Carson testified that the Scholarship Program is described as a “pilot” for the 2011-2012 school year, and the number of students that can receive public funds to attend private schools under the Scholarship Program is set at 500. *See, e.g.*, Policy § F; Exec. Summary, at 1 (Ex. 1). To date, Douglas County School District has offered 500 such “scholarships” to students to use as full or partial payment of tuition at designated Private School Partners for the 2011-2012 school year. As of the date of the injunction hearing, Dr. Cutter testified that 271 of the 500 students admitted under the Scholarship Program had been accepted to a Private School Partner. Leanne Emm (“Ms. Emm”), the Assistant Commissioner of Public School Finance for the Colorado Department of Education, further testified that approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

13. The Scholarship Program does not prohibit participating private schools from raising tuition after being approved to participate in the Scholarship Program, or from reducing financial aid for students who participate in the Scholarship Program. Thus far, at least one school, Valor Christian High School, has cut financial aid for a scholarship recipient in the amount of the tuition awarded under the Scholarship Program. *See* July 24, 2011 email to Tamra Taylor et al. (Ex. 102) (“[o]nce we got the voucher, Valor [Christian] adjusted our financial aid to reduce it by the amount of the voucher.”).

14. Dr. Cutter testified during the injunction hearing that he was not aware that Ms. Taylor, his administrative assistant, had received this email. He additionally stated that was not aware of any other situation in which a participating family under the Scholarship Program suffered a loss of financial aid as a result of their participation in the Scholarship Program. Dr. Cutter further acknowledged that he believed if a Private School Partner under the Scholarship Program reduced financial aid for a scholarship student participating in the program, it would “go against the intended contract” with the Douglas County School District.

15. To be eligible to participate in the Scholarship Program, students must be Douglas County School District residents who were enrolled in a Douglas County School District school for the 2010-2011 academic year and have resided in the Douglas County School District for no less than one year. Non-resident, open-enrolled Douglas County School District students are not eligible to participate. *See* Policy § D ¶ 5 (Ex. 1). Dr. Fagen testified that there is no policy provision precluding out of district students from moving into Douglas County, and enrolling in a Douglas County District public school, for one year and then applying to the Scholarship Program.

16. Students seeking to participate in the Scholarship Program must complete a Scholarship Program application and agree to take Colorado’s statewide assessment tests. *See* Policy § D ¶ 7.g (Ex. 1). There are no income limitations or requirements to apply for a scholarship under the Scholarship Program.

17. The Scholarship Program "encourages" students to research a Private School Partner's "admission criteria, dress codes and expectations of participation in school programs, be they religious or nonreligious." Policy § D ¶ 2 (Ex. 1).

18. A student selected to receive public funds under the Scholarship Program must also apply for and be granted admission to a Private School Partner. *See, e.g.*, Policy § D ¶ 6; Charter Sch. App., p.3.

19. Scholarship Program students must also enroll in the Douglas County School District's Choice Scholarship Charter School ("Choice Scholarship School").

20. At the injunction hearing, Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, in the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the [Choice Scholarship School], a student must . . . be accepted and attend a qualified Private School Partner School." *See* Charter Sch. App., p.8 (Ex. 5, at 8).

C. THE CHOICE SCHOLARSHIP CHARTER SCHOOL

21. Plaintiffs filed suit to enjoin the Scholarship Program on June 21, 2011. Later that day, the Douglas County School Board conditionally approved the creation of the Choice Scholarship Charter School." *See* Douglas County School District's Resolution of June 21 (Ex. 6, at p. 27). The Choice Scholarship Charter School application had been submitted to the Douglas County School Board on the same day, June 21, 2011. *See* Charter Sch. App., p.1 (Ex. 5, at 1). Dr. Cutter testified that the Scholarship Program was being implemented at the same time the Choice Scholarship School was being developed.

22. The Douglas County School Board gave final approval to the creation of the Choice Scholarship School on July 20, 2011. This was corroborated by testimony of Dr. Cutter, Dr. Fagen, and Mr. Carson.

23. The purpose of the Choice Scholarship School is to administer the Scholarship Program. *See, e.g.*, Charter Sch. Cont. § 4.2 (Ex. 6); Policy § A (Ex. 1). The Choice Scholarship School purports to contract with the Private School Partners for all educational services provided to students participating in the Scholarship Program. *See* Charter Sch. Cont. § 4.5 and § 7.4 (Ex. 6).

24. One of the major tasks of the Choice Scholarship School is to "gather all information and report to the Colorado Department of Education . . . so that Choice Scholarship students will be included in the Douglas County School District's pupil count and receive per-pupil revenue from the state for the Choice Scholarship students." *See* Policy § C ¶ 10 (Ex. 1). The Choice Scholarship School also monitors students' class schedules and attendance at the Private School Partners. In addition, the Private School Partners may be

charged with disciplining students for engaging in certain types of misconduct at the private schools. Choice Scholarship Sch. App. (Ex. 5).

25. School officials testifying during the hearing conceded that the Choice Scholarship School exists only on paper. The same school officials concurred with the fact that the Choice Scholarship School has no buildings, employs no teachers, requires no supplies or books, and has no curriculum. The Choice Scholarship School is merely the name given to the person(s) within the Douglas County School District who will administer the Scholarship Program. *See generally* Charter Sch. Cont. (Ex. 6).

26. Douglas County School District claims all students "enrolled" at the Choice Scholarship School as part of the Douglas County School District's "pupil enrollment" for the purposes of C.R.S. § 22-54-103(10). *See* Policy § D ¶ 1. Douglas County School Districts provides 100% of the "per pupil revenues" (less deductions for administrative overhead or purchased services) for each of the 500 scholarship participants directly to the Choice Scholarship School. *See* Charter Sch. Cont. §8.1.A (Ex. 6).

27. Dr. Cutter testified that the sole source of funding for the Choice Scholarship Schools is the "per pupil revenue" received from the state pursuant to C.R.S. §22-30.5-112(2)(a.5). *See also* Charter Sch. Cont. § 8.1.A, B (Ex. 6) ("The parties agree that the [Choice Scholarship] School is not entitled to any other funding . . . Consistent with Policy JCB, the [Choice Scholarship] School shall receive only PPR").

D. THE PRIVATE SCHOOL PARTNERS

28. To participate in the Scholarship Program, Private School Partners must apply, and disclose information related to enrollment, employment, financial stability, and other matters. *See* Policy § E ¶ 3 (Ex. 1). They need not be located within the boundaries of, or proximate to, the Douglas County School District. *See* Policy § E ¶ 1 (Ex. 1)

29. As part of the application, Private School Partners must agree to satisfy certain requirements, such as meeting the "minimum number of teacher-pupil instruction hours." Policy § C ¶ 10 (Ex. 1). Private School Partner applicants must also agree to allow Douglas County to administer assessment tests to the students in the Scholarship Program. *See* Policy § E ¶ 3.g (Ex. 1).

30. In order to participate in the Scholarship Program, however, a private school need not modify its admissions or hiring criteria, even if they involve religious or other discrimination. In fact, the Scholarship Program authorizes participating schools to "make employment and enrollment decisions based upon religious beliefs." Policy § E ¶ 3.f (Ex. 1). This was undisputed by the school officials during the injunction hearing.

31. In the spring of 2011, the Douglas County School District accepted applications from 34 Private School Partners for participation in the Scholarship Program. *See* Partner List

(Ex. 3). As of July 31, 2011, the Douglas County School District has contracted with 23 of those private schools to participate in the Scholarship Program. *Id*.

i. Identities of Private School Partners

32. The following Private School Partners have signed contracts to participate in the Scholarship Program:

- Ambleside School is a private school currently located at 345 E. Wildcat Reserve Pkwy, Highlands Ranch, Colorado 80126 but scheduled to relocate to 1510 East Phillips Ave., Centennial, Colorado 80122 for the 2011-2012 school year;

- Aspen Academy is a private school located at 5859 S. University Blvd., Greenwood Village, Colorado 80121;

- Ave Maria Catholic School is a private school located at 9056 East Parker Road, Parker, Colorado 80138;

- Beacon Country Day School is a private school located at 6100 E. Belleview, Greenwood Village, Colorado 80111;

- Cherry Hills Christian is a private school located at 3900 Grace Boulevard, Highlands Ranch, Colorado 80126;

- Denver Christian Schools-Highlands Ranch Campus is a private school located at 1733 E. Dad Clark Drive, Highlands Ranch, Colorado 80126;

- Denver Christian Schools-Van Dellen Campus is a private school located at 4200 E. Warren Ave., Denver, Colorado 80222;

- Denver Christian Schools-High School Campus is a private school located at 2135 S. Pearl Street, Denver, Colorado 80210;

- Evangelical Christian Academy is a private school located at 4190 Nonchalant Circle South, Colorado Springs, Colorado 80917;

- Front Range Christian School is a private school located at 6657 W. Ottawa Ave., A-17, Littleton, Colorado, 80128;

- Hillel Academy of Denver is a private school located at 450 Hudson, Denver, Colorado 80246;

- Humanex Academy is a private school located at 2700 S. Zuni Street, Englewood, Colorado 80110;

- Lutheran High School is a private school located at 11249 Newlin Gulch Blvd., Parker, Colorado 80134;

- Mackintosh Academy is a private school located at 7018 S. Prince Street, Littleton, Colorado 80120;

- Mullen High School is a private school located at 3601 Lowell Blvd., Denver, Colorado 80236;

- Regis Jesuit High School is a private school located at 6300 S. Lewiston Way, Aurora, Colorado 80016;

- Shepherd of the Hills Lutheran is a private school located at 7691 S. University Blvd., Centennial, Colorado 80122;

- Southeast Christian School is a private school located at 9650 Jordan Road, Parker, Colorado 80134;

- St. Peter Catholic School is a private school located at 124 First Street, Monument, Colorado 80132;

- The Rock Academy is a private school located at 4881 Cherokee Drive, Castle Rock, Colorado 80109;

- Trinity Lutheran is a private school located at 4740 North Highway 83, Franktown, Colorado 80116;

- Valor Christian High School is a private school located at 3775 Grace Blvd., Highlands Ranch, Colorado 80126;

- Woodlands Academy is a private school located at 1057 Park Street, Castle Rock, Colorado 80109.

33. Fourteen of the twenty-three participating private schools are located outside of the Douglas County School District: Aspen Academy, Beacon Country Day School, Front Range Christian School, Humanex Academy, Mackintosh Academy, Regis Jesuit High School, and Shepherd of the Hills Lutheran School are located in Arapahoe County; Denver Christian Schools (multiple campuses), Hillel Academy, and Mullen Hugh School are located in Denver County; and Evangelical Christian Academy and St. Peter Catholic School are located in El Paso County.

ii. Religious Affiliation of Private School Partners

34. The Scholarship Program does not limit participation to private schools that are nonsectarian. *See* Policy § E ¶ 2.c (Ex. 1).

35. Sixteen of the twenty-three private partner schools approved to participate in the Scholarship Program are sectarian or religious, as those terms are used in Article II, Section 4; Article V, Section 34; and Article IX, Section 7, of the Colorado Constitution. They teach "sectarian tenets or doctrines" as that term is used in Article IX, Section 8 of the Colorado Constitution.

36. For virtually all high school students participating in the Scholarship Program, the only options are religious schools. Of the five participating schools that are non-religious, one is for gifted students only (Mackintosh Academy), another (Humanex Academy) is for special needs students, and the remaining three run through eighth grade only. *See, e.g.*, Humanex Academy App. (Ex. 58); Woodlands App. (Ex. 62); Mackintosh App. (Ex. 60); Aspen App. (Ex. 54); Beacon App. (Ex. 56). The school officials testifying confirmed these facts during the injunction hearing.

37. As of the time of the injunction hearing, approximately 93% of the confirmed private school enrollment was attending religious schools. At the high school level, there are 120 students, and only *one* of them will attend a non-religious school (Humanex Academy).

38. Most of the Private School Partners that have been approved to participate in the Scholarship Program are owned and controlled by private religious institutions. *See, e.g.*, Ave Maria App., at 6 (Ex. 18) (controlled by Diocese of Colorado Springs); Cherry Hills Christian App. at 1 (Ex. 19, p.10, 15) (controlled by Cherry Hills Community Church.); Evangelical Christian App., at 1 (Ex. 25 p.16) (controlled by Village Seven Presbyterian Church); Lutheran High School App., at 1, 2 (Ex. 37 p. 10, 11) (controlled by Lutheran Church - Missouri Synod); Mullen High School App., Faculty Handbook, at 1 (Ex. 40 p. 6) (owned and controlled by "Christian Brothers of New Orleans/Santa Fe Province"); Shepherd of the Hills App., at 1 (Ex. 42 p.10) (owned and operated by Shepherd of the Hills Lutheran Church); Southeast Christian School App., at 1,2 (Ex. 44 p. 10, 11) (controlled by Southeast Christian Church); Rock Academy App., Parent Handbook (Ex. 47 p. 44); Trinity Lutheran App., Handbook (Ex. 48 at p.11, 18) (controlled by Trinity Lutheran Church). Dan Gehrke ("Mr. Gehrke"), Executive Director of the Lutheran High School Association, testified at the injunction that all of the members that makeup the Colorado Lutheran High School Association, which runs and has a vested interest in the high school, are churches.

