DISTRICT COURT **CITY AND COUNTY OF DENVER, COLORADO**	
Plaintiffs: **COLORADO CONGRESS OF PARENTS, TEACHERS AND STUDENTS**; **THE INTERFAITH ALLIANCE OF COLORADO; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; COLORADO STATE CONFERENCE OF BRANCHES OF THE NAACP; DEBORAH A. BRENNAN and ALAN J. DeLOLLIS, on behalf of themselves and their minor child Cameron Brennan; CAROLYN BARTELS and HOWARD BARTELS, on behalf of themselves and their minor child Hannah Bartels; SENATOR PATRICIA HILL PASCOE; SENATOR DOROTHY S. WHAM; RABBI JOEL R. SCHWARTZMAN; REVEREND DR. CYNTHIA CEARLEY; FRANCISCO CORTEZ; BEVERLY J. AUSFAHL; THERESA SOLIS; DANIELLE L. WAAGMEESTER and WILLIAM J. WAAGMEESTER, on behalf of themselves and their minor children Rachel Waagmeester, Madison Waagmeester, and Dane Waagmeester; JANET TANNER, on behalf of herself and her minor child Benjamin Tanner; and PAMELA WEBER, on behalf of herself and her minor child Kenneth Weber,** Defendants: **BILL OWENS**, **in his official capacity as Governor of Colorado; and the STATE OF COLORADO,**	5 COURT USE ONLY 5 Case Number: **03 CV 3734** **Courtroom 18**

Intervenor-Defendants: **KIMBLE BREAZELL, in her own behalf and as Next Friend of her children, Devon Breazell, Desire Breazell, Demetrik Breazell; TRACY A. DOMINGUEZ, in her own behalf and as Next Friend of her children, Manuel Thomas Dominguez, Steven Victor Dominguez, and Marissa Anne Dominguez; PATSY HILL, in her own behalf and as Next Friend of her children, Jonathan Hill and Antonio Hill; CHARLENE HOWARD, in her own behalf and as Next Friend of her children, Charles Howard and Carson Howard; LAURA HUCKABEY, in her own behalf and as Next Friend of her grandchildren, Starlite McGuire and William Hodge; BETTE KELSO, in her own behalf and as Next Friend of her grandchild, Amber Kelso; KENYA KNEZEVICH, in her own behalf and as Next Friend of her children, Brian Walk and Andrew Walk; ROSA MORALES, in her own behalf and as Next Friend of her children, Ray and Joseph Morales; ANGELIA TEAGUE, in her own behalf and as Next Friend of her children, Denise Teague and Danielle Teague; LISA TRUJILLO in her own behalf and as Next Friend of her child Dejerae Trujillo; YVONNE TRUJILLO, in her own behalf and as Next Friend of her children, Jacob Rodriguez and Kaitlyn Rodriguez; and TROYLYNN YELLOW WOOD, in her own behalf and as Next Friend of her child, Kimimila Irving Means.**	Case Number: **03 CV 3734** Courtroom 18

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

On April 16, 2003, Governor Owens signed into law the Colorado Opportunity Contract Pilot Program ("voucher program"). Colo. Rev. Stat. ("C.R.S.") § 22-56-101, *et. seq.* (2003).

The goal of the program is to help close the achievement gap between high and low performing students by providing a broader range of educational options for parents of high poverty, low achieving students. The statute provides that the voucher program will operate as follows.

Parents of students eligible for the voucher program may choose to participate in the program by entering into a contract with the participating school district where their student is enrolled. The parent and the district may sign the contract after the student is deemed eligible, the parent has chosen a participating private school for the student to attend and that school has admitted the student. C.R.S. § 22-56-107. The participating school district must pay for those students in their district that are enrolled in the program to receive their education at participating private schools. C.R.S. § 22-56-104(5)(a). The payment is an amount that is the lesser of: i) the private school's "actual educational cost per pupil," or ii) a percentage of the school district's per pupil operating revenues.[1] C.R.S. § 22-56-108(2). The district is to make quarterly payments during the school year. C.R.S. § 22-56-108(3). The payments are to be made by check payable to the parents of participating students and sent to the participating private schools. The parents are then required to endorse the check for "the sole use of the participating nonpublic school." C.R.S. § 22-56-108(4).

The legislation limits those school districts required to participate in the voucher program. Districts required to participate are defined in C.R.S. § 22-56-103(10)(a)(I) to encompass any school district "which, for the 2001-02 school year, had at least eight schools that received an academic performance rating of 'low' or 'unsatisfactory' pursuant to § 22-7-604 (5), and which school district continues to operate said schools in the 2003-04 school year." All parties agree that this standard applies to 11 school districts.[2] Any other school district may voluntarily join the program. C.R.S. § 22-56-103(10)(a)(II).

The legislation targets low income, low achieving children to participate in the voucher program. Subject to the enrollment cap, students in grades four through twelve are eligible to participate if they: i) reside within the participating school district; ii) are eligible to receive a free or reduced-cost lunch; iii) were continuously enrolled in and attending a public school; and iv) performed at an "unsatisfactory" level in at least one academic area on the Colorado Student Assessment Program (CSAP) or in reading, writing or mathematics on the ACT test for college admission. C.R.S. § 22-53-104(2). Students in grades one through three are eligible if they: i) are enrolled in or attending a public school; ii) lack overall readiness attributable to at least three family risk factors pursuant to C.R.S. § 22-28-106; and iii) reside in an area in which the student's neighborhood school is rated "low" or "unsatisfactory." C.R.S. § 22-56-104(2)(b)(III).

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[1] The per pupil operating revenue percentage is 85% for students in Grades 9-12, 75% for Grades 1-8, and 37.5% for kindergarten. See C.R.S. § 22-56-108(2).

[2] The eleven districts required to participate are Adams County School District No. 14, Aurora School District No. 28J, Colorado Springs School District No. 11, Denver County School District No. 1, Greeley School District No. 6, Harrison School District No. 2, Jefferson County School District No. R-1, Northglenn-Thornton School District No. 12, Pueblo School District No. 60, St. Vrain Valley School District No. RE-1J, and Westminster School District No. 50.

The pilot nature of the program limits enrollment to one percent of the students enrolled in a participating school district for the 2004-05 school year. That number increases to two percent for the 2005-06 school year. For the 2006-07 school year, enrollment for each district cannot exceed four percent. For the 2007-08 school year and each year thereafter, enrollment in the voucher program is capped at six percent of the school district's student enrollment for the previous year. C.R.S. § 2-56-104(5)(a). By January 1, 2008 both the state auditor and the participating school districts must submit performance reports to the legislature to evaluate the program's success. C.R.S. §§ 22-56-109, 110.

Private schools seeking to participate in the program must file an application with a school district and comply with certain statutory standards. These standards bar participation by schools that discriminate on the basis of race, color, religion, national origin or disability. C.R.S. § 22-56-106(1). In addition, the standards bar private schools from participating if they "advocate or foster unlawful behavior or teach hatred of a person or a group." Id. The private schools are also required to meet health and safety codes, permit statewide testing of eligible students, conduct criminal history background checks on employees, allow the eligible student to withdraw and provide information about the school and its curriculum. Id. Except for the prohibition against teaching hatred, the voucher program imposes no curriculum requirements on a participating private school. Any private school that is denied the right to participate in the voucher program may appeal to the State Board of Education. The decision of the state board is final and not subject to appeal. C.R.S. § 22-56-106(3)(c).

This case is brought by four organizations, seven individuals and eight parents on behalf of their children. The individual and parent plaintiffs are residents and taxpayers of districts required to participate in the voucher program. The plaintiffs assert eight causes of action:

1. That the voucher program is special legislation in violation of article V, section 25 of the Colorado Constitution;

2. That the voucher program violates article IX, section 15 of the Constitution by depriving local school boards of control over instruction in the public schools of their respective districts;

3. That the voucher program violates the free exercise of religion clause in article II, section 4 of the Constitution by making public funds available to sectarian private schools;

4. That the voucher program violates article IX, section 7 of the Constitution mandating separation of church and state by making public funds available to sustain sectarian private schools and the religious organizations which sponsor them;

5. That the voucher program violates the free exercise and establishment clauses of the Constitution by coercing parents to accept religious indoctrination for their children as the price for receiving a voucher;

6. That the voucher program violates article V, section 34 of the Constitution by contributing state funds to charitable organizations not under control of the state and to denominational and sectarian institutions;

7. That the voucher program violates article IX, section 3 of the Constitution restricting use of income from the public school fund; and

8. That the voucher program violates article IX, section 2 of the Constitution by disrupting the uniformity of public education.[3]

Twelve individuals have intervened as defendants, on behalf of their children. The intervenors reside in school districts that are subject to the voucher program, and their children meet the eligibility criteria in the statute. The intervenors intend to seek the benefits of the program for their children.

