☐ County Court ☒ District Court Denver County, Colorado 1437 Bannock Street, Denver, Colorado 80202	
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, **Plaintiffs,** **v.** **BILL OWENS, in his official capacity as Governor of Colorado; and the STATE OF COLORADO,** **Defendants.**	▲ COURT USE ONLY ▲ Case No.: 03CV3734 Courtroom 18

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MOTION FOR JUDGMENT ON THE PLEADINGS WITH SUPPORTING BRIEF

MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiffs respectfully move the Court, pursuant to C.R.C.P. 12(c), for judgment on the pleadings with respect to Counts I and II of their Complaint. In support thereof, plaintiffs state as follows.

1. This is an action for declaratory and injunctive relief, in which plaintiffs ask the Court to hold the Colorado Opportunity Contract Pilot Program ("Voucher Program"), §§ 22-56-101 et seq., C.R.S., invalid under multiple provisions of the Colorado Constitution.

2. Count I of plaintiffs' Complaint alleges that the Voucher Program constitutes local or special legislation prohibited by Article V, § 25. Count II contends that the Voucher Program violates the local control mandate of Article IX, § 15, in that it requires local school districts to fund education over which they have no control.

3. Both Count I and Count II raise purely legal claims that require no factual development and can be adjudicated on the face of the statute. (Certain facts of which the Court can take judicial notice are provided by an attached affidavit and exhibits.) They are therefore appropriate for resolution on a motion for judgment on the pleadings.

4. The legal argument in support of this motion is set forth in the attached Brief in Support of Motion for Judgment on the Pleadings. As explained therein, the Voucher Program is contrary to both Article V, § 25 and Article IX, § 15.

5. Plaintiffs respectfully request oral argument on this motion.

For these reasons, plaintiffs' motion should be granted and judgment should be entered in their favor on Counts I and II of the Complaint. The Court should declare the Voucher Program unconstitutional under Article V, § 25 and Article IX, § 15 of the Colorado Constitution, and should enjoin its implementation and enforcement.

Respectfully submitted,

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Martha R. Houser
Attorney for Plaintiffs

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

The Colorado Opportunity Contract Pilot Program ("Voucher Program"), §§ 22-56-101 to 22-56-110, C.R.S., directs certain Colorado school districts to pay for some of their students to enroll in private schools at taxpayer expense. As set forth in the Complaint, the Voucher Program is seriously flawed constitutionally in multiple respects and should be struck down under various provisions of Articles II, V, and IX of the Colorado Constitution.

While adjudication of some of plaintiffs' causes of action, particularly those based on the Constitution's religion clauses, will require some factual development, at least two claims can be resolved from the face of the statute itself. These are the contentions of Counts I and II, respectively, that the Voucher Program constitutes local or special legislation prohibited by Article V, § 25, and that it violates the assignment to local school boards by Article IX, § 15 of control over the instruction provided with the school district's funds. These claims go to the heart of the constitutional order created by Colorado's fundamental charter, and in both cases the General Assembly's transgression of the limitations placed on its legislative power are abundantly clear. This litigation can, therefore, be resolved expeditiously on the basis of either or both of the grounds presented by this motion.[1]

[1] Plaintiffs are aware of the Court's general preference for briefs not exceeding ten pages in length, C.R.C.P. 121, § 1-15(1). In view of the

BACKGROUND

Enacted on April 16, 2003, the statute creating the Voucher Program directs eleven Colorado school districts to enter into "opportunity contracts" with parents of students in Grades K-12 who meet certain income and other criteria, pursuant to which the school district is to pay, from its own revenues, for those children to attend private schools rather than the public schools operated by the school district.[2]

The class of school districts required to participate in the Voucher Program is defined in § 22-56-103(10)(a)(I), C.R.S., 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 section 22-7-604(5), and which school district continues to operate said schools in the 2003-04 school year."[3] Beginning with the 2004-05 school year,

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significance of this constitutional litigation and the dispositive nature of this motion, they appreciate the Court's indulgence of this lengthier brief.

[2] The structure and operation of the Voucher Program are described at greater length in the Complaint. Here we provide only a summary, with emphasis on the features that are particularly relevant to the two legal issues presented by this motion.

[3] While it is not essential to plaintiffs' legal arguments, the Court can take judicial notice, pursuant to C.R.E. 201(b)(2), that this definition encompasses the following eleven school districts: 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.

these school districts must pay for up to a certain percentage of their students to receive their education at participating private schools – a percentage that rises gradually from 1% in 2004-05 to 6% for the 2007-08 and subsequent school years. § 22-56-104(5)(a), C.R.S. These payments are to be in an amount that is the lesser of (a) the private school's "actual educational cost per pupil," or (b) a percentage of the school district's per pupil operating revenues ("PPOR") that varies according to the student's grade.[4] § 22-56-108(2), C.R.S.

School districts are to make these payments in four installments throughout the school year, § 22-56-108(3), C.R.S., by checks made out to the parents of participating students and sent "to the participating nonpublic school in which the parent's child is enrolled." § 22-56-108(4)(a), C.R.S. The statute mandates that "the parent shall restrictively endorse the check for the sole use of the participating nonpublic school." Id.

Subject to the enrollment cap, the Voucher Program is generally open to all of the school districts' students who are from low-income families and who (a) for Grades 4-12, performed at a proficiency level of "unsatisfactory" in at least one academic area on a statewide assessment or college entrance exam,

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50. See Affidavit of John M. West in Support of Motion for Judgment on the Pleadings ("West Affidavit"), ¶¶ 5-7. No other school districts are required to participate in the Voucher Program (although others may voluntarily choose to do so, § 22-56-104(1)(b), C.R.S.).

[4] This PPOR percentage is 85% for students in Grades 9-12, 75% for Grades 1-8, and 37.5% for Kindergarten.

or (b) for Grades K-3, lack "overall learning readiness" based on certain risk factors, reside in the attendance area of a school rated "low" or "unsatisfactory," or (for Grades 1-3 only) performed below grade level on certain reading assessments. § 22-56-104(2), C.R.S. Under these standards, most students will qualify for private-school vouchers without regard to the academic performance rating of the public school they would otherwise attend.

Any private school that submits a timely application to a participating school district has a right, enforceable through an appeal to the State Board of Education, to participate in the Voucher Program, as long as it complies with certain standards set forth in § 22-56-106(1) & (2), C.R.S.[5] School districts have no discretion to deny the application of any private school that demonstrates compliance with these statutory standards. § 22-56-106(3)(b), C.R.S. Neither the Voucher Program nor any other provision of state law affords the school districts any control over the instruction that is provided to Voucher Program students by participating private schools.

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[5] The statutory standards bar participation by schools that discriminate against Voucher Program applicants on the basis of race, color, religion, national origin, or disability, or that "advocate or foster unlawful behavior or teach hatred of a person or a group." Participating schools are also required to comply with relevant health and safety codes, permit Voucher Program students to participate in the statewide assessment program, obtain criminal background checks of their employees, make available information about their history, structure, educational philosophy, and curriculum, and (for schools in operation for less than three years) provide certain financial guarantees. Except for the prohibition against teaching hatred of persons or groups, the Voucher Program imposes no requirements with respect to the curriculum offered by participating private schools.

ARGUMENT

In enacting the Voucher Program, the General Assembly has ridden roughshod over two of the fundamental principles established by the framers of Colorado's Constitution to limit the legislature's power. The Voucher Program is, in the first place, impermissible local or special legislation: the General Assembly has not imposed the Voucher Program on the entire state, or even on a genuine class of similarly situated school districts, through a law of general and uniform operation. Rather, it has required participation in the Program only by a closed – and therefore illusory – class of school districts, defined by reference to conditions that existed at a time in the past, and on the basis of a characteristic that bears no rational relation to the legislative purpose. And, by obligating these school districts to fund instruction over which they have no control whatever, the Voucher Program departs from the constitutional principle that vests in local school boards control over the instruction funded by the school district and its taxpayers. For each of these reasons, which we now address in turn, the Voucher Program is unconstitutional.

I. THE LEGISLATION ESTABLISHING THE VOUCHER PROGRAM IS AN IMPERMISSIBLE LOCAL OR SPECIAL LAW WITH RESPECT TO THE MANAGEMENT OF THE COMMON SCHOOLS

Article V, § 25 of the Colorado Constitution provides that "[t]he general assembly shall not pass local or special laws" with regard to certain enumerated subjects – including, *inter alia*, the subject of "providing for the

management of common schools."[6] This means, as the Colorado Supreme Court has explained, that "the legislature cannot single out a district or districts, organized under the general law, and pass an act for the management of the schools in such territory different from that provided for their control in other districts, also existing under the general school law of the state." In re Senate Bill No. 9, 26 Colo. 136, 137, 56 P. 173, 174 (1899).

The prohibition on local and special legislation was an issue of the first magnitude for the framers of Colorado's Constitution in 1876 – one so important that it was the very first substantive provision of the Constitution to which the Convention made reference in its *Address to the People of Colorado* which presented the Convention's work to the voters. "[E]special effort," the *Address* emphasized on its first page, "was made to restrict the powers of the Legislative Department, by making all laws general and of uniform operation." The Constitution of the State of Colorado, Adopted in Convention, March 14, 1876; Also the Address of the Convention to the People of Colorado 54 (1876); see also id. at 56 (describing "[t]he evils of local and special legislation" as "enormous").

Under the caselaw developed by the Colorado Supreme Court over the last 125 years, legislation in one of the enumerated subject areas constitutes an impermissible local or special law if it fails either prong of a two-part

[6] Article V, § 25 also prohibits local or special legislation with regard to *any* subject "where a general law can be made applicable."

inquiry: "The question posed by article V, section 25, is whether the legislation creates true classes and, if so, whether the classifications are reasonable and rationally related to a legitimate public purpose." In re Interrogatory on House Bill 91S-1005, 814 P.2d 875, 885 (Colo. 1991). The Voucher Program fails *both* prongs of this test. It is local or special legislation because, in the first place, it does not create a "true class[]," but rather imposes the requirement of funding private-school education on a closed, and therefore illusory, class of school districts. And, even if this were a true class, the Voucher Program would still fail under Article V, § 25, because the class is defined by a criterion – eight schools rated low or unsatisfactory, regardless of the size of the school district – that is not rationally related to a legitimate public purpose.

A. The Voucher Program Is Impermissible Local Or Special Legislation Because It Imposes The Requirement Of Funding Private-School Education Only On A Closed, Illusory Class Of School Districts

The striking feature about the classification established by the Voucher Program is that it determines which school districts are required to participate by reference to conditions that existed at a time in the past. Thus, the statute imposes participation in the Voucher Program on 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 section 22-7-604(5), and which school district continues to operate said schools in the 2003-04 school year." § 22-56-103(10)(a)(I), C.R.S.

By defining the class of school districts required to fund the education of some of their students in private schools on the basis of school districts' academic performance ratings for the 2001-02 school year, the statute creates a closed class. Regardless of how many schools rated low or unsatisfactory other school districts might have in future years, no other school district will ever become a member of this class. And, conversely, the existing class members will always be members of the class and required to fund private-school education, no matter how much the performance of their schools may improve in the future.[7]

This is, in sum, not a legislative classification that applies to all school districts that now or in the future are similarly situated, but rather one that permanently designates the eleven members of the class as the sole mandatory participants in the Voucher Program, as surely as if the statute had listed them by name. This closed nature of the classification is precisely the characteristic

[7] The class definition contains a caveat conditioning class membership on the school district's continuing to operate its eight "low" or "unsatisfactory" schools in 2003-04 – a proviso apparently added to the legislation in order to exempt Boulder Valley School District RE-2. This wrinkle in the class definition is of no relevance – except insofar as it further underscores the legislature's intent to impose the Voucher Program as special legislation only on hand-picked school districts – and we disregard it in the analysis presented here. The mandatory-participation class remains closed, in the sense that no school district that did not have eight such schools in 2001-02 will ever be added to the class; and, once the 2003-04 school year has begun, no school district will ever be removed from the class.

of legislation aimed to benefit (or in this case burden) specific entities, rather than a genuine class, that has been condemned as local or special legislation.

As the Colorado Supreme Court has explained, to pass muster under Article V, § 25, a law must be "general and uniform in its operation upon all in like situation." American Water Dev., Inc. v. City of Alamosa, 874 P.2d 352, 370 (Colo. 1994). Throughout its history, the court has made clear that a classification's capacity for prospective application to entities that subsequently come to be similarly situated is the *sine qua non* of a classification that is general and uniform in its operation. Indeed, even where the court has been confronted with statutes establishing a "class of one," it has upheld the legislative classification against a challenge as local or special legislation if, but only if, the classification is capable of encompassing other entities that may subsequently come to share the characteristic defining the class.

