

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER,  COLORADO  Court Address: 1437 Bannock Street, Room 256  Denver, CO 80202  Telephone: (720) 865-8301</p>	
<p><b>Plaintiffs:</b> TAXPAYERS FOR PUBLIC EDUCATION; et al.  <b>vs.</b>  <b>Defendants:</b> DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al.  <b>and</b>  <b>Plaintiffs:</b> JAMES LaRUE, et al.  <b>vs.</b>  <b>Defendants:</b> COLORADO BOARD OF EDUCATION; et al.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Plaintiffs Taxpayers for Public Education, et al.:</p> <p>Michael S. McCarthy, #6688  Colin C. Deihl, #19737  Ll. Rhyddid Watkins, #49156  FAEGRE BAKER DANIELS LLP  1700 Lincoln Street, 3200 Wells Fargo Center  Denver, CO 80203  Telephone: (303) 607-3500  E-mail: <a href="mailto:Michael.mccarthy@faegrebd.com">Michael.mccarthy@faegrebd.com</a>  <a href="mailto:Colin.deihl@faegrebd.com">Colin.deihl@faegrebd.com</a>  <a href="mailto:Rhyddid.watkins@faegrebd.com">Rhyddid.watkins@faegrebd.com</a></p> <p>And</p> <p>Attorneys for Plaintiffs James LaRue, et al.</p> <p>Matthew J. Douglas, #26017  Timothy R. Macdonald, #29180  Michelle K. Albert, #40665  ARNOLD &amp; PORTER LLP  370 Seventeenth Street, Suite 4500  Denver, CO 80202-1370  Phone Number: 303.863.1000  Fax: 303.832.0428  Email: <a href="mailto:Matthew.Douglas@aporter.com">Matthew.Douglas@aporter.com</a>  <a href="mailto:Timothy.Macdonald@aporter.com">Timothy.Macdonald@aporter.com</a>  <a href="mailto:Michelle.Albert@aporter.com">Michelle.Albert@aporter.com</a></p>	<p>Case No.: 2011CV4424  (Combined with 2011CV4427)  Courtroom 259</p>
<p><b>PLAINTIFFS' MOTION FOR ENFORCEMENT OF AUGUST 12, 2011 PERMANENT  INJUNCTION RESTRAINING DEFENDANTS' RESUMED FUNDING AND  IMPLEMENTATION OF AN UNLAWFUL SCHOOL VOUCHER PROGRAM</b></p>	

Pursuant to Rule 65 and Rule 107, C.R.C.P., Plaintiffs<sup>1</sup> move the Court for an Order enforcing the permanent injunction embodied in this Court’s Order of August 12, 2011 and enjoining Defendants Douglas County School District (“District”), Douglas County Board of Education (“Board”) and the Colorado Department of Education (“CDOE”) from taking any further action to implement or fund the modified private school voucher program adopted by the District and the Board by resolution dated March 15, 2016 and referred to as the “School Choice Grant Program,” a copy of which resolution is marked as Exhibit A to the attached Affidavit of Cindra S. Barnard. Plaintiffs request that the Court direct that the CDOE be enjoined from providing or supplying in any way any funds to the District or the Board that will or may be used to fund the unlawful voucher program. Plaintiffs further request that the Court find that Defendants have disobeyed and resisted this Court’s Permanent Injunction Order of August 12, 2011.

As grounds for the relief sought, Plaintiffs submit the following points and authorities.

**The Issuance and Present Effectiveness of the Court’s  
August 12, 2011 Permanent Injunction: A Brief Case History.**

1. On August 12, 2011, shortly after the conclusion of a 3-day evidentiary injunction hearing under Rule 65, C.R.C.P., this Court entered its 68-page Order and related findings and conclusions granting Plaintiffs’ Motions for Preliminary Injunction and making its injunction permanent (the “Permanent Injunction”).

---

<sup>1</sup> The named Plaintiffs in this case are Taxpayers for Public Education, Cindra S. Barnard, Mason S. Barnard, James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera, and Susan McMahon.

2. The Permanent Injunction, which remains in effect, operates to “prevent Defendants from funding or otherwise implementing” the Choice Scholarship Pilot Program (“private school voucher program”). Permanent Injunction, p. 68; *see also*, LaRue Motion for Preliminary Injunction, July 5, 2011, at pp. 3, 11.

3. The extensive briefing and evidentiary proceedings in this case make clear that the central purpose of the Permanent Injunction was to prevent the diversion of scarce public education funds from the financially beleaguered public school system and into the coffers of private schools, religious or otherwise.

4. As this Court detailed in the Permanent Injunction Order, the Court found that the Douglas County private school voucher program violated multiple provisions of the Colorado Constitution (*e.g.* Article IX, Section 3). On those grounds, the Court granted a permanent injunction against Defendants, halting the funding and implementation of the private school voucher program.

5. Defendants appealed the Permanent Injunction to the Colorado Court of Appeals, which, in a 2-1 decision, reversed this Court’s Permanent Injunction in its entirety. See Taxpayers for Public Education v. Douglas County School District, 356 P.3d 833 (Colo. App. 2013).

6. The Colorado Supreme Court granted Plaintiffs’ Petition for Certiorari and, on June 29, 2015, issued its opinion reversing the Court of Appeals and reinstating the Permanent Injunction. Specifically, the Supreme Court stated that:

We reverse the judgment of the court of appeals and remand to that court with instructions to return the case to the trial court so that the trial court may reinstate its order permanently enjoining the

CSP [Choice Scholarship Program] 351 P.3d 461, 475. (emphasis added).

7. On July 15, 2015, the Colorado Supreme Court issued its Mandate in this case, attached to Affidavit of Rhyddid Watkins as Exhibit 1, which states, in pertinent part:

IT IS ORDERED and adjudged that the judgment of the Colorado Court of Appeals is REVERSED and this case is returned to the Colorado Court of Appeals.

8. On August 6, 2015, the Colorado Court of Appeal issued its Mandate, which states in pertinent part:

An opinion was entered by the Supreme Court on June 29, 2015, wherein the judgment of the Colorado Court of Appeals was reversed... IT IS NOW ORDERED that the judgement of the trial court is affirmed. Accordingly, the case is remanded to the District Court, City and County of Denver for further proceedings consistent with this opinion of the Colorado Supreme Court.

Watkins Affidavit, Exhibit 2.

9. The Permanent Injunction is therefore presently in full force and effect and is binding upon the District, the Board, and CDOE.

10. The actions of the Board, the District, and the CDOE to adopt, implement, and fund the private school voucher program reflected in Barnard Affidavit, Exhibit A, violate the Permanent Injunction.

**The Private School Voucher Program Adopted by the Board on March 15, 2016 Violates the Permanent Injunction.**

11. The private school voucher program that the Board adopted on March 15, 2016 under the rubric of the “School Choice Grant Program” is, on its face, only a modification of the Choice Scholarship Program invalidated by this Court and the Colorado Supreme Court. The current iteration of the voucher program is unlawful for many of the same reasons.

12. The current iteration of the Douglas County private school voucher program violates the substance of the Permanent Injunction because, among other defects, it again diverts monies from the “public school fund” to private schools in violation of Article IX, Section 3 of the Colorado Constitution. See Permanent Injunction, p. 63 (“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 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.”).

13. The functional identity between the original and revised versions of the private school voucher program confirms that the new iteration is subject to the Permanent Injunction.

14. The facts establishing the substantive and practical identify of the two programs include:

- a. On March 15, 2016, the Board voted 4-3 to approve a revision to the Choice Scholarship Program. In doing so, the Board made clear that it was not creating or adopting a new voucher program, but was only making adjustments to the existing Choice Scholarship Program, Barnard Affidavit, ¶ 6.
- b. The Board did not revoke “Board File: JCB Choice Scholarship Program (Pilot)” but rather voted simply to make revisions to that policy. The formal action taken by the Board was described in the Board agenda and Board minutes as “Revision to Board File: JCB Choice Scholarship Program (Pilot).” The revised policy

adopted by the Board is titled “Board File: \_\_\_ School Choice Grant Program (Pilot).” Id., ¶ 7.

- c. In an email dated March 18, 2016, from Board President Silverthorn to other Board members, the President of the Board admitted that “The School Choice Grant Program was a revision to the previous CSP policy, not a new resolution or policy. One reading was sufficient.” Id., ¶ 10.
- d. In explaining the continuity between the original voucher program and its revised version, District Superintendent Elizabeth Fagen stated that the revised program kept in place “the basic infrastructure [that] was already set up from the existing program.” Id., ¶ 8.
- e. At the Board meeting, the proponents of the revised voucher program mandated that the vote conform to Board procedures which govern “revision . . . of an existing Board policy” rather than more expansive Board procedures which govern the introduction of a new policy. Id., ¶ 9.
- f. A comparison of “Board File: JCB Choice Scholarship Program (Pilot)” with “Board File: \_\_\_ School Choice Grant Program (Pilot)” confirms that the revised policy is substantially identical to the original policy. The revised voucher policy is an 11-page, single-spaced document. Most of its operative provisions (not including the argumentative “Purposes and Findings” section) are identical to the original voucher policy. Id., ¶ 11.
- g. Although the revised voucher program calls a voucher a “grant” and the Choice Scholarship program called a voucher a “scholarship,” there is in fact no

difference in substance between the two. The vouchers given out by the revised voucher program are virtually identical to the vouchers given out under the Choice Scholarship Program. Both the Choice Scholarship Program and the revised voucher program use state public school monies to pay private school tuition for voucher recipients. Id., ¶ 12.

h. The operative provisions of the revised voucher program related to the use of state public school monies to pay private school tuition for voucher students are substantially identical to those of the Choice Scholarship Program, namely:

- A student who is currently attending a Douglas County public school applies to and enrolls in a private school that has been approved as a “Private School Partner” under the voucher program. [Board File JCB and Board File JCB revised, paragraphs D2, D3, D6]
- The student then applies to receive monies for private school tuition under the voucher program. The primary criteria for acceptance into the voucher program are that the student (1) must be a Douglas County resident who has attended a District school for at least one year and (2) has been accepted into a Private School Partner. [Board File JCB and Board File JCB revised, paragraphs D1, D2, D5]
- When the student has been accepted into the voucher program and is enrolled in and attending a private school, the District will still purport to count the voucher student as being “enrolled” in a District public school for the purpose of receiving state public school funds under the Colorado Public School Finance Act. The District will include every voucher student in the “pupil enrollment” numbers that the District reports to the Colorado Department of Education for the purpose of calculating and receiving “per pupil revenue” (“PPR”) that is distributed by the Colorado Department of Education to school districts under the Colorado Public School Finance Act. The District plans on claiming and receiving PPR from state public school monies for each voucher student who is enrolled in a private school. [Board File JCB and Board File JCB revised, paragraphs C6b, D1]
- The District will then use the PPR that it believes it will receive for each voucher student who the District claims is “enrolled” in District public

schools to pay tuition to the private school where each voucher student is actually enrolled. (The original voucher program earmarked 75% of each voucher student's PPR to be handed over to a private school to pay private school tuition; the revised voucher program increases that amount to 85%.) [Board File JCB and Board File JCB revised, paragraph C6b]

- Voucher “payments are sent to the appropriate Private School Partner(s)” by the District and must be used “for the sole purpose of paying tuition at a Private School Partner.” [Board File JCB and Board File JCB revised, paragraphs C3, C4, D7c] The District will send the voucher tuition payment to the private school in the form of a check made out to the voucher student's parent; the voucher student's parent is contractually obligated to restrictively endorse the check over to the private school “for the sole purpose of paying tuition” at the private school. [Board File JCB and Board File JCB revised, paragraphs C4, D7c]
  - The amount of the voucher paid to a private school for each voucher student is the lesser of: 85% of the PPR that the District receives for that student, or the actual cost of tuition. [Board File JCB and Board File JCB revised, paragraphs C6] Id., ¶ 13.
- i. The only material differences between the original and the revised versions of the private school voucher program are that in the modified program:
- Religious schools cannot be Private School Partners;
  - The fictional Choice Scholarship School (a school which existed only on paper and only as a device to make it appear that voucher students were enrolled in a District public charter school) is eliminated; and
  - The percentage of PPR which will be given out as a voucher is increased from 75% to 85%. Id., ¶ 14.
- j. On March 22, 2016, the District began to contact private schools to solicit them to be Private School Partners in the revised voucher program. Id., ¶ 15.
- k. In April 2016, the District launched the revised voucher program on its website. The District website confirms that the revised voucher program is a “revised version of the Choice Scholarship Program.” Id., ¶ 16.

**The Operative Judicial Opinions and Appellate Mandates  
in this case Require Application of the Permanent Injunction  
to Halt Implementation and Funding of the March 16, 2016  
Private School Voucher Program**

15. The Permanent Injunction, the Supreme Court opinion affirming and reinstating it, and the appellate mandates in this case are clear and unambiguous. The opinion of the Colorado Supreme Court, its Mandate and the Mandate of the Court of Appeals, read together, confirm in simple and straightforward fashion that “the judgment of the trial court is affirmed” (Court of Appeals Mandate) and that “the trial court may reinstate its order permanently enjoining the CSP.” (351 P.3d 461, 475.) No tenable argument can be made that this Court’s Permanent Injunction has been reversed, vacated or overruled, by any Colorado appellate court.

16. These judicial rulings dictate two clear conclusions: (1) this Court’s opinion and Permanent Injunction of August 12, 2011, are affirmed and reinstated; and (2) the opinion and judgment of the Court of Appeals in this case was reversed and thus of no further force or effect.

17. Notably, the Supreme Court did not rule that only certain holdings of the Court of Appeals were reversed while others purportedly continue to be effective. The Court’s mandate simply and clearly directed that “the judgment of the Court of Appeals is REVERSED.” (capitalization in original).

18. By claiming to base their adoption, implementation, and funding of the March 2016 iteration of the voucher program on the contention that selected rulings of the Court of Appeals somehow survive the Supreme Court’s complete reversal, the Defendants exhibit flagrant disobedience of the Courts’ rulings adjudicating this case. See Barnard Affidavit, Exhibit A, ¶ 3. These issues are now res judicata; and for Defendants to resist them is to stand in contempt of this Court’s Permanent Injunction.

**Defendants Stand in Contempt of  
This Court's Permanent Injunction**

19. Rule 107, C.R.C.P., vests this Court with the authority to exercise contempt power to remedy circumstances in which a party engages in “disobedience or resistance” with respect to “any lawful writ, process or order of the court.” C.R.C.P. 107(a)(1).

20. The Defendants in this case have, without any material factual dispute, engaged in disobedience of and resistance to the Court's Permanent Injunction by adopting, implementing, and funding the March 16, 2016, iterative revision of a private school voucher program that has been adjudicated unlawful.

21. Specifically, for example, this court enjoined the original version of the Douglas County private school voucher program based on its finding that that program would have diverted monies from the “public school fund” established under Article IX, Section 3 of the Colorado Constitution and was therefore invalid. Permanent Injunction, pp. 60-63. The March 2016 iteration of the program also diverts monies from the “public school fund,” and Defendants' adoption, implementation, and funding of the revised program is likewise barred by the Permanent Injunction. Defendants cannot rely on the Court of Appeals' ruling that rejected the Article IX, Section 3 finding to save the current program because the Supreme Court reversed the Court of Appeals' judgment in its entirety.

22. The Defendants' resistance to the Permanent Injunction, however, goes beyond the roll-out and funding of another unlawful voucher program. In a regrettable display of tactical gamesmanship, counsel for the Intervenor Defendants in this case, the Institute for Justice, have filed a new case in the U.S. District Court for the District of Colorado on April 19, 2016 in which they purport to challenge the newest version of the voucher program promulgated by their own

co-defendants in this case. See Thomas, et al. v. Douglas County Board of Education and Douglas County School District, D. Colo. No. 1:16-cv-00876-MSK-CBS. See Watkins Affidavit, Exhibits 3 & 4 Complaint and Answer in Thomas.

23. This new federal case postures a false controversy that lacks any true adversity between the parties. The lawsuit is transparently intended to collaterally attack this Court's Permanent Injunction and to obtain the substantive result that the intervenors, the Board, and the District all want, without having to deal with the inconvenience of robust, unconflicted opposition. Specifically, the substantive position advanced by the plaintiffs in the new federal lawsuit is identical to the position taken in the present case by the Board and the District, the supposedly adverse defendants they have sued. Indeed, the Board and the District continue to maintain those same positions in their pending U.S. Supreme Court petition for certiorari. See Douglas County School District and Douglas County School Board's Petition for a Writ of Certiorari in the United States Supreme Court, attached to Watkins Affidavit as Exhibit 5, and Colorado State Board of Education and Colorado Department of Education's Petition for a Writ of Certiorari in the United States Supreme Court, attached to Watkins Affidavit as Exhibit 6.

24. The Board and the District are thus implementing a new version of their voucher program premised upon the exclusion of religious schools at the same time that they are advocating that such exclusion violates the First Amendment's "free exercise" clause in certiorari filings with the U.S. Supreme Court. See Watkins Affidavit, Exhibit 5, p. 32 ("[T]he Colorado Supreme Court's requirement that petitioner exclude religious schools from the Scholarship Program plainly violates the Free Exercise Clause."); Watkins Affidavit, Exhibit 6, pp. 14-28.

25. The collusive nature of this foray into federal court is patent. Had the Board and the District obeyed this Court's Permanent Injunction and refrained from pursuing a new private school voucher program, there would have been no opportunity to posture a false controversy for adjudication in a separate forum. And all of this is unfolding while the Defendants' Supreme Court certiorari petitions in this case have yet to be decided.

26. Taking into account the totality of these circumstances, Plaintiffs submit that Defendants have manifested "disobedience" and "resistance" to this Court's Permanent Injunction within the meaning of C.R.C.P. 107.

WHEREFORE, Plaintiffs respectfully move the Court for entry of an Order in the form attached, granting this Motion for Enforcement of August 12, 2011 Permanent Injunction Restraining Defendants' Resumed Funding and Implementation of an Unlawful School Voucher Program.

Respectfully submitted this 24th day of May, 2016.

FAEGRE BAKER DANIELS LLP

ARNOLD & PORTER LLP

By: s/ Michael S. McCarthy  
Michael S. McCarthy

By: s/ Matthew J. Douglas  
Matthew J. Douglas

*Attorneys for Plaintiffs  
Taxpayers for Public Education, et. al.*

*Attorneys for Plaintiffs LaRue, et. al.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of May, 2016, a true and correct copy of the foregoing PLAINTIFFS' MOTION FOR ENFORCEMENT OF AUGUST 12, 2011 PERMANENT INJUNCTION RESTRAINING DEFENDANTS' RESUMED FUNDING AND IMPLEMENTATION OF AN UNLAWFUL SCHOOL VOUCHER PROGRAM was electronically filed and served via ICCES on the following:

Matthew J. Douglas  
[Matthew.Douglas@aporter.com](mailto:Matthew.Douglas@aporter.com)  
Timothy R. Macdonald  
[Timothy.Macdonald@aporter.com](mailto:Timothy.Macdonald@aporter.com)  
Michelle K. Albert  
[Michelle.Albert@aporter.com](mailto:Michelle.Albert@aporter.com)  
Arnold & Porter LLP  
370 17<sup>th</sup> Street, Suite 4500  
Denver, CO 8020

George Langendorf  
[George.Langendorf@aporter.com](mailto:George.Langendorf@aporter.com)  
Arnold & Porter LLP  
One Embarcadero Center, 22nd Floor  
San Francisco, CA 94111-3711  
**Attorneys for LaRue Plaintiffs**

Antony B. Dyl  
[tony.dyl@state.co.us](mailto:tony.dyl@state.co.us)  
Michelle Merz-Hutchinson  
[michelle.merz-hutchinson@state.co.us](mailto:michelle.merz-hutchinson@state.co.us)  
Office of the Colorado Attorney General  
1525 Sherman Street, 7th Floor  
Denver, CO 80203  
**Attorneys for Defendants Colorado  
Department of Education and Colorado  
State Board of Education**

James M. Lyons  
[jlyons@rothgerber.com](mailto:jlyons@rothgerber.com)  
Eric V. Hall  
[ehall@rothgerber.com](mailto:ehall@rothgerber.com)  
Lewis Roca Rothgerber Christie LLP  
One Tabor Center, Suite 3000  
1200 Seventeenth Street  
Denver, Colorado 80202  
**Attorneys for Defendant Douglas County  
Board of Education and Douglas County  
School District RE-1**

William H. Mellor  
[wmellor@ij.org](mailto:wmellor@ij.org)  
Richard D. Komer  
[rkomer@ij.org](mailto:rkomer@ij.org)  
Institute for Justice  
901 N. Glebe Road, Suite 900  
Arlington, VA 22203

Michael E. Bindas  
Institute for Justice  
10500 NE 8<sup>th</sup> Street, Suite 1760  
Bellevue, WA 98004  
[Mbindas@ij.org](mailto:Mbindas@ij.org)  
**Attorneys for Intervenors**

/s/Stephanie Rzepa  
Stephanie Rzepa