Plaintiffs have moved for judgment on the pleadings on their first and second causes of action. In response, defendants and defendant intervenors have moved for partial summary judgment dismissing the first and second causes of action. Oral argument was heard on the motions on November 12, 2003. All parties agree that the material facts surrounding the first and second causes of action are undisputed and that those claims may be resolved as a matter of law.

II. STANDARD OF REVIEW

The briefing on these motions includes references to demographic information about the school districts as well as affidavits from various parties. Because this information goes beyond the four corners of the complaint, I treat all of the pending motions as motions for summary judgment. See Branscum v. American Community Mut. Ins. Co., 984 P.2d 675, 677 (Colo. App. 1999).

In evaluating plaintiffs' claims of unconstitutionality, the Court must presume the voucher program, as enacted by the General Assembly, is constitutional. In re Interrogatory Propounded by Governor Roy Romer on House Bill 91S-1005, 814 P.2d 875, 883 (Colo. 1991)("In re House Bill 91S-1005"); Villanueva v. Carere, 873 F. Supp. 434, 447 (D. Colo. 1994), aff'd 85 F.3d 481 (10th Cir. 1996). Plaintiffs have the burden of showing the voucher program is unconstitutional beyond a reasonable doubt. In re House Bill 91S-1005, 814 P.2d at 883; Burtkin Associates v. Tipton, 845 P.2d 525, 528 (Colo. 1993); Anderson v. Colorado State Dept of Personnel, 756 P.2d 969, 975 (Colo. 1988). If defendants provide a reasonable construction of the voucher statute that would comply with the constitution, I must accept that construction. Colorado v. Buckallew, 848 P.2d 904, 907 (Colo. 1993); Passarelli v. Schoettler, 742 P.2d 867, 870 (Colo. 1987). The presumption of constitutionality is not overcome by speculation that state officials

[3] At the hearing on these motions, plaintiffs' counsel announced their intention to abandon the seventh and eighth causes of action.

may at some future time act in an unconstitutional manner under color of law. In re House Bill 91S-1005, 814 P.2d at 883.

III. SPECIAL LEGISLATION

The first claim for relief attacks the voucher program as special legislation. Section 25, article V of the Colorado Constitution provides that the General Assembly shall not pass local or special laws with regard to certain enumerated subjects, including the "management of common schools." The General Assembly also may not pass a special law where a general law can be made applicable on any topic.

The courts have adopted a two-part test for determining whether a law is impermissible special legislation:

The threshold question is "whether the classification adopted by the legislature is a real or potential class, or whether it is . . . limited to a class of one." In re House Bill 91S-1005, 814 P.2d at 886; City of Greenwood Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427, 441 (Colo. 2000); Darrow v. People *ex. rel*. Norris, 8 P. 661, 662 (Colo. 1885). If there is a real class, the next question is whether the classification is reasonable. In re House Bill 91S-1005, 814 P.2d at 886; Bloomer v. Board of County Comm'rs, 799 P.2d 942, 948 (Colo. 1990) ("In analyzing constitutional challenges that are based on the special legislation clause, we have upheld legislation if a reasonable basis exists for the legislation's distinction between classes it has created.")

The class challenged by the plaintiffs in the voucher program is the class of 11 school districts that are required to participate in the program. These districts are identified by reference to the academic performance ratings of their schools for the 2001-2002 school year. Plaintiffs argue that, by using a past event as a reference point, the legislation creates a "closed class." Specifically, plaintiffs complain that school districts which may become similarly situated to these 11 districts based on academic performance of their schools in the future will not be required to participate. In plaintiffs' view, the class would not be impermissible if the reference point were not tied to a past event.

Defendants respond that the voucher program establishes a true class and that Colorado case law does not require a class to remain open in order to avoid a special legislation challenge. Defendants also argue that the class may expand in the future by virtue of the provision in C.R.S. §22-56-104(1)(b) that any school district may volunteer to participate in the voucher program. Finally, defendants contend that the "pilot project" nature of the program justifies restricting it to a specified number of districts.

On the second prong of the special legislation test, plaintiffs contend that the criteria adopted by the legislature for selecting the districts required to participate in the program are not reasonably related to the purpose of the statute. Specifically, they argue that the legislature's use

of the absolute number of eight low performing schools in a district, rather than a percentage, results in excluding low performing small school districts and including high performing large school districts. They also challenge the criteria for determining eligible students because the legislation does not require that the student actually be attending a school rated low or unsatisfactory.

Defendants respond that the criteria chosen by the legislature to select districts and students need only meet the "rational relationship" test which is the least exacting standard of constitutional review. Mathematical nicety is not required, and the fact that different criteria might have been chosen does not invalidate those chosen by the General Assembly for this program. Pace Membership Warehouse, Div. of K-Mart Corp v. Axelson *et.al.* , 938 P.2d 504, 507 (Colo.1997).

Although the Colorado Supreme Court has decided a number of special legislation cases over the years, none is directly on point. Specifically, no Colorado case has either upheld or invalidated a law challenged as special legislation solely because the law applied to a closed class. The closest Colorado courts have come to outlawing a closed class is In Re Senate Bill No. 95 of the 43rd General Assembly, 361 P.2d 350 (Colo. 1961), where the Supreme Court struck down a bill designed to force the annexation of the City of Glendale into the City and County of Denver partly because the bill repealed itself within one year, thereby making it impossible to apply to any future situations. Colorado courts have focussed on the whether a proposed law can be applied generally and thereby comport with special legislation prohibitions. For example, in Darrow v. People *ex. rel.* Norris, 8 P. 661 (Colo. 1885), the court found legislation regarding the creation of superior courts, which impacted only one city at the time of enactment, not to be special legislation since it would apply to other cities that reached the size criteria thereafter. The courts have also held that a law that is general in appearance but not application violates the letter and spirit of the special legislation prohibition. In Re Senate Bill No. 9, 56 P. 173, 174 (Colo. 1899). Still, the legislature may enact a law that applies to only a few if it makes a specific determination that the law cannot be made generally applicable and still serve a valid purpose. Such a finding by the legislature is not reviewable by the courts except for consideration of abuse of discretion. Morgan County Junior College District v. Jolly, 452 P.2d 34 (Colo. 1969).

Nebraska has a special legislation clause in its constitution identical to Colorado's. In City of Scottsbluff v. Tiemann, 175 N.W.2d 74 (Neb. 1970), the Nebraska Supreme Court struck down a law requiring municipal courts to be established in cities of a certain population by reference to a past census, holding: "The law is unmistakably clear that a statute classifying cities for a legislative purpose in such a way that no other city may ever be added to the class violates the constitutional provision forbidding special laws where general laws can be applicable." In that case, the law's criteria applied to two cities, but no other cities could ever qualify since the size requirement referred to a past census. Plaintiffs argue that if given the opportunity, Colorado courts would follow the reasoning of the Nebraska case.

Defendants, on the other hand, argue that the only Colorado cases invalidating special legislation have focused on the "illusory class of one" exemplified by the Glendale case and that, since this class is greater than one, it automatically satisfies the first prong of the special

legislation test. The matter is not that simple. In Re Senate Bill No. 9, 56 P. 173, 174 (Colo. 1899), invalidated legislation which singled out four school districts by reference to their proximity to Denver. In American Water Development, Inc. v. City of Alamosa, *et al*., 874 P.2d 352, 370 (Colo. 1994), the court upheld the challenged class not because it had two members, but because it was subject to being expanded in the future. If the "illusory class of one" was the exclusive test, the court would not have focused on the possibility of future expansion.

Based on the totality of the circumstances surrounding the voucher program legislation, I am not convinced beyond a reasonable doubt that it violates article V, section 25 of the Colorado Constitution. First, the class of 11 districts required to participate is a real, not illusory class. As discussed more fully below, the criteria by which those districts are defined are rationally related to the purpose of the voucher program. No case in Colorado has struck down a class this large as special legislation. Although some language in the cases lends support to plaintiffs' theory that a class is impermissible, no matter how large, if it is closed to future similarly situated members, I cannot predict with certainty that the Supreme Court would strike a class this large solely because it is closed. As intervenors' counsel observed, the Supreme Court has in some cases gone to seemingly great lengths to avoid invalidating laws as special legislation. See e.g. City of Greenwood Village, 3 P.3d at 441-445; American Water Development, Inc., 874 P.2d at 371; In re House Bill 91S-1005, 814 P.2d at 886-889; People v. Maxwell, 427 P. 2d 310 (Colo. 1967).

Second, although the class of districts required to participate in the voucher program is closed, the class of districts that may actually participate is not. The legislation leaves the possibility that school districts facing the same challenges as the mandatory districts may elect to participate voluntarily. There is no way to assess the likelihood of this happening in the near future, but it seems no less likely than the possibility of another United Airlines wanting to open a large maintenance center in Colorado, In re House Bill 91S-1005, 814 P.2d 875, or another city of Centennial seeking to incorporate, City of Greenwood Village, 3 P.3d 427.

Third, the legislature apparently intends for the voucher program to be a "pilot program," although the statute is devoid of significant discussion of the pilot nature of the program, and there is no sunset clause ending the program after the pilot period. Taking the legislature at its word, it is fair to infer that, if it is successful in meeting the stated goals, the voucher program will be expanded by future legislation to all districts or at least to all districts with underperforming schools and high poverty populations, without tying the definition to a past event. As stated by the Pennsylvania Supreme Court in Harrisburg v. Zogby, 828 A.2d 1079, 1090 (Penn. 2003), regarding special legislation and voucher programs, it seems "rational for the General Assembly to seek to limit the program's initial reach to a small group of districts before prescribing the same procedures more generally throughout the state." Plaintiffs argue that there is no "pilot program exception" to the special legislation clause, but the relevant inquiry is not whether there is an exception to special legislation prohibitions for pilot programs, but rather whether the pilot program constitutes special legislation. Id. at 1091 n.16. For the reasons stated, I conclude that the Colorado voucher program does not.

On the second prong of the special legislation test, I reject plaintiffs' contention that the criteria adopted by the General Assembly for districts and students to participate in the voucher

program are not rationally related to the purposes of the program. The rational relationship test leaves the General Assembly large latitude in making the legislative choices to define a program. A court should be very reluctant to interfere or second guess those choices. See Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1019 (Colo. 1982)(Judicial intrusion to weigh the class distinctions and determine whether they are related to a legitimate legislative purpose must be avoided); see also, Town of Telluride v. Lot Thirty-Four Venture, LLC, 3 P.3d 30 (Colo. 2000) (Courts must avoid making decisions that are intrinsically legislative, because it is not up to the court to make or to weigh policy); People v. Maxwell, 427 P. 2d 310, 313 (Colo. 1967)("The legislature's wisdom in enacting the statute in question is not to be appraised by this court, if it is clear there exists a reasonable and valid need for it."); Denver City Tramway Co. v. Kennedy, 117 P. 167 (Colo. 1911)(Judicial legislation is to be carefully avoided).

It was not unreasonable for the General Assembly to adopt the pilot program approach for this experimental idea rather than imposing it across the state before knowing whether it does any good. As the court in Harrisburg explains, "[T]here is nothing improper about this method [use of pilot programs] of attacking social problems of statewide dimension, as the Legislature is free, for reasons of necessity or otherwise, to address such issues incrementally." 828 A.2d at 1090-1091. Given the reasonable decision to try a pilot program, the legislature had to develop criteria for selecting the limited number of students and districts to participate. Although a different policymaker might have chosen to involve school districts "with a history of low test performance," Harrisburg, 828 A.2d at 1083, or districts that "have ever been subject to required supervision" due to low performance ratings, Simon-Harris v. Goff, 711 N.E. 2d 203, 213 (Ohio 1999), that is no reason for invalidating legislative choices which fall within a range of reason. See Lujan, 649 P.2d at 1019. Therefore, I conclude that the voucher program is not invalid special legislation.

IV. LOCAL CONTROL

Section 15 of article IX of the Colorado Constitution provides as follows:

> 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*. (Emphasis added.)

Section 2 of the same article provides, in part:

> The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of *free public schools* throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. . . (Emphasis added.)

In addition to the explicit constitutional responsibility of establishing a uniform system of free public schools, the legislature has plenary power and inherent authority in the field of education. See School District No. 1 of Morgan County v. School Planning Committee of Morgan County, 437 P.2d 787, 546 (Colo. 1968)("[T]he legislature has plenary powers to determine the number, nature and powers of school districts and their territory … the legislature may modify or withdraw all such powers as it pleases."); Hazlet v. Gaunt, 250 P.2d 188, 194 (Colo. 1952) ("Because few, if any, restrictions are placed upon the legislative power in school affairs, by the constitution, the legislature has almost unlimited power to abolish, divide or alter school districts."); see also Lujan, 649 P.2d at 1026 (Erickson, J., concurring). Under the Colorado Constitution, the legislature's powers are not limited except where limits are explicitly stated. Lujan, 649 P.2d at 1017. One such limit is explicitly stated in section 15 of article IX.

The Colorado Supreme Court has had numerous occasions to interpret and apply article IX, section 15. In Belier v. Wilson, 147 P. 355 (Colo. 1915), the court held that a law allowing county commissioners to levy taxes in one school district to pay for a high school in another district violated section 15, "both in letter and in spirit," because the electors of the taxed district had no voice in selecting those who managed the subject high school in an adjacent district. In the same year, in School District No. 16 In Adams County v. Union High School No. 1 In Adams County, 152 P. 1149 (Colo. 1915), the court held that the legislature interfered with a school board's authority to control instruction, as guaranteed by section 15, by requiring one district to pay tuition for its students attending high school in another district without the paying district's consent. Similarly, in Hotchkiss v. Montrose County High School Dist., 273 P. 652 (Colo. 1928), the court held that section 15 was violated by legislation giving a student the right to compel the school district of her residence to pay the tuition fee required by another school district where she wished to attend.

In Craig v. People *ex rel.* Hazzard, 299 P. 1064 (Colo. 1931), the court faced a different method of funding out-of-district registration. In distributing the "public school fund" of the state[4], the General Assembly directed that the per pupil allocation for a student attending high school in another district should be paid by the state to that district and deducted from the student's district of residence. The court held that legislation did not violate section 15 because the only money involved was from the public school fund, and the redistribution did not concern funds raised by local taxation. Wilmore v. Annear, 65 P.2d 1433 (Colo. 1937), was the court's first look at apportionment of state general fund revenues to local school districts. The court rejected a taxpayer challenge and held that establishment and financial maintenance of public schools is a state purpose for which the legislature may appropriate monies from the state's general revenue fund without contravening local control over instruction within the individual school districts. In Bagby v. School District No. 1 Denver, 528 P.2d 1299 (Colo. 1974), the court held that despite the constitutional grant of authority over instruction, school districts and the boards which run them exercise authority to effectuate the educational purposes of the state, thereby making them subdivisions of the state for the purposes of public meeting laws.

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[4] The "public school fund" is the fund established in the Constitution (Art. 9 § 5) to receive revenue generated from state owned school lands.

The Colorado Supreme Court has consistently interpreted section 15 as requiring that the local board have significant control over the funding of instruction for the district's students. This emphasis on local control of funding reached its apex in Lujan v. Colorado State Board of Education, 649 P.2d 1005 (Colo. 1982). In rejecting a constitutional challenge to the state's system of financing public education, the court relied heavily on the Colorado philosophy of local control.

> The historical development of public education in Colorado has been centered on the philosophy of local control. See Colo. Const. Art. IX, Sec. 15 (citations omitted). Taxation of local property has not only been the primary means of funding local education, but also of ensuring that the local citizenry direct the business of providing public school education in their school district.

649 P.2d at 1021. The court went on to hold that the apparent objective of the Colorado system of financing public education is local control. Id. at 1022. This recognition led to the court's critical holding:

> We find that utilizing local property taxation to partly finance Colorado schools is rationally related to effectuating local control over public schools. The use of local taxes affords a school district the freedom to devote more money toward educating its children than is otherwise available in the state-guaranteed minimum amount. It also enables the local citizenry greater influence and participation in the decision-making process as to how these local tax dollars are spent. Some communities might place heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation. Finally, local control provides each district with the opportunity for experimentation, innovation, and a healthy competition for educational excellence.

Id. at 1023.

Defendants seem to argue that school financing and state influence over public education have evolved in such a way since Lujan that the courts should relegate section 15, article IX to an historical footnote. Specifically, the state argues that plaintiffs' reliance on old cases such as Belier, 147 P. 355, and School Dist. No. 16 In Adams County, 152 P. 1149, ignores the reality of modern school finance. See State Defendants' Response to Plaintiff's Motion for Judgment on the Pleadings and Brief in Support for Cross-Motion for Summary Judgment (hereinafter "Defendants' Response") at p. 36. According to the state, school funding today "is no longer solely a matter of local property taxation." Id. at p. 37. Rather, the majority of funding comes from the state's public school finance fund. Appropriations from this fund are the responsibility of the legislature and do not impact the local control of property taxation revenues. Id. (citing Craig,

299 P. 1064). Thus, decisions to redirect funds from one school district to parents or private schools should no longer be governed by the old cases or local control of property taxation revenues. Id. at pp. 37-38. The state takes this argument to an extreme when it states that the voucher program merely involves a "pass through" of state funds, suggesting that no local funds are involved. Id. at p. 39. While the parties have some disagreement as to what percentage of district revenues are locally generated (plaintiffs' estimate is 52 percent, while the state estimates 39 percent[5]), there is no doubt that revenues generated by local taxes will fund vouchers to a substantial degree. Therefore, I reject the state's argument that the Supreme Court's pronouncements in Belier through Lujan no longer apply.

In Board of Education v. Booth, 984 P.2d 639 (Colo. 1999), the Supreme Court again had the opportunity to weigh the tension between the state's plenary power in the field of education and local control of instruction. Booth concerned the Denver Board of Education's challenge to a provision in the Charter Schools Act which provides that the decision of the State Board of Education on a second appeal of a local board's denial of an application for a charter school is binding. The court first observed that Colorado was one of only six states with an express constitutional provision for local control, "underscoring the importance of the concept to our state. As a result, this court has consistently emphasized principles of local control." Id. at 646 (citing Lujan.). After analyzing the powers of the State Board of Education, the court went on to construe the language of section 15:

> "Control" means "power or authority to guide or manage." Webster's 496. "Instruction" is generally defined as "the action, practice or profession of one that instructs," and the "quality or state of being instructed." Id. at 1172. *Thus, control of instruction requires power or authority to guide and manage both the action and practice of instruction as well as the quality and state of instruction.* Booth, at 648. (Emphasis added.)

The court then noted the previous cases applying section 15 and summarized them: "Thus, control of instruction requires substantial discretion regarding the character of instruction that students will receive at the district's expense." Id. at 648.

Next, the Booth court derived several "guiding principles" from its prior decisions. The first principle, concerning resolving individual teacher employment issues, is not applicable here. But the second, third and fourth are instructive:

> Second, as a corollary, generally applicable law triggers control of instruction concerns when applied to specific local board decisions likely to implicate important education policy. Third, local board discretion can be restricted or limited in such circumstances by

[5] The state's estimate is in paragraph 12 of the affidavit of Karen Stroup, attached to Defendants' Response as Exhibit A. Plaintiffs' estimate is in footnote 15 to their reply brief. This factual dispute is not an impediment to deciding the legal issue presented by the motions.

> statutory criteria and/or judicial review. Fourth, such general statutory or judicial constraints, if they exist, *must not have the effect of usurping the local board's decision-making authority or its ability to implement, guide, or manage the educational programs for which it is ultimately responsible*.

Id. at 649 (Emphasis added).

The Booth court then engaged in the balancing of state authority against local control in the specific context of the second appeal provision in the charter school law. Ultimately, the court upheld the law because, even if required by the state board to approve a charter school application, the local board retains the power to negotiate the specific contract with the charter school. If the state could impose the specific contract and require the local board to open a school, that "might easily have the effect of usurping the local board's decision-making authority or its ability to implement the educational programs for which it is ultimately responsible. Such an effect would raise serious constitutional infirmities." Id. at 653.

Engaging in the balancing required by Booth in this case is relatively simple because the voucher program leaves no discretion to the mandatory districts. The state does not seriously argue to the contrary. On page 30 of its response, the state says the local district has the discretion to determine which nonpublic schools meet the statutory standards for participation; but those minimal standards are established by the legislature, and the local board may deny an application only on the basis of failure to provide documentation or failure to meet the statutory standards. The state board makes the final determination on any appeal of a district's rejection of an application. The state also characterizes the district's identification of students who are eligible for vouchers as an exercise of discretion; but this is simply a matter of reviewing records, and the district has no discretion to decide which of its students might benefit from the program. The local board is not even left with the discretion to decide which students should participate if the program is oversubscribed; the statute prescribes priorities to be followed and ultimately mandates a lottery approach. C.R.S. §22-56-104(5)(b). On page 34 of its response, the state more accurately characterizes the local district's responsibilities under the voucher program as "administrative." Having administrative and record-keeping responsibilities does not equate to "substantial discretion." The local board has no input whatsoever into the instruction to be offered by the private schools. Therefore, I conclude that the local district is left with no substantial discretion over the educational program embodied in the voucher program.

The state makes three primary arguments that the voucher program does not violate article IX, section 15. First, the state argues that its plenary power over education is very broad and has grown in recent years to encompass all sorts of directives to local districts that have not existed in the past. See e.g., Defendants' Response at pp. 28-29 ("The Colorado Revised Statutes are replete with duties and directives that impact school districts and the authority of local boards of education . . .All of these statutes directly or indirectly regulate the local boards' control over instruction."). While the state's power over education certainly is broad, no statute has repealed article IX, section 15 of the Constitution, and the legislature is not free to ignore the principle of local control.

The state's second argument is that the wording of section 15 grants local control over "instruction in the public schools." Since the instruction mandated by the voucher program will not be occurring in the public schools, the state argues that section 15 is not implicated. Defendants' Response at pp. 29-30.[6] This reading of section 15 simply ignores the decades of Supreme Court precedent interpreting section 15, from Belier through Booth. The theme of those cases is that section 15 mandates that the local district must have discretion over how its money is spent to provide instruction for students who live in the district. See Booth, 984 P.2d at 648 ("[C]ontrol of instruction requires substantial discretion regarding the character of instruction that students will receive at the district's expense."); Craig, 299 P. at 1067 ("Under the issues here joined, no attempt is made to compel the district of the pupil's residence to pay the cost of public instruction furnished by another."); Belier, 147 P. at 356 (Authorizing the county to levy a tax on property in one district for support of schools in another violates section 15.)

Third, the state argues that the General Assembly routinely directs local districts on how school revenue dollars are to be spent and that the dollars do not "belong" to the local district. This argument ignores Craig v. People, 299 P. 1064 (Colo. 1931) where the Supreme Court held that upon distribution, even public school income fund money allocated to education is vested in the local district. Defendants' argument that Craig was effectively overruled by Wilmore v. Annear, 65 P.2d 1433 (Colo. 1937) is wrong. Wilmore simply upheld general fund contributions to local districts against a constitutional challenge that funding public education was not a legitimate state function and allowed the state to allocate its $500 appropriation as it saw fit. No case has ever held that the General Assembly may disregard section 15 in directing local districts how to spend school monies.

The state argues that the Court must look for a way to find the statute constitutional. That is true. As the Supreme Court demonstrated in Booth, if a statute can be interpreted in a way that renders it constitutional, that interpretation must prevail. I see no way to interpret the voucher program statute in a way that does not run afoul of the principle of local control embodied in section 15. Here, the state is effectively asking, not that I interpret the voucher program statute in a manner to make it constitutional, but that I interpret section 15 as being of so little import that the state can exert total control over a certain segment of instruction. That approach would involve the Court in rewriting the Constitution, something no court may do. Dellinger v. Board of County Comm'rs for County of Teller, 20 P.3d 1234, 1238 (Colo. App. 2000), citing Pace Membership Warehouse v. Axelson, 938 P.2d 504 (Colo. 1997).

The goals of the voucher program are laudable, and providing vouchers so that select children may use public funds to attend private schools may be an effective means of addressing the educational disparities the General Assembly has recognized. The defendants, particularly the intervenors, seem to argue that since the voucher program is such a bright hope for such a needy population, it must be allowed to proceed. However, even great ideas must be implemented

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[6] Since statehood, Colorado law has defined "public school" as "a school that derives its support, in whole or in part, from money raised by a general state, county or district tax." C.R.S. § 22-1-101. By this definition, the private schools that receive voucher money may literally be "public schools." This issue need not be resolved here.

within the framework of the Colorado Constitution. By stripping all discretion from the local district over the instruction to be provided in the voucher program, the General Assembly has violated article IX, section 15. Therefore, I conclude, beyond a reasonable doubt, that the statute is unconstitutional. No party has suggested, and I cannot find, any way to sever certain provisions from the legislation in order to render it constitutional.

V. RELIEF

On the basis of the foregoing, plaintiffs' motion for judgment on the pleadings on the first cause of action is denied, and defendants' cross motions for summary judgment on that cause of action are granted. The first cause of action is dismissed with prejudice.

Plaintiffs' motion for judgment on the pleadings on the second cause of action is granted, and defendants' cross motions for summary judgment on that cause of action are denied. Plaintiffs' request for an injunction is granted. Defendants and all persons and entities acting under their direction or in concert with them are hereby enjoined from taking any actions to implement or enforce the Colorado Opportunity Contract Pilot Program.

The balance of plaintiffs' constitutional challenges to the voucher program are rendered moot. Judgment will enter accordingly.

SO ORDERED.

Dated this _____ day of December, 2003.

BY THE COURT:

Joseph E. Meyer III
District Court Judge

cc: Martha R. Houser, Attorney for Plaintiffs
Renny Fagan, Attorney for State Defendants
Richard A. Westfall, Attorney for Intervenor Defendants