Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	
Colorado Court of Appeals: 11CA1856 & 11CA1857 City and County of Denver District Court: 11CV4424 & 11CV4427, Honorable Michael A. Martinez, Judge	**COURT USE ONLY**
Petitioners Taxpayers for Public Education, *et al.* **v.** **Respondents** Douglas County School District, *et al.* and **Intervenor-Respondents** Florence and Derrick Doyle, *et al.*	Case Number: 13SC233
David B. Kopel Independence Institute 727 E 16th Ave. Denver, Colorado 80203 Telephone: 303-279-6536 Atty. Reg. #: 15872	

BRIEF OF THE INDEPENDENCE INSTITUTE AND THE FRIEDMAN FOUNDATION FOR EDUCATIONAL CHOICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). It contains 9,489 words.

Amici agree with appellees' statements concerning the standard of review and preservation for appeal.

INDEPENDENCE INSTITUTE,
FRIEDMAN FOUNDATION
FOR EDUCATIONAL CHOICE
/s/ David B. Kopel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Douglas County School District Materials

Scholarly Articles and Monographs

Books

Other

STATEMENT OF *AMICI* INTERESTS

Founded in 1985, the Independence Institute is dedicated to the eternal truths of the Declaration of Independence. The Institute is a nonprofit, nonpartisan 501(c)(3) educational organization.

The leading subject of the Institute's work has always been K-12 education, to improve education for all Colorado children in all types of schools. In addition to publishing research, the Institute provides immediately relevant information to Colorado's K-12 families. For example, the Institute's SchoolChoiceForKids.org website provides extensive information (in English and in Spanish) for families to learn about which schools have particular educational approaches, help for students with special needs, other services, types of schedules, and so on.

The Friedman Foundation for Educational Choice is a 501(c)(3) nonprofit and nonpartisan organization, dedicated to advancing Milton and Rose Friedman's vision of school choice for all children. The Foundation, one of the nation's leading school-choice advocates, continues its founders' mission of promoting school choice as the most effective and equitable way to improve K-12 education in the United States.

SUMMARY OF ARGUMENT

The School District's Choice Scholarship Program is fiscally prudent. It is a small pilot program; and it is structured to protect the District and individual public schools from losses.

The pilot program is also well-designed to improve family satisfaction with schools. The program expands choices that may be of interest to some families. Families not interested in the additional choices continue to enjoy just as many options in the District as they did before.

Studies of choice programs throughout the United States have come to a common conclusion: particular choice programs have led to measurable educational benefits for some students, and have been neutral for other students. No empirical studies anywhere in the United States (including those cited by the Colorado Education Association and the American Federation of Teachers in their amicus briefs) have found that vouchers *harm* students or schools.

ARGUMENT

I. THE STRUCTURE OF THE CHOICE SCHOLARSHIP PROGRAM PREVENTS FISCAL HARM TO THE DOUGLAS COUNTY PUBLIC SCHOOLS

The CSP is a small, locally-crafted pilot program designed to provide additional educational choices. While directly benefiting families participating in the program, the CSP has strong fiscal safeguards for the District and its schools.

According to the CEA amicus brief, the Choice Scholarship Program is "unlikely to provide any widespread benefits." CEA at 17. That is true: it would be surprising for a small-scale, experimental program involving 500 students to produce widespread effects in a district that serves over 66,000 students.[1] As a pilot program, the CSP is not intended to produce "widespread" effects. Rather, it is a small-scale experiment designed specifically to mitigate systemic impacts until an "adequate record of its effects on student performance and financial viability can be reviewed and reported." Bd. File: JCB, *Choice Scholarship Program (Pilot)* at 1

[1] Colo. Dep't Educ., 2013 *Fall Pupil Membership by District*, http://www.cde.state.co.us/sites/default/files/2013_2014_pupilmembershipbycountyanddistrict.pdf.

(Addendum 2 to Douglas County School Board brief) [hereinafter, DCSD, *Choice Scholarship Program (Pilot)*].

DCSD took "great care to develop the CSP and to measure its effects on the District and its various stakeholders." *Id.* The reason that the CSP is only a small-scale pilot program is precisely in order to study its effects on students and the financial structure of the District overall. *Id*.

Despite the apocalyptic rhetoric of plaintiffs and their union amici, the CSP will financially protect the Douglas County schools. The CSP's basic structure took into account DCSD's unique needs and characteristics to ensure fiscal neutrality (or even savings).

Colorado school districts receive most of their general operating funds through a designated Per-Pupil Revenue (PPR) amount in the School Finance Act (SFA). A district's PPR varies based on factors including student population, cost of living, and the number of at-risk students enrolled.

The Choice Scholarship Program allots each of the 500 CSP students only 75% of the district's PPR in the form of a scholarship, with the remaining 25% of PPR retained by the District to administer the program and cover other costs. The 2011-2012 scholarship size equaled $4,575 (75% of $6,100). The District retained $1,525 per scholarship student.

In other words, if a full 500 students participated in the CSP, then the District would make a profit of $762,500. (The Per-Pupil Revenue amount received by the District, minus the 75% scholarship given to individual students.)

Of the revenue gained by the District, slightly under half ($361,199) was budgeted to administer the program for 500 students. Trial tr. at 377-78.[2] The remaining $401,301 was set aside for "extenuating circumstances." This amount will cover any effects experienced by individual schools. Thus, for every student who participates in the Choice Scholarship Program, $800 is set aside to mitigate any potential issues involving the school the student formerly attended. This is a very generous formula to provide assistance to the particular public school that the scholarship family chose to leave.

In addition to the built-in financial cushion, the allocation of CSP funds is fiscally sound for DCSD for three other reasons described below.

A. THE CSP IS WELL ALIGNED WITH COLORADO'S SCHOOL FINANCE SYSTEM.

The CEA insists that the CSP will harm the District fiscally because "the students most likely to leave public schools via the CSP are also those most

[2] This amount covers the costs of a program director, two additional employees, rent, supplies, and $93,340 to administer state tests for CSP participants. *See* DCSD Financial Services Office, *Choice Scholarship Charter Budget 2012 w Disruption Analysis*, unpublished spreadsheet document (July 2011)(in custody of DCSD).

likely to take more funding from the district than it costs to educate them." CEA at 28. As will be described below, CEA operates under the mistaken assumption that ordinary public school students are profit centers for the schools.

CEA further assumes that special needs students are a financial loss to a school district. CEA foresees "a very real risk" that CSP will boost the percentage of special-needs students remaining in Douglas County's public schools. *Id.* Even if this prediction came true, the effect would be microscopic. Make the extreme assumption that *none* of the 500 CSP students have special needs; if so, the District's percent of special needs students would increase from 9.7% to 9.8%.[3] This is not sufficient to support CEA's forecast of financial calamity.

1. DCSD saves money because the scholarship amount is lower than State's minimum per-pupil allocation.

CEA requires one to believe that ordinary students (not special needs) are significantly over-funded by the General Assembly. In other words, that substantial numbers of DCSD students cost *less* to educate than the General

[3] Calculation made from Colo. Dep't Educ., *Fall 2013 Pupil Membership by County, District, and Instructional Program*, http://www.cde.state.co.us/cdereval/fall2013pupilmembershipbyinstructionalprogrampdf. In 2013-14 DCSD enrolled 66,230 students, 6,453 (or 9.74%) of whom are classified as special education. If 500 ordinary students enroll in the CSP, the remaining student population is 65,730. Of that total, 6,453 is 9.82%.

Assembly has determined via its funding of Per-Pupil Revenue. This is implausible.

The "statewide base rate" is the amount the General Assembly determines to be the minimum needed to educate a child before student at-risk status or other factors such as disability are considered. For the 2011-12 school year, the statewide base rate was $5,634.77.

That same year, the Choice Scholarship Program amount was over a thousand dollars less: $4,575. The scholarship amount is 75% of the PPR for the Douglas County School District. One thing that keeps the scholarship amount relatively low is that the District is on the low end of the PPR formula set by the General Assembly; for the 2011-2012 school year, the Douglas PPR was lower than all but 19 of 178 Colorado districts.[4]

In short, the scholarship amount is far *lower* than the District's cost to educate the student. As described above (*supra* at 2), the District keeps about $1,500 of a CSP participant's Per-Pupil Revenue. This large reserve is one of the reasons the CSP safeguards the District's fiscal health.

[4] Colo. Dep't of Educ., *Public School Finance Act of 1994, Fiscal Year 2011-12 District-by-District Table*, http://www.cde.state.co.us/sites/default/files/documents/cdefinance/download/spreadsheet/dbydfinal12.xls.

2. DCSD saves money because the scholarship amount is far lower than actual per-pupil spending.

The cost of educating an ordinary Colorado student is far more than the Per-Pupil Revenue contributed by the State. The PPR is the largest source of taxpayer revenue for Colorado school districts, but there are also large revenues from local sources (e.g., property taxes) and from federal ones. For Douglas County, the PPR is 72.4% of all education tax revenue received.[5]

The District spent $7,978 per student on operating expenditures in 2011-2012, according to the Colorado Department of Education. This is much more than the $4,575 that a CSP family could have received that year. Thus, the CSP may well save money for the District, and cannot become a financial drain.

B. CSP'S SMALL SCALE AND DCSD'S ENROLLMENT GROWTH PROVIDE PROTECTION AGAINST NEGATIVE EFFECTS ON INDIVIDUAL PUBLIC SCHOOLS.

The American Federation of Teachers brief contends that the loss of CSP students could fiscally strain individual schools because of fixed costs. In other words, there are fewer students in the building, but no decrease in

[5] *Id.*; Colo. Dep't Educ., *Fiscal Year 2011 District Revenues and Expenditures*, Tables IA-IC, http://www.cde.state.co.us/cdefinance/revenue_expenditure_2011_2012_oth_sources.

spending for heating, maintaining the athletic fields, and so on. This is a valid concern.

Fortunately, the Board has taken care of this. For every student who participates in CSP, $800 is set aside to help the student's former school, if necessary. *See supra* at 3.

In addition, the District enjoys growing enrollment. So there will not be a problem of a declining number of students to cover the fixed costs. Indeed, the CSP is a relief valve which can prevent some increases in fixed costs.

1. DCSD enrollment growth each year far exceeds the number who leave under the pilot Scholarship Program.

The DCSD's enrollment grows at 1,200 to 3,000 pupils per year. Superintendent Elizabeth Celania-Fagen, tr. at 518. According to the Colorado Department of Education (CDE), since 1999 the lowest annual increase in DCSD student enrollment was 1,209, the highest 5,740, and the median more than 2,300.[6]

This is far more than the 500 who might participate in the Choice Scholarship Program. The 13 or 14 students who might leave 1,700-student Highlands Ranch High School to participate in the CSP, for example, would

[6] District enrollment data for the 2013 school year are in Colo. Dep't Educ., *Pupil Membership for 2013—District Data*, http://www.cde.state.co.us/cdereval/pupilcurrentdistrict. Historic data for 1999-2012 are in Colo. Dep't Educ., *Fall Pupil Membership*, http://www.cde.state.co.us/cdereval/rvprioryearpmdata.

be more than replaced through regular growth patterns. The AFT's doomsday scenario of a downward financial spiral due to declining enrollment has no relevance in DCSD's growth environment.

2. The CSP is a "relief valve" for future DCSD fixed costs.

Rather than worsening the burden of fixed costs, the CSP helps to reduce them. Superintendent Celania-Fagen testified that enrollment growth patterns often necessitate the construction of mobile elementary classrooms with 60% higher maintenance costs. Tr. at 519. Over the long term, enrollment growth requires additional school construction and associated capital expenses. Thus, CSP is a "relief valve" that forestalls or mitigates increased maintenance and construction costs associated with rising enrollment. Meanwhile, the extra dollars retained for each CSP student remain available to cushion any individual school's operating budget. As long as DCSD's general enrollment trends continue, the Board's decision to create the CSP will mitigate—not exacerbate—the burden of fixed costs.

3. Experiences in Milwaukee and Cleveland indicate that voucher plans generate substantial savings.

The AFT brief points to Milwaukee and Cleveland as examples of school districts that did not save money by implementing vouchers. Relying on 12-year-old voucher student distribution numbers from the Wisconsin Department of Public Instruction, AFT claims Milwaukee public schools

were "unable to save money" due to remaining fixed costs. AFT at 20.[7] Yet the program generated more than $10 million in net fiscal savings in 2001-2002, climbing to $37.2 million annually by 2008-2009. Robert Costrell, *The Fiscal Impact of the Milwaukee Parental Choice Program, 2010-11 Update and Policy Options*, University of Arkansas (2010).

For Cleveland, AFT cites a 2001 study which allegedly found that Cleveland's voucher program created no "change in overall operating costs" for public schools. AFT at 20-21, 25 citing Zach Schiller, *Cleveland School Vouchers: Where the Students Come From*, Policy Matters Ohio (2001). Yet the Schiller study does not contain this quote, nor does it say anything like what the quote contends.

AFT also claims based on a 2006 study that "savings promised to taxpayers disappeared" due to administrative and related costs. Clive Belfield, *The Evidence on Education Vouchers: An Application to the Cleveland Scholarship and Tutoring Program* 19, National Center for the Study of Privatization in Education (2006); AFT at 20-21. Yet the cited study actually reports savings at "between $2,500-$3,000" for each voucher student. Belfield, at 19. Two other studies—one by KPMG Consulting and

[7] *How Much Do Vouchers Really Cost?* People for the American Way Foundation (2002), http://www.pfaw.org/sites/default/files/file_136.pdf.

the other by amicus Friedman Foundation—found beneficial fiscal impacts for the Cleveland District from the voucher program.[8]

C. PARTICIPATION RULES REQUIRE CSP PARTICIPANTS TO HAVE ATTENDED DCSD SCHOOLS.

The CSP requires participants to reside in DCSD and to have attended a DCSD school for one year before being eligible to receive a scholarship. DCSD, *Choice Scholarship Program (Pilot)* at 4. This design preserves funds for DCSD and also protects the State from making expenditures for students who already attend private schools and thus would not have been funded otherwise.

Implausibly, AFT asserts that 30% of CSP students "would likely have left public school on their own." AFT at 15. The assumption is based on guesses about proposed, never-enacted programs in North Carolina and Pennsylvania, and on a newspaper article about Wisconsin. The North

[8] Susan Aud, *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990-2006*, at 24-26, Friedman Foundation (2007)($61 million over Cleveland program's first nine years); KPMG Public Services Consulting, *Cleveland Scholarship and Tutoring Program, Management Study Final Report* (1999) (Because the Cleveland voucher program was so small, and drew students from all over a large district, it did not reduce district administrative costs, nor did it allow the elimination of any teaching positions. Even so the program's fiscal impact on Cleveland public schools was positive: local school district revenue, coming from property taxes, was not reduced when some students left for voucher schools. Thus, Cleveland public schools had the same number of local dollars to spend on fewer pupils.).

Carolina analysis assumed "that 90% of all eligible private school students would apply for a scholarship."[9] The Pennsylvania proposal and the Wisconsin program expressly allow students already in private schools to participate.[10] The Douglas County policy, however, does not allow *any* private school students to apply for a scholarship.

The Court of Appeals noted that the plaintiffs provided no evidence that *any* CSP students would have attended a private partner school without a scholarship. The Court explained: "as plaintiffs' counsel conceded at oral argument, that assumption lacks evidentiary support in the record. Indeed, the evidence in the record bearing on this point indicates the contrary." *Taxpayers for Pub. Educ. v. Douglas County Sch. Dist.*, 2013 COA 20, ¶46 (Colo. App. 2013).

According to AFT, Superintendent Celania-Fagen testified at least some of the CSP students attending Regis Jesuit and Valor Christian high schools would have attended these schools without the benefit of a scholarship. AFT at 16. Dr. Fagen's testimony on this matter was simply "it's possible." Tr. at 549-51. It is possible that a small number of students transitioning from

[9] Gen. Assembly of N.C., Leg. Fiscal Note on H.B. 944, 2013 sess., http://www.ncleg.net/Sessions/2013/FiscalNotes/House/PDF/HFN0944v2.PDF.

[10] Pa. Gen. Assembly, Leg. Fiscal Note on S.B. 1, 2011-2012 sess., http://www.legis.state.pa.us/WU01/LI/BI/SFN/2011/0/SB0001P1711.pdf; Wisc. Stats. § 118.60(2)(a)(2).

middle school to high school might have attended a private school anyway. To whatever extent this occurs, the District fiscally benefits, since it gains about $1,500 in extra revenue related to that student; if that student had attended a private school without the CSP, the District would have received no revenue.

In the vast majority of cases, the CSP makes choice possible. In the very few situations where CSP supports a choice that would have been made anyway, the District gains revenue, to the benefit of all Douglas County students.

II. THE CHOICE SCHOLARSHIP PROGRAM DOES NOT HARM DCSD STUDENTS.

CEA worries that CSP is "likely" to harm students who remain in Douglas County public schools. The argument is predicated on the validity of a theory called "cream-skimming." However, as explained below, the empirical evidence of such practices actually occurring in the United States is extremely thin. Contrary to CEA's claims, the CSP does not impose discrimination.

A. THE DOUGLAS SCHOLARSHIP PROGRAM ATTRACTS GREATER PARTICIPATION FROM FAMILIES WITH FEWER EDUCATIONAL ADVANTAGES; THERE IS NO EVIDENCE IN THE U.S. THAT CHOICE PROGRAMS DISCRIMINATE.

A CEA-cited study of a Durham, North Carolina, program for choice within public schools (but not vouchers for independent schools), did not claim that any of the public choice schools intentionally discriminated. The study did find further evidence for the well-known empirical finding that "students whose parents have a college education are more likely to opt out of their assigned schools."[11]

Interestingly, precisely the opposite has been observed in the CSP: compared to the student body as a whole, *smaller* percentages of CSP applicants have parents who completed a four-year degree and undertook post-graduate work. Dick Carpenter & Marcus Winters, *Who Chooses and Why in a Universal Choice Scholarship Program: Evidence for Douglas County, Colorado*, at 10, (CU Colo. Springs, 2012).

CEA warns that private schools discriminate against choice program applicants in an attempt to skim only the best or most advantaged students.[12]

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[11] Robert Bifulco, et al., *The Effects of Public School Choice on Those Left Behind: Evidence from Durham, NC*, 84 PEABODY J. EDUC. 130, 147 (2008).

[12] CEA at 20 ("Absent the open admissions requirement, participating schools can 'choose their students' and admit only those with superior test scores or other indicators of academic ability."), 25 ("Thus, in Douglas

CEA cites some studies which examined the phenomenon of "cream-skimming." CEA at 22.

CEA correctly explains that the cited studies advocate careful design of choice programs to prevent cream-skimming. The CSP *has* been so designed. The design may be one reason why CSP has been somewhat *more* attractive to families with *less* parental education. If cream-skimming were to take place, the CSP's structure as a pilot program allows the District to remove certain partner schools, revise the CSP, or cancel it entirely long before any problem could have systemic impacts—let alone before the dire harms forecast by CEA.

There is no evidence of intentional cream-skimming in U.S. choice programs—a fact clearly stated in two of the studies cited by CEA,[13] and supported by strong empirical research.[14]

County, 'school choice' will not mean that families choose schools—instead, it will be precisely the reverse.")

[13] CEA at 20-22; Brian Gill, et al., *Rhetoric Versus Reality: What We Know and Need to Know About Vouchers and Charter Schools* 170 (RAND Corp., 2d ed. 2007) [hereinafter Rand 2007] ("[T]here is no evidence that voucher schools are 'creaming' high-achieving students from the public schools."); Caroline Hoxby, *School Choice and School Competition: Evidence from the United States*, 10 SWEDISH ECON. POL'Y REV. 9, 9 (2003) ("Not only do currently enacted voucher and charter programs not cream skim; they disproportionately attract students who were performing badly in their regular public schools.").

[14] WILLIAM HOWELL & PAUL PETERSON, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS 61-65 (Brookings Inst., rev. ed. 2006).

As CEA accurately states, there is some evidence of cream-skimming behavior in large-scale, national choice programs in Chile and New Zealand. However, both of these programs differ from Douglas County's small-scale pilot program—a program deliberately designed to observe, measure, and minimize the very effects at issue. Indeed, the cited Chilean study itself acknowledges that choice programs in the United States are likely to result in different outcomes.[15]

B. CEA EXAGGERATES DISCRIMINATION BY THE CHOICE SCHOLARSHIP PROGRAM'S PRIVATE SCHOOL PARTNERS.

The CSP requires partner schools to abide by multiple state and federal laws regarding nondiscrimination. DCSD, *Choice Scholarship Program (Pilot)* at 7. Yet CEA offers a cavalcade of purported illustrations of the extraordinarily discriminatory behavior of CSP's private school partners. CEA at 23-25. This is hyperbolic.

For example, CEA cites some private schools' policies regarding expulsion or refusal of service in cases involving behavioral or conduct-related issues. CEA at 24. CEA forgets that DCSD itself has a lengthy, open-

[15] Chang-Tai Hsieh & Miguel Urquiola, *The Effects of Generalized School Choice on Achievement and Stratification: Evidence from Chile's Voucher Program*, 90 J.PUB. ECON. 1477, 1499 (2006) ("[T]he underlying institutions and the precise details of the program implemented are critically important…[A] choice program in a decentralized schooling system, such as that in the U.S., is likely to result in a different type of sorting.").

ended, and roughly analogous policy. Among other things, the policy allows the District to "subject a student to disciplinary measures, including classroom removal, suspension, [and] expulsion" should the student exhibit continued willful disobedience, open and persistent defiance of proper authority, or repeated interference with a school's ability to provide educational opportunities to other students. DCSD, *Student Suspension, Expulsion, and Classroom Removal* 2, File:JKD/JKE. The policy authorizes disciplinary action up to and including expulsion for a "habitually disruptive student" and for sexual displays or inappropriate sexual conduct. *Id.* at 2, 4. Thus, so-called discrimination based on "behavior problems" in private partner schools is similar to what students already experience in DCSD.

Likewise, while many of the CSP's private school partners require that students submit their academic record (including grades and test scores) upon application, DCSD has an analogous requirement for incoming students. DCSD Bd., *Student Education Records* at 3, File:JRA-R, JRC-R. CEA cites only one of the 34 prospective private school partners (Mackintosh Academy) as explicitly seeking *only* gifted students. CEA at 25.[16] The other schools may, like Douglas County, require academic records

[16] Some gifted students, like other differently abled students, thrive best among similar students. Aspen Academy requires a cognitive test as part of the admission process; and Regis and Mullen require a placement test; such

simply for record-keeping purposes or to ensure that a student receives appropriate attention or instruction. With most private schools at lower than full capacity, their practical ability for selective admissions is small.

CEA asserts that the private school partners discriminate against students with disabilities. CEA at 23. While a handful of partner schools are equipped to educate these students, it is true that the majority are not. Far from being invidiously discriminatory, the schools simply lack the resources and capacity for special education. This is a common theme among virtually every choice program in the United States; the best solution is, as a CEA-cited study recommends, to provide *larger* subsidization for students with special needs—not to abandon choice programs. Brian Gill, et al., *Rhetoric Versus Reality: What We Know and Need to Know About Vouchers and Charter Schools* 170, 241-42 (RAND Corp., 2d ed. 2007) [hereinafter Rand 2007], cited by CEA *passim*.

A few partner schools have faith-based admissions criteria. CEA at 24. It is certainly true that not every partner school is a good choice for every student. Some are the best choice only for a small fraction of students. One purpose of increasing choice is to help a minority of students whose needs are not being fully met by the District's currently available choices. Heavy-

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tests help ensure that the schools have the appropriate resources for the applicant's ability level.

handed regulation of religious schools would limit choice by constraining the supply of autonomous schools willing to participate in choice programs, according to a CEA-cited study. RAND 2007 at 238. The foundational value of choice stems from increasing the number of available and varied environments.

C. A WIDE VARIETY OF HIGH-QUALITY ALTERNATIVES EXIST FOR NONPARTICIPATING STUDENTS.

Parents are unlikely to choose a school that does not maximize their utility, especially if ample alternatives are provided. For instance, parents of homosexual children are unlikely to choose a faith-based private school that disallows open displays of homosexuality. Rather, parents are far more likely to select another school from the extensive choice menu in DCSD, or from one of the CSP partner schools that have no policy on homosexuality.

Thirty-four private schools applied to participate, of which 23 were approved according to CSP eligibility requirements before the program was suspended due to legal proceedings.[17] The majority of these schools are religious. For this reason, and for many others, many DCSD families will not be interested in some or all of the CSP schools. All DCSD families will continue to enjoy choices among the District's 13 charter schools, two magnet schools, four alternative schools, 47 traditional neighborhood

[17] *Taxpayers*, at ¶6.

elementary schools, nine traditional middle schools, and nine traditional high schools. If, however, DCSD's many excellent schools do not meet a particular student's needs, that student may open enroll into *any other public school in Colorado*. C.R.S. §22-36-101. According to AFT, the DCSD is a public school paradise. AFT at 33. The Douglas County School District has long striven to provide families with choices. The CSP pilot program continues that effort, supplementing the District's many fine choices among District-operated schools.

III. THE CHOICE SCHOLARSHIP PROGRAM BENEFITS PARTICIPATING STUDENTS.

As Part IV will detail, scholarly research has quantified academic benefits for students participating in particular choice programs. While the magnitude of these benefits varies from program to program, their presence generally does not. By design, the CSP promotes high-quality choices, which often provide benefits *in addition to* academic improvement.

A. THE CHOICE SCHOLARSHIP PROGRAM'S DESIGN ENSURES THE QUALITY OF PARTICIPATING PRIVATE SCHOOL PARTNERS.

The CSP requires careful evaluation of all partner schools on an ongoing basis, using various academic measures, to ensure they provide acceptable growth and achievement for participants. DCSD, *Choice Scholarship Program (Pilot)* at 6. Partner schools that do not meet these or other

eligibility standards may be barred from the program. *Id.* at 9. While student performance at each partner school undoubtedly will vary, the CSP has carefully controlled for the overall quality of these schools. If a particular partner school failed to deliver quality education, the school would become ineligible for continued participation. Even if the District improperly failed to enforce the oversight standards, families provide an additional, powerful check. A poor school would decline or disappear as a choice exercised by families.

B. THE CHOICE SCHOLARSHIP PROGRAM PROVIDES BENEFITS BEYOND ACADEMIC ACHIEVEMENT.

Academic progress as measured by test scores is an important metric of educational quality. However, every student and every teacher is more than a test score. There are myriad other aspects of a school that affect the quality of the educational experience.

Because each student and family is unique, school choice programs increase net welfare by allowing families to choose schools that better meet idiosyncratic needs. For instance, school choice allows families to participate in schools that provide programs, services, athletic activities, or environments they find particularly important;[18] or that better match their

[18] RAND 2007, *supra* note 13, at 135; Hoxby, *supra* note 13, at 43.

value systems;[19] or that spend money in ways they value more highly.[20] In other words, choice makes families and students better off by allowing them to select schools based on the criteria they value most. Thus, choice—and the liberty it represents—is itself an inherently valuable outcome of the CSP. It is of the highest constitutional value. *See* COLO. CONST. art. II § 3.[21]

The popularity of other choice programs in the United States has demonstrated abundant demand for educational choice among families, which indicates that such programs can provide substantial net welfare gains.[22] Strong desire for choice also appears to be present in Douglas County; nearly 25% of resident students currently choose to enroll in Douglas County district schools outside their own neighborhood, or in charter schools, magnet schools, or out-of-district schools.[23]

Not surprisingly, the participants in the CSP were less satisfied than average with their current Douglas County School. (The magnitude is

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[19] Helen F. Ladd, *School Vouchers: A Critical View*, 16 J.ECON. PERSP. 3, 18 (2002).

[20] Hsieh & Urquiola, *supra* note 15, at 1499.

[21] "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right…of seeking and obtaining their safety and happiness."

[22] RAND 2007 at 129, 135.

[23] Calculations are based on DCSD and CDE data, and are provided in the Appendix to this brief.

relatively small, but the relationship is statistically significant.)[24] Most parents in Douglas County are interested in finding the best fit for their child. The CSP is an effort by the School District to provide additional choices for some of its less-satisfied customers.

School choice indisputably leads to great family satisfaction with schooling. The 2007 RAND study cited by CEA notes that "findings on parental satisfaction in voucher programs have been strongly and uniformly positive." RAND 2007 at 142-43.

This outcome is not surprising; parents and students value different aspects of education to different degrees. They may evaluate their schools on a wide variety of criteria beyond academic achievement as measured by standardized tests.

The CEA brief, though, measures quality schooling solely by test scores, implicitly asserting that the *only* valuable outcome for students and families in Douglas County is greatly improved academic achievement as measured by standardized test scores. Statewide tests are very important in Colorado, because of the State's annual testing program. C.R.S. §§ 22-7-406, 409. However, it would be irrational to claim that CSAP scores (used in Colorado until 2011) or TCAP scores (used since 2012), or their equivalents in other

[24] Carpenter & Winters, *supra* 13, at 21, 23.

states are the lone measure of a good school for a particular student. If a student changes schools and becomes happier, that is a good outcome even if the student's academic progress is no better than at the old school. The inalienable right to pursue "happiness" is a foundation of the Colorado Constitution, and of our society. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); COLO. CONST. art. II § 3.

C. THE SCHOLARSHIP AMOUNT IS REASONABLE.

Because the CSP is constructed around universal eligibility and accepts students based on a random lottery in case of oversubscription, all DCSD resident students have an equal opportunity to access the program. DCSD, *Choice Scholarship Program (Pilot)* at 4. However, because some private school partners charge substantially more than $4,575 (the maximum scholarship amount), some eligible families will be unable to afford the tuition at some of the partner schools. CEA cites this fact as evidence of socio-economic discrimination. This is backwards; giving everyone an exactly equal benefit is not discrimination. Without the CSP, a family wishing to attend a private school with $8,000 tuition receives no public assistance. With CSP, the small number of families in the pilot program receive about $4,600 towards tuition. Some families can provide the remainder, and other families may receive scholarships from the school or

from a nonprofit scholarship organization (such those provided to DCSD voucher students by ACE Scholarships, headquartered in Denver[25]). No one has fewer choices as a result of the CSP.

Thus, CSP scholarships make possible some families' ability to choose private schools for their children by covering a significant portion of the costs. If, as CEA asserts, this subsidization is insufficient, the most obvious solution is to *increase* the scholarship value cap. However, this conflicts with the CEA's (implausible) argument that the cap is already so high that it will financially harm DCSD.

CEA contends that the CSP's scholarship value is simultaneously too low and too high. The CSP's scholarship amount is a reasonable combination of increased choice for families and strong fiscal protection for the District.

IV. RESEARCH FROM OTHER STATES SHOWS THAT VOUCHER PROGRAMS RESULT IN STATISTICALLY SIGNIFICANT ACADEMIC IMPROVEMENT FOR SOME STUDENTS, NO EXTRA GAINS FOR OTHER STUDENTS, AND NO HARM TO ANY STUDENTS.

The CEA brief contests the scholarly evidence on the benefits of school choice programs. Careful examination of CEA's cited sources reinforces the

[25] ACE Scholarship, *DougCo Gives Parents More Choice*, Mar. 21, 2011, http://www.acescholarships.org/News-Video/DougCo-Gives-Parents-More-Choice.

scholarly consensus that vouchers are sometimes helpful for test score improvement, sometimes have no discernible effect, and are never harmful.

CEA devotes much attention to criticizing a meta-study (a survey of research literature on a topic, along with statistical analysis of the combined results in the prior studies) written by Dr. Greg Forster, who is a senior fellow with amicus Friedman Foundation. Oddly, the CEA brief discusses Forster's 2011 meta-study,[26] while side-stepping his 2013 meta-study, which added analysis of more recently-published scholarship.[27] (One new study re-analyzed data and confirmed the academic gains found by previous researchers for New York City school choice for students from low-performing public schools;[28] another new study found that three years of

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[26] Greg Forster, *A Win-Win Solution: The Empirical Evidence on Vouchers*, Friedman Foundation for Educational Choice (1st ed. 2011), http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/656/A-Win-Win-Solution---The-Empirical-Evidence-on-School-Vouchers.pdf.

[27] Greg Forster, *A Win-Win Solution: The Empirical Evidence on Vouchers*, Friedman Foundation for Educational Choice (2d ed. 2013), http://www.edchoice.org/CMSModules/EdChoice/FileLibrary/994/A-Win-Win-Solution--The-Empirical-Evidence-on-School-Choice.pdf.

[28] Hui Jin, John Barnard, & Donald Rubin, *A Modified General Location Model for Noncompliance with Missing Data: Revisiting the New York City School Choice Scholarship Program using Principal Stratification*, 35 J. OF EDUC. AND BEHAV. STAT. 154, 168-70 (2010).

vouchers in elementary school produced major gains in college attendance for Black students, but not for other students.[29])

Forster's 2011 meta-study examined only academic performance, while Forster's 2013 meta-study also analyzed all the existing literature on additional voucher topics. The 2013 study found that school choice "saves taxpayer money, moves students into more integrated classrooms, and strengthens the shared civic values and practices essential to American democracy."[30]

As the Statement of Amici interests describes, the Friedman Foundation supports school choice programs. As a union threatened by non-unionized schools, CEA has its own bias on vouchers. Ideologically motivated authors are sometimes rigorous and careful, and sometimes not. Careful examination of the social science research shows that school choice programs sometimes help academic achievement for some, do not make a difference for others, and are never harmful.

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[29] Matthew Chingos & Paul Peterson, *The Effects of School Vouchers on College Enrollment: Experimental Evidence from New York City* 62-63 (Brookings Institution and Harvard University 2012) (Black students who were offered vouchers in elementary school were 20 percent more likely to attend college within three years of the age they would be expected to graduate high school, 25 percent more likely to attend college full-time, and over 100 percent more likely to attend a selective four-year college.)

[30] Forster 2013, at 1.

A. RANDOM ASSIGNMENT STUDIES—THE GOLD STANDARD OF VOUCHER RESEARCH—SHOW THAT VOUCHERS HAVE A STRONG POSITIVE EFFECT ON ACADEMIC ACHIEVEMENT.

One challenge of social science research is comparing two self-selected groups. For example, if one studied people who own Denver Broncos season tickets, and compared them with people who do not, one would likely find that Broncos ticket-holders are wealthier. This does not prove that attending Broncos games will make you rich; rather, it is likely that the people who chose to buy season tickets were already wealthier than the general population.

A similar problem arises in studying school choice. Maybe students who participate in choice programs show academic improvement; but perhaps the reason those students participated in the choice program was because their families had strong academic motivation. So did choice cause the academic gains, or were the gains just the inevitable consequence of the family's academic energy?

Happily, there is a way to answer this question. Eight studies have analyzed voucher programs that used "random assignment methods" to select voucher participants. In a random assignment study, subjects are divided randomly into a "treatment group" and "control group." The treatment group receives the treatment being observed (e.g., a voucher or a

new drug therapy); the control group does not. “Because the two groups are separated only by a random lottery, they are likely to be very similar in every respect other than the treatment.” Forster 2013, at 6. Random assignment affords high confidence that only the treatment itself is influencing the research results, and that the results are not caused by other factors. *Id.* at 8.

If a voucher program has more applicants than available slots, a random lottery determines who participates. Students who “win” the lottery and are offered vouchers can be compared to students who asked for vouchers, did not win the random drawing, and were not offered vouchers. “This creates a naturally occurring random-assignment research design.” Forster, *id*. Thus, “If we see any systematic (*i.e.*, non-random) differences between the outcomes of the two groups, those differences can be attributed to the offer of vouchers, because nothing other than the offer of vouchers and randomness separates the groups.” Forster 2011, at 7.[31]

Forster identified eight studies examining participant outcomes in school districts that used random-assignment for vouchers. *Id*. at 8. Since one of the

[31] Oddly, CEA asserts that “Selection bias is rampant in random-assignment studies.” CEA at 6. This is exactly backward. In the random assignment study, all of the students applied for a voucher. At random, some were given a voucher and some were not given a voucher. Thus, there is absolutely no selection bias between these two groups. Indeed, the 2007 RAND study touted by CEA says so: “Random assignment solves the problem of selection bias by ensuring that the treatment and control groups have similar characteristics.” RAND 2007 at 75.

studies examined three different cities, there are ten separate assessments which are available. The results:

> Six of them find that vouchers had a positive impact across all students participating. Another three find that vouchers had a positive impact on some student groups and no visible impact on other students. One study—which has grave methodological flaws that undermine confidence in the results—found no visible impact from vouchers. None finds that vouchers had a negative effect.

Forster 2011, at 8.

1. Milwaukee, by Greene/Peterson/Du

The first random-assignment study of vouchers was conducted in 1998 by Jay Greene, then of the University of Texas at Austin, and Paul Peterson and Jiangtao Du of Harvard. They compared Milwaukee students who used vouchers in 1990-93 with students who applied for vouchers but did not receive them. Voucher students who stayed in the program all four years scored six percentile points higher in reading and 11 points higher in math than the control group.[32]

2. Milwaukee, by Rouse

Cecilia Rouse of Princeton also studied the Milwaukee program. Each year for four years, vouchers improved math scores by 1.5 to 2.3 percentile

[32] Jay Greene, Paul Peterson, & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, in LEARNING FROM SCHOOL CHOICE 345 (Paul Peterson & Bryan Hassel eds.)(Brookings Inst. 1998).

points (or 6-9 points cumulatively for four years); reading scores showed no improvement.[33]

3. Charlotte, by Greene

In 2001, Jay Greene conducted a random-assignment study of a privately funded voucher program in Charlotte, North Carolina. In one year, voucher students scored about six percentile points higher on combined math and reading tests.[34]

4. Charlotte, by Cowen

In 2008, Joshua Cowen reanalyzed Greene's data. Cowen used a different method to account for students who were selected to receive a voucher but did not use it. After one year, voucher students scored eight points higher in reading and seven points higher in math.[35]

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[33] Cecilia Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q.J. ECON. 553, 593 (1998).

[34] Jay P. Greene, *Vouchers in Charlotte*, 1 EDUC. NEXT 55, 57 (2001).

[35] Joshua M. Cowen, *School Choice as a Latent Variable: Estimating the 'Complier Average Causal Effect' of Vouchers in Charlotte*, 36 POL'Y STUDIES J. 301, 309 (2008).

5. Dayton, New York City & Washington, by Howell/Peterson

In 2002, William Howell of the University of Wisconsin at Madison and Paul Peterson (currently at Harvard) studied three privately funded voucher programs in Dayton, New York City, and Washington, D.C.[36]

a. Dayton, Ohio

After two years, Black students, who were 72% of participants, scored 6.5 points higher on combined math and reading tests. There was no visible extra improvement among non-Black students as a whole.

b. Washington, D.C.

In Washington, D.C., Howell and Peterson found that voucher students scored 7.5 percentile points higher in combined math and reading tests after two years. But the difference was no longer visible in the third year of data.

c. New York City

New York City results were similar to Dayton. Black students, representing 42% of participants, scored nine percentile points higher on combined tests due to vouchers. Non-Black students as a group showed no visible effects. Forster suggests the "most plausible hypothesis" for the statistically significant gains of Black students was that they "were served

[36] WILLIAM HOWELL & PAUL PETERSON, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS 10-11, 146 (Brookings Inst. 2006).

more poorly in their public schools and thus stood to gain the most from the opportunity to use vouchers." Forster 2011, at 11.

6. New York City, by Barnard/Frangakis/Hill/Rubin

Two other teams of researchers reanalyzed the Howell and Peterson data for New York. In 2003, one of the teams—consisting of John Barnard of deCODE Genetics, Constantine Frangakis of John Hopkins University, Jennifer Hill of Columbia University, and Donald Rubin of Harvard—re-analyzed math scores in the program's first year and separated students based on the quality of the public schools they left to use vouchers. The students leaving low-quality schools found a one-year gain of five percentile points.[37]

7. New York City, by Krueger/Zhu

The other research team—Allan Krueger and Pei Zhu of Princeton—also reanalyzed the New York City data and changed the way students were classified by race.[38] Krueger and Zhu classified a student as Black if either parent was Black, and they made this change only for Black students. According to Forster, their approach "abandons the scientific method"

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[37] John Barnard, Constantine Frangakis, Jennifer Hill, & Donald Rubin, *Principal Stratification Approach to Broken Randomized Experiments: A Case Study of School Choice Vouchers in New York City*, 98 J.AM. STAT. ASSOCIATION 299, 308-09 (2003).

[38] Alan Kueger & Pei Zhu, *Another Look at New York City School Voucher Experiment*, 47 AM. BEHAV. SCIENTIST 658 (2004).

because the generally accepted method is to use the father's race if a student does not self-identify, and these researchers were "[a]rbitrarily redefining a critical variable"—race—"in an abnormal way, and arbitrarily doing so only with one selected group rather than for all students." Forster 2011, at 11-13. Only "through these manipulations", according to Forster, were Krueger and Zhu "able to drag the variable for statistical significance down below the standard threshold", thus "allow[ing] them to claim that the voucher program had no visible effect on black student scores." *Id.* at 12.

Howell and Peterson responded to the Krueger/Zhu analysis by publishing a series of 120 re-analyses of their data set, each one consisting of a different set of specifications.[39] These analyses show that "the positive finding for black students is robust across numerous different assumptions about racial identification." Forster 2011, at 12. Indeed, "the positive effect only disappears if the analysis incorporates Krueger and Zhu's exact combination of arbitrary racial redefinition, students with missing data, and exclusion of baseline scores." Forster 2011 at 12-13.

[39] William Howell & Paul Peterson, *Voucher Research and Controversy*, 4 EDUC. NEXT 73, 78 (2004)("Neither changing the definition of African American nor adding students for whom baseline test scores are missing changes the results we originally reported.").

8. Washington, D.C., by Wolf

Finally, in 2010 a team of researchers led by Patrick Wolf from the University of Arkansas released the results of a six-year study of the Washington, D.C., voucher program. The study examined the 2003 voucher program that Congress had established.[40] (Not the same as the D.C. privately funded program studied by Howell and Peterson.[41]) They concluded that vouchers improved graduation rates by twelve percentage points: voucher students had an 82% graduation rate, compared to 70% for students in the control group.[42] On test scores, they found that voucher students scored higher on average than the control group. But the statistical analysis fell just short of reaching the conventional level of certainty. The result was 94% certain (not due to chance) but, as Forster explained, "prevailing conventions require 95% to report a finding." Forster 2011, at 13.

B. QUALITY SCIENTIFIC RESEARCH ALSO SHOWS VOUCHERS HAVE A STRONG PUBLIC-SCHOOL EFFECT ON ACADEMIC ACHIEVEMENT.

Do vouchers help public schools improve by exposing them to additional competition? The issue can be studied by comparing public schools which

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[40] Patrick Wolf, et al., *Evaluation of the DC Opportunity Scholarship Program* (U.S. Dep't of Educ., Nat'l Center for Educ. Evaluation & Regional Assistance, 2010).

[41] HOWELL & PETERSON, THE EDUCATION GAP, *supra* note 36.

[42] Wolf, *supra* note 40, at 51.

were exposed to vouchers with public schools not exposed. The students in those two different sets of schools can be studied over time (a "longitudinal study"). Tracking students over time removes most of the influence of unmeasured factors, such as parental motivation, allowing the researcher to isolate the effect of the measured factor (here, the effect of vouchers on the student's public school environment). Forster 2011, at 6, 9. For example, if a student is being advantaged in a way that is not measured—such as parental motivation at home—that advantage is likely to be present over time and not just a single year. *Id*. at 6, 8. The change in the student's outcomes between years one and two of the study, accordingly, will be due principally to other factors. Controlling for the effects of unmeasured factors "allows the analysis to isolate the impact of the factors that are being measured, such as exposure to vouchers." *Id*. at 8.

Forster identified nineteen empirical studies assessing how voucher programs affect achievement in public schools. Eighteen of the nineteen found that vouchers improve public schools. One study found no visible impact on public schools. No empirical study has ever found that vouchers had a negative impact on public schools. Forster discussed the studies extensively and summarized their findings. Forster 2013, at 11 (summary).

C. THE STUDIES CITED BY CEA REINFORCE THE FINDING THAT VOUCHERS PRODUCE STATISTICALLY SIGNIFICANT ACADEMIC BENEFITSS FOR SOME STUDENTS.

CEA offers its own litany of studies. Closely examined, these studies also find that vouchers sometimes have statistically significant benefits on test scores, sometimes do not, and are never harmful.

1. 2007 RAND

CEA cites a 2007 meta-study by the RAND Corporation so often that it earns a *passim* in the Table of Authorities. CEA accurately quotes RAND that "none of the important empirical questions [on vouchers] has been answered *definitively*." CEA 5 (emphasis added) (quoting RAND at 217). True. Social-science research is often not definitive. But the post-2007 research, in combination with prior research, cumulatively provide additional, positive findings for school choice.

Notably, RAND recognized that studies looking at early, experimental voucher programs are largely positive for African-American children in particular: "The effect sizes in several of the studies are large enough to make a substantial dent in the racial gap in student achievement." RAND 2007 at 84. In addition, RAND found that "satisfaction levels are high in virtually all voucher … programs studied, indicating that parents are happy

with the school choices made available by the [voucher] programs." RAND 2007 at 217.

2. Brookings Institution

CEA accurately quotes a study by the Brookings Institution, which said that the evidence shows vouchers have no "strong" effects on test scores. CEA at 5.[43] As Brookings detailed, some studies find test score improvement of varying sizes; some find none. Other studies find benefits for only certain groups (Black students, for instance), but other studies do not.

The 2008 Brookings report recognized that vouchers may also provide benefits beyond academic achievement, but said that research was too thin to draw conclusions.

3. Rouse & Barrow

Another study cited by CEA concluded that "the best research to date finds relatively small achievement gains for students offered education vouchers, most of which are not statistically different from zero." CEA 5-6.[44]

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[43] NANCY PINDUS, ET AL., VOL. 3 URBAN AND REGIONAL POLICY AND ITS EFFECTS 5 (Brookings Inst., 2008).

[44] Citing Cecilia E. Rouse & Lisa Barrow, *School Vouchers and Student Achievement: Recent Evidence, Remaining Questions* (Federal Reserve Bank of Chicago 2008).

In other words, "the best research" finds *positive* effects from vouchers, and that *some* of those effects *are* statistically significant. If *any* measurements were statistically significant and *better* than zero, and *none* of the measurements were statistically significant and *less* than zero, the research produces a *positive* finding for school choice.

4. Camilli & Bulkley

CEA takes aim at a study of Florida's A+ Program by Jay Greene, who found that the mere *threat* that a public school would be eligible for vouchers caused it to improve. CEA at 7; *cf.* Forster 2011 at 18-19. CEA accurately quotes a 2001 critique of Greene's study by researchers Gregory Camilli and Katrina Bulkley; they wrote that Greene's results "were implausible and should have been submitted to additional methodological scrutiny." CEA at 8-9.[45] But there is more to the story.

Greene and a co-author accepted the criticism, and conducted additional research that corrected for the initial methodological shortcomings; the

[45] Quoting Gregory Camilli & Katrina Bulkley, *Critique of "An Evaluation of the Florida A-Plus Accountability and School Choice Program,"* 9 EDUC. POL'Y ANALYSIS 7 (2001), http://epaa.asu.edu/ojs/article/view/336/462, discussing Jay Greene, *An Evaluation of the Florida A+ Accountability and School Choice Program*, Manhattan Inst. (2001).

better methodology led to results consistent with Greene's original conclusion.[46]

Camilli and Buckley also argued that the public school improvements could have resulted entirely from other Florida school reforms that were implemented at the same time. This is a plausible conjecture. However, subsequent research has found that the competitive improvement resulting from choice programs has an independent, additional effect on public school improvement.[47]

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[46] Jay Greene & Marcus Winters, *Competition Passes the Test*, 4 EDUC. NEXT 66, 68 (2004); Forster 2011, at 18-22.

[47] *See* Forster 2011, at 19-22; Rajashri Chakrabarti, *Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Programs*, at 387, Federal Reserve Bank of N.Y., Staff Paper no. 315 (2008); Rajashri Chakrabarti, *Vouchers, Public School Response, and the Role of Incentives: Evidence from Florida*, at 524, Federal Reserve Bank of N.Y. Staff Report no. 306 (2007); Rajashri Chakrabarti, *Closing the Gap*, 4 EDUC. NEXT 66 (2004); Cecilia Rouse, Jane Hannaway, Dan Goldhaber & David Figlio, *Feeling the Florida Heat? How Low-Performing Schools Respond to Voucher and Accountability Pressure*, National Center for Analysis of Longitudinal Data in Education Research (2007); Martin West & Paul Peterson, *The Efficacy of Choice Threats within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 ECON. J. C46 (2006) ; Greg Forster, *Lost Opportunity: An Empirical Analysis of How Vouchers Affected Florida Public Schools*, Friedman Foundation for Educational Choice (2008); *cf.* David Figlio & Cecilia Rouse, *Do Accountability and Voucher Threats Improve Low-Performing Schools?* 90 J. OF PUB. ECON. 239 (2006)(suggesting that the "stigma" of being named as an F-rated school which students can use vouchers to exit may be more important than the direct competition of vouchers).

5. Milwaukee

Martin Carnoy's 2007 study of Milwaukee vouchers found very strong improvements in the first two years for voucher students, but no additional gains thereafter. Similarly, the improvement effect on public schools was strong in the first two years, but did not increase thereafter.[48] CEA does not dispute the above. CEA at 9.

No one can identify for certain the causal mechanism for the strong academic gains in the first two years for Milwaukee voucher students, following by only ordinary gains thereafter. That the gains did occur shows that the Milwaukee program had beneficial results.

6. Center on Education Policy

CEA next touts a 2011 meta-study by the Center on Education Policy ("CEP"), which CEA says was "exceedingly thorough" and "much more rigorous" than Forster's report from the same year. CEA at 10.[49] As CEA recounts, CEP acknowledged modest gains in achievement for voucher students in some cases, but cautioned that "these findings are inconsistent among studies." CEA at 11.

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[48] MARTIN CARNOY, ET AL., VOUCHERS AND PUBLIC SCHOOL PERFORMANCE: A CASE STUDY OF THE MILWAUKEE PARENTAL CHOICE PROGRAM (Econ. Pol'y Inst. 2007), http://www.epi.org/publication/book_vouchers/.

[49] Alexandra Usher & Nancy Kober, *Keeping Informed about School Vouchers: A Review of Major Developments and Research* (Center on Educ. Pol'y 2011).

The CEP meta-study also found that "In some cities and states with voucher programs, gains in student achievement were greater in public schools most affected by voucher competition than in other public schools." CEP at 10. CEP cautioned that "it is difficult, if not impossible to decisively attribute the causes of achievement gains." *Id.* 11. True.

Social science research is not always decisive. But the studies with the best methodology (random assignment) do point towards measurable improvement for at least some students. Unanimously, the studies find no student harm from vouchers.

7. 2009 RAND

In something of a diversion, CEA directs this Court's attention to a 2009 RAND study on *charter* schools. CEA at 12. Charter schools are not an issue in this case. The Douglas CSP makes no change in the District's current charter school program.

If charter schools were relevant, then the following RAND finding (the sentence immediately before the sentence quoted by CEA) would also be relevant: "The complete absence of any significant negative effects on TPS [Traditional public school] students is encouraging and at least suggests that

this concern, often voiced by charter-school opponents, may not be justified." [50]

8. Cato Institute

The Cato Institute is a Washington, D.C., libertarian think tank. An article in a Cato periodical examined the effect of Ohio's EdChoice Program on public-school performance.[51] CEA quotes a line from the Cato article: regarding vouchers: "no one theory appears to be predominant among the research community." CEA at 12-13.

Perhaps one day, better theory will explain why vouchers provide statistically significant test scores gains only some of the time. That the gains do occur sometimes, and that harms never occur, is all that is known at present.

9. West & Peterson

CEA summarizes a study by Martin West and Paul Peterson that found "only minuscule gains for African-American students and students receiving

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[50] Ron Zimmer, et al., *Charter Schools in Eight States: Effects on Achievement, Attainment, Integration, and Competition* 90 (RAND Corp. 2009), http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG869.pdf.

[51] Matthew Carr, *The Impact of Ohio's Ed Choice on Traditional Public School Performance*, 31 CATO J. 257, 260 (2011).

free and reduced lunches, and no statistically significant gains for other students." CEA at 16.[52]

In other words, there were statistically significant academic benefits for some students, and no discernible effect for other students. Given the challenges faced by African-American students and by low-income students (those receiving free and reduced lunches), any statistically significant improvement in academic achievement is to be celebrated. The West and Peterson study is consistent with that of other scholars: vouchers have a positive effect for some students, a neutral effect for others, and they harm no one.

V. FIRST, DO NO HARM

No empirical study of any private-school choice program anywhere in the United States has ever had a *negative* finding—*i.e.*, a statistically significant determination that vouchers actually make students and/or public schools *worse off*. Notably, CEA cites none.

CEA asserts that adopting CSP "on the ground that doing so at least does no harm—even if true—is hardly a sound basis for good public policy." CEA at 13-14. To the contrary, it is eminently rational to adopt a policy

[52] Citing Martin West & Paul Peterson, *The Efficacy of Choice Threats Within School Accountability Systems: Results from Legislatively Induced Experiments*, 116 ECON.J. C46 (2006).

which is known to be harmless, and for which the only unknown will be the magnitude and breadth of the benefits.

Based on empirical research, the CSP is almost certain to result in increased satisfaction and happiness among voucher families. Based on the experience of other school districts, the CSP will do no harm to the Douglas County School District or to any individual school therein. The CPS's strong fiscal safeguards, including its large reserve of funds to assist individual schools, provide additional security. *See* Part I.

CEA is correct that current research does not prove that vouchers have been "decisively" or "definitively" proven to produce large academic gains for all students. But nothing a school board does could pass such a demanding standard.

Rather, the Douglas County School Board's decision to implement the CSP as a small, pilot program is reasonably supported by a large body of scholarship. Considered as a whole, the scholarship indicates that the CSP will produce statistically significant academic gains for some students but not for all students, and will harm no students.

Helping some people while harming none is the epitome of wise public policy.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted this 4th day of August, 2014.

/s/ David B. Kopel
David B. Kopel, No.15872
INDEPENDENCE INSTITUTE
727 E 16th Ave.
Denver, Colorado 80203
Telephone: 303-279-6536
Email: David@i2i.org

Geoffrey G. Slaughter
TAFT STETTINIUS & HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, Ind., 46204-2023
Tel: 317-713-3500
Fax: 317-713-3699
Email: GSlaughter@taftlaw.com
(not admitted in Colorado)

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2014, true and correct copies of the foregoing amicus brief and the Motion for Leave to File the amicus brief were filed with this Court using the ICCES system, and will be distributed by ICCES to the counsel listed below:

Matthew J. Douglas, Timothy R. Macdonald, Michelle K. Albert
ARNOLD & PORTER LLP
370 17th Street, Suite 4500
Denver, Colorado 80202

George Langendorf
ARNOLD & PORTER LLP
One Embarcadero Center
22nd Floor
San Francisco, Calif. 94111-3711

Paul Alexander
ARNOLD & PORTER LLP
1801 Page Mill Road
Suite 110
Palo Alto, Calif. 94304-1216

Michael S. McCarthy, Colin C. Deihl, Nadia G. Malik, Sarah A. Kellner, Caroline Lee
FAEGRE BAKER DANIELS, LLP
3200 Wells Fargo Center
1700 Lincoln
Denver, Colorado 80203-4532

Alexander Halpern
ALEXANDER HALPERN LLC 1426
Pearl Street, #420
Boulder, Colorado 80302

Raymond L. Gifford, Phil Roselli
WILKINSON BARKER KNAUER, LLP
1430 Wynkoop Street, Suite 201
Denver, Colorado 80202

Ayesha N. Khan, Gregory M. Lipper
AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE
1301 K Street NW
Suite 850, East Tower
Washington, DC 20005

Daniel Mach, Heather L. Weaver
ACLU FOUNDATION PROGRAM ON FREEDOM OF RELIGION AND BELIEF
915 15th Street NW, Suite 600
Washington, DC 20005

Mark Silverstein, Rebecca T. Wallace
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, Colorado 80218

Anthony B. Dyl, Nicholas G. Stancil
OFFICE OF THE ATTORNEY GENERAL
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: 720-508-6000

William H. Mellor, Richard D. Komer, Timothy D. Keller
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203

Michael Bindas
INSTITUTE FOR JUSTICE
101 Yesler Way, Suite 603
Seattle, Washington 98104

James M. Lyons, Eric V. Hall,
ROTHGERBER JOHNSON & LYONS, LLP
1200 17th Street
One Tabor Center, Suite 3000
Denver, Colorado 80202

Mark Grueskin
RECHT KORNFELD PC
1600 Stout Street, Suite 1000
Denver, Colorado 80202

/s/ David B. Kopel
David B. Kopel, No.15872
INDEPENDENCE INSTITUTE
727 E 16th Ave.
Denver, Colorado 80203
Telephone: 303-279-6536
Email: David@i2i.org

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

APPENDIX

Numbers in yellow are for charter schools or for the District-operated cyber school ("eDCSD"). These same numbers are also **bolded**.

DCSD School	Open Enrol'd into School	Enrol'd from out of Dist.	Comment
Academy Charter	**738**	17	
Acres Green Elementary	69	9	
American Academy	**1,549**	53	Not all are open enrolled, due to special agreement with developer
Arrowwood Elementary	23		
Aspen View Academy	**644**	1	
Bear Canyon Elementary	84	6	
Ben Franklin Academy	**859**	117	
Buffalo Ridge Elementary	46		
Castle Rock Elementary	95	3	
Castle Rock Middle School	124	2	
Castle View High School	389	7	
Challenge To Excellence Charter	**490**	43	
Chaparral High School	234	36	
Cherokee Trail Elementary	42	14	
Cherry Valley Elementary	3	2	
Cimarron Middle School	142	8	
Clear Sky Elementary	43		
Cloverleaf Home Education		59	Homeschool supplemental program
Copper Mesa Elementary	63		
Core Knowledge Charter	**602**	19	
Cougar Run Elementary	85	12	
Coyote Creek Elementary	53	1	

Cresthill Middle School	197	12	
Daniel C Oakes High School		2	Alternative HS
Douglas County High School	225	11	
Eagle Academy High School		6	Alternative night HS
Eagle Ridge Elementary	85	1	
Early Childhood Education		1	
eDCSD - Online Education	**261**	2	
Eldorado Elementary	71	8	
Flagstone Elementary	71		
Fox Creek Elementary	117	7	
Franktown Elementary	32	5	
Frontier Valley Elementary	90	8	
Gold Rush Elementary	100	3	
Heritage Elementary	70		
Highlands Ranch High School	138	32	
Home School		35	
HOPE Online Learning Academy CO-OP			
HOPE Online Learning Academy Elementary			
HOPE Online Learning Academy Middle	**3,074**	2,992	
Iron Horse Elementary	87	13	
Larkspur Elementary	22	4	
Legacy Point Elementary	30	3	
Legend High School	332	62	
Lone Tree Elementary	474	1	
Mammoth Heights Elementary	116	15	
Meadow View Elementary	53		
Mesa Middle School	148	8	
Montessori Charter	**405**	20	
Mountain Ridge Middle School	172	6	
Mountain View Elementary	32		
Mountain Vista High School	315	39	
North Star Academy Charter	**669**	24	
Northeast Elementary	22	1	
Northridge Elementary	73	2	
Pine Grove Elementary	143		

Pine Lane Elementary I	56	3	
Pioneer Elementary	60	5	
Platte River Academy Charter	1	52	
Plum Creek Academy			District special educ. program. No open enrollment.
Ponderosa High School	163	45	
Prairie Crossing Elementary	78	1	
Ranch View Middle School	114	7	
Redstone Elementary	47	3	
Renaissance Expeditionary Magnet	415		
Rock Canyon High School	422	4	
Rock Ridge Elementary	164		
Rocky Heights Middle School	205		
Roxborough Elementary	2	2	
Roxborough Intermediate	8	2	
Saddle Ranch Elementary	116	2	
Sage Canyon Elementary	81		
Sagewood Middle School	76	16	
Sand Creek Elementary	76	7	
Sedalia Elementary	20	2	
Sierra Middle School	71	2	
SkyView Academy	**1,035**	174	
Soaring Hawk Elementary	38	2	
South Ridge Elementary	36	1	
STEM	**745**	155	
Stone Mountain Elementary	140	2	
Summit View Elementary	116		
ThunderRidge High School	224	19	
Timber Trail Elementary	86		
Trailblazer Elementary	39	4	
Wildcat Mountain Elementary	54	1	
Total open enrollment into DCSD schools	**18,689**		
Total open enrollment into DCSD schools from outside the DCSD		**4,243**	

DCSD students enrolling into other DCSD schools: 14,446

(18,689 total open enrolled in DCSD, minus 4,243 students who came from outside the District)

DCSD students enrolling into public schools outside DCSD: 2,383

Total open enrollment by residents of DCSD: 16,829

(14,446 who open enrolled inside DSCD + 2,383 who open enrolled outside DCSD)

Total students who live in DCSD and who are enrolled in a Colorado public school: 64,370

(DCSD's 2013-14 enrolled student population was 66,230. Subtract the 4,243 of that population who came into DCSD from other districts. Add the 2,383 DCSD residents who enrolled in another district. The result is the number of students who are enrolled in a Colorado public school and who live in Douglas County = 64,370.)

Percentage of public school students residing in the DSCD who used an open enrollment option: 26.14%

(16,829 Douglas-resident open enrollees out of 64,370 Douglas-resident students who attend public school)

Data sources:

Colo. Dep't of Educ., *2013 District Rankings by Pupil Membership*, http://www.cde.state.co.us/cdereval/fall2013districtrankingpupilmembershiphightolowxls

Colo. Dep't of Educ., *2013 Pupil Membership by School and Grade*, http://www.cde.state.co.us/cdereval/fall2013pupilmembershipbyschandgradelevelxls.

Colo. Dep't of Educ., *2013 Pupil Membership - Districts Serving Non-District Students* (sorted by district of student attendance), http://www.cde.state.co.us/cdereval/fall2013districtsservingnon-residentstudentsxls.

Colo. Dep't of Educ., *2013 Pupil Membership - Districts Serving Non-District Students* (sorted by district of parents' residence),

http://www.cde.state.co.us/cdereval/fall2013studentsattendingpublicschoolsnotinparentsdistrictofresidencexls.

The information above is straightforwardly available from the above documents, with one exception. Amici had to make their own calculations to determine the Douglas-resident numbers of students at the three Hope Online Learning Academies. These on-line schools are authorized by Douglas County, but their enrollment comes from all over Colorado. CDE lists 4,243 non-resident students who open-enrolled into DCSD. Of them, 1,251 are listed as attending DCSD schools other than Hope Academies. Thus, 4,243 minus 1,251 = 2,992 HOPE students enrolling from out of district.