DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202-5385	
Plaintiffs: JAMES LARUE, SUZANNE T. LARUE, INTERFAITH ALLIANCE OF COLORADO, RABBI JOEL R. SCHWARTZMAN, REV. MALCOLM HIMSCHOOT, KEVIN LEUNG, CHRISTIAN MOREAU, MARITZA CARRERA and SUSAN MCMAHON v. **Defendants:** COLORADO BOARD OF EDUCATION, COLORADO DEPARTMENT OF EDUCATION, DOUGLAS COUNTY BOARD OF EDUCATION and DOUGLAS COUNTY SCHOOL DISTRICT	**▲ COURT USE ONLY ▲** **Case Number: 2011CV4424** **Div./Ctrm.: 259** Consolidated with: Case Number: 2011CV4427
CONSOLIDATED WITH: **Plaintiffs:** TAXPAYERS FOR PUBLIC EDUCATION, a Colorado Non-Profit Corporation; CINDRA S. BARNARD, an individual; and MASON S. BARNARD, a minor child v. **Defendants:** DOUGLAS COUNTY SCHOOL DISTRICT RE-1; DOUGLAS COUNTY SCHOOL DISTRICT RE-1 BOARD OF EDUCATION; COLORADO DEPARTMENT OF EDUCATION; and COLORADO STATE BOARD OF EDUCATION	

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RESPONSE IN OPPOSITION TO MOTION TO CHANGE VENUE

INTRODUCTION

Plaintiffs James LaRue, Suzanne T. LaRue, Interfaith Alliance of Colorado, Rabbi Joel R. Schwartzman, Rev. Malcolm Himschoot, Kevin Leung, Christian Moreau, Maritza Carrera and Susan McMahon, (collectively, "Plaintiffs"), respectfully request that this Court deny the Motion to Change Venue filed by Defendants Douglas County Board of Education ("Douglas County Board") and Douglas County School District ("School District") (collectively, "County Defendants"). Because the challenged school-voucher program is funded by the state government in Denver, and because significant planning for the program took place in Denver,

venue is proper in Denver. Defendants have failed to demonstrate that the convenience of witnesses and the ends of justice warrant transferring the case to Douglas County.

This case is about whether taxpayer funds earmarked for public education can be sent by the State of Colorado to Douglas County, to be used instead to fund students attending private, primarily religious schools, all in violation of the Colorado Constitution and statutes. Without these state taxpayer funds, the Douglas County Choice Scholarship Program ("Voucher Program" or "Program") will not exist. The decisions about whether to fund this unconstitutional program with state monies will be made by the Colorado Board of Education and the Colorado Department of Education (collectively, "State Defendants"), both of which are located in Denver County. These facts alone support venue in Denver, but they are just the tip of the iceberg.

Beginning in November 2010, the State Defendants actively collaborated with the County Defendants on the specific design and implementation of the Voucher Program. The State Defendants helped the County Defendants to develop the Voucher Program in a manner that the State Defendants believed had the best chance of circumventing the obvious legal barriers. The State Defendants participated in at least two key strategic meetings—both of which were organized by the Department of Education Commissioner and took place in Denver. The State Defendants specifically recommended the phantom charter school vehicle through which Douglas County hopes to obtain funding for the Program students. In short, the State Defendants have made clear that they will do everything in their power to support the Program. The State Board Chairman's own words demonstrate this link: In a November 2010 email, he wrote that

he would "like to pave the way" for Douglas County, and do "everything I can to fix ASAP any" problems with the Voucher Program's funding by the State.

Even without the benefit of any formal discovery, the facts known to the Plaintiffs confirm that the State Defendants have followed through on Chairman Schaffer's vow. The official acts at issue in this case include far more than the County Defendants' adoption of the Voucher Program. The State Defendants' collaboration with Douglas County on the design and implementation of the Program, coupled with the fact that the State funding decisions—the cornerstone of the entire Program—will be made in Denver, strongly supports venue in Denver County.

In addition, Defendants have not met their burden to prove that convenience and the ends of justice warrant transferring the case to Douglas County. The Motion and affidavits simply state that Douglas County would be "more convenient" for some witnesses, presumably because the courthouse is closer, and the Motion points to no facts or reasons why justice warrants a transfer. Not only is this insufficient legal proof—the Douglas County courthouse and the Denver County courthouse are less than 30 miles apart—but for Plaintiffs Interfaith Alliance and Taxpayers for Public Education ("TPE") (both of which are located in Denver), the State Defendants, some of the participating private schools, and likely even some Douglas County residents participating in the Program, Denver is a closer and, under County Defendants' reasoning, a more convenient forum.

Plaintiffs have moved for preliminary injunctive relief and will suffer irreparable harm if the funding and implementation of the Voucher Program is not enjoined prior to the start of the 2011-2012 school year, which could be as early as the second week of August. The process of

obtaining preliminary relief will grind to a halt if Defendants' motion is granted. Indeed, Defendants have refused even to discuss a briefing schedule for Plaintiffs' already-filed motion until after the venue motion is resolved.

Because many of the critical decisions and actions that give rise to this action occurred and will occur in Denver County, and because Douglas County is not a more convenient forum, Defendants have failed to sustain their heavy burden of overriding Plaintiffs' choice of venue. The motion to change venue should be denied.

FACTS

Since late 2010, officials of the State Board and Department of Education have actively assisted the Douglas County Defendants in crafting a Voucher Program that the State Defendants hoped could surmount constitutional and statutory hurdles. One of the central issues with the development of the Program has been Douglas County's desire to "count" the Program students as public school students, despite the fact that these students would actually be attending private schools. This issue is critical because the School District gets state money from the Department of Education for each student that is "counted" as being in the district, but loses that funding for any student that leaves the district. From early in the process, the State Defendants have been helping the District with this and other issues:

- As discussed above, in November 2010, Colorado Board of Education Chairman Schaffer wrote an email to Mary Nevans of the Board of Education in which he vowed to do everything in his power to "pave the way for Douglas County right away with CDE." Exhibit 1 at 2.

- Mr. Schaffer continued: "Can you ask around and see if you can identify any barriers at CDE regarding funding or anything else. Essentially, if Douglas County adopts a voucher plan, *will there be any problems in getting the money to follow the student? If so, I intend to do everything I*

can to fix ASAP any such problems that can be fixed by the Board." *Id.* (emphasis added).

- In response, Dwight Jones, then-Commissioner of the Colorado Department of Education, wrote back to Mr. Schaffer to "share what [Ms. Nevans] reported to me related to your request." Exhibit 2 at 1.

- Mr. Jones, in turn, wrote, "*[w]e are still working this on our end.* Please share with Robert [Hammond] this morning *anything else we might do that you would deem helpful*," and advised that one of his staff members, Vody Herrmann, would "begin looking into this today." *Id.* (emphasis added).

As detailed below, the State Defendants began immediately to help Douglas County design the Program.

A. State Officials Organized Key Program Strategy Meetings In Denver.

State Defendants admit that "on two occasions, staff of the Department met with representatives of Douglas County School District *to provide technical assistance*." State Defendants' Answer at 4 ¶8 (emphasis added). Both meetings were organized by Colorado Department of Education Commissioner Robert Hammond, and took place in his office in Denver.

Commissioner Hammond organized a meeting on January 5, 2011, with the "DCSD team" to discuss the "implications of their new voucher program." Exhibit 14. The meeting was attended by several prominent School District officials, including Superintendent Celania-Fagen, two assistant superintendents, the chief financial officer, and district legal counsel, and Commissioner Hammond and other high-level state officials, including Tony Dyl, Senior Assistant Attorney General. Exhibit 3 at 1. These officials identified and discussed several open questions with the draft Program, which they realized raised legal concerns, including whether to include religious schools, how to "count students" for funding purposes, whether using religious

criteria for admission to the partner schools would be problematic, and how to address the participation of out-of-district schools. Exhibit 3 at 1-4.

Assistant Attorney General Dyl and Department of Education Commissioner Hammond played an active role in the meeting, identifying legal pitfalls and proposing solutions. *See* Exhibit 3 at 1-4. In response to a question by the School District chief financial officer about how to count students in the Program for funding purposes, attorney Dyl opined that students would need to take the Colorado Student Assessment Program tests (CSAP) and "comply with all other provisions that can't be waived." *Id.* at 2. Commissioner Hammond agreed, stating that there are "things you can do to count students." *Id*. at 2. Mr. Dyl also suggested that the School District could count the students for finance purposes if it set up the program as a charter school. *Id.* at 2.

Not only did Mr. Hammond and Mr. Dyl provide input and advice; they also agreed to "continue to work on how to count kids—and be clear how this can be done," and explicitly stated that they "[d]on't intend to block" the Program. *Id.* at 3. As School District Superintendent Celania-Fagen acknowledged at the conclusion of the meeting, Commissioner Hammond and State officials' assistance was critical to the development of the Program, and the County "needed this information to go forward." *Id.* at 4.

The State Defendants continued to work on the Voucher Program after the January 5th meeting. An email from Ms. Nevans of the Board of Education dated January 18, 2011, acknowledged that Commissioner Hammond "*is working on the voucher issue with Douglas County* and I think that is moving along successfully and openly, but nothing has been put in place yet." Exhibit 4 (emphasis added). In a subsequent email in the same chain, Ms. Nevans

added, "[y]ou haven't missed a lot on this issue because *Robert [Hammond] -- keeping Bob [Schaffer] apprised -- has been working with Douglas County to support their plan . . . .*" Exhibit 5 at1 (emphasis added).

B. State Officials Called A Second Meeting In Denver To Review The Program Before It Was Made Public.

On March 1, 2011, Commissioner Hammond requested a second meeting on March 7, 2011, to take place in his Denver office, with key School District officials including Superintendent Celania-Fagen and School District attorney Robert Ross, to discuss the Voucher Program and the "draft overview of the program plan that Mr. Ross provided to Commissioner Hammond and Tony Dyl on February 22, 2011." Exhibit 6. The email setting the meeting explained that "Superintendent Fagen and Mr. Ross are essential participants." *Id.* In response to the meeting request, Mr. Ross wrote, "I know you and your team are meeting to discuss DCSD's scholarship draft this week. . . . We are anxious to hear [Commissioner Hammond's] thoughts" on the "best structure (charter versus district school or program) to account for the students," and on whether nonwaivable laws would be applicable to the voucher students. Exhibit 7. Before the meeting, Mr. Ross forwarded to the state officials the latest version of the draft Program, which Mr. Ross represented "should address most of [the state officials'] concerns." Exhibit 8 at 1.

Six representatives of the State Defendants, including Mr. Dyl, attended the March 7, 2011 meeting called by Commissioner Hammond. Exhibit 9 at 2. Margo Allen of Department of Education took minutes, titling them "Record of Meeting Minutes," and affixed the State of Colorado seal. *Id.* The minutes were circulated to Commissioner Hammond and to Mary Nevans, the Director of State Board Relations. *Id.* at 1.

At the meeting, Commissioner Hammond and Tony Dyl commented on the latest draft of the Voucher Program. *See, e.g.*, Exhibit 9 at 2 (Dyl: "This draft looks good. Highly qualified still an issue."). Both Mr. Hammond and Mr. Dyl strongly advocated for a charter school format. Mr. Hammond explained that "[a] key issue is *how you spin it* -- as a charter or a program." *Id*. at 4. A charter would be "easier on waivers." *Id.* Mr. Dyl explained that: "You will have to jump more hoops if you select 'program' over 'charter.'" *Id.*

The Board of Education reiterated that the School District should continue to work with the State, and even invited the District to "[f]eel free to work with Denise Mund on our staff." *Id.*

C. The School District Adopted The State Defendants' Approach.

On March 15, 2011, the Douglas County Board of Education approved the Voucher Program. School District attorney Ross immediately sent the final version to Commissioner Hammond and to attorney general Dyl, and stated that "we certainly appreciated your advice on how best to qualify the participating students for funding." Exhibit 10 at 1. Mr. Ross also noted that "taking your counsel from both our meetings into consideration," the school district intended to "mov[e] quickly on establishing a charter school." *Id*. Ross concluded, "we appreciate the collaborative approach you have taken with us and look forward to working with CDE as this pilot project is implemented over the next several months." *Id.*

School District Officials have openly acknowledged the State's influence. A recent statement by Randy Barber, School District Spokesman, confirmed that the State Department of Education was responsible for the charter school approach: The Choice Scholarship School "is the first charter school of its kind in Colorado and was recommended by the Colorado

Department of Education as the optimal way to handle the per-pupil funding that will make its way through the voucher program." Exhibit 11 at 1.