39. The governing entities of many participating Private School Partners reflect, and are often limited to, persons of the schools' particular faith. *See, e.g.*, Ave Maria App., at 6) (Ex. 18); Cherry Hills App., at 1 (Ex. 19 p. 10) (stating that school superintendent reports to pastor of Cherry Hill Church, and Board of Elders); Evangelical Christian App. Bylaws at IV. B (Ex. 25 p. 17) (stating that each member of the Board shall be from "a

reformed denomination subject to the approval of the Sessions of the Founding Churches"); Lutheran High School App., Diploma of Vocation (Ex. 37 p. 23) (appointing Dan Gehrke as Director "in the name of the Triune God"); Shepherd of the Hills App., at 1 (Ex. 42 p. 10) (stating that the Board serves as a trustee for the congregation); Southeast Christian App., at 1 (Ex. 44 p.10) (stating that "Southeast's Elder Board provides oversight to the School Board. The church is staff directed and elder protected."); Trinity Lutheran App., at 1 (Ex. 48 p. 10) (stating that the Trinity congregation is the "ultimate governing authority"). Mr. Gehrke and Robert Bignell ("Mr. Bignell"), Superintendent at Cherry Hills Christian, both confirmed this at the injunction hearing.

40. Many of the participating Private School Partners are funded primarily or predominantly by sources that promote and are affiliated with a particular religion. *See, e.g.*, Lutheran High School App., Promissory Note (Ex. 37 p. 15) (evidencing loan from Lutheran Church Extension Fund—Missouri Synod); Mullen High School App., at 1 (Ex. 40 p.6) (stating school is "owned and operated" by "Christian Brothers of New Orleans . . . in cooperation with the Archdiocese's Catholic School Office of the Catholic Archdiocese of Denver"); Shepherd of the Hills App., Enrollment Policies (Ex. 42 p. 14) (stating that Shepherd of the Hills is "sponsored and maintained by Shepherd of the Hills Lutheran Church"); Trinity Lutheran App., Accreditation Report (Ex. 48 p. 192) (stating that "school and church operate under a unified budget with the church financing a portion of the total school costs"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

41. Most of the Private School Partners that have been approved to participate in the Scholarship Program require students to attend religious services. *See, e.g.*, Ave Maria App. at 3, 7, 8) (Ex. 18); Cherry Hills App., at 3 (Ex. 19); Evangelical Christian App., at 2 (Ex. 25); Front Range Christian App., at 6,7 (Ex. 29 p. 15, 16); Denver Christian School App., at 4 (Ex. 23); Hillel Academy App., at 5 (Ex. 31 p.14); Lutheran High School App., at 3 (Ex. 37 p.12); Mullen High School App., at 2 (Ex. 40 p. 2); Regis Jesuit App., at 6 (Ex. 41 p. 15); Southeast Christian App., at 5 (Ex. 44 p. 14); The Rock Academy App., at 2 (Ex. 47 p. 11); Trinity Lutheran App., at 4 (Ex. 48 p. 13); Valor Christian App., at 4 (Ex. 49 at p. 13). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

42. Most participating Private School Partners discriminate in enrollment or admissions on the basis of the religious beliefs or practices of students and their parents, and some even give preference to members of particular churches. *See*, e.g., Ave Maria App., at 8, 27 (Ex. 18) (discriminating in admissions and hiring); Denver Christian at 100-1, 100-5 (Ex. 23 p. 16-17, 20) (discriminating in favor of "children of parents who are members of a Reformed church); Evangelical Christian App., Doctrinal Statement (Ex. 25 p. 101) ("Evangelical Christian Academy shall admit only students of parents who give evidence of regeneration, who affirm this doctrinal statement"); Front Range App., Student Enrollment Info. (Ex. 29 p. 18) (acceptance contingent on attestation of parent); Lutheran High School App., Employee Handbook (Ex. 37 p. 65) (discriminating in favor of

Lutherans in hiring); Shepherd of the Hills App., Enrollment Policies 6.1.2.1, and Employee Resource Guide 1.40, and Enrollment Paragraphs (Ex. 42 pp. 14, 22, 27, 28-29) (discriminating on the basis of religion in admissions and employment by, for example, categorizing workers as "called" vs. "non-called.") The Rock Academy App., Parent Handbook (Ex. 47 p. 47, 87) (giving preference for admission to members of the Rock Church); Valor Christian App., Employee Handbook (Ex. 49 p. 81) (requiring teachers to be 'authentic and committed believers in Jesus Christ'"). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

43. Most of the participating Private School Partners subject students, parents, and faculty to religious tests and qualifications. *See, e.g.*, Cherry Hills App., Family Commitment Policy (Ex. 19 p. 36) (requiring students and Parents to execute "Family Commitment Statement" that includes commitment to pray); Denver Christian App., Policy Manual (Ex. 23 p. 16-17) (requiring faculty to sign religious attestation); Evangelical Christian App., Handbook at 15, Employment Policy at 1, Doctrinal Statement (Ex. 25 p. 46, 94 101) (requiring parents to attest to faith in Jesus Christ and sign "doctrinal statements", and requiring faculty to attend church that agrees with "statement of faith"); Front Range App. (Ex. 20 p. 18, 58, 64, 70) (requiring parent to profess a "personal relationship with God," and requiring teachers to execute Statement of Faith and Declaration of Moral Authority); Shepherd of the Hills App., Enrollment Policies 6.1.2.1 (Ex. 42 p. 14) (requiring students to attest that they "will accept training in the teachings in the Christian faith."); Southeast Christian App., Family Commitment Agreement (Ex. 44 p. 27-29) (requiring parents and students to sign "commitment agreement" and "give your Christian testimony."); Valor Christian App., Employee Handbook (Ex. 49 p. 81, 117) (requiring faculty to agree to the Statement of Faith as a condition of employment). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

44. The primary missions of most of the Private School Partners, and of the religious entities that own, operate, sponsor, or control them, is to provide students with a religious upbringing and to inculcate in them the particular religious beliefs and values of the school or sponsoring religious organization. *See, e.g.*, Ave Maria App., at 3, 7 (Ex. 18) (mission statement); Cherry Hills App., at 1 (Ex. 19) (mission statement); Denver Christian App., Policy Manual 100-7 (Ex. 23 p. 22) (describing educational philosophy as preparing students for service in the Kingdom of God); Evangelical Christian App., Philosophy Statement (Ex. 25 p. 14) (describing education as founded on the centrality and preeminence of Christ in all things); Front Range App., at 2 (Ex. 29 p. 11) (stating that school exists to equip students to "impact the world for Christ"); Hillel Academy App., at 2 (Ex. 31 p. 11) (describing educational goals, in part, as "to provide a Judaic education that allows students to act as fully functioning Orthodox Jews."); Lutheran App., at 2 (Ex. 37 p. 11) ("Christian principles guide all of student life; classes, sporting and special events, and relationships."); Mullen App., Faculty Handbook at 1 (Ex. 40 p. 18) (preparing graduates to "embrace God's gift of learning [and] devote their lives ceaselessly for His learning"); Regis App., at 3 (Ex. 41 p. 12) (stating that Regis

graduates “will come to know and experience God”); Shepherd Hills’ App., at 2 (Ex. 42 p. 11) (Mission statement: “Through the Gospel of Jesus Christ, Shepherd of the Hills Christian School seeks to strengthen families by helping parents to train their children in a Christian way of life …”); Southeast Christian App., at 2 (Ex. 44 p.12) (“ The Christian school is an arm of the Christian home in the total education of children.” . . . “Train up a child in the way he should go, and even when he is old he will not depart from it.”) (quoting Proverbs 22:6); The Rock Academy App., Parent Handbook (Ex. 47 p. 45) (“The Rock Academy exists to partner with parents in training the next generation through discipleship in God’s word . . .”); Trinity Lutheran App., Parent/Student Handbook (Ex. 48 p. 18, 32) (“The “primary objective of Trinity Lutheran School is to support parents in the spiritual training of their children.”); Valor Christian App., Mission Statement (Ex. 49 p. 18) (school’s “vision” is to “prepar[e] tomorrow’s leaders to transform the world for Christ”). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

45. The curricula at most participating schools is thoroughly infused with religion and religious doctrine, and includes required courses in religion or theology that tend to indoctrinate and proselytize. The participating schools additionally require theology classes as a component for graduation eligibility. *See, e.g.*, Cherry Hills App. (Ex. 19 p. 18); Denver Christian App., Policy Manual at 100-7 (Ex. 23 p. 22) (describing pillar of the curriculum as “Religion: Knowledge of religions, church history, Christian doctrine, and Christian ethics; always involving a challenge to respond in faith and obedience to the Lord.”); Evangelical Christian App. (Ex. 25 pp. 19, 52) (requiring “Bible classes for graduation” and stating that “all materials are taught from a Christian Reformed worldview.”); Front Range App., at 3 (Ex. 29 p. 12) (“We believe that all truth is God's truth. Therefore, all academic disciplines are taught and integrated within a Christian worldview.”); Hillel Academy App. at 3 (ex. 31 p. 12) (“Our Judaic Program adheres to a traditional (Halakha) interpretation of laws and customs.”); Lutheran High School App., Employee Handbook at 44 (Ex. 37 p. 104) (stating that religious instruction is an “integral part of every subject area”); Southeast Christian App., at 2 (Ex. 44 p. 11, 14) (“Biblical integration is included in all aspects of our learning. Bible class is considered a core academic class.”); The Rock App., (Ex. 47 p. 31) (curriculum description); Trinity Lutheran App., Parent Student Handbook (Ex. 48 p. 21) (“describing “in-classroom time given to devotions and worship”); Valor Christian App., Student Handbook (Ex. 49 p. 60) (requiring 3.5 semesters of required courses in religion or theology). This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

E. THE RESTRICTIONS ON RELIGIOUS AND OTHER DISCRIMINATION, RELIGIOUS EDUCATION, AND MANDATORY PARTICIPATION IN RELIGIOUS SERVICES

46. The Scholarship Program provides no meaningful limitations on the use of taxpayer funds to support or promote religion, and no meaningful protections for the religious liberty of participating students. The Scholarship Program permits participating Private

School Partners to discriminate on the basis of religion in both admission and in employment. *See* Policy § E ¶ 2, 3.f) (Ex. 1). Douglas County School District "recognize[s] that many schools embed religious studies in all areas of the curriculum." FAQ (Ex. 2).

47. There are no restrictions on how participating Private School Partners may spend the taxpayer funds that they receive under the Scholarship Program. The participating private schools are free to use these funds for sectarian purposes, including, for example, religious instruction, worship services, clergy salaries, the purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer. *See* FAQ (Ex. 2).

48. Mr. Bignell explained in a letter on April 15, 2011, to Dr. Cutter, "My summary of our two-hour interview is that the district wants *no control* over Cherry Hills Christian or any other partner school." (Ex. 101) (emphasis added). This was additionally confirmed by the testimony of Dr. Cutter.

49. The Scholarship Program permits participating private schools to discriminate against students with disabilities. This was confirmed by the testimony of Dr. Cutter. Douglas County School District categorizes students with disabilities who participate in the Scholarship Program as "parentally-placed students with disabilities" and includes a disclaimer in its form application stating that the "[d]istrict-provided services to parentally placed students with disabilities are limited." (Ex. 5 p. 10). Further, parents opting to have their children participate in the Scholarship Program essentially waive their rights under the Individuals with Disabilities Education Act. *See* Policy JCB (Ex. 107 at p. 5).

50. Participating Private School Partners may also engage in other forms of discrimination. For example, Denver Christian's application sets forth its "AIDS policy," under which it can refuse to admit, or expel, HIV-positive students. (Ex. 23 p. 28.) The "Teacher Contract" at Front Range lists homosexuality as "a cause for termination." (Ex. 29 p. 71).

F. THE "OPT OUT" PROVISION AGAINST RELIGIOUS INSTRUCTION OR PARTICIPATION IN RELIGIOUS EXERCISES

51. The Scholarship Program purports to afford participating students the right to "receive a waiver from any required religious services at the [Private School Partner]." *See* Policy § E ¶ 3.l (Ex. 1). But this "opt out" right is illusory. Dr. Cutter confirmed that scholarship students may still be required to attend religious services, so long as they are permitted to remain silent. *See* FAQ (Ex. 2). Many participating private religious schools require such attendance. *See supra*, at ¶ 54.

