DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, Colorado 80202	DATE FILED: August 3, 2016 9:39 AM CASE NUMBER: 2011CV4424
Plaintiffs: TAXPAYERS FOR PUBLIC EDUCATION; et al. vs. **Defendants:** DOUGLAS COUNTY SCHOOL DISTRICT RE-1, et al. and **Plaintiffs:** JAMES LaRUE, et al. vs. **Defendant:** COLORADO BOARD OF EDUCATION; et al.	▲ COURT USE ONLY ▲ Case No: 2011CV4424 Courtroom: 259
ORDER GRANTING MOTION FOR ENFORCEMENT OF AUGUST 12, 2011 PERMANENT INJUNCTION	

THIS MATTER is before the Court on the Motion for Enforcement of this Court's August 12, 2011 Permanent Injunction Restraining Defendants' Resumed Funding and Implementation of an Unlawful School Voucher Program (the "Motion") filed by Plaintiff Taxpayers for Public Education, et al. ("Plaintiff"). The Court has reviewed the Motion and all pertinent pleadings and authority and, being otherwise fully advised in the premises, finds and orders as follows:

FACTS

The procedural posture of this case is extensive, and this Court finds it unnecessary for purposes of this Order to recount every activity in detail. Accordingly, as relevant here:

1. On June 29, 2015, the Colorado Supreme Court reversed the judgment of the Colorado Court of Appeals and remanded the case to that court with instructions to return the case to this Court so that this Court could reinstate its permanent injunction order.

2. Correspondingly, on August 6, 2015, the Colorado Court of Appeals affirmed the judgment of this Court and returned the case to this Court for further proceedings consistent with the opinion of the Colorado Supreme Court.
3. On May 24, 2016, Plaintiffs filed the instant Motion with this Court. While Plaintiffs' Motion acknowledges that the enjoined program was altered so as to exclude religious schools, it argues that the program largely remains in effect, albeit under a different name, because the program continues to partner with private schools.
4. Defendants and Intervenors filed responses on June 14 and 15, 2016. Generally, their responses argue that because the Colorado Supreme Court's opinion focused on one constitutional issue, article IX, section 7 of the Colorado Constitution, which concerns private elementary and secondary schools controlled by churches and religious organizations, this Court's permanent injunction extends only to that sole issue, and thus the altered program is permissible under the June 29, 2015 Colorado Supreme Court opinion.
5. Plaintiffs filed a reply in support of their Motion on June 21, 2016.
6. The Court notes that following the recusal of the Hon. Catherine A. Lemon at the outset of this case, the Hon. Michael A. Martinez was the presiding judicial officer throughout these proceedings. After the June 2015 decision of the Colorado Supreme Court, this action was remanded to Courtroom 209 (the Hon. Morris B. Hoffman, presiding). Due to the rotation of Judge Hoffman out of Courtroom 209, and the rotation of the newly-appointed Hon. Jay S. Grant into Courtroom 209, Plaintiffs filed a motion seeking an order from Judge Martinez, in his capacity as Chief Judge, reassigning this case to himself in Courtroom 259. The motion for reassignment was granted on June 24, 2016.

LEGAL STANDARD

"When an appellate court remands a case with specific directions to enter a particular judgment or to pursue a prescribed course, a trial court has no discretion except to comply with the instructions." *People In Interest of M.D.*, 338 P.3d 1120,1123 (Colo. App. 2014). Thus, per the "mandate rule," an inferior court has no power or authority to deviate from the mandate issued by an appellate court. *People v. Wise*, 348 P.3d 482, 485 (Colo. App. 2014) (*citing Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948)). A trial court in the state of Colorado, such as this

district court, is therefore bound by the determinations made by the Colorado Court of Appeals, which is in turn bound by the determinations made by the Colorado Supreme Court.

Furthermore, "[e]very court has power… [t]o compel obedience to its lawful judgments, orders, and process…" C.R.S.A. 13-1-114(c). This means that a court has "inherent authority and jurisdiction to make such orders as are necessary to give effect to or enforce its prior decrees," but it does not give the court the power to "modify or correct an erroneous judgment after the time for review has passed." *Mulei v. Jet Courier Service, Inc.*, 860 P.2d 569, 571 (Colo. App. 1993) (*citing City of Englewood v. Reffel*, 522 P.2d 1241, 1243 (Colo. App. 1974)).

DISCUSSION

In relevant part, this Court's 2011 order enjoined Douglas County School District from maintaining the Choice Scholarship Program (the "CSP") because it was found to violate five provisions of the Colorado Constitution: Article II, section 4; Article V, section 34; Article IX, section 3; Article IX, section 7; and Article IX, section 8. While the Colorado Court of Appeals invalidated the injunction in finding that the CSP did not violate any of those five provisions, the Colorado Supreme Court subsequently reversed the judgment of the Colorado Court of Appeals and affirmed the judgment of this Court. In its opinion, the Colorado Supreme Court conceded that although certiorari was granted on multiple issues, it was unnecessary to consider whether the program complied with constitutional provisions other than article IX, section 7 because that provision alone was sufficient to enjoin the program.

This Court cannot ignore the fact that this Motion seeks to enjoin not the CSP but rather the new School Choice Grant Program (the "SCGP"). However, the Court is persuaded by Plaintiffs' arguments that the SCGP is in actuality a mere revision of the CSP. Plaintiffs assert, and Defendants do not contest, that there are only a few differences between the two programs: in the SCGP, vouchers are called grants instead of scholarships, religious schools cannot be private school partners, the fictional Choice Scholarship School is eliminated, and the percentage of "per pupil revenue" ("PPR") which will be given out as a voucher is increased. Other than these few changes, the essence of the CSP substantially remains intact: after a Douglas County public school student has applied to and enrolled in an approved private school partner, he or she can apply to receive money for private school tuition through the voucher program; the District continues to count the voucher student as being enrolled in a public school for the purpose of receiving state

public school funds; the District plans to claim and receive PPR from state public school monies for each voucher student enrolled in a private school; and the District will then use the PPR to pay tuition to the private school where each voucher student is actually enrolled. In further support of Plaintiffs' contention that the SCGP is a simple revision of the CSP, the SCGP has been promoted and marketed as a continuation of the CSP by Board and District officials through emails, meeting agendas and minutes, statements made at meetings, and program documents. Thus, it appears to this Court that there is no fundamental difference between the two programs that would warrant exemption under this Court's original injunction.

This Court is also well aware that the Colorado Supreme Court focused its opinion on the issue of religious schools receiving public funding under article IX, section 7 of the Colorado Constitution and did not reach the remaining constitutional issues. However, the ultimate opinion of the Colorado Supreme Court was without limitation: "Accordingly, we reverse the judgment of the court of appeals and remand the case 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]." *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d 461, 461 (Colo. 2015). Its mandate also lacked limiting language: "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." An understanding that the Colorado Supreme Court articulated a general reversal of the appellate court judgment and a full reinstatement of this Court's order is reflected by the Colorado Court of Appeals mandate, which reads: "IT IS NOW ORDERED, that the judgment of the trial court is affirmed. Accordingly, this case is returned to the District Court, City and County of Denver for further proceedings consistent with the opinion of the Colorado Supreme Court." Colorado Court of Appeals Mandate, 2011CA1856 & 2011CA1857, Aug. 6, 2015.

If the Colorado Supreme Court had intended to enjoin the program only as it related to religious schools, that is not apparent from the plain reading of its holding or its mandate. Instead, it clearly articulated that the trial court was to "reinstate its order," which the court knew applied to all private schools. In fact, in a footnote to its opinion, the court recognized that rewriting the program so as to exclude religious schools would not align with Plaintiffs' endeavor because they

sought to enjoin the program in its entirety.[1] The court did not make or suggest any qualifications or modifications to this Court's order, as it commonly would by reversing or reinstating a judgment only in part. Accordingly this Court will not, and more importantly cannot, make any changes to the order here.

To support their argument against reinstating the order in its entirety, Defendants point out that doing so would additionally contradict the opinion of the Colorado Supreme Court because that court found that Plaintiffs lacked standing under the PSFA while this Court found that they did have such standing. However, the two issues are distinct: the Colorado Supreme Court found reason to enjoin the program even though they did not find standing, which demonstrates the understanding that concerns surrounding the PSFA are independent from the constitutionality of the program. This independence allows this Court to honor that court's holding on standing under the PSFA while upholding the injunction of the program.

In conclusion, as an inferior court, this Court must follow the exact mandate of the courts above, which clearly and wholly reinstated this Court's order to enjoin school districts from diverting public funds to private schools.

The last issue with this Motion is the application of the injunction to Defendants Colorado Department of Education and Colorado State Board of Education (collectively, "State Defendants").

In their response, State Defendants argue that the Motion does not allege any misconduct on the part of the State Defendants that warrants court intervention as they played no role in designing or implementing the challenged program. Their involvement is limited, they argue, to providing districtwide funding based on a statutory formula tied to Douglas County's own pupil counts.

However, State Defendants have again played a larger role than they purport. As in 2011, State Defendants have communicated with Douglas County representatives regarding the statutory prerequisites that would permit state funding for the SCGP. While they argue that they have not decided whether the SCGP would qualify for a school code or whether students enrolled in the SCGP may be counted for per pupil funding purposes, those arguments are starkly contradicted by

[1] In relevant part, footnote 18 of the Colorado Supreme Court opinion reads: "Regardless, Petitioners do not seek to rewrite the CSP so that it excludes religious schools (pervasively sectarian or otherwise); they simply desire a court order enjoining implementation of the CSP in its entirety." *Taxpayers for Public Education v. Douglas County School District*, 351 P.3d at 472 n.18.

the efforts made in their response to demonstrate the legality of the SCGP. It appears to this Court that State Defendants have the intention to facilitate the implementation of the SCGP, which would be directly inconsistent with the permanent injunction of this Court.

Further, although the injunction does not ask State Defendants to perform their own pupil counts or scrutinize local programs, the injunction's prohibition against the Douglas County School District's inclusion of voucher students in its PPR pupil count necessarily includes a corollary requirement that State Defendants may not allow the Douglas County School District to include voucher students in their calculation of PPR.

CONCLUSION

WHEREFORE, the Court GRANTS Plaintiff's Motion for Enforcement of this Court's August 12, 2011 Permanent Injunction. Pursuant to the opinion and mandate of the Colorado Supreme Court, as well as the mandate of the Colorado Court of Appeals, the permanent injunction entered by the Court on August 12, 2011 was reinstated in its entirety and continues to be an order of this Court. Defendants are thus enjoined from implementing the School Choice Grant Program.

SO ORDERED.

Dated this 3rd day of August, 2016.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge