DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202	▲ **COURT USE ONLY** ▲
Plaintiffs: JAMES LARUE, SUZANNE T. LARUE, INTERFAITH ALLIANCE OF COLORADO, RABBI JOEL R. SCHWARTZMAN, REV. MALCOLM HIMSCHOOT, KEVIN LEUNGT, 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	Case Number: 11CV4424 Courtroom: 259
ORDER	

THIS MATTER comes before the Court on the Motion to Change Venue filed by the Defendants, Douglas County Board of Education and Douglas County School District (collectively "Douglas County Defendants") on July 5, 2011. Plaintiffs James Larue, *et al.* and Taxpayers for Public Education, *et al*. (collectively "Plaintiffs") filed separate Responses on July 13, 2011. The Douglas County Defendants and the Colorado Board of Education and the Colorado Department of Education (collectively "State Defendants") filed a combined and joint Reply on July 15, 2011. The Court has reviewed the Motion, the pertinent pleadings, all relevant authorities, and being sufficiently advised, concludes as follows:

BACKGROUND

On June 21, 2011, Plaintiffs filed complaints seeking to challenge the legality and constitutionality of the Douglas County School District's Choice Scholarship Pilot

Program ("Program") which, if upheld, will provide private school tuition scholarships for up to 500 eligible students in Douglas County.

STANDARD OF REVIEW

C.R.C.P. 98 specifies where venue is proper in Colorado. Venue requirements "are imposed for the convenience of the parties, and are a procedural, not substantive issue." *See Spencer v. Sytsma*, 67 P.3d 1, 3 (Colo. 2003). "There is a strong presumption in favor of plaintiff's choice of forum." *UIH-SFCC Holdings, L.P. v. Brigato*, 51 P.3d 1076, 1078 (Colo. App. 2002).

C.R.C.P. 98(b)(2) provides that venue "against a public officer . . . for an act done by him in virtue of his office" shall be tried in the county "where the claim, or some part thereof, arose." Under this rule, claims for injunctive relief against public officials arise in the county in which the public body has its official residence and from which any action emanates. *Denver Bd. of Water Comm'rs v. Bd. of Cnty. Comm'rs*, 528 P.2d 1305, 1307 (Colo. 1974).

Colorado has long held that when venue is proper in more than one county, the choice of place of trial generally rests with the plaintiff. *See, e.g., Welborn v. Bucci*, 37 P.2d 399 (Colo. 1934); *Progressive Mut. Ins. Co. v. Mihoover*, 284 P.1025 (Colo. 1930). It is further well established that the trial court must begin its venue analysis by presuming that the county in which the suit was brought is proper. *See Adamson v. Bergen*, 62 P. 629, 630 (Colo. App. 1900). 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.3d 1079, 1084 (Colo. 1984). Accordingly, any attempt to prove that venue is improper must defeat

"every hypothesis in favor of the county in which the action was commenced." *Id.* 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).

ANALYSIS

In this case, Douglas County Defendants allege that venue is improper here and request the Court to change venue in this action from Denver County to Douglas County. Specifically, Douglas County Defendants contend that venue is proper in Douglas County because: (1) Plaintiffs' claims arise out of the actions of the Douglas County Defendants only; and, (2) the convenience of the parties and witnesses, and the ends of justice, would be promoted by transferring this action to Douglas County. The Court addresses each argument, in turn, below.

I. Transfer of venue under C.R.C.P. 98(b)(2)

Douglas County Defendants argue that venue is improper in Denver County as Plaintiffs' claims arose solely out of the actions of the Douglas County Defendants taken in Douglas County. Douglas County Defendants also assert that apart from administrative tasks, the State Defendants have had no substantive role in the development of the Program. The Court is not persuaded.

Plaintiffs claim that, since late 2010, the State Defendants have actively assisted the Douglas County Defendants in crafting the Program. Specifically, Plaintiffs contend that: (1) the State Defendants have assisted the Douglas County Defendants regarding various issues related to the Program, including, without limitation, the development of a proposal permitting the Douglas County Defendants to "count" the Program students as

public students in order to continue to receive funding; (2) that officials of the State Defendants organized key Program strategy meetings, which were attended by members of the Douglas County Defendants, in Denver; and (3) that the Douglas County Defendants ultimately adopted the State Defendants' recommended approach in implementing the Program.

C.R.C.P. 98(b)(2) addresses venue for claims arising out of the actions of public officers. Rule 98(b)(2) provides that venue "against a public officer . . . for an act done by him in virtue of his office" shall be tried in the county "where the claim, or some part thereof, arose." Under this rule, claims for injunctive relief against public officials arise in the county in which the public body has its official residence and from which any action emanates. *Denver Bd. of Water Comm'rs v. Bd. of Cnty. Comm'rs*, 528 P.2d 1305, 1307 (Colo. 1974).

Here, in light of the record before me, the Court finds that the Douglas County Defendants have failed to establish that a change of venue is required. Further, the Court finds that the meetings hosted by officials of the State Defendants constituted more than mere "tangential" conduct as the Douglas County Defendants contend. The more reasonable conclusion under the circumstances and pleadings presented here, is that the meetings were a part of the process to identify various issues in the implementation of the Program and to propose solutions thereto. Since Rule 98(b)(2) directs that venue "against a public officer . . . for an act done by him in virtue of his office" shall be tried in the county "where the claim, or *some part thereof*, arose," the Court concludes that the requested transfer of venue is unwarranted. (emphasis added). Further, based upon the totality of the record presented, the Court is persuaded that sufficient evidence exists to support a determination that, at a minimum, venue is proper in both Douglas County *and*

Denver County. Where venue is proper in multiple counties, deference is given to the plaintiff. *See, e.g., Welborn*, 37 P.2d at 400; *Mihoover*, 284 P. at 1025-26.

Accordingly, applying the standards and analysis stated above, the Court finds that Douglas County Defendants have failed to meet their burden under C.R.C.P. 98(b)(2) to establish that venue is improper in Denver County.

II. Transfer of venue under C.R.C.P. 98(f)(2)

The Court turns next to Douglas County Defendants' request that venue be changed to Douglas County for the convenience of the parties and witnesses pursuant to C.R.C.P. 98(f)(2). Specifically, the Douglas County Defendants claim that venue should be transferred to Douglas County because "almost all" of the parties and witnesses to this action reside in, or just outside of Douglas County, and, therefore, Douglas County is more convenient for parties on both sides. Again, the Court is not persuaded.

C.R.C.P. 98(f)(2) addresses change of venue under specific circumstances and for the convenience of the parties, a rule that has at times been referred to as the doctrine of *forum non conveniens.* Rule 98(f)(2) states that "[t]he court may, on good cause shown, change the place of trial in the following cases: when the convenience of witnesses and the ends of justice would be prompted by the change." A party moving to change venue based on convenience and the interest of justice under C.R.C.P. 98(f)(2) must show more than just "conclusory assertions [that the venue is] remote and that witnesses would be inconvenienced." *See Sampson*, 590 P.2d at 959.

Here, the Douglas County Defendants support their Motion with the affidavits of John Carson, President of the Douglas County Board of Education and Elizabeth Celania-Fagen, Superintendent of Douglas County Schools. Each affidavit supplies the Court

with a list of potential witnesses and parties to the action. Each affidavit also generally concludes that Douglas County would be a "more convenient" venue because each witness or party lives, works, or go goes to school in Douglas County. Douglas County Defendants also support their proposition by citing the cases of *State Dep't of Highways v. Dist. Court*, 635 P.2d 889, 892 (Colo. 1981) and *Bacher v. Dist. Court*, 527 P.2d 56, 58-59, where the Colorado Supreme Court held that traveling distances of 150 miles and 200 miles, respectively, weighed in favor of venue change.

The affidavits provided by Douglas County Defendants provide no factual support compelling a change in venue under Rule 98(f)(2) aside from mere conclusory assertions that Douglas County would be a "more convenient" venue. The Court notes that the distance between the Douglas County Courthouse and the Denver District Courthouse is roughly 30 miles, not an insignificant distance but substantially less than the distance parameters described in the *Bacher* and *State Dep't of Highways* cases referenced above. Coincidently, the official website of Douglas County contradicts the claimed inconvenience and touts how "convenient" the commute to Denver is for its residents.[1]

Accordingly, the Court finds that the Douglas County Defendants have failed to meet their burden under C.R.C.P. 98(f)(2) to establish that a change of venue is necessary. In arriving at this determination, the Court notes that, apart from the conclusory statements proffered in their affidavits, the Douglas County Defendants failed to provide any factual evidence to support its claim that the parties and witnesses are inconvenienced by this action remaining in Denver County. Therefore, the Court concludes that a change of venue is not warranted due to convenience or the ends of justice.

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[1] *See* http://www.douglas.co.us/business/transportation/

CONCLUSION

WHEREFORE, in light of the reasoning stated above, Douglas County Defendants' Motion for Change of Venue is **DENIED**.

Dated this 16th day of July, 2011.

BY THE COURT:

Michael A. Martinez
District Court Judge