52. Scholarship students have no right to opt-out of religious instruction, even if the religious instruction would conflict with their own religious beliefs. *Id.* Scholarship students also

have no right to sit silent during other religious exercises that does not occur in the context of formal religious worship services and chapel, such as prayer recitations, scriptural readings, etc, which many schools mandate throughout the day. *Id*. This fact was also corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell.

53. Douglas County School District officials collaborated with religious Private School Partners to ameliorate their concerns regarding the initial waiver language which provided a complete right to opt out of religious services and instruction. Further, District Officials intentionally weakened the waiver language to encourage private religious schools to participate in the Scholarship Program. Shortly before the Douglas County School Board voted on the Scholarship Program, Dr. Cutter explained to a group of private religious schools that he had received "mixed responses" to a waiver policy that would have required participating private schools students in the Scholarship Program to "*remove themselves* from faith-based classes and/or activities" March 5, 2011 Email (Ex. 86) (emphasis added). Dr. Cutter also asked a group of private religious schools whether the waiver provision was a "deal-breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88). The testimony of Dr. Cutter confirmed that these facts were accurate. Dr. Cutter further acknowledged that a large number of the private schools were sectarian and that it was imperative to get their participation. Dr. Cutter confirmed that without the religious schools' participation, there would not be much of a Scholarship Program.

54. The limited opt-out right is subject to even further reduction—or outright elimination—based on the opinion and testimony of Mr. Cutter. For example, Mr. Cutter assured Ken Palmreuter of Trinity Lutheran that "because services vary between faiths and institutions, the waiver will include unique specifics for each individual school. It's not a 'one waiver fits all.' you and I can work together to make sure it is comprehensive after your application is submitted." April 17, 2011 Email (Ex. 96).

G. THE EDUCATION PROVIDED BY THE PARTICIPATING RELIGIOUS PRIVATE SCHOOL PARTNERS

55. A "uniform standard" for public education in Colorado is set forth in the criteria created by the state legislature and is implemented by and under the continued supervision of the local school boards. Douglas County School District has adopted Colorado State Standards, as promulgated by the Colorado Department of Education, to create learning targets for the District. Douglas County School District's Standards Website (Ex. 10). These standards describe the learning goals in each area of instruction for each academic grade level. *Id.*

56. Douglas County School District also issues its own learning goals for each school year, outlining the key academic objectives to be achieved for that year. Douglas County

Student Learning Goals (Ex. 9). Teachers in Douglas County School District are subject to licensing criteria as set forth by the Colorado State Board of Education.

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

H. THE COLORADO DEPARTMENT OF EDUCATION HAS NOT DECIDED WHETHER TO FUND THE PROGRAM

58. The Scholarship Program is premised on the assumption that the Colorado Department of Education will pay Douglas County School District the "per pupil revenue" for students that attend participating private schools under the Scholarship Program. *See* Policy § C ¶ 6, 10 (Ex. 1)

59. Douglas County School District has already begun distributing money to participating private schools. As of the date of the injunction hearing, 271 of the 500 students admitted under the Scholarship Program had been accepted to Private School Partners and approximately 184 checks have been mailed to Private School Partners totaling over $200,000.

60. Mr. Hammond testified at the injunction hearing that the state has not determined whether or not it will fund the Scholarship Program.

61. Mr. Hammond testified at the injunction hearing that, if the Colorado Department of Education determines that students participating in the Scholarship Program should not be part of the pupil count for Douglas County School District, the state may seek reimbursement from the Douglas County School District of any state aid used to finance the Scholarship Program. Specifically, Mr. Hammond testified that the state could "claw back" the moneys spent towards the Scholarship Program if the Scholarship Program is determined to be improper.

62. Additionally, the Scholarship Program could be abruptly terminated when the State conducts its audit sometime in 2012, when students are already enrolled and immersed in the private schools. Students in the Scholarship Program would need to be reintegrated into public schools, or parents would be forced to pay the remaining private tuition on their own. Public school curricula would be disrupted, classes might need to be added or reallocated to accommodate hundreds of unplanned students, and additional textbooks

and supplies that were not budgeted or planned for would need to be quickly procured. Furthermore, the Douglas County School District could face the obligation to return millions of education dollars to the State. Many, if not all, of these circumstances could likewise occur in the event injunctive relief is granted.

63. Although the state has not committed to fund the Scholarship Program, the Douglas County School District nonetheless intends to forego investments in Douglas County public schools, which are necessary to keep pace with increased student enrollment, on the assumption that the Scholarship Program will alleviate this increased enrollment. Specifically, Dr. Fagen testified that the Scholarship Program will alleviate additional cost, such as classroom materials and facilities, associated with an increasing student enrollment.

64. Mr. Carson testified at the hearing that if the Scholarship Program is successful, he hopes to expand the Scholarship Program beyond the initial 500 students. *See also* December 12, 2010 Email (Ex. 126). Mr. Carson further stated that his viewpoint on expanding the Scholarship Program generally reflected the thoughts of the other Douglas County School Board members.

65. Mr. Carson testified that, under the state education funding system, more students equaled more money to the school district. Mr. Carson elaborated that part of his job responsibility is to devise ways to increase money and students to the Douglas County School District. Mr. Carson testified that the Douglas County School District has suffered tens of million dollars in budget reductions, and because the Douglas School District "does not have a finite pot of money, [the Douglas County School District's] budget is dependent upon pupil growth." Therefore, if the Scholarship Program grows in size, Douglas County School District's budget grows in size. Dr. Cutter testified that after running a financial analysis on the Scholarship Program, the Scholarship Program was forecasted to "break even" at 200 scholarship students. If these scholarship students are counted in the Douglas County School District's per pupil revenue, as the school officials testified that they will be, the funds directed to the Douglas County School District will be at the cost to other school districts around the state.

II.
STANDARD OF REVIEW

A. C.R.C.P. 12(B)(1) – LACK OF STANDING

A motion to dismiss for lack of standing is governed by C.R.C.P. 12(b)(1). "Subject matter jurisdiction is defined as a court's power to resolve a dispute in which it renders judgment." *Levine v. Katz,* 192 P.3d 1008, 1011 (Colo. App. 2006). In order for a court to have

proper jurisdiction over a dispute, “the plaintiff must have standing to bring the case.” *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004) (en banc). Furthermore, “[s]tanding is a threshold issue that must be satisfied in order to decide a case on the merits. *Id.*

A trial court may consider any competent evidence pertaining to a C.R.C.P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction without converting the motion to a summary judgment motion. *Lee v. Banner Health*, 214 P.3d 589, 593 (Colo. App. 2009). A plaintiff has the burden of proving that the trial court has jurisdiction to hear the case. *Id*. at 594.

B. C.R.C.P. 12(5) – FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

In addressing a C.R.C.P. 12(b)(5) motion, the court must view the allegations in the light most favorable to the non-moving party, *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992) (en banc), and accept all averments of material fact contained in the complaint as true. *Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1099 (Colo. 1995) (en banc) (quoting *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 122-23 (Colo. 1992) (en banc)). Whether a claim is stated must be determined solely from the complaint. *Dunlap,* 829 P.2d at 1290.

Under C.R.C.P. 8(a)(2), all that is required is “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Henderson v. Gunther*, 931 P.2d 1150, 1168 (Colo. 1997) (en banc). Thus, dismissal of claims under C.R.C.P. 12(b)(5) is proper only “where a complaint fails to give defendants notice of the claims asserted.” *Shockley v. Georgetown Valley Water & Sanitation Dist.*, 548 P.2d 928, 929 (Colo. App. 1976). Unless it appears beyond doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief, the motion will be denied. *Dunlap*, 829 P.2d at 1290.

C. C.R.C.P. 65 - INJUNCTION

Colorado law is clear on the requirements to enter an injunction. Courts are permitted to enter an injunction pursuant to C.R.C.P. 65. In order for a preliminary injunction to enter, a plaintiff must demonstrate the following elements:

> (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.

See Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982) (internal citations omitted).

C.R.C.P. 65(f) additionally contemplates that injunctions can be mandatory or permanent and that the court can require a party to take affirmative action "if merely restraining the doing of an act or acts will not effectuate the relief to which the moving party is entitled[.]" "It is generally held that if a preliminary mandatory injunction will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, it should not be issued. Only in rare cases if the complainant's right to the relief is *clear and certain* will an injunction issue under such circumstances as involved here." *Allen v. Denver*, 351 P.2d 390, 391 (Colo. 1960) (emphasis in original).

III.
CONCLUSIONS OF LAW

The Court now addresses Defendants' Motion to Dismiss and Plaintiffs' Motions for Preliminary Injunction, in turn:

A. MOTION TO DISMISS

Defendants allege that Plaintiffs' claims for violations of C.R.S. § 22-54-101 *et seq.* and violation of Article IX, Section 3 of the Colorado Constitution should be dismissed, pursuant to C.R.C.P. 12(b)(1), because Plaintiffs lack standing to bring these claims. Furthermore, Defendants contend that Plaintiffs' remaining claims for violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 should be dismissed for failure to state a claim upon which relief can be granted, pursuant to C.R.C.P. 12(b)(5). In response, Plaintiffs argue that standing is proper for all claims alleged and that all claims are viable and properly alleged. The Court addresses each of Defendants' arguments, in turn, below.

i. Lack of Standing for Statutory Claims

Defendants allege that Plaintiffs lack standing to bring their statutory violation claims because Plaintiffs lack a legally protected interest to enforce the statutes and have not suffered an injury in fact. Plaintiffs argue that they have suffered both economic and non-economic losses and they have a protected legal interest in their constitutional and statutory claims.

In *Wimberly v. Ettenberg*, the Colorado Supreme Court outlined a two-step test for determining standing. 570 P.2d 535, 539 (Colo. 1977) (en banc). A plaintiff has standing if he or she (1) incurred an injury-in-fact (2) to a legally protected interest, as contemplated by statutory or constitutional provisions. *See id*. This test, because of its application in a variety of different contexts, has become the general test for standing in Colorado. *See Brotman v. East*

Lake Creek Ranch, LLC, 31 P.3d 886, 890 (Colo. 2001) (en banc). "In Colorado, parties to lawsuits benefit from a relatively broad definition of standing." *Ainscough*, 90 P.3d at 855.

The first prong of the test has been interpreted to require "a 'concrete adverseness which sharpens the presentation of issues' that parties argue to the courts." *Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (en banc) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). An injury that is "indirect and incidental" is insufficient to confer standing. *Brotman*, 31 P.3d at 891. "In the context of administrative action, this element of standing does not require that a party suffer actual injury, as long as the party can demonstrate that the administrative action 'threatens to cause' an injury." *Bd. of County Comm'rs v. Colo. Oil and Gas Conservation Comm'n*, 81 P.3d 1119, 1122 (Colo. App. 2003). "However, an injury must be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy proper for judicial resolution." *Id.*

The second prong of the test "requires that the plaintiff have a legal interest protecting against the alleged injury." *Ainscough*, 90 P.3d at 856. There are three factors that courts use to determine whether a statute reflects a legislative purpose to confer a legal interest that entitles plaintiff to judicial redress: "(1) whether the statute specifically creates such a right in the plaintiff; (2) whether there is any indication of legislative intent to create or deny such a right; and (3) whether it is consistent with the statutory scheme to imply such a right." *Olsen v. City of Golden*, 53 P.3d 747, 752 (Colo. App. 2002) (citing *Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n*, 620 P.2d 1051, 1057 (Colo. 1981) (en banc)).

Here, Plaintiffs have alleged a direct economic injury on the grounds that the Scholarship Program will result in over $3 million in public funding being removed from the Douglas County

School District. Plaintiffs further claim that because this action is based upon an administrative action, the threat of diverting money intended to further their children's education is sufficient to establish standing. Finally, Plaintiffs assert that they have a legal interest in protecting against the injury, both as taxpayers opposing the unconstitutional and unlawful expenditure of funds, and as parents and students protecting their interest in public education.

Defendants argue that any injury alleged is not sufficiently direct to establish standing for Plaintiffs. Furthermore, Defendants argue that the statutes upon which Plaintiffs base these claims lack the express language to establish standing for taxpayer enforcement, lack any indication of legislative intent to create a taxpayer right of enforcement, and lack the implication that a general right of taxpayer right of judicial redress exists.

The Court finds that the injuries asserted by Plaintiffs, both economic and non-economic, are sufficient in quality and directness to establish standing. The prospect of having millions of dollars of public school funding diverted to private schools, many of which are religious and lie outside of the Douglas County School District, creates a sufficient basis to establish standing for taxpayers seeking to ensure lawful spending of these funds, in accordance with the Public School Finance Act. Similarly, these same circumstances are sufficient to establish standing for students, and the parents of students, seeking to protect public school education.

With respect to legal interest, the Court notes that Defendants' argument focuses, almost exclusively, on a lack of legislative purpose to confer a legal interest on taxpayers. Although this argument has some merit, the argument ignores the fact that Plaintiffs are comprised of not only taxpayers, but parents and students as well. Plaintiffs have successfully argued that their status

as students in the Douglas County School District, as well as parents to these students, confers a legal interest in the enforcement of the statutes enumerated in their claims.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims against Defendants' alleged statutory violations.

ii. Lack of Standing for Article IX, Section 3 Claim

Defendants next challenge Plaintiffs' standing on their constitutional claim for the violation of Article IX, Section 3 of the Colorado Constitution. As with the statutory claims, Defendants allege that Plaintiffs lack standing because Plaintiffs lack a legally protected interest and have not suffered an injury in fact. Plaintiffs argue that they have suffered economic and non-economic losses and that they have a protected legal interest in their constitutional and statutory claims.

While the *Wimberly* test outlined above applies equally to constitutional claims, it bears noting that additional deference is given to plaintiffs asserting claims based on constitutional violations. *See, e.g.*, *Ainscough*, 90 P.3d at 856; *Colo. State Civil Serv. Employees Ass'n v. Love*, 448 P.2d 624, 627 (Colo. 1968) (en banc). The Supreme Court has interpreted *Wimberly* to confer standing when a plaintiff argues that a governmental action that harms him is unconstitutional. *Ainscough*, 90 P.3d at 856. "[A] precept of constitutional law is that a self-executing constitutional provision ipso facto affords the means of protecting the right given and of enforcing the duty imposed." *Love*, 448 P.2d at 627. Although citizens may generally sue to protect a "great public concern" regarding the constitutionality of a law, the jurisprudence on this particular section of the Colorado Constitution indicates otherwise. *Compare Love*, 448 P.2d at 627 *with Brotman*, 31 P.3d at 891-92. In *Brotman*, although the Court held that taxpayers lack

standing to bring claims under this Section of the Constitution, the Court expressly noted that this decision "does not preclude a determination like that in Branson that plaintiff schools and schoolchildren might have such standing." *Brotman*, 31 P.3d at 892.

In the present case, Plaintiffs are comprised not only of taxpayers, but also of parents and students in the Douglas County School District. While the Colorado Supreme Court's holding in *Brotman* expressly precludes taxpayer standing to assert claims based on the violation of Article IX, Section 3 of the Colorado Constitution, the Supreme Court clearly articulates that this holding is not sufficient to preclude standing of schools and students affected by the disbursement of funds generated from school lands. As outlined in the statutory claims section, *supra*, Plaintiffs have successfully asserted economic and non-economic injuries and have argued that their status as students and parents in the Douglas County School District confers a legal interest in the enforcement of the statutes enumerated in their claims. In evaluating Plaintiffs' standing, the Court reads the Supreme Court's language in *Brotman* in conjunction with its "relatively broad definition of standing" in Colorado and general conferral of standing upon a plaintiff arguing that an unconstitutional governmental action has injured the plaintiff.

In conclusion, the Court finds that Plaintiffs have sufficiently established that they have proper standing to assert their claims for the violation of Article IX, Section 3 of the Colorado Constitution.

iii. Failure to State a Claim Upon Which Relief Can Be Granted

Next, the Court turns to Defendants' challenge of the remaining constitutional claims. Defendants contend that, because Plaintiffs' remaining claims lack merit and fail to show a probability of success, these claims should be dismissed pursuant to C.R.C.P. 12(b)(5).

Conversely, Plaintiffs argue that all claims asserted are viable claims for constitutional violations and, furthermore, are likely to succeed on the merits.

Colorado jurisprudence is clear that C.R.C.P. 12(b)(5) motions are generally disfavored and are designed to allow a defendant to test the formal sufficiency of a complaint. *See, e.g.*, *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 665 (Colo. 1999) (en banc); *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996) (en banc). Thus, "a complaint is not to be dismissed [under a C.R.C.P. 12(b)(5) motion to dismiss] unless it appears beyond doubt that the plaintiff cannot prove facts in support of the claim that would entitle the plaintiff to relief." *Dorman*, 914 P.2d at 911. Under the Colorado Rules of Civil Procedure, all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief," therefore a complaint is sufficient to withstand a motion to dismiss if the plaintiff states a claim that would entitle him to relief. C.R.C.P. 8(a)(2); *Shapiro & Meinhold*, 823 P.2d at 122-23.

Here, in their remaining constitutional claims, Plaintiffs' Complaints allege violations of Article II, Section 4, Article IX, Sections 2, 7, 8, and 15, and Article V, Section 34 of the Colorado Constitution. Generally, these claims allege that the Choice Scholarship Program, as currently constituted, requires students to "attend or support [a] ministry or place of worship, religious sect or denomination against [their] consent," fails to provide a "thorough and uniform system of free public schools," provides aid to churches and religious institutions, utilizes religious tests or qualifications for admission into public educational institutions, fails to maintain school board and school board director control of instruction in local schools, and provides appropriations to a "denominational or sectarian institution or association." In addition, Plaintiffs' Complaints include factual allegations which support the assertion of these claims.

While these claims have been hotly contested by Defendants, pursuant to the C.R.C.P. 12(b)(5) jurisprudence, the Court views these allegations in the light most favorable to Plaintiffs, the non-moving parties with respect to the Motion to Dismiss. Accordingly, taking the allegations in the complaints as true, the Court finds that the Plaintiffs' allegations are sufficiently pled to put Defendants on notice of the claims asserted. Furthermore, the Court finds that, despite Defendants' argument, Plaintiffs' claims are not precluded by Colorado substantive law. Finally, the Court affords a more detailed assessment of the merits of these claims below.

In conclusion, the Court finds that Plaintiffs have sufficiently alleged their remaining claims for constitutional violations.

WHEREFORE, in light of the reasoning above, Defendants' Motion to Dismiss is **DENIED**.

B. INJUNCTION

Plaintiffs request the Court to enter an injunction preventing Defendants from funding or otherwise implementing the Scholarship Program. A heightened standard is compelled in this case because, as the Court stated during the injunction hearing, Plaintiffs' request for preliminary injunction, if granted, would provide Plaintiffs with all of the relief sought in their respective complaints. Further, a trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. *See Colo. Springs Bd. of Realtors v State*, 780 P.2d 494 (Colo. 1989). Certainly the totality of the circumstances in this case warrants the modification of typical injunction proceedings from the norm.

Because the Court has determined that the higher standard of proof of a permanent or mandatory injunction applies here, *see supra*, the Court addresses the *Rathke* criteria in the

following manner: the initial analysis will be directed to an assessment of the six *Rathke* elements and the degree to which Plaintiffs have met their burden for preliminary injunctive relief. The Court will dedicate a more detailed analysis of the constitutional and statutory provisions, with respect to the question of whether Plaintiffs have established by clear and certain evidence their entitlement to mandatory or permanent injunctive relief. The purpose in addressing the *Rathke* criteria in this fashion is to augment the Court's conclusion that, not only have Plaintiffs proven the six *Rathke* criteria by a preponderance of the evidence such that a preliminary injunction would be warranted, but that Plaintiffs additionally provided clear and certain evidence entitling them to mandatory or permanent injunctive relief.

i. Danger of Real, Immediate, and Irreparable Injury

Plaintiffs are in danger of real, immediate, and irreparable injury. An injunction is warranted where property rights or fundamental constitutional rights are being destroyed or threatened with destruction. *Rathke*, 648 P.2d at 652. The injuries to Plaintiffs' constitutional rights are irreparable and, without enjoining the Scholarship Program, Plaintiffs' injury cannot be undone. *See Kikimura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (holding that a violation of an individual's religious rights is not adequately redressed by monetary compensation and is therefore irreparable, and explaining that "when an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

Here, as more fully detailed below, the undisputed evidence before the Court reflects that the Scholarship Program continues to move forward in preparation for the 2011-2012 school year and Defendants continue to enroll students and make payments to Private School Partners. Further, Dr. Fagen and other Douglas County School District officials testified that school has

already started in most Douglas County public schools. Plaintiffs have established, by a preponderance of the evidence, that the Scholarship Program violates both financial and religious provisions set forth in the Colorado Constitution. This evidence includes testimony from parents who reside in Douglas County, administrators from the Private School Partners, and employees of the Douglas County School District, confirming that the Scholarship Program, among others things: (1) requires participating students to attend religious services and receive religious instruction; (2) provides aid to churches and religious institutions; and, (3) utilizes religious tests or qualifications for admission into partner schools and, consequently, into the Choice Scholarship School. Allowing the program to continue to move forward with students attending the Private School Partners and Defendants distributing taxpayer funds to support the Scholarship Program violates Plaintiffs' constitutional rights and, therefore, presents a danger that is real, immediate, and irreparable to Plaintiffs.

In conclusion, the Court finds that Plaintiffs' danger is real, immediate, irreparable, and ongoing. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

ii. No Plain, Speedy, and Adequate Remedy at Law

Because injunctive relief falls within the Court's equitable authority, and because the Plaintiffs' request for an injunction presents the only adequate remedy for the alleged statutory and constitutional violations, there is no plain, speedy or adequate remedy at law available to

Plaintiffs. *See Pinson v. Pacheco*, 397 Fed.Appx. 488, 492 (10th Cir. 2010) (stating that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief). This *Rathke* element, a lack of plain, speedy or adequate remedy at law, is highly correlated to the "danger of real, immediate, and irreparable injury" element outlined above because a finding of irreparable injury is consistent with the finding that a plaintiff lacks an adequate remedy at law. *See Rathke*, 648 P.2d at 653-54. As outlined below, by not enjoining the Scholarship Program, Plaintiffs' constitutional rights will be irreparably violated and, necessarily, this constitutional injury cannot be undone or remedied by monetary or any other compensation. *See Kikimura*, 242 F.3d at 963.

In conclusion, the Court finds that Plaintiffs have proven, by a preponderance of the evidence, that no plain, speedy, and adequate remedy exists at law. Accordingly, the Court finds that this *Rathke* element supports a decision to enjoin the program.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

iii. Granting of a Preliminary Injunction Will Not Disserve the Public Interest

Enjoining Defendants' implementation of the Scholarship Program does not disserve the public interest. Although Defendants assert that the interests of participating students and the Douglas County School District in the educational process would be enhanced by the implementation of the Scholarship Program, this interest is outweighed by the substantial disservice to the public interest that would result from the implementation of an unconstitutional

program affecting approximately 58,000 students and the taxpaying residents of Douglas County.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that the public interest ultimately favors, and is served, in upholding the requirements established by the Colorado Constitution. Accordingly, the Court finds that this element of *Rathke* supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

iv. Balance of Equities Favors the Injunction

As articulated by both Plaintiffs and Defendants during the proceedings, this factor is, in many ways, the most difficult for this Court to determine. With respect to Plaintiffs, a denial of the request for injunction presents significant injury in the form of continued constitutional and statutory violations of Plaintiffs' rights. Conversely, with respect to Defendants, granting the Plaintiffs' request for injunctive relief will undoubtedly result in significant hardships for the families already selected for enrollment in the Scholarship Program, as well as the Private School Partners (for instance, the Woodlands Academy) that have relied on the Scholarship Program's implementation.

Defendants assert that a finding against the Scholarship Program will result in the potential disruption of other statutory-based programs that are already in place. As the Court describes in greater detail below, the evidence presented demonstrates that there are significant differences between the Scholarship Program and other statutorily-based programs discussed at

the injunction hearing. Accordingly, the Court finds that the theoretical impact on other statutorily-based programs does not weigh into its decision on the merits of the injunction.

While the Court recognizes the difficulty in deciding the balance of equities, ultimately, the Court finds that the balance of equities element of *Rathke* favors the enjoining of the Scholarship Program. Specifically, the Court finds that the threatened constitutional injuries to Plaintiffs, and the other residents of Douglas County they represent, outweighs the threatened harm the injunction may inflict on Defendants, Intervenors, and the students and families selected for participation in the Scholarship Program. Plaintiffs have demonstrated by a preponderance of the evidence that the Scholarship Program, through the aforementioned constitutional violations and the suspect transfer of public funds to support private schools, will cause Plaintiffs' substantial and irreparable harm. Moreover, Plaintiffs' injury would be amplified for every additional student enrolled in the Scholarship Program and on each additional day the Program operates. As Dr. Carson and Dr. Fagen testified, this expansion is a circumstance that is likely to occur. Because Plaintiffs have shown that it is not only probable, but clear and certain, that they will succeed on the merits, as discussed, *infra*, and because Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted, the balance of the equities favors an injunction. *See Keller Corp. v. Kelley*, 187 P.3d 1133, 1137 (Colo. App. 2008).