Thus, in Darrow v. People, 8 Colo. 417, 8 P. 661 (1885), the court rejected a challenge to a statute that established a superior court for cities beyond a certain population threshold. While emphasizing that special legislation could not be made acceptable merely if "disguised by the use of general language," id. at 418, 8 P. at 662, the court reasoned as follows in rejecting the contention that this was in fact such legislation:

> Denver, it is true, is the only city to which the act at present applies. *But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned.* The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and

> cities within the state will eventually contain 25,000 inhabitants. *Whenever this size is attained by such municipal corporations, the act becomes applicable thereto.*

Id. at 418-19, 8 P. at 662 (emphasis added).

By contrast, in In re Senate Bill No. 95, 146 Colo. 233, 361 P.2d 350 (1961), the court held unconstitutional legislation intended to permit Denver to annex the Town of Glendale. As in Darrow, the classification – although drafted in general terms – applied only to a single situation, but that was not its flaw. Unlike the Darrow statute, the Glendale bill contained an automatic repeal provision that took effect after a year, which ensured that it could *never* apply to any other situation in the future. That is why the court held it invalid: "The bill cannot operate prospectively because it is impossible that before July 1, 1962, any circumstance can occur to allow another town to be surrounded for five years by a special charter town or city." Id. at 239, 361 P.2d at 354. "This," the court emphasized, "is exactly what the constitution forbids in plain language." Id.

Most recently, in City of Greenwood Village v. Petitioners for the Proposed City of Centennial, 3 P.3d 427 (Colo. 2000), the court upheld a statute that provided for holding annexation proceedings in abeyance pending a conflicting incorporation proceeding for a proposed city of 75,000 or more inhabitants. Even though the court recognized that the statute had been adopted specifically to address the conflict between Greenwood Village and Centennial, it rejected the special legislation challenge because of the statute's applicability

to all similar situations: "The 1999 Act is generic in its application, *is applicable to other foreseeable situations*, does not deal with a class of one, and thus passes constitutional muster under Article V, section 25." Id. at 442 (emphasis added).[8] See also House Bill 91S-1005, 814 P.2d at 887 (upholding bill intended to apply to one corporation because "we cannot say, as we did in In re Senate Bill No. 95, that no entity other than United Airlines will ever meet the statutory criteria set forth in H.B. 1005"); American Water Dev., 874 P.2d at 371 (upholding statutory classification of certain stream systems on basis of legislation's "indefinite period of application" and possibility of application to other stream systems in future).

Many other states have constitutional provisions similar to Colorado's Article V, § 25 – sometimes labeled prohibitions on "local or special laws," and sometimes denominated "uniform operation" requirements. The courts of these states have similarly held that the possibility of a classification's prospective

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[8] The court's reference in this and other cases to a "class of one" appears to be a shorthand way, in light of the facts of the specific case before it, of describing the evil of a closed class that will not embrace other entities that in the future come to be similarly situated to the member(s) of the class. The fact that the closed class established by the statute in this case is a class of eleven, rather than a class of one, is immaterial. "[T]he number of class members known to be affected by the statutory criteria at the time of enactment is not determinative in deciding whether the legislation amounts to unconstitutional special legislation." America Water Dev., 874 P.2d at 370-71. See also Raybestos-Manhattan, Inc. v. Glaser, 365 A.2d 1, 19 (N.J. Super. Ct. Ch. Div. 1976) ("If 'it has the vice of discrimination against members of a class to which the subject matter of the legislation reasonably and naturally relates,' . . . it is an invalid classification, whether the class includes one or one thousand."), aff'd, 384 A.2d 176 (N.J. Super. Ct. App. Div. 1978).

application to similarly situated entities is the critical test for determining the classification's constitutionality. See, e.g., City of Scottsbluff v. Tiemann, 175 N.W.2d 74, 78 (Neb. 1970) (statute applying to two cities was unconstitutional special legislation where it created a "permanently closed class" by classifying cities on basis of a particular census in the past); Thomas v. Foust, 435 S.W.2d 793, 795–96 (Ark. 1969) (act that classified school districts according to conditions existing on a date in the past was nonprospective and therefore "inappropriate and arbitrary . . . special or local legislation"); State ex. rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 920–21 (Mo. 1993) (holding that "[t]he determination whether a statute is a special law rests on whether it is 'open-ended'" and invalidating classification based on a past census); Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369, 1379 (Ohio 1980) (striking down state statute that created two classes of municipalities based on municipal legislation in effect as of a past date); Austintown Township Bd. of Trustees v. Tracy, 667 N.E.2d 1174, 1179 (Ohio 1996) ("The statute was . . . incapable of application to any other city because it was confined to localities which possessed certain characteristics as of a date certain in the past.") (discussing State ex rel. Dayton Fraternal Order of Police v. State Employment Relations Bd., 488 N.E.2d 181 (Ohio 1986)); Harrisburg School Dist. v. Hickok, 762 A.2d 398, 407 (Pa. Commw. Ct. 2000) (legislature is free to create statutory classifications "if it does not establish a closed class").[9]

[9] Copies of these cases are attached for the Court's convenience.

As in these cases, the Voucher Program creates a closed class of school districts required to participate in the Program, based on academic performance ratings for the 2001-02 school year. The General Assembly has imposed the Voucher Program on these school districts – and no others – just as surely as if their names had been enumerated in the statute. This is, in short, special legislation which, under Article V, § 25, the General Assembly is prohibited from enacting.

B. The Class Definition Also Fails The Requirement That It Be Reasonably Related To The Purpose Of The Statute

While the Court need go no further to strike down the Voucher Program under Article V, § 25, there is in fact a second, independent reason for doing so. Even assuming *arguendo* that the mandatory-participation class created by the statute were a genuine class rather than a closed, illusory class, it would still fail the second prong of the test – the requirement that the classification be reasonable and rationally related to a legitimate public purpose.

As the Colorado Supreme Court has explained, "[t]he classification must be based on some distinguishing peculiarity *and must reasonably relate to the purpose of the statute*." House Bill 91S-1005, 814 P.2d at 887 (emphasis added). The Nebraska Supreme Court has put the point similarly: "The classification must rest upon real differences in situation and circumstances surrounding members of the class relative to the subject of the legislation

which renders appropriate its enactment." City of Scottsbluff, 175 N.W.2d at 81.

Applying this standard, the Colorado Supreme Court has consistently struck down under Article V, § 25 legislative classifications that evidenced no such reasonable relationship to the statutory purpose. See, e.g., People v. Sprengel, 176 Colo. 277, 490 P.2d 65 (1971) (no "substantial difference which reasonably relates to the purpose of the statute" in applying advertising restrictions to motels but not hotels); Mountain States Tel. & Tel. Co. v. Animas Mosquito Control Dist., 152 Colo. 73, 380 P.2d 560 (1963) (striking down statutory exemption from mosquito control district of property exceeding 20 acres or valued in excess of $25,000; neither distinction "bear[s] any reasonable relation to the benefits sought to be obtained" by the statute); Allen v. City of Colorado Springs, 101 Colo. 498, 75 P.2d 141 (1937) (no rational basis for Sunday closing law's distinction between sale of groceries by grocery stores and by drug stores). See also City of Scottsbluff, 175 N.W.2d at 81-83 (striking down legislation creating municipal court in cities of population over 13,000, located in counties with population over 33,000, because county's size was irrelevant to city's need for such a court).

The primary purpose of the Voucher Program, as set forth in the statute's legislative declaration, § 22-56-102, C.R.S., is to "help high-poverty, low-achieving students improve their academic achievement," by allowing such students in selected school districts to attend private schools rather than the

public schools operated by the school districts. To select these school districts, the General Assembly used the test of whether the school district had eight or more schools that, for the 2001-02 school year, received academic performance ratings of "low" or "unsatisfactory." § 22-56-103(10)(a)(I), C.R.S. In view of the enormous disparity in the size of Colorado's school districts, this use of an absolute number of such schools to identify low-performing school districts – rather than basing the participation requirement on the *percentage* of a district's schools that scored "low" or "unsatisfactory" – bears no rational relation to the purpose articulated by the legislature in enacting the Voucher Program. The result is to *exclude* low-performing small school districts – even districts whose schools are all or almost all rated "low" or "unsatisfactory" – and to *include* high-performing large school districts that have only a small proportion of schools rated at those levels.[10]

As is apparent from statistics published by the Colorado Department of Education ("CDE"), the vast majority of all Colorado school districts – approximately three-quarters – have fewer than eight schools. See West

[10] Plaintiffs do not agree with the Voucher Program's implicit premise that a school's academic performance reports accurately reflect the quality of education offered by the school; more often, what is measured by the standardized tests on which these reports are based are levels of poverty and minority populations in the communities served by the school. Nonetheless, for purposes of the argument presented in this section we adopt the perspective of the statute and assume that a school's academic performance reports are indicative of the quality of education it offers.

Affidavit ¶ 3 & Exh. A.[11] None of these school districts could conceivably be included in the class of school districts created by the statute, no matter how poorly their schools were doing. Thus, for example, according to CDE's performance ratings, the statutory classification excludes from the mandatory-participation class small, low-performing school districts such as Branson Reorganized School District No. 82 (two of three schools rated "unsatisfactory"), Aguilar Reorganized School District No. 6 (both schools rated "low"), Lake County School District No. R-1 (all three schools with ratings rated "low"), and Trinidad School District No. 1 (three of four schools with ratings rated "low"). Id., ¶¶ 9-12 & Exh. D-G. The same is true even of somewhat larger districts with high percentages of low-performing schools, such as Mapleton School District No. 1 (six of eight schools with ratings rated "low") and Brighton School District No. 27J (seven of twelve schools rated "low" or "unsatisfactory"). Id., ¶¶ 13-14 & Exh. H-I. By contrast, the statutory classification *includes* in the mandatory-participation class Jefferson County School District No. R-1, of whose approximately 150 schools 52% are rated "excellent" or "high," while only 14% are rated "low" and *none* are "unsatisfactory." Id., ¶ 15 & Exh. J.

[11] The information in this paragraph is drawn from data maintained and published on the internet by CDE, which is presented and summarized in the attached West Affidavit. The Court can take judicial notice of this data, which is "not subject to reasonable dispute" and is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." C.R.E. 201(b). Should the Court not agree that this information is judicially noticeable, it can nonetheless consider it by treating this as a motion for summary judgment, as allowed by C.R.C.P. 12(c).

This irrational under- and over-inclusiveness is the result of using the absolute number of eight schools, rather than a percentage, as the basis for assigning school districts to the mandatory-participation class.

The criterion for defining the class is particularly irrational in view of how the Voucher Program determines eligibility for participation by students. While it is the existence of eight schools rated "low" or "unsatisfactory" that triggers a school district's mandatory participation, the determination of which students in that district are eligible for private-school vouchers is almost entirely divorced from whether they would be attending any of those "low" and "unsatisfactory" schools. See § 22-56-104(2), C.R.S.[12] Thus, the inclusion of a large, high-performing school district like Jefferson County means that all of the district's students who satisfy the statute's income and performance criteria will be eligible for private-school vouchers even if their public school is among the 86% of schools in that district that are *not* rated "low" or "unsatisfactory." The Voucher Program's legislative goals simply are not furthered by a classification that results in private-school vouchers being made available to any low-income, low-performing student in a school district with 86% of its schools rated "excellent," "high," or "average," but not in a district with all or almost all schools rated "low" or "unsatisfactory."

[12] For students in Grades 4-12, the eligibility determination has nothing to do with the public school they would attend. Students in Grades K-3 can qualify on the basis of their residence in the attendance zone of a school rated "low" or "unsatisfactory," but also on the basis of any of several other criteria.

The statutory classification that divides Colorado school districts into those with and without eight or more schools rated "low" and "unsatisfactory" is not, in sum, a classification "based on some distinguishing peculiarity" that "reasonably relate[s] to the purpose of the statute." House Bill 91S-1005, 814 P.2d at 887. Even if the Voucher Program did not create a closed class, therefore, it would still have to be struck down as local or special legislation under Article V, § 25.

II. THE VOUCHER PROGRAM UNCONSTITUTIONALLY REQUIRES LOCAL SCHOOL DISTRICTS TO PAY FOR INSTRUCTION OVER WHICH THE SCHOOL BOARD HAS NO CONTROL

The Voucher Program not only imposes special legislation on eleven school districts, but it infringes the central constitutional principle of local control of education, by locally elected boards of school directors, established by Article IX, § 15 of the Colorado Constitution.

As the Colorado Supreme Court has emphasized, "[t]he framers' inclusion of Article IX, section 15 makes Colorado one of only six states with an express constitutional provision for local governance" of education. Board of Educ. v. Booth, 984 P.2d 639, 646 (Colo. 1999). Thus, "[t]he historical development of public education in Colorado has been centered on the philosophy of local control." Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1021 (Colo. 1982). Article IX, § 15 provides that local school boards "shall have control of instruction in the public schools of their respective

districts," and thus vests in the school board of each school district – rather than in the General Assembly – control over the instruction provided with that district's funds.

Consistent with this constitutional delegation of authority, the Colorado Supreme Court has repeatedly held that the Constitution prohibits the General Assembly from requiring that a school district's funds be used to provide instruction over which the local school board has no control. In 1915, the court held unconstitutional a statute that authorized counties to tax residents of one school district for the support of a high school in a neighboring district. While attendance at the high school was open to students from the plaintiff's school district, the constitutional flaw was the lack of any voice for that district's voters in selecting those who managed and controlled the high school in the adjoining district. "This," the court held, "violates, both in letter and in spirit, article IX, section 15, of our state constitution." Belier v. Wilson, 59 Colo. 96, 98, 147 P. 355, 356 (1915).

That same year the court also struck down a statute that required school districts without high schools to pay tuition for their residents who chose to attend high school in another district in the county. The Colorado Supreme Court found this provision contrary to Article IX, § 15:

> [T]he general assembly, by the attempted legislation, seeks to divest the directors of districts, wherein there is no high school, of control of instruction therein . . . and invest such control in the pupils residing therein or in the board of directors of an adjoining district. The legislature, in providing for the education of the

> pupils of a given district in the schools of another district, and imposing the cost thereof upon the former, clearly interfered with the control of instruction in such district. No discretion is left in the board of directors of the district wherein there is no high school as to the character of high school instruction the pupils thereof shall receive at the cost of the district.

School Dist. No. 16 v. Union High School No. 1, 60 Colo. 292, 293, 152 P. 1149, 1149 (1915). The court found the case analogous to Belier: "In either case, the money raised in one district by taxation of the property therein is, without the consent of the board of directors thereof, expended for instruction in another district over which the board of directors of the former district have no control." Id. at 294, 152 P. at 1149.

To the same effect is Hotchkiss v. Montrose County High School District, 85 Colo. 67, 273 P. 652 (1928), in which the court invalidated under Article IX, § 15 a statute that "purport[ed] to give the right and privilege to a pupil, who resides in a high school district of one county, of attending as a pupil in a high school district of another county, and to compel the district of her residence to pay the tuition fee required by the district of her attendance . . . ." Id. at 69, 273 P. at 653.

The court has subsequently described the constitutional issue in the latter two cases as follows: "[T]he effect of the statutes held unconstitutional was *to permit the pupil at his option, rather than the district board, to determine and control the public school instruction that he should receive as a resident of such district*. This, of course, deprived the board of a constitutional power

expressly granted to it." Wilmore v. Annear, 100 Colo. 106, 113-14, 65 P.2d 1433, 1436 (1937) (emphasis added).

It goes without saying, of course, that if a school district cannot be required by statute to pay for its residents, at their option, to obtain instruction in public schools that are not within the school board's control, the school district and its taxpayers cannot, *a fortiori*, be required to provide funding for residents to receive instruction in *nonpublic* schools, in which the instruction offered is, if anything, even further beyond the school board's control.

The principle for which these cases stand – that Article IX, § 15 does not permit the State to require a school district and its taxpayers to fund instruction over which the district's school directors have no control – retains its full vitality to this day. The Colorado Supreme Court has relied on this line of cases at least twice in recent years in emphasizing the central role of local school boards in Colorado's constitutional scheme of control over publicly funded instruction. In Lujan, citing the value of local control over education, the court upheld the state's reliance on local property taxes as the cornerstone of its system of public school finance. The court relied on both School District No. 16 and Belier in holding that "[t]axation of local property has not only been the primary means of funding local education, but also of insuring that the local citizenry direct the business of providing public school education in their school district." 649 P.2d at 1021-22. "[C]ontrol of the locally elected school board," the court held, allowed voters in each school district to "influenc[e] the

determination of how much money should be raised for the local schools, *and how that money should be spent*." Id. at 1022-23 (emphasis added).

Just four years ago, in Booth, the court relied on School District No. 16, Hotchkiss, and Belier in addressing a challenge under Article IX, § 15 to an appeal provision of the Charter Schools Act, § 22-30.5-108, C.R.S. The court reaffirmed the teaching of those cases "that the General Assembly cannot require money raised in one district to be expended for instruction in another district without the first district's consent," because to do so would take from the district's school board its constitutionally mandated "discretion . . . as to the character of the . . . instruction the pupils thereof shall receive at the cost of the district." Booth, 984 P.2d at 648 (quoting School Dist. No. 16, 60 Colo. at 294, 152 P. at 1149).[13]

The issue in Booth was whether a local school board's constitutional authority under Article IX, § 15 was infringed by the "second appeal" provision of the Charter Schools Act, which allowed the State Board of Education to direct the local board to approve, over its objection, a charter school application. The court was able to answer that question in the negative only because it found that, under the Charter Schools Act, an approved charter did not constitute a contract specifying the terms under which the charter school

[13] The court's reaffirmation and application of these cases in Lujan and Booth removes the basis for any argument that the partial state funding of the public schools, which began in 1935, in any way undermines the constitutional principle of local control established by Article IX, § 15.

could operate, 984 P.2d at 653-54; rather, the approval of an application was merely an interim step toward a contract, and the local board could "still expect resolution of its initial grounds for denial in a satisfactory final agreement with the charter school applicants." Id. at 654.

A contrary interpretation of the statute – requiring a local board to fund a charter school on terms that the local board had rejected – would, the court made clear, have raised serious problems under Article IX, § 15:

> If an approved charter application became the terms of a contract, then a State Board order to approve an application, substituting its judgment for that of the local board, would authorize a proposed charter school to operate under the terms of an application that the local board had rejected. This result . . . 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.

* * *

The Voucher Program is constitutionally infirm under Article IX, § 15 for precisely the reasons set forth in the cases just reviewed. The central teaching of these cases is that local taxpayers – through their elected school boards – are constitutionally entitled to retain democratic control over the educational programs that are funded with their tax money, and that the General Assembly may not give either individual parents or other school entities control over any portion of the school district's funds, to finance instruction over which the school board has no control.

In enacting the Voucher Program, the General Assembly has required local taxpayers to pay for instruction in private schools, over which their elected school directors have no control whatever. Local school boards have no control either over which private schools will give the instruction for which the school district is required to pay,[14] or over the content of the instruction offered in those schools.

If, as the Colorado Supreme Court held in Booth, it would raise serious constitutional issues to compel a local school board to fund instruction in a charter school – which is a school within the district that is accountable by law and contract to the local board of education[15] – on terms that the school board had rejected, it follows *a fortiori* that compelling a local school board to fund instruction in private schools, as to which the local school board has no control nor any opportunity whatever to set the terms, cannot survive scrutiny under Article IX, § 15.

The Voucher Program, in short, takes from local school boards and the taxpayers who elect them their constitutional right to control the content of the instruction provided with the school district's funds, and must be struck down for this reason as well.

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[14] The standards for private-school participation in the Voucher Program are fixed by state law, and the school districts' purely ministerial role requires them to approve all applications meeting the statutory criteria.

[15] See § 22-30.5-104(2), C.R.S. (charter schools "shall be accountable to the school district's local board of education").

CONCLUSION

For the reasons set forth above, plaintiffs' Motion for Judgment on the Pleadings should be granted, and judgment should be entered in favor of plaintiffs on Counts I and II of their Complaint. The Court should declare the Voucher Program unconstitutional under Article V, § 25 and Article IX, § 15 of the Colorado Constitution, and should enjoin its implementation and enforcement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Judgment on the Pleadings with Supporting Brief, and the attached supporting affidavit, were served by first-class mail, postage prepaid, this first day of July, 2003, on counsel for defendants and intervenors, addressed as follows:

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