D. State Defendants Continue To Support The Program And Have Indicated That They Plan To Fund It.

The Colorado Department of Education and Board of Education continue to collaborate with School District officials on the implementation of the Voucher Program. The District has been in regular contact with the State Defendants regarding the issue of obtaining waivers for the phantom charter school associated with the Voucher Program. *See, e.g.*, Exhibit 12 at 1-2. The State Board of Education also has reserved a place on its August 3, 2011 agenda for "possible submission of Douglas County options certificate waiver request for approval." Exhibit 13 at 2. Moreover, State Defendants' Answer affirmatively represents that they believe the Program is constitutional and otherwise legal, and removes any doubt as to whether the State Defendants—having "paved the way"—intend to support and fund the Program moving forward. *See, e.g.*, Answer at 9 ¶3 (stating, among other defenses of the Program, that it "complies with the constitutional tests," that the Program is a "new and innovative means of delivering a public education," and that it falls within the "'public purpose doctrine' exception to the prohibition against the State transferring public funds to organizations not under its absolute control").

STANDARD OF REVIEW

C.R.C.P. 98(b)(2) provides that venue "against a public officer . . . for an act done by him in virtue of this office" shall be tried in the county "where the claim, or some part thereof, arose." Venue requirements "are imposed for the convenience of the parties, and are a procedural, not a substantive issue." *Spencer v. Sytsma*, 67 P.3d 1, 3 (Colo. 2003). "There is a

strong presumption in favor of a plaintiff's choice of forum." *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076, 1078 (Colo. Ct. App. 2002).

Further, when venue is proper in more than one county, the choice of place of trial generally rests with the plaintiff. *See Welborn v. Bucci*, 37 P.2d 399 (Colo. 1934); *Progressive Mut. Ins. Co. v. Mihoover*, 284 P. 1025 (Colo. 1930). A party seeking to transfer venue bears the heavy burden of proving that venue in a particular court is improper, or that convenience and the ends of justice warrant transfer. *See Tillery v. Dist. Court*, 692 P.2d 1079, 1084 (Colo. 1984); *Adamson v. Bergen*, 62 P. 629, 630 (Colo. Ct. App. 1900) (explaining that a court reviewing a motion to transfer venue should begin with the presumption "that the county in which the suit was brought is the proper county for trial,"). "An application to change the trial of a cause from one county to another should negative every hypothesis in favor of the county in which the action was commenced." *Adamson*, 62 P.2d at 630. A transfer pursuant to C.R.C.P. 98(f)(2) for convenience and the ends of justice must be supported with evidence; conclusory assertions will not suffice. *Sampson v. Dist. Court*, 590 P.2d 958, 959 (Colo. 1979).

ARGUMENT

Because venue is proper in Denver and the County Defendants have failed to prove that convenience and the ends of justice would justify a transfer to Douglas County, this Court should deny the County Defendants' motion to change venue. Defendants have failed to overcome the "strong presumption in favor of a plaintiff's choice of forum." *UIH-SFCC Holdings*, 51 P.3d at 1078. Defendants have not shown that Plaintiffs' choice of venue is improper, and their appeals to convenience are entirely conclusory.

I. Denver Is A Proper Forum For This Case Because State Defendants Have Participated—And Continue To Participate In—Designing, Implementing, And Funding The Program.

Under Rule 98(b)(2), venue is proper in a county where a claim, "or some part thereof," arose. Here, a substantial part of Plaintiffs' claims arose in Denver. The State Defendants' offices are located in Denver; State Defendants held at least two critical strategy meetings in Denver on January 5, 2011 and March 7, 2011, at which they provided detailed and specific advice and recommendations on the design of the program; and State Defendants will act in Denver to allocate and distribute the public funds that will make the Program financially possible. Because venue is proper in Denver, the strong presumption in favor of Plaintiffs' choice of forum applies, and this Court should reject the Motion to transfer.

Since at least November 2010, the State Defendants have taken affirmative steps and concrete actions to "pave the way" for the Voucher Program, and particularly to ensure that public funds would "follow" the students attending private schools through the pilot program. Exhibit 1. Multiple documents produced by Defendants reference "work" done by the State Defendants in this regard. *See e.g.*, Exhibit 2 at 1 (former Colorado Board of Education Commissioner Jones explains that "we are still working on" identifying any barriers "regarding funding or anything else," and states that State Board employee Mr. Herrmann would "begin looking into this today"); Exhibits 4 at 1; 5 at 1 (stating that Commissioner Hammond "is working on the voucher issue with Douglas County" and "keeping [State Board Chairman] Bob [Schaffer] apprised" to "support their plan"). Further, State Defendants' Answer is proof positive of the State Defendants' involvement with, and intent to fund, the Program. In their Answer, these Defendants admit that they provided "technical assistance" to the School District

related to the Program, and, more importantly, in their affirmative defenses, State Defendants take a stand in favor of the Program and remove any doubt as to whether they believe there are any legal barriers to the State's funding of the Program. *See* Answer at 3-4 ¶8, 8-10 ¶¶1-7.

In addition to dedicating personnel hours within their departments to the Voucher Program, the State Defendants actively reached out to and advised the School District about how to structure the Program. *See* discussion of January 5, 2011, and March 7, 2011 meetings, above at pp. 6-11 (offering advice on, among other things, how to count students for funding purposes, whether including religious schools and allowing those schools to use religious admission criteria would violate state and federal constitutional provisions, whether the requirement that public teachers be "highly qualified" posed a problem, and raising special education concerns). In fact, State Defendants recommended and advocated a key component of the Voucher Program—namely using the charter school model as the easiest way to deal with waivers and obtain state per-pupil funding for the students who would be enrolled in private schools, the model which the District ultimately adopted. *See* Exhibit 8.

This ongoing pattern of conduct, and Defendants' own documents, belie the County Defendants' assertion that State Defendants met "informally" with County Defendants and did not "actively [assist]" the District with the Program. *See* Def. Motion at 4, n.3. Tellingly, on March 1, 2011, Colorado Department of Education Commissioner Hammond's executive assistant wrote to Paula Teel of Douglas County, stating that "Commissioner Hammond would like to convene a 1 1/2 hour meeting on Monday, March 7th . . . in the commissioner's office." Exhibit 6. The purpose of the meeting was "to follow up on the previous meeting [of] January 5, 2011 regarding the district's 'Choice Scholarship Program' and the draft overview of the

program plan that Mr. Ross provided to Commissioner Hammond and Tony Dyl on February 22, 2011." *Id.* The typed minutes from this hour and a half meeting are stamped with the State of Colorado seal. *See* Exhibit 9 at 2. Moreover, at the meeting, attorney Dyl and CBE Commissioner Hammond offered extensive comments and suggestions about how to design the Program. *See Id.* at 2-4. These facts show that the March 7, 2011 meeting was indeed an official meeting between State and County Defendants who acted together in their representative capacities to jointly design the Program.

Moreover, Denver will soon be the scene where the State Defendants will officially decide to ratify the Program and agree to illegally distribute public funds to Douglas County for the 500 students that will attend private schools through the Program. The decision to write the check will be made in Denver, and the check will be written in Denver. Money will flow from Denver out to Douglas County and the other counties where participating private school partners are located. These actions are central to Plaintiffs' claims against Defendants, and are sufficient to confer venue under Rule 98(b)(2).

The cases relied on by the County Defendants in their Motion actually support the conclusion that venue is proper in Denver in this case. The County Defendants rely primarily on cases that state the basic proposition that claims brought under Rule 98(b)(2) challenging actions taken by public officers in their official capacities should be brought in the county where the challenged acts or decisions occurred. *See Colorado Springs v. Bd. Of Comm'rs*, 147 P.3d 1, 4 (Colo. 2006) (explaining that "the decisional act of the public officer . . . establishes venue of an action against such officer," and finding that a claim challenging regulations passed by a board must be heard in the location where the officials "acted" to implement those regulations); *Dept.*

of Corr. v. Dist. Court, 923 P.2d 885, 886-87 (Colo. 1996) (stating that it is the act by the public officer that "gives rise to venue," and finding venue improper in a county where none of the officials' challenged actions occurred—plaintiffs challenged visitation rights at a correctional facility in Fremont County but tried to establish venue in Boulder based on a phone call made by plaintiffs from Boulder county); *Denver Bd. of Water Comm'rs v. Bd. of County Comm'rs*, 528 P.2d 1305, 1307 (Colo. 1974) (enunciating the same principle, and finding venue proper in Denver because the challenged order "would issue from Denver"). Here, Plaintiffs challenge acts that occurred and are occurring in Denver as well as Douglas County. Accordingly, the County Defendants' cases support venue here in Denver.

Defendants also misunderstand the crux of Plaintiffs' claims against the State Defendants. They argue that venue is proper "in Douglas County, not Denver, even if the [Program] has a potential impact on the State Defendants," and that mere "awareness" of the Program by the State Defendants is not enough. Def. Mot. 4-5. But Plaintiffs' claims against the State actors are not based on whether the effects of the Voucher Program will be felt in Denver, or based on mere "awareness," but rather on the *actions taken* and *decisions made* by the State Defendants.

As discussed above, Plaintiffs' claims arise out of numerous actions and decisions taken by the State Defendants in Denver. Moreover, when the State Defendants fund the Program, as they have made clear they intend to do, the decision to fund the Program and the actual funds will issue from Denver, pass through Douglas County, and extend to all the counties where the private schools are located, which includes Arapahoe, Denver, and El Paso Counties. Exhibit 15 at 1-3.

For the foregoing reasons, venue is proper in Denver.

II. Plaintiffs Need Only Show That Their Forum of Choice—Denver—Is A Proper Forum To Bring A Case Against One Or More Defendants.

Contrary to County Defendants' suggestion that venue can only be proper in a single county, Colorado courts recognize that venue may be proper in more than one county; and when it is, the choice of place of trial generally rests with the plaintiff. *See Welborn v. Bucci*, 37 P.2d 399 (Colo. 1934); *Progressive Mut. Ins. Co. ("Progressive") v. Mihoover*, 284 P. 1025 (Colo. 1930). In *Progressive*, the Colorado Supreme Court affirmed a trial court decision rejecting a defendant's motion to transfer venue from Pueblo to Denver, explaining that venue in either county was "the proper one, and from neither can a change of venue be properly granted." 284 P. at 1026.

Furthermore, a request to change venue from an appropriate forum should generally not be granted, even to move the case to another forum where venue would also be proper. *See Cripple Creek v. Johns*, 494 P.2d 823 (Colo. 1972). In *Cripple Creek*, the Court found venue proper in Denver under Rule 98(c), which authorizes venue wherever any of the defendants reside, because venue was satisfied as to some of the defendants. *See* 494 P.2d at 825. In moving for a change of venue to Teller County, the defendants argued that (1) the majority of defendants resided there, (2) a contract was to be performed there, and (3) convenience and the ends of justice would allegedly be served. *Id.* at 825. The Court rejected defendants' arguments, and explained that "[w]here the venue is proper in either of two counties, then [a] change of venue cannot properly be granted from either unless some other provision requiring the change arises." *Id.* The Court also found that because two defendants who resided in Denver (these

defendants were not parties to the venue transfer motion) had filed answers and counterclaims in Denver, the motion to transfer venue by the other defendants "was properly denied." *Id.*

The School District's argument that Denver and Douglas County cannot both be viable venues is simply not supported by the cases they cite, and is directly contradicted by *Progressive* and *Cripple Creek*. In the cases cited by Defendants on this point, all defendants were located in the same county, and thus neither court addressed the question of whether venue could be viable in two counties under circumstances involving actions by two or more diverse defendants. *See Colorado Springs*, 147 P.3d at 1 (one plaintiff and one defendant); *Dept. of Corrections*, 923 P.2d at 885-86 (two state defendants whose actions relevant to the complaint occurred solely in one county).

Thus, the logic of *Progressive* and *Cripple Creek*, not the logic of *Colorado Springs* or *Department of Corrections*, applies here. As discussed above, venue in Denver is proper in this case. *Cripple Creek* makes clear that even if venue is also proper in Douglas County under Rule 98(b)(2), since venue would be proper in both counties under Rule 98(b)(2), Plaintiffs are entitled to their choice of venue in Denver, and the case should not be transferred to Douglas County unless some other provision requires the change. In order to transfer the case to Douglas County, the County Defendants must meet their burden of showing that convenience and the ends of justice require the transfer, a showing they have not made.

III. The County Defendants Have Not Met Their Burden To Prove That Convenience And Justice Require This Court To Transfer the Case.

A party moving to change venue based on Rule 98(f)(2) must show more than just "conclusory assertions [that the venue is] remote and that witnesses would be inconvenienced." *Sampson v. Dist. Court*, 590 P.2d 958, 959 (Colo. 1979). Although the Defendants attempt to

meet that burden with two affidavits, the affidavits merely conclude that the witnesses live in Douglas County, without pointing to a compelling reason why the less-than-30-mile drive from Castle Rock to Denver is a legally cognizable inconvenience. *See* Celania-Fagen Aff. ¶6; Carson Aff. ¶5. Rather, both affiants merely state, without elaboration, that Douglas County would be more convenient. Such an unsupported, conclusory assertion is insufficient under *Sampson*.

Nor do County Defendants even attempt to argue that the ends of justice require a change of venue. They state the words "ends of justice," but offer no facts or argument as to why it would be unjust to try this case in Denver, particularly when two of the Defendants, and two of the Plaintiffs (Interfaith Alliance, and consolidated plaintiff TPE), all reside in Denver. County Defendants have completely failed to meet their burden on this point.

Moreover, County Defendants misinterpret the legal standard and seem to believe that they need simply show that it would be "more convenient" for some defendants and witnesses in order to transfer the case. This is not the case. A court in Colorado has rejected a motion to transfer venue under 98(f)(2) that merely alleged a slight increase in travel time. *See e.g.*, *Barry v. Trujill*o, No. 05CV3652, 2006 WL 5670032 (Colo. Dist. Ct. April 25, 2006) (denying a change-of-venue request where a small amount of additional travel time did not fulfill movant's burden of proof). A court in New York reached a similar conclusion. *See e.g.*, *State v. Slezak Petroleum Products, Inc.*, 78 A.D.3d 1288, 1289-90 (N.Y. App. Div. 2010) (rejecting argument that "having to travel over 30 miles to the Albany County Courthouse," even for someone "of advanced age and one of whom is afflicted with a condition that limits his mobility," is a legally cognizable inconvenience).

Even the cases cited by the School District, where venue was transferred, demonstrate that a transfer pursuant to Rule 98(f)(2) requires a showing of a significant burden on the moving party. *See e.g., Bacher v. Dist. Court*., 527 P.2d 56, 57 (Colo. 1974) (holding a distance of "approximately 200 miles" in a case involving several child witnesses weighed in favor of a venue change); *Dept. of Highways v. Dist. Court*, 635 P.2d 889, 892 (Colo. 1981) (holding that "a distance of over 150 miles coupled with the imposition of a Denver trial on the witnesses' employment responsibilities" weighed in favor of venue change).

Here, County Defendants will not suffer a legally cognizable inconvenience by litigating this case in Denver. The Denver and Douglas County courthouses are less than 30 miles apart. Exhibit 16. This distance is no farther than driving from one part of Douglas County to another (Larkspur to Lone Tree), Exhibit 17, or driving from Evangelical Christian Academy, a "private school partner," to Castle Rock. Exhibit 18.

County Defendants' argument that "convenience" warrants a transfer is also flawed because it ignores the fact that even if convenience were simply a matter of miles, transferring the case to Douglas County would be less convenient for other parties and witnesses, including Plaintiffs Interfaith Alliance, TPE, and the State Defendants (who, although they "do not oppose the motion," have notably not joined the Motion to Transfer and have filed an Answer in this case). *See Corfee v. S. California Edison Co.*, 202 Cal. App. 2d 473, 478 (Cal. Ct. App. 1962) (explaining that where "the only showing of inconvenience is the loss of time in traveling between the two places," and the party opposing transfer shows that witnesses reside in the place where the action was properly brought, "a logical inference to be drawn is that the latter witnesses will likewise be similarly inconvenienced if the place of trial is changed"). Denver is

also centrally located for some of the "private school partners," who hail from a wide variety of municipalities, including: Denver, Aurora, Centennial, Englewood, Parker, Highlands Ranch, Greenwood Village, and Littleton. Exhibit 15 at 1-3. A number of the witnesses with knowledge and relevant documents are located at these private schools, in addition to the many State officials, staff and relevant documents located in Denver.

In sum, the County Defendants have failed to show that convenience of witnesses and the ends of justice would justify transferring this case to Douglas County.

CONCLUSION

Because venue is proper in Denver, and because the County Defendants have not met their burden to prove that transfer is justified under Rule 98(f)(2), Plaintiffs respectfully request that this Court deny the Motion to Change Venue.

Dated: July 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2011, a true and correct copy of the foregoing RESPONSE IN OPPOSITION TO MOTION TO CHANGE VENUE was served via LexisNexis File & Serve on the following:

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