The Court, in arriving at its decision, in no way diminishes the impact an injunction will have on the Defendant families and those in similar situations. However, in balancing the degree of impact and the number of families involved, the Court concludes that the balance of equities

compels granting Plaintiffs' request for preliminary injunctive relief. Accordingly, the Court finds that this *Rathke* element supports the granting of the requested preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

v. Injunction Will Preserve the Status Quo

The issuance of an injunction will preserve the status quo. Generally, the status quo to be preserved is the "the last peaceable uncontested status existing between the parties before the dispute developed." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004) *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *see also Arapahoe Cnty. Pub. Airport Auth. V. Centennial Express Airlines, Inc.*, 956 P.2d 587, 598 (Colo. 1998); *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006).

Here, the last peaceable status before the dispute was the absence of the Scholarship Program. The undisputed evidence before the Court demonstrates that when Plaintiffs first filed suit, the Choice Scholarship School had not been implemented or introduced, the list of schools participating had not been finalized, public funds had not been distributed, and the 2011-12 academic year had not begun. The Court is not persuaded that the status quo changed as a result of the summertime involvement of a few scholarship participants with their new Private School Partner, by the distribution of funds to Private School Partners after the lawsuit was filed, or by the investments of some Private School Partners in the hiring of new teachers or remodeling of classrooms. Ultimately, the enjoining of the Scholarship Program will preserve the status quo as

the former students participating in the Scholarship Program will continue to receive their education from a Douglas County public school as before the Scholarship Program was implemented. The Court heard testimony of the possibility that some students may potentially face the unfortunate difficulty of returning to the school they attended before enrolling in the Scholarship Program, however, while this scenario is possible, nothing was presented to the Court beyond speculation that such a scenario might occur. Plaintiffs have expressly not asked the Court to direct the disenrollment of scholarship recipients already attending Private Partner Schools or the return of funds already expended.

Finally, the Court is not persuaded by Defendants' contention that Plaintiffs "sat on their hands" or engaged in undue delay in the filing of this lawsuit. The Court finds that there is sufficient evidence in the record to establish that during the time between the Scholarship Program was officially created and the filing of this lawsuit, Plaintiffs were involved in pre-trial investigatory procedures relating to the implementation and creation of the Scholarship Program.

In conclusion, the Court finds that the Plaintiffs have shown, by a preponderance of the evidence that enjoining the Scholarship Program will preserve the status quo. Accordingly, the Court finds that the status quo is maintained by the issuance of a preliminary injunction.

Furthermore, based upon the totality of the evidence presented at the hearing, the Court finds that Plaintiffs not only satisfy the preponderance standard, but have also demonstrated a clear and certain right to mandatory or permanent injunctive relief.

vi. Reasonable Probability of Success on the Merits

In conducting its analysis of the present case under the first Rathke element, the Court reviews the following constitutional and statutory provisions: Article II, Section 4, Article V,

Section 34, and Article IX, Sections 2, 3, 4, 7, 8, and 15 of the Colorado Constitution and Sections 22-54-101 et seq. and 22-32-122 of the Colorado Revised Statutes. The Court addresses each of these arguments below.

a. The Historical Significance of the United States Constitution and the Colorado Constitution

In response to Plaintiffs' claims that the Scholarship Program violates various funding and religious provisions of the Colorado Constitution, Defendants essentially claim that, while the religious provisions of the Colorado Constitution are "considerably more specific" than the federal Establishment Clause, *Americans United for Separation of Church and State Fund, Inc. v. State of Colo.*, 648 p.2d 1072, 1082 (Colo. 1982), the Colorado Constitution's different religious provisions are no different nor impose no greater restriction than the federal Establishment Clause.

The Court is not persuaded by this assertion because it is premised on the idea that the framers of the Colorado Constitution must have debated, drafted, and ratified these provisions without purpose. Further, ignoring the detailed language of Colorado's religious constitutional provisions and labeling them "no broader than the federal Establishment Clause" would render them of no value. *See Cain v. Horne*, 202 P.3d 1178, 1182 (Ariz. 2009)(evaluating the constitutionality of a similar "scholarship" program and declining to interpret the Arizona Constitution's "Aid Clause as no broader than the federal Establishment Clause.").

Defendants have provided no legal authority supporting a limitation on the scope of the religious provisions of the Colorado Constitution and this Court declines the invitation to craft one now.

While, as pointed out in Defendants' briefing, the Court in *Americans United* may have stated that the religious provisions of the Colorado Constitution "embody the same values of free-exercise and governmental non-involvement secured by the religious clauses of the First Amendment," 648 p.2d at 1081-82, the Court in *Americans United* also stated that the Establishment Clause is "not necessarily determinative of state constitutional claims." *Id*. at 1078. Had the Court in *Americans United* agreed with Defendants' position in this case, the Court would have abandoned the specific analysis of the religious provisions in the Colorado Constitution and focused strictly on the federal Establishment Clause and the underlying interpretations from federal courts. However, the Colorado Supreme Court did not. Further, Defendants provide no authority, and the Court is aware of none, to suggest that the federal Establishment Clause precludes this Court's consideration of the religious provisions of the Colorado Constitution.

Since Plaintiffs make no claim here with respect to the federal Establishment Clause, and because the federal Establishment Clause does not subsume the Colorado Constitution, the Court narrows its focus to the provisions of the Colorado Constitution rightly at issue.

Defendants next argue that the First Amendment, through the Free Exercise Clause, requires states to aid religious schools. However, Defendants direct the Court to no legal authority to support this contention. To the contrary, in *Locke v. Davey*, the U.S. Supreme Court rejected a Free Exercise challenge to a scholarship program enacted in Washington State that forbids students to use state scholarship funds to pay for a degree in theology. *See* 540 U.S. 712, 725 (2004). In doing so the Court held that the Free Exercise clause *does not* require a state to

fund theology students. *Id*. (emphasis added). Accordingly, in this case, this Court is not prepared to mandate that Colorado taxpayers fund private religious education.

Similarly, Defendants' argument that the Court should ignore the language of the Colorado Constitution because the provisions were written and ratified under the guise of "Catholic bigotry" is unpersuasive. First, Defendants provide no legal authority that would allow this Court to undertake such an endeavor. In fact, this exact argument has been rejected by various other state courts. *See Cain*, 202 P.3d at 1184; *Bush v. Holmes*, 886 So. 2d 392, 412-413 (Fla. 2006). Second, even if there were such authority, there is a genuine dispute as to the historical relevance of the "Blaine amendments" in the context of the Colorado Constitution. To begin, Colorado's "no aid" provision is nearly identical to a provision in the Illinois Constitution, Article VIII, Section 3, which was enacted prior to the proposal of the Blaine amendments. *See Education in Colorado 1861-1885*, Colorado State Teacher's Association, 37-38 (1885). Further, as acknowledged by Dr. Charles Glenn, an expert witness for Defendants in this case, Catholics even conducted a "pro-constitution" rally in Denver just days before ratification, signifying at least some Catholic support of the provisions of the Colorado Constitution. Therefore, as Defendants have provided no legal authority to suggest that the Court may disregard certain constitutional provisions because they "may have been tainted by questionable motives," the historical nature of the Blaine Amendments does not factor into the Court's decision in this Order. *See Cain*, 183 P.3d at 1278 n.2.

Accordingly, the Court turns its attention to focus on each of the alleged violations of the Colorado Constitution at issue in the present case, in turn below.

b. Article IX, Section 7 of the Colorado Constitution

First, Plaintiffs claim that the Scholarship Program violates Article IX, Section 7 of the Colorado Constitution because the Scholarship Program takes public funds intended to support public schools and uses them instead to help support or sustain the Private School Partners controlled by churches or religious denominations.

Article IX, Section 7 of the Colorado Constitution directs that:

> Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatsoever, anything *in aid of* any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant of land, money, or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.

Colo. Const. art. IX, Section 7 (emphasis added).

To determine whether there is "aid" to a sectarian or religious school within the meaning of the Colorado Constitution, "[t]he answer to the question must be sought by consideration of the entire program measured against the constitutional proscription." *See Americans United*, 648 P.2d at 1083.[2]

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[2] The Court noted that:

> We do not confine ourselves to the statutory criteria for a "pervasively sectarian" institution . . . in determining whether there is aid to a 'sectarian' institution within the meaning of the Colorado Constitution. These statutory criteria reflect a legislative effort to comply with the standards which evolved under Establishment Clause doctrine for aid to private institutions and although relevant to our analysis, they do not by themselves answer the question whether the statutory program violates the proscription of Article IX, Section 7.

Id.

Since the Colorado Supreme Court's holding in *Americans United*, the U.S. Supreme Court has reversed course with respect to the analysis of "pervasively sectarian" institutions.[3] Specifically, the U.S. Supreme Court has determined that any inquiry into the religiousness of a particular institution, including religious schools, is improper. *See Mitchell v. Helms*, 530 U.S. 793, 828 (2000); *see also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008). In *Mitchell*, the Court stated, "[t]he inquiry into the recipient's religious views required by a focus on whether a school is pervasively sectarian is not only unnecessary but also offensive." 530 U.S. at 828. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs . . . [t]he application of 'pervasively sectarian' factors collides with our decisions that have prohibited governments from discriminating in the distribution of public benefits based upon religious status or sincerity." *Id.*

Accordingly, the Court will not analyze the religiousness of a particular institution. However, because an institution's status as "pervasively sectarian" was but one factor addressed by the *Americans United* Court, the fact that this Court declines to address that factor is not dispositive of the constitutionality of the Scholarship Program.

In *Americans United*, the Court determined that a college tuition-assistance program, as passed by the General Assembly, did not violate the Colorado Constitution's no aid provision based on five factors.

[3] The *Americans United* Court based its holding, in part, on whether the public aid was permitted to "pervasively sectarian" institutions, as defined by statutory criteria which have since been repealed. *See* C.R.S. 23-3.5-105(1) (repealed 2009).

First, the aid was designed to assist the student, not the institution, and any benefit to the institution appeared to be an unavoidable byproduct of an administrative role relegated to it by the statutory scheme or program. *See* 648 P.2d at 1083.

Second, the aid was only available for students attending institutions of higher education. *Id*. The court stated, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Third, aid is available to students attending both public and private institutions, thereby dispelling any notion that the aid was calculated to enhance the ideological ends of the sectarian institution. *Id*.

Fourth, although the statute enabling the funding did not expressly limit the purpose for which the institutions could spend the funds distributed to them by the grant program, the statute directed a bi-annual audit of payment procedures and other practices. These statutory provisions were expressly designed to insure that the grant program was being administered properly. The college-tuition assistance program also included a statutory provision which provided that, "upon commencement of participation in the program, no institution shall decrease the amount of its own funds spent for student aid below the amount spent prior to participation in the program." This prohibition, the Court concluded, "create[d] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id*.

Lastly, the Court used the statutory "pervasively sectarian" criteria, as referenced above, finding that the subject institutions did not rise to the level of "pervasively sectarian" and therefore the program did not constitute impermissible aid to sectarian institutions.[4]

Here, applying the same factors set forth in *Americans United*, with the exclusion of the statutory criteria for what constitutes a "pervasively sectarian" institution, the Court finds a stark disparity in the overall substance of the Scholarship Program at issue in the present case and the college-tuition assistance program at issue in *Americans United*.

First, the Court in *Americans United* was concerned with the purpose of the aid provided by the state to the sectarian institution. The Court concluded that because the purpose was to aid the students and not the institution itself, the public funds did not constitute impermissible aid within the meaning of Article IX, Section 7. *Id.* at 1083. Here, like the college-tuition assistance program at issue in *Americans United*, the Scholarship Program appears to be a well-intentioned effort to assist students in Douglas County. As Defendants have stated, the purpose of the program is to aid students and parents, not sectarian institutions. The Court agrees with Defendants on this point.

Additionally, the Court in *Americans United* considered the fact that the college tuition-assistance program had a bi-annual audit to ensure that state funds being paid to the sectarian institution were being used in a constitutionally permissive manner. *Id*. at 1084. Further, there was a provision in the college tuition-assistance program requiring that the sectarian institution maintain the amount of its own funds spent for student aid prior to participation in the program,

[4] As stated above, this Court declines an invitation to address whether the Private Partner Schools in this case constitute "pervasively sectarian" institutions. *See Mitchell*, 530 U.S. at 828.

thereby "creat[ing] a disincentive for an institution to use grant funds other than for the purpose intended – the secular educational needs of the student." *Id*.

Here, like the college tuition-assistance program in *Americans United*, the Scholarship Program appears to have a check and balance system whereby Douglas County retains a right to periodically review the records, including the financial records of the Private School Partners participating in the program. Section 3.1(A) of the agreement between the Douglas County School District and the Choice Scholarship Charter School sets forth the Douglas County School District's rights and responsibilities and requires that records be open to inspection and review by Douglas County School District officials. *See* Charter Sch. Cont. (Ex. 6). Similarly, Section 3.2 (A) requires that financial records be posted and reconciled "at least monthly." *Id*. Section 3.2(D)(ii) further requires that, in addition to the general posting of financial information, the Private School Partners must provide a proposed balanced budget, a projected enrollment, a charter board approved budget, quarterly financial reports, an annual audit, and an end of year trial balance. *Id*.

