

DISTRICT COURT, COUNTY OF DENVER,  
COLORADO

Court Address: 1437 Bannock Street  
Denver, Colorado 80202

**Plaintiffs:**

TAXPAYERS FOR PUBLIC EDUCATION, et al.

v.

**Defendants:**

DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et  
al.

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Case Number: 2011CV4427

Div.: 259

**MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiffs Taxpayers for Public Education and Cindra S. Barnard, individually and on behalf of Mason S. Barnard, a minor child, hereby move for a preliminary injunction pursuant to Rule 65(a) of the Colorado Rules of Civil Procedure against Defendants Douglas County School District RE-1 (“Douglas County School District”), the Board of Education of the Douglas County School District (“Douglas County School Board”), the Colorado Department of Education, and the Colorado State Board of Education (collectively, the “Defendants”).

### **INTRODUCTION**

Plaintiffs move to stop an imminent and irrevocable violation of their fundamental constitutional rights. On March 15, 2011, the Douglas County School Board adopted the Pilot Choice Scholarship Program (“Voucher Program”) in violation of the Colorado Constitution and numerous statutory provisions. (Ver. Compl ¶ 1.) If implemented, the Voucher Program will allow for 500 Douglas County School District students to attend private schools—most of which are religious—at the taxpayers’ expense. See Board Policy JCB, attached as Ex. A. If the Voucher Program is not stopped, the Douglas County School District will funnel over \$3,000,000 in public funds it receives from the Colorado Department of Education to private schools in direct violation of Article IX, Sections 3, 5, 7, 9, 10, and 15 of the Colorado Constitution; Article V, Section 34 of the Colorado Constitution; and the Public School Finance Act of 1994, C.R.S. § 22-54-101, et seq. (“Public School Finance Act” or “the Act”).

Plaintiffs, some of whom pay taxes or are enrolled in the Douglas County School District, will suffer irrevocable injury from the Douglas County School District and its Board’s misuse of public funds. (Ver. Compl. ¶¶ 3-4.) Plaintiffs seek a preliminary injunction prohibiting Defendants from taking any further actions to implement the Voucher Program.

## FACTUAL BACKGROUND

### A. Public School Funding

In Colorado, public schools are funded through a dual taxation system that combines local and State revenue. The local share is funded primarily from local property taxes and specific ownership taxes, while the State share is funded from 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. See C.R.S. § 22-54-106. The Public School Finance Act is the legislative means by which Colorado public schools are funded, and the Act seeks to satisfy the mandate in Article IX, Section 2 of the Colorado Constitution, which requires the State to establish and maintain “a thorough and uniform system of *public* schools throughout the state.” C.R.S. § 22-54-102(1); Colo. Const. Art. IX, Sec. 2 (emphasis added).

A school district’s “total program funding” under the Act is essentially determined by its pupil enrollment multiplied by its “per pupil funding.” C.R.S. § 22-54-104(1). Pupil enrollment is generally defined as “the number of pupils enrolled in the school district on October 1 within the applicable budget year, as evidenced by the actual enrollment of such pupils prior to said date.” C.R.S. § 22-54-103(10)(a)(I). Thus, 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.

Under the Public School Finance Act, the Colorado Department of Education distributes both State and local funds to school districts. See C.R.S. § 22-54-106(1)(a) and (b). For the

2011-2012 school year, the Douglas County School District estimates that the local share of these funds will account for 33.14% of the per pupil funding for the District, while State sources will account for the remaining 66.86%. See DCSD Budget Estimate, attached as Ex. B. The Douglas County School District estimates that the per pupil revenue from the State for its District for the 2011-2012 school year will be approximately \$6,100.00. (Ver. Compl. ¶¶ 25-26.)

Included in the State share of funds disbursed by the Colorado Department of Education to the Douglas County School District under the Public School Finance Act will be monies distributed from the “public school fund,” which, among other things, consists of the proceeds of the public school lands. Colo. Const. Art. IX, §17(2)(a); C.R.S. §22-41-101(2); (Ver. Compl. ¶¶ 90-94.) Under the Colorado Constitution, the “public school fund” shall only be “expended in the maintenance of the schools of the state.” Colo. Const Art IX, Sec. 3. Income held in the public school fund is transferred “periodically” to the “state public school fund” together with moneys appropriated by the general assembly from the general fund to meet the state’s share of the total program funding of all school districts under the Public School Finance Act. C.R.S. § 22-54-114(1). The Douglas County School District will receive funds from the public school fund as part of its per pupil funding from the State under the Public School Finance Act, so the expenditure of these funds to pay for private school tuition under the Voucher Program violates the Colorado Constitution.

#### **B. The Voucher Program**

In December 2010, members of the Douglas County School District’s Choice Task Force presented plans for the Voucher Program to the Colorado State Board of Education. See DCSD Fiscal Oversight Committee Minutes, Feb. 10, 2011, attached as Ex. C. On March 15, 2011, the

Douglas County School Board officially adopted the Voucher Program. See Board Policy JCB. Under the Voucher Program, the Douglas County School District will offer up to 500 “scholarships” to students to use as full or partial payment of tuition at certain designated private schools. Id. “Scholarship” applications will be accepted through June 21, 2011, and there are currently 495 students enrolled in the Voucher Program.

The Douglas County School District states that it will use the per pupil revenue from the State to fund the Voucher Program, and that it will count students attending private schools among its enrolled students. Id. For the 2011-2012 school year, the District will provide a “scholarship” to each “scholarship student” in an amount equal to 75% of the per pupil revenue received from the State, or the actual cost of the student’s private school tuition, whichever is less. See DCSD Executive Summary, attached as Ex. D. The parent or guardian will be responsible for any additional fees assessed by the private partner school. Id. The District will retain the remaining 25% of the per pupil revenue it receives from the State.

In order to make it appear as if the “scholarship students” are enrolled in the District and eligible to be included in the funded pupil count for the purpose of receiving per pupil revenue from the State, the Douglas County School District has created a purported charter school called the “Choice Scholarship School” in which the voucher students will be “enrolled” for the purposes of funding and testing. See Choice Scholarship School Application, attached as Ex. E; see also Agreement between CSS and DCSD, attached as Ex. F. The Douglas County School District plans to count students attending private schools in its per pupil count by claiming the students are enrolled in a charter school that has no physical location, curriculum, or educational

program. This misrepresentation by the District defrauds the State of Colorado and violates both the Colorado Constitution and the Public School Finance Act.

Students enrolled in the Choice Scholarship School will not attend or be instructed in the Douglas County public schools, and the charter school's "educational program will be carried out through the Private School Partners, with the Private School Partners implementing their own methods." Id. at 5. The District admits that the "Choice Scholarship School is created solely to serve the students participating in the [Voucher Program]" and that "[t]his is a unique arrangement unlike the usual relationship between a Charter organizer and authorizing District." Id. at 7. In short, the "unique arrangement" between the Choice Scholarship School and the Douglas County School District is a pretextual attempt to hide the fact that students participating in the Voucher Program will not be attending school in the District, even though the District receives funding for these students and improperly counts them among its enrolled students.

The Douglas County School Board is ceding total control over the "educational program" of scholarship students participating in the Voucher Program to the private schools. Id. at 5-6. The District has approved and contracted with nineteen private schools to participate in the Voucher Program, and the District refers to these private schools as "partner schools." (Ver. Compl. ¶ 36). Parents and guardians of "scholarship students" must choose from among these nineteen "partner schools." Fourteen of these "partner schools" are religious or sectarian, and of the five remaining schools, one admits only gifted students and another is for special needs students. Moreover, several of the schools are located outside the boundaries of the Douglas County School District. Id.

The private partner schools are subject to certain “Conditions of Eligibility” to participate in the Voucher Program that are set forth in separate contracts between the Douglas County School District and each of the private partner schools. See Board Policy JCB, 5-9. The “Conditions of Eligibility” do not restrict the admission criteria used by the private partner schools, dictate how private schools must use public funds, or exert any meaningful local control over instruction. Id. Accordingly, the private partner schools are free to use public funds for sectarian purposes, such as religious instruction, worship services, salaries or stipends of clergy or members of religious orders, purchase of Bibles and other religious literature, and construction of chapels and other facilities used for worship and prayer. See FAQ: Potential Partner Schools, attached as Ex. G.

While the Douglas County School District plans to funnel millions of dollars of State and local funds to these private schools, the District will retain no control over the instructional programs of the partner schools. Id.; see also Choice Scholarship School Application at 5. Partner schools 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. Id. Moreover, teachers employed by the private schools participating in the Voucher Program are not required to hold current CDE Teachers Licenses with appropriate endorsements and experience for the courses that they teach. Id.

Plaintiffs will suffer immediate and irreparable injury if the Colorado Department of Education distributes funds under the Public School Finance Act to the Douglas County School

District for use in its Voucher Program. Plaintiffs will also be irreparably injured when the Douglas County School District distributes these public funds to private and sectarian schools. Specifically, Plaintiffs will suffer injury to their rights under Article IX, Sections 2, 3, and 15 of the Colorado Constitution when the District abdicates local control over instruction to private schools, transfers protected funds from the public school fund to private schools, and disrupts the “thorough and uniform” funding of education in Colorado. Once public funds are transferred to private, predominantly religious schools, in violation of the Colorado Constitution and statutes, the harm occurs. Plaintiffs have no adequate remedy at law to prevent the violation of their constitutional and statutory rights caused by the Voucher Program, so this Court should enter a preliminary injunction to halt the funding and implementation of that program.

### **ARGUMENT**

#### **I. Plaintiffs are Entitled to a Preliminary Injunction.**

##### **A. Legal Standard for Preliminary Injunction.**

Under Colorado law, to establish entitlement to preliminary injunctive relief, the moving party must demonstrate: (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, 648 P.2d at 653-54; see also Atmel Corp. v. Vitesse Semiconductor Corp., 30 P.3d 789, 792 (Colo. App. 2003); Home Shopping Club, Inc. v. Roberts Broad. of Denver, 961 P.2d 558, 560 (Colo. App. 1998). Plaintiffs satisfy all of these elements.



In this case, Plaintiffs have met their burden of showing that injunctive relief is necessary to protect existing fundamental constitutional rights, specifically their fundamental rights under Article IX of the Colorado Constitution. A preliminary injunction is especially appropriate to ensure that the education of students enrolled in the Douglas County School District will not be disrupted if the Voucher Program is enjoined after a trial on the merits. Not only will the education of students participating in the Voucher Program be disrupted, but the education of Plaintiff Mason S. Barnard and other students enrolled in the public schools will also be disrupted if the District is forced to absorb five-hundred students from the enjoined Voucher Program mid-semester.

**B. There Is A Reasonable Probability That Plaintiffs Will Succeed on the Merits of Their Claims.**

Plaintiffs have a reasonable probability of success on the merits of their claims seeking protection of their constitutional rights. Specifically, Plaintiffs will likely succeed on their claims for a declaratory judgment that the Voucher Program violates: (1) the “local control” provision of Article IX, Section 15 of the Colorado Constitution; (2) the restrictions on the spending of monies from the “public school fund” contained in Article IX, Section 3 of the Colorado Constitution; and (3) the “thorough and uniform” clause of Article IX, Section 2 of the Colorado Constitution.

1. Plaintiffs have a reasonable probability of success on their claim that the Voucher Program violates the “local control” provision of Article IX, Section 15 of the Colorado Constitution.

The “local control” provision contained in Article IX, Section 15 of the Colorado Constitution requires that local school boards “shall have control of instruction in the public schools of their respective districts.” Colo. Const. art IX, sec. 15. This provision confers on local

School Districts and School Boards the “responsibility for the instruction of their students.” Owens v. Colo. Cong. of Parents, 92 P.3d 933, 938 (Colo. 2004) (emphasis added). Under the Voucher Program, the Douglas County School District will violate the local control provision by abdicating control over the instruction of participating students and sending locally raised funds and State funds outside the District.

A. The Douglas County School District and its Board violate the local control provision by abdicating their responsibility for instruction under Article IX, Section 15 of the Colorado Constitution.

The District exercises no control over the curricula and educational goals of private schools participating in the Voucher Program, and the private schools have total control over the “educational program” of participating students. See Choice Scholarship School Application at 5. In fact, the Douglas County School District has informed participating private schools that it wants “no control” over the private schools’ operation and educational goals. In a letter dated April 15, 2011, from Robert Bignell, Superintendent of Cherry Hills Christian School to Dr. Christian Cutter, assistant superintendent of the Douglas County School District, Mr. Bignell recounted an interview between the two regarding the Voucher Program. Mr. Bignell stated, “[m]y summary of our two-hour interview is that the district wants *no control* over Cherry Hills Christian or any other partner school.” (emphasis added). Bignell Letter, attached as Ex. H.

Private schools will have control over curricula and instruction for “scholarship students,” and the instruction offered will be fundamentally different from that occurring under the control and directives of the Douglas County School District and its Board. The Douglas County School District and its Board expressly warn students that they “will not create specialized programs in Private School Partners.” See Student Application to Choice

Scholarship Program, attached as Ex. I, also available at [http://www.dcsdk12.org/portal/page/portal/DCSD/District\\_Information/School\\_Choice/Option\\_Certificates/Scholarship\\_Application](http://www.dcsdk12.org/portal/page/portal/DCSD/District_Information/School_Choice/Option_Certificates/Scholarship_Application) (last visited July 5, 2011). Thus, private schools are not obliged to offer any specific educational program or courses, but have the unrestricted ability to devote significant class time to religious or sectarian ends.

The curricula of participant schools diverge dramatically from the curricula controlled by the Douglas County School Board. For example, Lutheran High School, which is participating in the Voucher Program, has a curriculum that seeks to help students “develo[p] with Jesus Christ.” See Lutheran High School, Prospective Students, attached as Ex. J, also available at <http://www.lhsparker.org/caseforchristianedu.html> (last visited July 5, 2011). Another participating school, Cherry Hills Christian Elementary School, has a “Positive Action for Christ Bible Curriculum” that emphasizes “Scripture Memorization,” “New Testament Study,” “Old Testament History” and the “Lives of the Patriarchs.” See Cherry Hills Curriculum, attached as Ex. K, also available at [points/data /chc/ databases/chc\\_01\\_01/widgets/ forms /00/ 00/00/23/ form doc/original.pdf](points/data/chc/databases/chc_01_01/widgets/forms/00/00/00/23/form doc/original.pdf) (last visited July 5, 2011). Similarly, the Hillel Academy’s curriculum contains Judaic Studies, which is taught by experienced rabbis. See Hillel Curriculum, attached as Ex. L, also available at <http://www.hillelacademy ofdenver.com/judaicStudies.html> (last visited July 5, 2011). In recognition of the vastly different curricula at participating private schools, the District tries to ensure that credits earned at private schools will transfer back into the District, but even the District does not guarantee students complete credit for each hour of coursework completed at the private schools. See Private Partner Participation Agreement, § J(5), attached as Ex. M.

Under the Voucher Program, the Douglas County School District and its Board will also abdicate total control over student-teacher ratios, teacher qualifications, and admission policies. Unlike public school teachers, who generally must have at least 24 semester hours in their area of expertise and hold a current CDE Teachers License before employment, teachers at private partner schools are not subject to state licensing requirement. See Open Position Application, attached as Ex. N, also available at [https://appsadp.dcsdk12.org/apex/f?p=119:4:290\\_0882498463850::NO::P4\\_POSTING\\_ID,P4\\_LOCATION\\_TYPE:38269](https://appsadp.dcsdk12.org/apex/f?p=119:4:290_0882498463850::NO::P4_POSTING_ID,P4_LOCATION_TYPE:38269) (last visited July 5, 2011). Teachers at private schools, however, are subject to radically different requirements, and some schools require an attestation of faith.

For example, Valor Christian High School, which currently has accepted the highest number of students under the Voucher Program, prides itself on the fact that “100% of our team are committed followers of Jesus Christ.” See Voucher Update, attached as Ex. O; see also Valor Culture Document, 18, attached as Ex. P. Similarly, private partner schools also have total control over which students are admitted, and they are free to apply any of their own admission criteria, such as criteria that evaluate students on the basis of their church membership. See FAQ: Potential Partner Schools.

Thus, the Douglas County School District and its Board have abdicated local control over the instruction of students enrolled in the Voucher Program. By failing to exercise its constitutional responsibility for the instruction of its students, the Douglas County School Board violates Article IX, Section 15 of the Colorado Constitution, and Plaintiffs suffer a loss of local control over the education they fund.

B. The Douglas County School District and its Board violate the local control provision by not controlling the instruction purchased with locally raised funds.

The Douglas County School District and its Board also violate the “local control provision” by ceding control over locally raised funds to private schools. The District concedes that it will provide approximately \$4,575 for each student enrolled in a private school, and that these funds will be turned over to the private school. See School Application 2. According to the Douglas County School District’s own analysis, State funds account for 66.86% of per pupil funding, which totals approximately \$6,100. Id. Thus, in 2011-12, State funds will provide approximately \$4,078.46 in funding, while the local share will account for the remaining \$2,021.54. As a result, when a private school receives a voucher check for \$4,575, they will obtain control over approximately \$496.54 in local funds for each student.

Local control over educational instruction is a hallmark of the Colorado Constitution. Owens, 92 P.3d at 935 (citing Lujan v. Colo. State Bd. of Educ. 649 P.2d 1005 (Colo. 1982)). By requiring school districts to fulfill their responsibility to control instruction paid for with local funds, the Colorado Constitution seeks to maintain the “democratic framework created by our state constitution.” Owens, 92 P.3d at 935. As the Colorado Supreme Court noted in Owens, the local control provision is violated when local school districts “turn over a portion of their locally-raised funds to nonpublic schools over whose instruction the districts have no control.” Id. at 936. This is exactly the case here, as the Douglas County School District will relinquish total control over instruction, and almost \$250,000 of local funds, to implement the Voucher Program.

By abdicating local control over instruction, failing to fulfill its responsibility for the instruction of its students, and transferring local funds to private schools, the Douglas County

School District and its Board will commit a flagrant violation of Article IX, Section 15 of the Colorado Constitution. Thus, Plaintiffs have a reasonable likelihood of success on this claim and a preliminary injunction should be granted.

2. Plaintiffs have a reasonable probability of success on their claim that the Voucher Program violates the restrictions on the spending of monies from the “public school fund” contained in Article IX, Section 3 of the Colorado Constitution.

Article IX, Section 3 of the Colorado Constitution, states, in relevant part, “[t]he public school fund of the state shall, except as provided in this article IX, forever remain inviolate and intact and the interest and other income thereon, only, shall be expended in the maintenance of the schools of the state.” Colo. Const, Art. IX, sec. 3 (emphasis added). This section of the Colorado Constitution is unequivocal that funds from the public school fund will only be expended on the “schools of the state” which are defined later in the section as “public schools.” See id. Funds disbursed by the Colorado Department of Education to the Douglas County School District will contain monies derived from the “public school fund,” which, among other things, consists of the proceeds of the public school lands. Colo. Const. Art. IX, §17(2)(a); C.R.S. §22-41-101(2). By funneling monies from the public school fund to private schools—rather than “schools of the state”—the Defendants violate Article IX, Section 3 of the Colorado Constitution and cause irreparable harm to all Coloradoans.

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.

State statutes also create a “public school fund” in the State Treasurer’s office which, among other things, consists of the proceeds of the public school lands. Colo. Const. Art. IX, §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 moneys appropriated by the general assembly from the general fund to meet the state’s share of the total program funding of all school districts under the Public School Finance Act. C.R.S. §22-54-114(1). Thus, monies from the public school fund are distributed to local school districts as part of their funding under the Public School Finance Act.

The Douglas County School District will receive funds from the public school fund as part of its per pupil funding from the State under the Public School Finance Act. (Ver. Compl. ¶¶ 90-94.) By improperly counting students participating in the Voucher Program as enrolled in the District, the District will necessarily distribute monies from the public school fund included in its per pupil funding to private partner schools. Such a disbursement to private and sectarian schools would constitute a direct violation of Article IX, Section 3 of the Colorado Constitution which only allows for public school funds to be “expended in the maintenance of the schools of

the state.” Colo. Const. Art. IX, Sec. 3 (emphasis added). The Colorado Supreme Court has 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” Craig v. People, 299 P. 1064, 1067 (Colo. 1931).

The Douglas County School District and its Board acknowledge that funds they receive from the State, including necessarily revenue from the public school fund, will be distributed to the private schools under the Voucher Program. Private schools are not public “schools of the state,” so any disbursements of monies from the public school fund to private schools violates Article IX, Section 3 of the Colorado Constitution. As a result, Plaintiffs have a reasonable probability of success on the merits of their claim that the Voucher Program violates Article IX, Section 3 of the Colorado Constitution, and their motion for a preliminary injunction should be granted.

3. Plaintiffs have a reasonable probability of success on their claim that the Voucher Program violates the “thorough and uniform” clause of Article IX, Section 2 of the Colorado Constitution.

Article IX, Section 2 of the Colorado Constitution, which is entitled “Establishment and Maintenance of Public Schools,” requires the general assembly to “provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state.” Colo. Const. Art IX, Sec. 2. Pursuant to the authority and directives of Article IX, Section 2 of the Colorado Constitution, the Colorado General Assembly enacted the “Public School Finance Act of 1994,” C.R.S. § 22-54-101, et seq. The legislative purpose of the Public School Finance Act is to further “the general assembly’s duty under section 2 of article IX of the state



constitution to provide for a thorough and uniform system of public schools throughout the state.” C.R.S. § 22-54-102.

The Voucher Program violates the “thorough and uniform” clause for two reasons. First, the Voucher Program contradicts the plain language of the “thorough and uniform” clause, and judicial interpretation of this clause under Lujan v. Colo. State Bd. of Educ. 649 P.2d at 1017. Second, the Voucher Program undermines and upsets the Public School Finance Act’s delicate funding balance, which seeks relatively “uniform” funding of education across the state. By adopting the Voucher Program, and retaining 25% of the public funds it receives under the Act for pupils not attending school in the District, the Douglas County School District enriches itself and siphons public funds away from less prosperous school districts. In short, students enrolled in the Voucher Program will not be enrolled in, in attendance at, or instructed by the Douglas County School District, so the District is not entitled to any funding under the Public School Finance Act for these students.

A. The “Thorough and Uniform” clause does not allow for the funding of private schools with public funds.

The Voucher Program violates the plain language of the “thorough and uniform” clause and runs wholly contrary to the framers’ intent. The “thorough and uniform” clause is concerned only with “free public schools” of the state, and state funding is directed only toward these *free public* schools. See, e.g. Lujan, 649 P.2d at 1011. As the Colorado Court of Appeals has noted, “a free public school, within the contemplation of the constitution, is one to which any resident of the state, between the ages of six and twenty-one years, shall be admitted, and there be educated gratuitously, that is to say, at public expense, or from the public funds provided for that purpose. Adams County Sch. Dist. No. 16 v. Union High Sch., 25 Colo. App. 510 (Colo. App.

1914) rev'd on other grounds, 152 P. 1149 (1915).

In this case, the Douglas County School District takes funds raised and distributed under the directive of the “thorough and uniform” clause and pays them to private schools. Private schools participating in the Voucher Program are not schools which residents may attend “gratuitously...at public expense.” Id. In fact, even those participating in the Voucher Program are required to pay additional tuition, as tuition at most participating private schools vastly exceeds the \$4,575 Voucher provided by the Douglas County School District. For example, tuition at for the 2011-2012 school year at Valor Christian High School is \$13,350; at Regis Jesuit High School tuition is \$11,225. See Valor Fact Book, 5, attached as Ex. Q; see also Regis Tuition Payment Agreement, attached as Ex. R.

The Voucher Program is a misuse of public funds distributed to Douglas County in furtherance of the “thorough and uniform” clause, as the program benefits affluent students at the expense of other Coloradoans. Specifically, public funds used in the Voucher Program are not used to fund schools that students can attend “gratuitously at the public expense,” but rather subsidize expensive sectarian institutions. Adams County, 25 Colo. App. 510. Only students whose parents can afford to pay thousands of dollars in additional tuition at private schools can avail themselves of the program. As such, this program undermines the egalitarian imperative contained in Article XI, Section 2’s requirement for a “uniform system of free public schools.” Although Douglas County calls its Voucher Program the “Choice Scholarship Program,” only students who have thousands of dollars in additional tuition can “choose” to participate.

Likewise, the thorough and uniform clause, as evidenced and furthered under Colorado statutes, clearly prohibits the transfer of public funds to private schools. Colorado vigorously

controls and limits the circumstances under which a school district may pay for educational services for pupils in the district to attend private schools. For example, under CRS § 22-32-110, a district may pay for educational services for pupils to “attend nonpublic schools,” only if school is paid for “out of federal grants made available specifically for this purpose.” CRS § 22-32-110(1)(cc)(emphasis added). Because Colorado law limits school district expenditures to private schools only to federal funds, the Douglas County School District cannot transfer funds it receives under the Public School Finance Act to private schools.

For the forgoing reasons, the Voucher Program undermines and violates the thorough and uniform provision in Article IX, Section 2 of the Colorado Constitution.

B. The Voucher Program violates the “Thorough and Uniform” clause by disrupting the equalizing effects of the Public School Finance Act.

The Public School Finance Act states that a “thorough and uniform system of education requires that all school districts...operate under the same finance formula.” Id. (emphasis added). One principal purpose of the Act is to equalize the ability to raise educational resources between districts without a high tax base and more affluent districts. C.R.S. § 22-54-102. By equalizing relative funding across the State, the Act seeks to eliminate spending disparities between districts. While the Act does not require numerical equality or uniformity of funding across districts, as poorer districts will necessarily receive a greater share of State funds, it does seek to equalize educational opportunities across districts by factoring in the needs and means of each district. See Boulder Valley Sch. Dist. Re-2 v. Colo. State Bd. of Educ., 217 P.3d 918, 928 (Colo. App. 2009).

The Public School Finance Act establishes a finance formula that applies to “all school districts” in the State. C.R.S. § 22-54-102(1). The Act directs that the statutory 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 so calculated “shall be available to the district to fund the costs of providing *public* education.” C.R.S. § 22-54-104(1)(b)(emphasis added). A school district’s funding under the Public School Finance Act is determined by multiplying the district’s per pupil funding amount by the district’s funded pupil count, and adjusting by specific statutory factors. Thus, a school district’s funding under the Act depends, to a large extent, 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 CRS §§ 22-54-103(7)(e) and (10)(a)(1); 1 CCR § 301-391:2254-R-3.01.

By improperly counting students who attend private schools under the Voucher Program as enrolled in the Douglas County School District, the District and its Board seek to enrich Douglas County at the expense of poorer school districts across Colorado. It is no secret that funding for education has been reduced due to the ongoing economic crisis, and the Douglas County School District saw a “total budget reduction of about \$26 million” between the 2009-2010 and 2010-2011 school years. Dep. of Bonnie Betz, from Lobato v. State of Colo., No. 2005CV4794 at 17:5-6, attached as Ex. S. The Douglas County School District intends to receive additional, unlawful revenue under the Voucher Program by retaining 25% of the public funding it receives under the Public School Finance Act for those students attending private schools—students it does not instruct, transport, or budget for. See DCSD Executive Summary.

Because the “scholarship students” will not be enrolled in, in attendance at, or instructed by the Douglas County School District, the District is not entitled to any funding under the Public School Finance Act for these students. In short, the Douglas County School District

unlawfully enriches itself by claiming funds distributed under the “thorough and uniform” clause for students not in attendance in the District. Plaintiffs—and all Coloradoans—will suffer irreparable and immediate injury when the Colorado Department of Education distributes funds to the District for students participating in the Voucher Program.

Thus, Plaintiffs have a reasonable probability of success on the merits for their claim that the Voucher Program violates Article IX, Section 2 of the Colorado Constitution, and their motion for a preliminary injunction should be granted.

**C. Injunctive Relief Is Necessary to Prevent Real, Immediate and Irreparable Injury, and There Is No Adequate Remedy at Law.**

Plaintiffs seek to protect their fundamental constitutional rights under Article IX of the Colorado Constitution, so they necessarily face irreparable injury to which there is no adequate remedy at law. Under Colorado law, “any denial of fundamental constitutional rights would be real, immediate, and irreparable.” Evans v. Romer, 1993 WL 19678, No. 92 CV 7223, at \* 8 (Colo. Dist. Ct. Jan. 15, 1993). Moreover, a presumption of irreparable injury exists where constitutional rights are infringed.” Kneen v. Corr. Corp. of Am., No. 10-cv-01284, 2010 WL 5230912, at \*4 (D. Colo. Nov. 23, 2010) (citing Kikumura v. Hurley, 242 F.3d 950, 963 (10th Cir. 2001)). Courts “may assume that a constitutional injury is irreparable in the sense that it cannot be adequately redressed by post-trial relief.” Pinson v. Pacheco, 397 Fed. Appx. 488, 491-492 (10th Cir. 2010); see also Fortner v. Cousar, 992 P.2d 697, 700 (Colo. App. 1999) (no monetary damages can redress the violation of a plaintiff’s constitutional rights).

Plaintiffs’ injury is also imminent. Within a few weeks, sometime in July 2011, the Colorado Department of Education apparently intends to make its first distribution of funds for the 2011-2012 school year to the Douglas County School District. Shortly thereafter, the

Douglas County School District intends to transfer these public funds to private schools. With the transfer of public funds to private schools, the Douglas County School District and its Board will abdicate control over all instruction purchased with these funds and enrich religious and sectarian institutions in violation of the Colorado Constitution. Once public funds are transferred to private schools, the harm occurs. As Colorado taxpayers, and as residents and taxpayers within Douglas County and the Douglas County School District, Taxpayers for Public Education, Ms. Barnard, as well as her minor child, will suffer injury because of the loss of local control over the education they are required to fund.

Plaintiffs have shown that the Voucher Program poses an immediate and irreparable injury to their constitutional rights for which there is no adequate remedy at law; thus, this Court should enter a preliminary injunction to avoid constitutional violations pending a trial on the merits.

**D. The Granting of the Preliminary Injunction Will Not Disserve the Public Interest.**

The granting of a preliminary injunction will not disserve the public interest, and will further Colorado's long history of promoting public education. Even at the time when Colorado entered the union, "public education was an important and prominent concern." Lobato v. State of Colorado, 218 P.3d 358, 368 (Colo. 2009). The Colorado Supreme Court has also recognized the "importance of public education to our social well-being." deKoevend v. Board of Educ. of West End School Dist. RE-2, 688 P.2d 219 (Colo. 1984).

Plaintiffs seek to preserve public education in Colorado by protecting local control over instruction, the "inviolable" public school fund, and the "through and uniform" distribution of resources. See Colo Const., Art. IX, Sections 2,3,9. A preliminary injunction will avoid any