However, this is where the similarities between the college tuition-assistance program in *Americans United* and the present case end. Specifically, there is no express provision within the Scholarship Program that prevents the Private School Partners from using public funding in furtherance of a sectarian purpose. In fact, because of the interplay between the participating Private School Partners' curriculum and religious teachings, any funding of the private schools, even for the sole purpose of providing education, would further the sectarian purpose of religious indoctrination within the schools educational teachings and not the secular educational needs of the students. This was corroborated by the testimony of Mr. Gehrke. Mr. Gehrke testified that

tuition, including the tuition from students participating in the Scholarship Program, is the largest source of revenue for the high school. Mr. Gehrke also testified that the tuition received from the Scholarship Program supports the operation of the school, teacher salaries, chapel facilities, and aids in carrying out the mission of the school, which is to "nurture academic excellence and encourage growth in Christ." Among the benefits Lutheran High School seeks to gain out of the school's participation in the Scholarship Program is increased enrollment. An increase in enrollment would result in more tuition to aid in payment of Lutheran High School's financial debt and mortgage payments. Mr. Gehrke specifically testified during the hearing that the school's mortgage payments are paid directly to the Lutheran Church Extension Fund, a bank that is a "dual ministry in partnership" with the Lutheran Church.

Further, there is evidence that at least one school, Valor Christian High School, has reduced its financial aid award to a scholarship recipient in the same amount awarded through the Scholarship Program. *See* July 24, 2011 Email (Ex. 102). In his testimony, Dr. Cutter stated that he was not aware of this action, but believed that a Private School Partner that reduced financial aid for students participating in the Scholarship Program would "go against the intended contract" with the Douglas County School District.

This identical scenario was expressly disapproved in *Americans United*. Allowing Valor Christian High School to reduce a scholarship participant's financial aid in the amount of the tuition provided through the Scholarship Program would essentially directly hand over public funds to Valor, for Valor's use in any manner it sees fit, including the promotion of sectarian purposes. Moreover, these public funds would otherwise have been used for the needs of public school students in Douglas County.

The next item deemed important by the *Americans United* Court was the fact that the aid was only available for students attending institutions of higher education. "Because as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Here, unlike the college tuition-assistance program in *Americans United*, the Scholarship Program is not designed for students attending an institution of higher education. Rather, the Scholarship Program is intentionally directed to students attending elementary and secondary schools. This fact alone is cause for constitutional alarm because, as the Court in *Americans United* explicitly warned, the "risk of indoctrination" is substantially higher when associated with a voucher program designed to aid primary and secondary institutions. *Id*. Further, while the Scholarship Program purports to provide students participating in the program an "opt out" or "waiver" from any required religious services at the Private School Partner, the "waiver" "does not include [religious] instruction." *See* FAQ (Ex. 2). In fact, for many of the Private School Partners, religious instruction is the foundation of their core educational curriculum and religious theology is embedded in many of their classes. This was confirmed by Messrs. Gehrke and Bignell. The materials and applications for the Private School Partners confirm that their curriculum is premised on the basis of religious education and teaching in the classroom. *See*, *supra*, ¶¶ 44-45.

Because the scholarship aid is available to students attending elementary and secondary institutions, and because the religious Private School Partners infuse religious tenets into their educational curriculum, any funds provided to the schools, even if strictly limited to the cost of

education, will result in the impermissible aid to Private School Partners to further their missions of religious indoctrination to purportedly "pubic" school students. Therefore, the Scholarship Program is subject to the heightened risks described in *Americans United*. *See* 648 P.2d at 1083-84.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article IX, Section 7 of the Colorado State Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

c. Article II, Section 4 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article II, Section 4 of the Colorado Constitution because it compels taxpayers, through the use of funds provided by the Public School Finance Act, to support the churches and religious organizations that own, operate, and control many of the private religious schools that are participating in the Scholarship Program.

Article II, Section 4 of the Colorado Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

Colo. Const. art. II, Section 4.

In *Americans United*, the Colorado Supreme Court also addressed a challenge to the college tuition-assistance program as being in violation of Article II, Section 4 of the Colorado Constitution. Similar to the Court's analysis of whether the program violated Article IX, Section 7, the Court did not view the college tuition-assistance program as constitutionally flawed under Article II, Section 4 as providing "compelled support" from Colorado taxpayers. In reaching that determination, the Court in *Americans United* based its conclusion on the following factors: (1) the program was designed for the benefit of the students, not the institution; (2) the program was available to all students at institutions of higher learning; and, (3) the financial assistance was distributed under statutory conditions calculated to significantly reduce any risk of fallout assistance to the participating institution. *See* 648 P.2d 1072, 1082.

Here, as discussed above with respect to Article IX, Section 7, the Court agrees, and the testimony of the school officials reflect, that the purpose of the Scholarship Program was for the benefit of the students, not the benefit of the private religious schools. However, the Court is still faced with the glaring discrepancy between the college tuition-assistance program in *Americans United* and the Scholarship Program at hand. While there is significant language in the policy enacting the Scholarship Program intended to alleviate concerns regarding how public finances are to be used, e.g., an annual audit and the required production of financial records at the request of Douglas County School District officials, neither the Scholarship Program nor the contracts between the Choice Scholarship School and Private School Partners contain any express language that limits or conditions the use of the state funds received by the partner schools for the strict purpose of secular student education.

To the contrary, as discussed above in regard to Article IX, Section 7, the public funds in this case are *not* limited to those seeking an education at an institution of higher learning, but rather to primary elementary and secondary educational schools. Additionally, the mission statements and described purposes of the participating Private School Partners are to infuse religious teachings into the curriculum. It necessarily follows that any public taxpayer funding provided to the partner schools, even for the sole purpose of education, would inherently result in compulsory financial support to a sectarian institution to further its goals of indoctrination and religious education. Further, as discussed above, as the Scholarship program is presently constituted, Private School Partners are allowed to, and, as the evidence reflects, undoubtedly will use public funds to further their respective religious missions.

The conclusion that necessarily follows is that, under the Scholarship Program any "compelled support" by way of taxpayer funding to a Private School Partner whose mission is to provide an education based on theological and religious principles is a violation of Article II, Section 4 of the Colorado Constitution. As the Court stated in *Americans United*, "[b]ecause as a general rule religious indoctrination is not a substantial purpose of sectarian colleges and universities, there is less risk of religion intruding into the secular educational function of the institution than there is at the level of parochial elementary and secondary education." *Id*. at 1084.

Accordingly, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

d. Article IX, Section 8 of the Colorado Constitution

Plaintiffs allege that the Scholarship Program violates Article IX, Section 8 because the Scholarship Program: (1) subjects scholarship recipients to religious admission criteria; (2) requires scholarship recipients to attend religious services if the Private School Partner directs its own students to attend ; and, (3) subjects scholarship recipients to the teachings of religious tenets and doctrines. Defendants argue that this Article IX, Section 8 does not apply to the Scholarship Program because the Private School Partners are not "public" institutions.

Article IX, Section 8 requires that:

> [1] No religious test or qualification shall ever be required of any person as a condition of *admission* into any public institution of the state, either as a teacher or student; and [2] no teacher or student of any such institution shall ever be required to *attend* or participate in any religious service whatsoever. [3] No sectarian tenets or doctrines shall ever be *taught* in the public school, nor shall any distinction or classification of pupils be made on account of race or color, nor shall any pupil be assigned or transported to any public educational institution for the purpose of achieving racial balance.

Colo. Const. Art IX, Section 8 (emphasis added).

A fundamental principle of Colorado law is that any person of any religion or no religion may become a student of a public institution. *See People ex rel. Vollmar v. Stanley*, 255 P. 610, 615 (Colo. 1927), *rev'd on other grounds*, *Conrad v. City & Cnty. of Denver*, 656 P.2d 662 (Colo. 1982). On their face, the following two provisions in Article IX, Section 8 protect students enrolled in public schools from forced attendance at religious services and forced exposure to religious teachings. *See* Colo. Const. art. IX, Section 8.

All of the students participating in the Scholarship Program are "enrolled" at the newly developed Choice Scholarship Charter School. Charter schools are defined as "public schools" "for any purpose under Colorado law." *See* C.R.S. § 22-30.5-104(4). Similarly, charter schools

are public entities for purposes of constitutional and statutory liability. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010). Charter schools may not discriminate on the basis of religion, sexual orientation, or disability among others. C.R.S. § 22-30.5-104(b)(3). Finally, charter schools are required to "[o]perate . . . pursuant to . . . article IX of the state constitution." C.R.S. § 22-30.5-204(2)(a).

The Choice Scholarship School was specifically enacted as a public charter school for the purposes of implementing the Scholarship Program. During the hearing, the witnesses testifying on behalf of Defendants conceded that the Choice Scholarship School was designed for pupil "counting" purposes in order to qualify for state public funding.

Accordingly, because students participating in the Scholarship Program are still "counted" for purposes of receiving their per pupil revenue, the treatment of scholarship recipients must comport with Article IX of the Colorado Constitution requiring the Douglas County School District to protect the religious liberty of the scholarship recipients that are enrolled in the Choice Scholarship School. Specifically, public school students participating in the Scholarship Program should not be subject to: (1) religious qualifications for admission; or (2) compelled attendance at religious services and mandatory religious instruction.

i. Qualifications for Admission

First, Article IX, Section 8 of the Colorado Constitution forbids the use of religious qualifications or standards for admission into the public schools. Dr. Fagen testified that admission into a Private School Partner is not a prerequisite for receiving a scholarship under the Scholarship Program. However, the evidence and other testimony presented at the hearing makes it clear that *enrollment* in the Choice Scholarship School is predicated on a student's

admittance into one of the Private School Partners. In the Choice Scholarship School Application, the enrollment policy states: "[t]o be eligible for enrollment in the CCS [Choice Scholarship School], a student must … be *accepted* and attend a qualified Private School Partner all as defined and described in DCSD Board Policy JCB." *See* Charter Sch. App. (Ex. 5) (emphasis added).

The enrollment policy carries significant constitutional ramifications because under the Scholarship Program, Private School Partners will *not* be required to change their admission criteria to accept students participating in the program. This was confirmed by both Dr. Cutter and Dr. Fagen. The Choice Scholarship School Application specifically states that: "Choice Scholarship recipients shall satisfy all admission requirements of the Private School Partner on their own." Further, the policy enacting the Scholarship Program states, in the section entitled, "Private School Partner's Conditions of Eligibility," that "religious Private School Partners may make enrollment decisions based upon religious beliefs." *See* Policy JCB (Ex. 107). Further, in Scholarship Program's "Frequently Asked Questions," the Douglas County School District states, "[i]t is not our intention in this program to change any school's application process." *See* FAQ (Ex. 2). This fact is also corroborated by testimony from Dr. Fagen, Dr. Cutter, and Messrs. Gehrke and Bignell.

Since admission into the Choice Scholarship School rests on whether or not a student meets the sectarian and faith based qualifications of the participating religious Private Partner Schools participating in the Scholarship Program, a student may not qualify under the Scholarship Program unless the student meets the faith based qualifications of a participating private school. *See*, *supra*, ¶¶ 42-43.

These admission qualifications violate Article IX, Section 8 of the Colorado Constitution. Because admission into the Scholarship Program, a "public program," is predicated on acceptance into one of the Private School Partners, the vast majority of which have faith based admission requirements, the Court concludes, based on the overwhelming evidence, that the Scholarship Program imposes a "religious test or qualification . . . as a condition of admission" into a public school, in violation of Article IX, Section 8 of the Colorado Constitution.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits of this claim, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

ii. Compelled attendance at religious services and mandatory religious instruction

The undisputed evidence reflects that the Scholarship Program, in theory, provides scholarship recipients participating in the Scholarship program with an "opt out" or "waiver" from any required religious services at a Private School Partner. The policy enacting the Scholarship Program states in the section entitled, "Private School Partner's Conditions of Eligibility," that "[a] religious Private School Partner shall provide Choice Scholarship parents the option of having their child receive a waiver from any required religious services at the Private Partner School." *See* Charter Sch. App. (Ex. 5).

However, upon review, the undisputed evidence clearly reflects that any such "opt out" or "waiver" fails to pass muster under Article IX, Section 8. For example, as set forth in the Scholarship Program's "Frequently Asked Questions," the waiver "does not include instruction" and although "[s]tudents may opt-out of participation" in worship service, students may nevertheless "be required to respectfully attend, if that is the school's policy." *See* FAQ (Ex. 2).

This fact is not disputed by Defendants and was corroborated by the individual Private School Partner Applications, *see*, *supra*, ¶¶ 51-54, as well as the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke and Bignell. Moreover, some Private Partner Schools considered a total and complete opt out of religious services and instruction to be a "deal breaker." (*See*, *supra*, ¶ 53). Similarly, in an email exchange between Robert Ross, legal counsel for the Douglas County School District, and School District officials, Mr. Ross described the waiver from religious services as "[n]ot much of an opt out" because the waiver did not cover attendance at worship services or instruction. *See* March 28, 2011 Email (Ex. 97). Dr. Fagen, Dr. Cutter, and Mr. Carson testified in unanimity concerning the distinction between religious services and religious instruction. Further each corroborated in their testimony that the opt out waiver was limited to religious services only, and that Private Partner Schools were entitled to compel attendance but not participation in religious services by scholarship recipients.

The fact that students may be required to attend religious services "if that is the school's policy" disregards the plain language of Article IX, Section 8. Furthermore, the Scholarship Program, as discussed in great detail above, not only allows for religious teaching, but that is precisely the mission of the religious Private School Partners participating in the program.

Defendants' argument that the prohibitions of Article IX, Section 8 do not apply to the Scholarship Program because the Private School Partners are not public is not persuasive. Defendants enroll students into a public charter school for the benefit of "counting" in order to receive public funds. Student admission into the charter school is predicated on the students' admission into one of the Private School Partners and once the students begin attending classes, they may be subject to mandatory attendance at religious services and religious teachings and

indoctrination within the educational curriculum. Defendants' assertion that the Private School Partners are not "public," thereby availing themselves from the requirements of Article IX, Section 8 of the Colorado Constitution, is unavailing in light of the weight of the evidence and applicable law here.

In Colorado, *Americans United* remains the benchmark by which the constitutionality of public funding of private schools is judged. Defendants' well intentioned effort at providing choice in schools simply misses that mark.

Accordingly, because of the Scholarship Program's provisions allowing for faith based admission standards, compelled attendance at religious services, and teaching of religious tenets to students enrolled in a public charter school are violations of art. IX, § 8, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated a clear and certain right to mandatory or permanent injunctive relief.

e. ***The Public School Finance Act, Colorado Revised Statutes, Section 22-54-101*** **et seq.** ***& Article IX, Section 2 of the Colorado Constitution***

Plaintiffs contend that the Douglas County School District intends to use funds distributed by the Colorado Department of Education under the Public School Finance Act to pay tuition at private schools, in direct contravention of both Article IX, Section 2 of the Colorado Constitution and the Public School Finance Act, C.R.S. § 22-54-101 *et seq*. Specifically, Plaintiffs allege that the Scholarship Program contradicts the plain language of the "thorough and uniform" clause in Article X, Section 2 and undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

Article IX, Section 2 of the Colorado Constitution requires that public funds be used "for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state," where all K-12 students "may be educated gratuitously." *See* Colo. Const., art. IX, Section 2. The Colorado General Assembly enacted the Public School Finance Act "in furtherance of the general assembly's duty in correlation of section 2 of Article IX to provide for a thorough and uniform system of public schools throughout the state." *See* C.R.S. § 22-54-102(1).[5] [6] Taken together, Article IX, Section 2 and the Public School Finance Act establish a clear intent and explicit directive that funds distributed to school districts under the Public School Finance Act must be used only to support free public education at public schools.

Plaintiffs first argue that the Scholarship Program runs contrary to the framers' intent of the "thorough and uniform" clause because participants of the Scholarship Program will not be enrolled in, be in attendance at, or receive instruction in a Douglas County public school. Plaintiffs further allege that the Scholarship Programs violates the requirement of Article IX, Section 2 that each child of school age has the opportunity to receive a free education. *See Lujan*, 649 P.2d at 1017.

The drafters of the Colorado Constitution charged the General Assembly with "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

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[5] The Public School Finance Act is also the legislative means by which Colorado public schools are funded and explicitly and exclusively sets aside education funding for "public education" and "public schools." C.R.S. §§ 22-54-101, -102, -104(1)(a), §§ 22-55-101(1), -106(1)(b), § 22-1-101.

[6] A "public school" is defined as "a school that derives its support, in whole or in part, from moneys raised by a general state, county, or district tax." C.R.S. § 22-1-1-1(1). Conversely, a "private school" is a school that "does not receive state funding through the 'Public School Finance Act of 1994,' article 54 of this title, and that is supported in whole or in part by tuition payments or private donations." C.R.S. § 22-30.5-103(6.5).

years, may be educated gratuitously." Colo. Const. art. IX, Section 2. According to the drafters, it is the "system of free public education" that must be thorough and uniform. *Id*. The Colorado Supreme Court affirmed this notion in *Lujan* by stating that "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. *See id*. at 1025 (emphasis added).

Here, the Court is not persuaded that Plaintiffs have presented the Court with sufficient evidence to support their argument that the Scholarship Program is constitutionally invalid under Article IX, Section 2. While the Scholarship Program fails to comport with other Constitutional provisions, the Court finds that Plaintiffs have not provided sufficient evidence that the Scholarship Program prevents students from otherwise obtaining a free public education in Douglas County. Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive.

However, Plaintiffs also urge the Court to conclude that the Scholarship Program undermines the Public School Finance Act's funding balance, which seeks relatively "uniform" funding of education across the state.

The Public School Finance Act establishes a finance formula for "all school districts" in the state. C.R.S. § 22-54-102(1). Under the Act, the first step in Colorado public school funding is the determination of the "Total Program" amount for each school district. The amount "represents the financial base of support for public education in that district." C.R.S. § 22-54-104(1)(a). A district's Total Program is made available to the district by the state "to fund the costs of providing public education." *Id.* The Act directs that the formula "be used to calculate for each district an amount that represents the financial base of support for public education in

that district" and that the monies "shall be available to the district to fund the costs of providing public education." C.R.S. § 22-54-104(1)(b).

The formula calculates the per pupil funding amount for each school district based on a statewide base funding amount adjusted by "factors" intended to address certain characteristics of each school district. *See* C.R.S. § 22-54-104. A district's Total Program funding is determined by multiplying the district's per pupil funding amount by the district's funded pupil count, and adjusting by specific statutory factors. *Id.*

"Funded pupil counts" are self-administered by school districts each year. Pursuant to Colorado regulations, "[a] district's pupil membership shall include only pupils enrolled in the district and in attendance in the district." 1 CCR § 301-39:2254-R-5.00. Local districts perform this pupil count each October 1 and report the numbers to the State Board and the Department of Education by November 10. 1 CCR § 301-391:2254-R-3.01.

A school district's funding under the Act depends on its pupil enrollment, which is generally defined as the number of pupils enrolled in the school district on October 1 of the applicable budget year. *See* C.R.S. §§ 22-54-103(7)(e) and (10)(a)(1); 1 CCR § 301-391:2254-R-3.01. For instance, the number of pupils enrolled on October 1, 2010, determines funding for the budget year beginning July 1, 2010. Because the fiscal year begins before the count date, funding under the Act is distributed based on estimated pupil counts. After October 1, once all enrolled pupils have been counted, funding under the Act is adjusted to reflect the actual count. *See* 1 CCR § 301-391:2254-R-3.01. This formula was corroborated by Ms. Emm at the injunction hearing.

Each school district's Total Program funding under the Act is composed of the "local share," which is mainly comprised of the proceeds of property taxes levied on the real property within the district's boundaries and the "state share," which is state funding and provides the difference between a district's Total Program and its local share. C.R.S. § 22-54-106. State aid provides the difference between a district's total program funding and the district's local share. *Id.* The state share is funded from state personal income, corporate, sales, and use taxes, as well as monies from the public school fund established by Article IX, Section 3 of the Colorado Constitution. *Id.*

The Colorado Department of Education distributes money to school districts in twelve approximately equal monthly payments beginning on July 1. Because the "funded pupil count" is not determined until October 1 and reported until November 10, in the first half of the fiscal year, the payments are based upon pupil count and assessed value estimates. *See* 1 CCR § 301-391:2254-R-3.01. For the 2011-2012 school year, Douglas County School District estimates that the local share of these funds will account for 33.14% of the per pupil funding for the Douglas County School District, while state sources will account for the remaining 66.86%. The school district estimates that the per pupil revenue from the state for the 2011-2012 school year will be roughly $6,100. This amount was confirmed by witnesses testifying on behalf of Defendants at the injunction hearing. Even though the scholarship recipients will not spend any amount of time in an instructional setting in a Douglas County public school, the witnesses testifying on behalf of Defendants confirmed that the Douglas County School District intends to obtain the full per pupil funding amount from the state for each scholarship student.

Here, the Court is persuaded by the overwhelming evidence in the record that the Scholarship Program fails to comport with the Public School Finance Act provisions which promote "uniform" funding of education across the state. The formula under the Act is predicated on each district counting the students it has enrolled in the "schools of the state," and then allocating state funding based on that public school count. The Scholarship Program, as presently constituted, effectively results in an increased share of public funds to the Douglas County School District rather than to other state school districts. The undisputed evidence and the testimony of Mr. Hammond, Dr. Cutter, Dr. Fagen, and Mr. Carson, all confirmed that the development of the Choice Charter School was devised specifically as a mechanism to obtain funding from the state and to circumvent any legal impediments the Scholarship Program might encounter. Dr. Cutter, Dr. Fagen, and Mr. Carson additionally acknowledged that the Choice Scholarship School has no building, no curriculum, and no books. Thus, the Court finds that the enactment of the Choice Scholarship School violates the Public School Finance Act funding balance and inappropriately taps resources from other Colorado school districts.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 2, as it is not dispositive. However, the Court does find that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits on their claim regarding the Public School Finance Act, Plaintiffs have demonstrated that the Scholarship Program violates the Public School Finance Act, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

f. Article V, Section 34 of the Colorado Constitution

Plaintiffs argue that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution because the Scholarship Program provides taxpayer funds to sectarian institutions and to institutions not under absolute control of the state for nonpublic purposes. To the contrary, Defendants maintain that Article V, Section 34 is not applicable as the Scholarship Program does not utilize General Assembly appropriations and, even if the Scholarship Program did use General Assembly appropriations, the Scholarship Program would withstand constitutional challenge because it falls under the public purpose exception to the absolute control provision.

Article V, Section 34 of the Colorado Constitution states, in pertinent part, that:

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

Colo. Const., art. IX, Section 34.

Defendants first argue that Article V, Section 34 does not use General Assembly appropriations, a proposition that is unsustained by the factual record before the Court. Despite Defendants' assertion, the undisputed evidence and testimony presented to the Court in this matter demonstrates that the Scholarship Program is indeed funded by state appropriations. During the injunction hearing, multiple witnesses testifying on behalf of Defendants admitted the Douglas County School District's intention to direct state funds to the participating Private School Partners. That the payment of state funds is made directly to the Private School Partners on behalf of the students does not change the character or origin of the funds. In fact, the uncontroverted evidence before the Court was that the parents of the participating scholarship recipient are required to sign over the check provided to the particular school by restrictive

endorsement, thereby completing the somewhat circular process of paying state funds to the participating Private School Partners. Upon receiving the tuition payments, both Messrs. Gehrke and Bignell testified that their schools would use the payments to, among other things, support the school, carry out the school's mission, enhance chapel facilities, and pay down loans funded from other sectarian institutions. Unlike *Americans United,* where the college tuition-assistance program had preventative safeguards to monitor where the funds ultimately wind up, the Scholarship Program has no procedures or safeguards in place to prevent the tuition funds from being used to promote a Private School Partner's sectarian agenda.

In the alternative, Defendants contend that, even if General Assembly appropriations were utilized, the Scholarship Program falls within the "public purpose" exception to the absolute control provision set forth in *Americans United,* 648 P.2d at 1085 (quoting *Bedford v. White*, 106 P.2d 469, 476 (Colo. 1940)). The public purpose exception renders perceived constitutional infirmities a nullity if the asserted public purpose is "discrete and particularized" and clearly outweighs "any individual interests incidentally served by the statutory program" when measured against the proscription of Article V, Section 34. *See id.* at 1086.

However, the Scholarship Program at issue here is factually inapposite to the principles enunciated in *Americans United*. Through the testimony of Mr. Hammond, and the various school officials, the Scholarship Program appropriates taxpayer funds for private schools that are not under state control. The Scholarship Program, moreover, does not contain any of the prophylactic measures that led the Court in *Americans United* to find that the college tuition-assistance program satisfied the public purpose exception. In contrast to the college tuition-assistance program that was found to satisfy the public purpose exception in *Americans United*,

the Scholarship Program here applies directly to "elementary and secondary education" and thus the risk of religion "intruding into the secular educational function" is significantly higher. *See id.* at 1084 (citations omitted).

The overwhelming undisputed evidence and testimony in the record, most notably the testimony of Messrs. Gehrke and Bignell, confirms that, not only is the risk of religion intruding into the secular educational function great, that risk is inevitable and unavoidable due to the very structure of the Scholarship Program. *See, e.g.,* March 7, 2011 (Ex. 87) ("[I]f a family wanted to opt out of religious instruction, they would have to prepare their child to bolt out of any class and I suspect that would occur frequently."). Students attending a sectarian Private School Partner under the Scholarship Program have no choice but to receive their education with the school's religious theories and theology embedded therein. This factual reality was corroborated by the testimony of Dr. Cutter, Dr. Fagen, and Messrs. Gehrke, Bignell, and Carson, as well as the Private School Partners' Scholarship Program applications. *See, supra,* ¶ 45. As detailed above, Dr. Cutter testified that the original plan for the Scholarship Program envisioned an "opt out" provision which would allow students to remove themselves from both religious services and instruction. However, Mr. Cutter testified, and the evidence reflects, that the Private School Partners thought that such a comprehensive "opt out" provision would be a "deal breaker." *See, e.g.*, March 7, 2011 Email (Ex. 87); March 8, 2011 Email (Ex. 88).

Thus, the totality of the evidence in the record dictates the Court's determination that the core principles implanted in the Scholarship Program are fundamentally at odds with the college tuition-assistance program and the Colorado Supreme Court's holding in *Americans United*. On

that basis, the Court finds that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution.

Moreover, and perhaps more importantly, the Scholarship 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. This clause, which was not considered in *Americans United*, reflects the conviction that sectarian interests are inherently private. The Court finds, and the record is unquestioned, that 19 of the 23 Private School Partners participating in the Scholarship Program are "denominational or sectarian institutions or associations" for the purposes of Article V, Section 34.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Scholarship Program violates Article V, Section 34 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

g. Article IX, Section 3 of the Colorado Constitution

Plaintiffs contend that the Scholarship Program violates Article IX, Section 3 of the Colorado Constitution because the Scholarship "funnels" monies from the "public school fund" to private schools, rather than to "schools of the state."

Article IX, Section 3 directs, in pertinent part, that:

> The public school fund of the state shall . . . forever remain inviolate and intact and the interest and other income theron, 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 a manner as may be prescribed by law. No part of this fund, principal, interest, or other income shall ever be transferred to any other fund, or used or appropriated, except as provided in this article IX.

Colo. Const., art. IX, Section 3.[7]

Article IX, Sections 3, 5, 9 and 10 of the Colorado Constitution established the "public school fund," which consists of the proceeds of lands granted to the state by the federal government upon statehood. In 1875, the United States Congress passed the Colorado Enabling Act authorizing the admission of Colorado as a state. *See* 18 Stat. 474 (7); *see also Lujan*, 649 P.2d at 1011. Section 7 of the Enabling Act granted the state title to two sections in every township within its boundaries "for the support of common schools." *Id*. This property is referred to as the "state school lands." Section 14 of the Enabling Act further specified that the state school lands: "[S]hall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools." 18 Stat. 474 (14). These provisions of the Enabling Act create a federal trust (the "school lands trust") for the sole and exclusive benefit of the Colorado state public schools.

The legislature additionally created the "public school fund" within the State Treasurer's office which, among other things, consists of the proceeds of the public school lands. Colo. Const. art. IX, Section 17(2)(a); C.R.S. § 22-41-101(2). Income held in the public school fund is transferred "periodically" to the "state public school fund" together with, *inter alia*, moneys appropriated by the General Assembly from the general fund to meet the state's share of the total program funding for all school districts under the Public School Finance Act. C.R.S. § 22-54-114(1).

[7] Article IX, Section 3 was amended in 1996 by ballot initiative ("Amendment 16") to add, *inter alia*¸ the following language: Distributions of interest and other income for the benefit of public schools; provided for in this article IX shall be in addition to and not a substitute for other moneys appropriated by the general assembly for such purposes. Thus, Article IX, Section 3 defines "schools of the state" specifically as "public schools."

The Colorado Supreme Court has previously noted that "income from the public school fund is owned by the state and is distributed as a gratuity to the various counties and school districts to supplement local taxation for school purposes" but such funds cannot be distributed in "contravention of constitutional mandates." *See Craig v. People*, 299 P. 1064, 1067 (Colo. 1931).

Generally, when interpreting constitutional and statutory provisions, courts seek to ascertain intent, starting with the plain language of the provision and giving the words their ordinary meaning. *See, e.g., Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005); *Lambert v. Ritter Inaugural Comm., Inc.*, 218 P.3d 1115, 1121 (Colo. App. 2009. Courts additionally interpret constitutional and statutory provisions as a whole and attempt to harmonize all of the contained provisions. *See id*.

According to H.B. 10-1376 (the "2010 Long Bill"), moneys from the "public school fund" account for more than $100 million in public school funding each year in Colorado. *See* H.B. 10-1376 (Ex. R.); *see also* State Def. Resp. at 19. By judicial admission, Defendants acknowledge that interest derived from the investment of the "public school fund" is credited to the "state public school fund," which provides an ongoing source of revenue for the state's share of the districts' total program funding and other educational programs. *Id*. As a result, the "public school fund" is, as Defendants noted, "one component" of public school funding in Colorado. *See id*. at 20. Mr. Hammond additionally testified at the injunction hearing that the state could "claw back" moneys that the state provides to Douglas County for the Scholarship Program students if the Scholarship Program were found to be improper.

Although Defendants allege that income for the "public school fund" accounts makeup an insignificant amount of public school funding, Defendants' argument misses the mark. Giving Article IX, Section 3 its plain and ordinary meaning, funds from the "public school fund," regardless of amount, must "forever remain inviolate" and can be disbursed only to public "schools of the state." Based on the 2010 Long Bill, the judicial admission by Defendants, and the testimony of Mr. Hammond, the undisputed facts confirm that, under the Scholarship Program, money from the "public school fund," which flows into total public school funding, will ultimately end up being disbursed to non-public schools in "contravention of constitutional mandate" as part of the Scholarship Program tuition payments. *See Craig*, 299 P. at 1067.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that that funds from the "public school fund" will be used, in part, to pay tuition to private schools, in violation of Article IX, Section 3 of the Colorado Constitution, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

h. Article IX, Section 15 of the Colorado Constitution

Plaintiffs allege that under the Scholarship Program, Defendants will violate the local control provision, Article IX, Section 15 of the Colorado Constitution by abdicating control over the instruction of participating students and sending locally raised funds and state funds outside the district.

Article IX, Section 15 of the Colorado Constitution provides

> 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.

Colo. Const. Art IX, Section 15.

Plaintiffs' argument that Defendants' alleged abdication of control over instruction of students in the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution is an issue of first impression in Colorado. Plaintiffs ask the Court to distinguish the facts in this case to the other Colorado cases having already previously adjudicated this same provision.

Relying on *Owens v. Colo. Cong. of Parents,* where the Colorado Supreme Court rejected an unconstitutional state-wide school voucher program because the program directed school districts to turn over a portion of their locally-raised funds to nonpublic schools over whose instruction the districts had no control, Plaintiffs contend that the "local control" provision contained in Article IX, Section 15 of the Colorado Constitution requires that local school boards "have control of instruction in the public schools of their respective districts" and the "responsibility for the instruction of their students." *See* 92 P.3d 933, 938 (Colo. 2004). Relying on this statement, Plaintiffs contend that Defendants in this action have violated Article IX, Section 15 because the Douglas County School District exercises no control over the curricula, educational goals, hiring policies, or enrollment procedures of the Private School Partners.

As argued by Defendants, the primary case law in this area focuses on interactions between local districts and the state. These cases generally discuss whether the state has excessively encroached into the local control of a district. In light of the Scholarship Program's inability to overcome constitutional muster on other grounds, the Court is not now inclined to undertake Plaintiffs' position that is unsupported by any case law in Colorado.

Accordingly, the Court gives no weight to Plaintiffs' argument that the Scholarship Program violates Article IX, Section 15 of the Colorado Constitution as it is not dispositive of the issues in dispute.

i. The Contracting Statute, Colorado Revised Statute, Section 22-32-122

Finally, Defendants contend that the Scholarship Program is authorized under C.R.S. § 22-32-122 (the "Contracting Statute") which allows school districts to contract for "educational services." *See* C.R.S. § 22-32-122. More specifically, Defendants assert that the Contracting Statute grants school districts the broad authority to contract with private schools for the provision of a public education to public school students. The Court finds that this interpretation is exceedingly broad and inconsistent with the underlying legislative intent of this statute.

The Contracting Statute states, in pertinent part, that:

> 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 . . . . Any state or federal financial assistance which shall accrue to a contracting school district, if said district were to perform such service, including educational service, activity, or undertaking individually, shall, if the state board finds the service, including educational service, activity, or undertaking is of comparable quality and meets the same requirements and standards as would be necessary if performed by a school district, be apportioned by the state board of education on the basis of the contractual obligations and paid separately to each contracting school district in the manner prescribed by law.

C.R.S. § 22-32-122.

If a statute is ambiguous, courts may determine the intent of the General Assembly by considering the statute's legislative history and the problem intended to be addressed by the

legislation. *See Rowe v. People,* 856 P.2d 486 (Colo. 1993). Here, Defendants argue that the General Assembly amended the Contracting Statute to specifically authorize local school boards to contract with private schools to provide educational services. *See* H.B. 93-1118. Defendants contend that H.B. 93-1118 was drafted by the Colorado House of Representatives to overturn an opinion of the Attorney General's Office that prohibited state funding of public school students who attended private schools.

A review of the legislative history provides clarity on this issue. Although the original House version of H.B. 93-1118 sought to allow such outsourcing to private schools for educational services, the Senate felt that the House bill had "really taken a wrong turn" and revised its language significantly. *See* Trans. of Senate 2nd Reading, 46:13-19; Versions of H.B. 1193. When asked if the revised bill would allow a school district to enroll public school students in private schools and "count them" in the school district's enrolled student count for funding, Senator Dottie Wham (R-Denver), the sponsor of the bill, stated: "It does not do that anymore. Or allow it. *As the language in the law does not allow it*." *Id*. at 47:22-23 (emphasis added). Senator Wham additionally affirmed Senator Tebedo's (R-Colorado Springs) comment that "if the kids want to go to the private school, they can, but [the school districts are] not going to get to keep their enrollment count." *Id*. at 48:3-4.

Thus, the legislative history of the Contracting Statute compels the conclusion, and the Court finds, that the final version of the Contracting Statute does not confer upon a public school or school board the broad authority, as Defendants suggest, to exclusively contract with a private school to provide *all* educational services rendered to select students. Rather, the legislative history confirms that the General Assembly intended that the Contracting Statute implemented

into law would merely allow school districts to contract for particular educational services not offered by the public schools, such as foreign-language instruction. *See* Trans. of Senate 2nd Reading, 47:8-13.

In a further effort to bolster its viability, Defendants attempt to align the Scholarship Program with other statutory schemes that appropriately apply the provisions of the Contracting Statute, e.g., *inter alia*, the Colorado Preschool Program, C.R.S. §§ 22-28-101, *et. seq*; the Exceptional Children's Educational Act, C.R.S. §§ 22-20-101, *et. seq*; the Gifted and Talented Students Act, C.R.S. § 22-26-101, *et. seq*, and the Concurrent Enrollment Programs, C.R.S. §§ 22-35-101, *et. seq*. Each of these unique or specialized programs, however, are factually disparate from the Scholarship Program Defendants have implemented here. Each of these comparative programs is limited in scope and narrowly tailored to a specific educational issue or concern thereby comporting with the Contracting Statute which grants school district's the authority to contract with private entities for educational services.

The Court is not persuaded by Defendants' sweeping generalization that enjoining the Scholarship Program will put these programs in jeopardy. The Court finds that these statutorily enacted programs are factually and legally dissimilar to the Scholarship Program at issue here. Accordingly, the Court will not delve into the merits of Defendants' argument comparing the Scholarship Program to other statutorily created programs. The Court finds that the dissimilarities between these programs and the Scholarship Program are sufficiently significant so as not to place these other statutory schemes at risk of legal challenge or rendering them constitutionally infirm.

Accordingly, the Court finds that, not only have Plaintiffs presented sufficient evidence to establish a reasonable likelihood of success on the merits, Plaintiffs have demonstrated that the Contracting Statute does not permit school districts the broad authority to contract with private schools for the provision of a public education to public school students, thereby creating a clear and certain right to mandatory or permanent injunctive relief.

WHEREFORE, in light of the reasoning above, Plaintiffs' Motions for Preliminary Injunction are **GRANTED**.

IV.
ORDER

WHEREFORE, based on the above findings of fact and conclusions of law, Defendants' Motion to Dismiss is **DENIED** and Plaintiffs' Motions for Preliminary Injunction are hereby **GRANTED** and hereby made permanent.

Dated this 12th day of August, 2011.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge