Lewis Roca
ROTHGERBER CHRISTIE

Lewis Roca Rothgerber Christie LLP
90 South Cascade Avenue
Suite 1100
Colorado Springs, CO 80903

719.386.3000 main
719.386.3070 fax
lrrc.com

L. Martin Nussbaum
Admitted in Colorado
719.386.3004 direct
719.386.3070 fax
mnussbaum@lrrc.com

The Unconstitutional Blaine Amendment in Colorado and Beyond

by
L. Martin Nussbaum, Esq.[*]

for
Colorado Advisory Committee
to the
U.S. Commission on Civil Rights

July 18, 2017

In March 2011, the Douglas County School Board approved a Choice Scholarship Program ("DCS Voucher") that awarded tuition vouchers payable to approved Private School Partners for up to 500 of its 60,000 students. This program, the Board found, served three purposes. It "provide[d] greater educational choice for students and parents to meet individualized needs." It "improve[d] educational performance through competition, and [it provided] a high return on investment of educational spending."

The Private School Partners included both for profit and nonprofit schools, whether and secular and religious. Under the DCS Voucher program, 75% of Colorado's designated "per pupil revenue" followed the student to the Private School Partner of the student's choice. For the first year, this amount was $4,575. The remaining 25% or $1,525 stayed with the District and thereby left more funds per capita for traditional students in the District. Both the left of center Denver Post and the conservative columnist, George Will, praised the program,[1] as did the

[*]L. Martin Nussbaum serves as co-counsel for the Douglas County School District in defending against the lawsuit challenging its Choice Scholarship Program.

Colorado Association of School Boards and the Colorado Attorney General. Those challenging this program argued that it violated the Colorado Blaine Amendment in article IX section 7 of the Colorado Constitution along with a number of other laws.

In this paper, I describe the history of the Blaine Amendment movement in Colorado and nationally, and I briefly on why the application of state Blaine Amendments to block school vouchers programs violates the Free Exercise, Establishment, and Equal Protection Clauses. I also comment, primarily through the Appendix, that government at all levels—including nineteen programs enacted by the Colorado General Assembly—have repeatedly found that the public interest is well served through public private education partnerships that include both secular and religious schools and universities.

BLAINE AMENDMENT HISTORY

Protestant Hegemony. Increased Catholic immigration, especially from Ireland, during the century threatened the Protestant power and birthed an anti-Catholic movement led by President Ulysses Grant[2] and Speaker of the House of Representatives, James Blaine.[3] The

---

[1] *School Vouchers Spell Choice in Douglas County*, Denver Post (March 17, 2011) (available at http://www.denverpost.com/2011/03/17/editorial-school-vouchers-spell-choice-in-douglas-county/) (contending that the DCS Voucher will "create health competition," save the school district over $400,000, and give parents choice), George Will, *School Choice in Colorado*, Washington Post (August 26, 2011) (available at https://www.washingtonpost.com/opinions/school-choice-in-colorado/2011/08/25/gIQATJO5gJ_story.html?utm_term=.46355340093d) .

[2] President Grant's September 30, 1875 speech to the Army of the Tennessee, during its reunion in Des Moines, spewed anti-Catholic sentiment. Grant warned of "another contest" relevant to "the near future of our national existence" between public schools teaching "patriotism and intelligence" and Catholic schools teaching "superstition, ambition and ignorance . . ." Philip Hamburger, SEPARATION OF CHURCH AND STATE 322 (2002). Grant urged his former troops to "[e]ncourage free schools, and resolve that not one dollar appropriated to them shall be applied to the support of any sectarian school." *Id.* In his annual message to Congress, two weeks before the opening of the Colorado Constitutional Convention, Grant proposed an amendment barring public funding to any school "for the benefit of . . . any religious sect or denomination" lest Americans become "directed by the demagogue or priest craft." *Id.* at 323.

petition for certiorari we filed with the United States Supreme Court in the DCS Voucher litigation further described the cultural and religious dominance of Protestantism at that time.

> From the Nation's founding until the mid-nineteenth century, Protestantism enjoyed unrivaled dominance over the nation's religious and civic landscape. "Many people viewed Protestantism as inseparable from the American republican idea," Stephen Macedo, Diversity and Distrust: Civic Education in a Multi-cultural Democracy 57 (2000), even as synonymous with "Americanism," John C. Jeffries, Jr. & James E. Ryan, A Political History of the Establishment Clause, 100 Mich. L. Rev. 279, 297 (2001) (quotation marks omitted).
>
> Protestant hegemony was particularly evident in American education. The first publicly funded school systems—the common schools—served as important tools for inculcating civic Protestant values in their students. Noah Feldman, Non-Sectarianism Reconsidered, 18 J.L. & Pol. 65, 72 (2002). These public schools' curricula "evidenced a 'pan-Protestant compromise, a vague and inclusive Protestantism' designed to tranquilize conflict among Protestant denominations." Kyle Duncan, Secularism's Laws: State Blaine Amendments and Religious Persecution, 72 Fordham L. Rev. 493, 503 (2003) (quoting Jeffries & Ryan, supra, at 299). They "had Bible readings, prayers, and hymns, but simultaneously refused to allow more particularized kinds of religious instruction." Christopher C. Lund, The New Victims of the Old Anti-Catholicism, 44 Conn. L. Rev. 1001, 1006 (2012). By the mid-nineteenth century, "[t]his became known as 'nonsectarianism,'" which "satisfied Protestants of all stripes." *Id.* But there was no room for Catholicism in this homogenized form of "nonsectarian" Protestantism. Many Protestant Americans viewed their new nation as a rejection of the customs and traditions of the Old World. *See* Macedo, *supra*, at 59-61. Catholicism was regarded as part of that discarded history, and the Catholic Church a corrupt and fearful foreign power. *See* Richard W. Garnett, The Theology of the Blaine Amendments, 2 First Amend. L. Rev. 46, 63 (2003); Philip C. Hamburger, Separation of Church and State, 232-36, 436 n.112 (2002).

Douglas County School District Petition for Writ of Certiorari at 5-6, *Douglas County Sch. Dist. v. Taxpayers for Pub. Educ.*, No. _____ (U.S. October 28, 2015) (authored principally by George Hicks, Paul Clement, and Professor Douglas Laycock).

---

[3] Professor Hamburger argues that there were "layers of religious prejudice in the Blaine Amendments" because the political coalition supporting these amendments included theological liberals who sought to exclude public funding from all religious schools whether Catholic or not. Philip Hamburger, *Prejudice and the Blaine Amendments*, First Things (June 20, 2017) (available at https://www.firstthings.com/web-exclusives/2017/06/prejudice-and-the-blaine-amendments).

The Perceived Catholic Menace. The Blaine Amendment movement, therefore, sought to preserve the generic Protestant culture of public schools, including reading of the King James Bible, while barring Catholic schools from receiving government funding.[4] While these amendments did not mention the Catholic Church, "it was an open secret that 'sectarian' was code for 'Catholic'."[5] The Blaine Amendment "was an anti-Catholic measure that still permitted a generalized Protestantism in public schools."[6] This history is settled. Nine U.S. Supreme Court justices acknowledge that anti-Catholic nativism was the engine of the Blaine movement.[7] Four opined that Blaine amendments have **"a shameful pedigree" rooted in a "doctrine, born of bigotry, [that] should be buried now."** *Mitchell v. Helms*, 530 U.S. 793, 828-29 (2000) (plurality opinion) (emphasis added). While the Blaine Amendment did not pass in Congress, this movement put "mini-Blaine" amendments in 39 to 41 state constitutions, including Colorado's.[8]

---

[4] Hamburger, SEPARATION OF CHURCH AND STATE, 297-99, 298 n.30, 322-26 (2002).

[5] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion); *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002) (dissenting opinion) ("'sectarian schools' . . . in practical terms meant Catholic"); *see also* Hamburger, *supra*, at 325 n. 99 (the newspaper of the Free Religious Association, the *Index*, explained on December 29, 1875, "[f]or 'sectarian' . . ., read 'Catholic,' and you have the full meaning . . ."). The Blaine provisions in the Colorado Constitution all use this code. *See* Colo. Const. art. IX, § 7 ("sectarian" used four times); IX, § 8 ("no sectarian tenets"); II, § 4 ("religious sect or denomination", and V, § 34 ("nor to any denominational or sectarian institution").

[6] Hamburger, *supra*, at 297.

[7] *See Mitchell*, 530 U.S. at 828-29 (plurality opinion of Justices Thomas, Rehnquist, Scalia, and Kennedy condemns anti-Catholicism innervating the Blaine movement*); Zelman*, 536 U.S. at 720-21 (dissenting opinion of Justices Breyer, Stevens, and Souter finds that Blaine was a form of backlash against "efforts to right the wrong of discrimination against religious minorities in public education"); *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer noting that Blaine has been "linked with anti-Catholicism").

[8] Meir Katz, *The State of Blaine: A Closer Look at the Blaine Amendments and their Modern Application*, 12 Engage 111, 112 (June 2011) (41 states with Blaine Amendments); *Trinity Lutheran*

Colorado Constitutional Convention. The Colorado Constitutional Convention proceeded simultaneously with efforts to pass the Blaine Amendment in Congress, and Colorado papers reported both events. In fact, the inclusion of Blaine language in the Colorado Constitution was the most controversial issues of the Convention. Protestant and Catholic camps submitted 45 petitions "of which thirty-eight called for prohibition" of public funding for Catholic schools.[9] Despite the substantial Catholic population in the state, especially in the Mexican-dominated southern counties, only Protestant ministers served as Convention chaplains and no Catholic delegates attended the Convention.[10]

The priest who later became the first Catholic bishop of Colorado, Rev. Joseph Machebeuf, led the Catholic petitioners, and personally addressed the Convention in opposition to the proposed Blaine provisions. Proceedings, 235, 329-32. The former territorial governor, John Evans, led a group of Denver Protestant churches in support of those provisions. They petitioned to preserve elements of the Protestant cultural hegemony—including a reference to God in the preamble, Bible in public schools, Sabbath as a civic holiday, and church tax exemptions—while opposing "sectarian influences" in public schools. Proceedings at 113-14.

Church of Columbia, Inc. v. Comer, 137 S.Ct. 2012, 2037 n.10 (Sotomayor, J, dissenting) (citing 38 states plus Missouri with Blaine Amendments).

[9] Donald W. Hensel, *Religion and the Writing of the Colorado Constitution*, Church History 349, 354 (1961).

[10] *See* Proceedings of the Constitutional Convention (1875-1876) ("Proceedings") 235 (February 4, 1876 letter of Rev. Joseph P. Machebeuf (future Catholic bishop of Denver) to the Convention stating "We believe that the Catholic population of the Territory have no one to speak for them and advocate their interests in your honorable body), 330 (February 17, 1876, written address of Rev. Machebeuf to the Convention, stating: "Catholics have not been represented among you."). Anthony Parker who surmised from the delegates' Hispanic surnames that three Catholic delegates were elected to the Convention. *See* Parker, Religious Controversies Surrounding the Colorado Constitution Convention of 1876 46-47 (1992). Even Machebeuf is incorrect and this were so, "only one [was] present, and he voted against the Catholics." Hensel, *supra*, at 355.

Evans admitted that anti-Catholicism provided political support for the Colorado Blaine provisions. He wrote in January 1876: "It seems like the Know Nothing movement—the Republicans are going into secret societies against the Catholics . . . But I keep my hand covered while I stir them up." Hensel, *infra*, at 352.

Those supporting adoption of the Colorado Constitution coldly calculated that the Blaine provisions were worth the risk of alienating Catholic voters because those provisions mobilized greater support from the Protestant majority. The Rocky Mountain News editorialized: "[T]he convention showed the wisdom of the serpent . . . for far more protestants can be got to vote for the constitution on account of this very clause than catholics for the same reason to vote against it and many no doubt, will vote for it for the sake of this single clause alone." *The School Fund and the Constitution*, Rocky Mountain News (February 2, 1876). In short, the political calculus in Washington and Denver were of a piece. Charles L. Glenn, Contrasting Models of State and School: A Comparative Historical Study of Parental Choice and State Control ch. 7 (2011).

It should also be noted that the move against Catholic education during this era was not only discrimination against a particular religion but discrimination between two religions. It favored the generic Protestantism regnant in the public schools, while opposing what it perceived as the anti-American sectarianism inculcated in the Catholic schools.

> [Nativists'] animosity against the Catholic Church arose not so much from the doctrines of their particular churches as from their broader theologically liberal concerns about church authority. They complained that the Catholic Church's assertions of authority (including its hierarchy, its creeds, and its dogmatic claims of truth) threatened the mental independence of individuals. Catholic claims of priestly and especially papal authority thus seemed to prevent individual Christians from choosing their own faith, as necessary for salvation; they also seemed to prevent citizens from thinking and voting independently, as necessary for democracy.

Hamburger, "Prejudice and the Blaine Amendments," *supra*.

> Just a few years later, Horace Bushnell wrote:
>
> > [T]he withdrawing of our Catholic children from the common schools . . . is a bitter cruelty to the children, and a very unjust affront to our institutions. . . .We bid them welcome . . . They, in return, forbid their children to be Americans, pen them as foreigners to keep them so, and train them up in the speech of Ashdod[11] among us.
>
> LIFE AND LETTERS OF HORACE BUSHNELL, 301 (1880).

There was at least one difference between the Colorado Blaine Amendment movement and the national movement. The despised Catholic minority nationally was the Irish. In Colorado it was the Mexicans. The day before the Convention began, the Rocky Mountain News ran a front page story entitled, "The Mexicans Keeping Up Their Thieving Reputations." Rocky Mountain News (December 19, 1875). It reported a discussion by the Colorado Teachers' Association ten days later of what should be done to bring Spanish-speaking schools into "our" system. *Educational-Colorado Teachers' Convention*, Rocky Mountain News (December 29, 1875). The Boulder paper editorialized in favor of the Blaine provisions, asking: "is it not enough that Rome dominates in Mexico and all of South America"? *See* Hensel, *supra*, at 349. *See* Eugene H. Berwanger, The Rise of the Centennial State: Colorado 1861-1876 15-16, 42-43, 112-15, 145-46 (2007). The Trinidad War of 1867-1868 between Anglos and Hispanics was of recent memory as was the vote of the southern Colorado counties opposing statehood.

With no one at the Convention to speak for the Catholics, the task fell to Rev. Joseph Machebeuf.[12] Proceedings at 235, 329-32. His address to the Convention shows that he felt he had to first establish that he and his Catholic flock were not enemies of Colorado, and that the best they could hope for in this era of great suspicion of their patriotism was to limit the Blaine

[11] Ashdod is a Philistine city mentioned in I Samuel 6:17.

[12] Machebeuf is fictionalized as Joseph Vaillant in Willa Cather, Death Comes for the Archbishop (1929).

policy to statutes instead of the state constitution that could be protected ever after by a mere one-third vote. *Id*. at 329-32.

THE UNCONSTITUTIONALITY OF THE BLAINE AMENDMENT

Application of Blaine Amendment against school voucher programs not only breathes life into law born of bigotry, it violates the Constitution's Free Exercise, Establishment, and Equal Protection Clauses.

The Free Exercise Clause Bars Denial of Government Benefits Because The Applicant Is Religious. The Supreme Court has spoken: applying the Missouri Blaine Amendment to bar a Lutheran school from participating in a state playground resurfacing program because the school is religious violates the Free Exercise Clause. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012 (U.S. June 26, 2017). Relying upon *McDaniel v. Paty*, 435 U.S. 618 (1978), *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,508 U.S. 520 (1993) (striking ordinance banning ritual sacrifice of animals), *Sherbert v. Verner*, 374 U.S. 398 (1963) (reversing denial of unemployment compensation to Sabbatarian who refused replacement work that included Saturdays), and *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995) (University's denial of funds to pay for student publication seeking to proselytize other student constitutes violates free speech rights),[13] the United States Supreme Court held that the Blaine-required "exclusion of Trinity Lutheran from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand." *Trinity Lutheran* at 2025.

[13] *Lukumi*, *Sherbert*, and *Rosenberger* each involved government impediments based upon religious conduct—religious **exercise**—to wit: the act of ritually sacrificing animals, the refusal to work on the Sabbath, and the publication of a newspaper that sought to convert others to the Christian faith. *See Trinity Lutheran*, 137 S.Ct. at 2025 (Gorsuch, J., concurring) (explaining that the status-conduct distinction reserved in *Trinity Lutheran*'s footnote three is not "a useful distinction" because "the same facts", in the hands of a thoughtful advocate, "can be described both ways").

The Free Exercise Clause and Equal Protection Clause Bar Adverse Government Action Targeting a Particular Religion. Evidence of legislative intent is often relevant in constitutional analysis. It is appropriate for a court evaluating the constitutionality of the DCS Vouchers or any school voucher program subject to a Blaine challenge to discern the legislative body acted with a discriminatory intent, "as in equal protection cases, . . . from both direct and circumstantial evidence." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (plurality opinion).

> Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body.

Id., s*ee also Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-68 (1977) (discussing the use of historical background, legislative history, and circumstantial and direct evidence to discern a discriminatory legislative intent in equal protection analysis); *Wallace v. Jaffree*, 472 U.S. 38, 56-60 (1985) (striking down Alabama's moment of silence statute after reviewing evidence of legislative intent, including statements by the governor and various legislators made inside or outside the official legislative process); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (Colorado constitutional provision struck down because it was "born of animosity" to gays and lesbians).

Because the evidence shows that the enactment of the Colorado Blaine provision was animated by anti-Catholic[14] and anti-Mexican animus, it violates the Free Exercise and Equal

[14] *See Kotterman v. Killian*, 193 Ariz. 273, 291 (Ariz. 1999) ("The Blaine Amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing 'Catholic menace' . . . we would be hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it.").

Protection Clauses[15] and must be declared unconstitutional. *See Lukumi* (ordinance targeted Santerian ritual sacrifice of animals while permitting killing of animals for food production, population control, and even training of greyhounds); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (when the historical motive in enacting facially neutral law was "a desire to discriminate against blacks on account of race and the section continues . . to have that effect[, the state constitutional provision] violates equal protection . . . ").

The Core Principle Of The Establishment Clause Is That Government Cannot Favor One Religion Over Another. Regardless whether one reads the Blaine Amendment as denying otherwise available government benefits on Catholic schools or as discriminating against all religious schools, it violates the Establishment Clause. *Colorado Christian Univ. v. Weaver*, 534 F.3d at 1257 (10th Cir. 2008) (The "neutral treatment of religions [is t]he clearest command of the Establishment Clause.") (citing *Larson v. Valente*, 456 U.S. 228 (1982)). Even Missouri's application of its Blaine Amendment against all religious organizations constitutes an establishment. Professor Hamburger explains:

> The seriousness of the problem is revealed by the fact that, although *Trinity Lutheran* has come before the Supreme Court as a free exercise and equal protection case, the Blaine Amendments most centrally collide with the Establishment Clause. In fact, the Blaine Amendments are among the clearest examples in the nation's history of state establishment of religion—and the only reason they have not been recognized as such is that they establish a theologically liberal vision of religion. The formal establishment of relatively orthodox churches came to an end in the early nineteenth century, and the Blaine Amendments mark the political ascendancy and establishment of theological

[15] *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (religion as a suspect class under Equal Protection Clause); *Niemotko v. State of Md.*, 340 U.S. 268, 272 (1951) (Equal Protect Clause bars government decision based on "City Council's dislike for or disagreement with the [Jehovah's] Witnesses or their views"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010) (same); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (voiding facially neutral ordinance targeting Santerian ritual practice).

> liberalism—an establishment not of any particular, let alone orthodox church, but a vision of individual spirituality unimpeded by ecclesiastical authority.

Hamburger, *Prejudice and the Blaine Amendments, supra*.

Government Scrutiny As To Which Institutions Are Sectarian and Which Are Not Creates Entanglement Problems And, Therefore, Establishment Problems. Blaine provisions require government to assess which schools are "sectarian" and which are not. This is particularly problematic because the Colorado Constitutional Convention did not find the generic Protestant religious practices in the 1870s public schools to be sectarian. Accordingly, the Blaine provisions both discriminate among types of religion and require an entangling governmental inquiry into the degrees of a private school partner's religiosity. The Establishment Clauses forbids both such practices.[16]

Blaine Provisions Cannot Survive Strict Scrutiny. There is no compelling governmental reason for the religious discrimination mandated by the Blaine provisions because: (1) just as Congress has found the government's interest well served by giving tens of millions of veterans vouchers through the GI Bill for college and vocational training at government or private institutions whether secular or religious,[17] the City and County of Denver has made funding

[16] *Colorado Christian Univ. v. Weaver*, 534 F.3d at 1257 (10th Cir. 2008) (statute requiring state to distinguish between pervasively sectarian and non-pervasively sectarian colleges violates First Amendment. The "neutral treatment of religions [is t]he clearest command of the Establishment Clause.") *See also Larson v. Valente,* 456 U.S. 228 (1982).

[17] *See* Servicemen's Readjustment Act of 1944 (signed by President Franklin D. Roosevelt), Montgomery GI Bill of 1984, 38 U.S.C. § 1401 (signed by President Ronald Reagan), "Top-Up" amendment to Montgomery GI Bill of 2000 (signed by President William J. Clinton), Veteran's Opportunities Act of 2001 (signed by President George W. Bush), 21st Century GI Enhancement Act of 2001 (signed by President George W. Bush).

available for preschool education whether the preschool is religious or not,[18] and the Colorado General Assembly has found, **in nineteen different programs**, that the government's interest in providing educational choice is in the best interest of students by repeatedly enacting neutral statutes indirectly permitting funds to flow to religious private schools[19]; (2) the Establishment Clause requires no religious exclusion when a voucher program is neutral and indirect, *Zelman v. Simmons-Harris*, 536 U.S. 639, 721 (2002); (3) educational choice complements the fundamental right of parents to direct the education of their children and the corollary right of schools to provide diverse educational options, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1923); and (4) the Douglas County School District has determined that the Choice Scholarship Program advances its governmental interests.

[18] The Denver Preschool Program allows residents to apply tax-derived funds toward tuition at any licensed preschool provider that agrees to be involved in a quality improvement program or has been accredited by an approved national organization. All licensed preschool providers—for-profit, non-profit, public, private, home-based, religious, and regardless of location (inside or outside Denver)—are eligible to participate. Denver Preschool Program Provider Agreement § II.4.

[19] *See* Appendix, Colorado Public-Private Education Partnerships That Include Religious Institutions as Eligible Partners.

APPENDIX
COLORADO PUBLIC-PRIVATE EDUCATION PARTNERSHIPS
THAT INCLUDE RELIGIOUS INSTITUTIONS AS ELIGIBLE PARTNERS

Public-Private Education Partnerships that include religious institutions as eligible partners are commonplace. This article has already discussed three such programs: the Douglas County Choice Scholarship, the GI Bill of Rights that has provided education and training opportunities for tens of millions of military personnel,[20] and the Denver Preschool Program.[21] But this is not all. The Colorado General Assembly has enacted nineteen public-private educational partnerships that do the same. The State of Colorado described these programs in its brief quoted below (with modest edits and omitting citations to the appellate record). *See* Opening Brief of State Appellants at 6-13, *Colorado State Bd. of Educ. et al. v. Larue,* Nos. 11CA1856 & 11CA1857 (Colo. App. April 16, 2012).

A. Preschool and Childcare

State Level. At the state level, the Colorado Preschool Program uses public funds to provide free preschool to eligible children at risk of academic failure. Colo. Rev. Stat. §§ 22-28-101 to 22-28-114 (citation to "§" or "§§" in this appendix are to the Colorado Revised Statutes). Through this program, participating school districts may contract with facilities associated with private and parochial schools. §§ 22-28-103(2), 26-6-102(1.5). *See also* Colorado Preschool Program: 2010–11Handbook, at 24. The Colorado Childcare Assistance Program assists low-income families with child care expenses. Using federal, state, and county tax revenues, parents may choose a child care facility that meets their needs, including, when eligible, private and parochial schools. *See* § 22-28-103(2); §§ 26-6-102(1.5) & (5.4).

B. Primary and Secondary

Special Education. Under the Exceptional Children's Education Act, §§ 22-20-101, school districts and Boards of Cooperative Educational Services may place special education students in private schools to provide them with a "Free and Appropriate Public Education" under the Individuals with Disabilities Education Act. Each student placed in a private school receives public funding. Like the Douglas County Choice Scholarship Program, this program "strive[s] to provide the best educational programs possible within limited resources," § 22-2-401(1)(b), and promotes a public–private partnership to "vastly improve the quality of each student's overall academic experience." § 22-2-401(1)(e). To this end, school districts frequently place students in approved "facility" schools, which may be operated by private or public agencies, including religiously-affiliated entities. State per pupil revenues are sent directly to the approved facility school by the Department of Education for the cost of the pupil's education, and the

[20] *See* n. __ , *supra.*

[21] *See* n. __ , *supra.*

approved facility school can then bill the child's school district of residence for the remaining cost of the pupil's education. 1 CCR § 301-8, 2220-R-9.03(2)(a)(ii)(B); *see also* 2220-R-8.03.

English Language Proficiency. The English Language Proficiency Act provides public funding for school districts, institute charter schools, and facility schools to implement English language proficiency programs. As under the Exceptional Children's Education Act, facility schools may include private and religious entities. § 22-24-103(2.5), § 22-2-402(1); §§ 26-6-102(1.5) & 104; 1 CCR 304-1.

College in High School Programs. At the high school level, the Concurrent Enrollment Programs Act and its predecessor, the Postsecondary Enrollment Options Act, allow students to earn high school and college credit simultaneously. §§ 22-35-101 to 112. Under these programs, public school students in grades 9–12 may use publicly-funded tuition benefits to pay for approved courses at eligible institutions of higher education, including private colleges. These publicly-funded tuition benefits flow through the Public School Finance Act, but participating institutions of higher education need not modify their curriculums in any respect. The Early College Program similarly partners public high schools with private institutions of higher education. Through this program, public charter schools are established on college and university campuses. A substantial part of the students' coursework is through the college or university, which may be private. § 22-35-103(10). For example, Colorado Springs Early Colleges is a public charter school associated with Colorado Technical University, which is private, and Southwest Early College High School is a public charter school associated with Colorado Heights University, another private university.

Career and Technical Education. Under section § 23-8-102, an "education provider" may receive state funds for administering a career and technical education program. These education providers include in-district and out-of-district facility schools. §§ 23-8-101.5(5) and 103(2)(d). The program permits taxpayer funds to be spent at private—including religious—entities to provide students with educational opportunities they might otherwise have been denied.

Grant Programs for At-Risk Students. The Department of Education also administers grant programs benefitting K–12 public school students through public–private partnerships. Through the Expelled and At-Risk Student Services grant program, for example, the Department of Education funds school districts to provide services to expelled students and students who are at risk of academic failure. These educational services may be provided by private schools. §§ 22-33-203(2)(c)(I) and 205(1)(b).

The Tony Grampsas Youth Services Program "provide[s] state funding for community-based programs that target youth and their families for intervention services in an effort to reduce incidents of youth crime and violence." § 25-20.5-201(1)(a). Eligible entities include, among others, non-profit organizations, institutions of higher education, local governments, and schools. § 25-20.5-201(4). These eligible entities provide a variety of services, including education. Finally, the Colorado Comprehensive Health Education Act provides grants to fund health and wellness programs at public and facility schools. § 22-25-104(1). Parents may remove their children from objectionable portions of the program. § 22-25-104(6)(b).

C. Higher Education

College Opportunity Fund. Colorado is a national leader in public–private partnerships in higher education. Colorado's College Opportunity Fund ("COF") program provides a stipend for each eligible Colorado undergraduate student to attend a public or participating private institution of higher education. § 23-18-102. The amount of the stipend may vary "annually based on the General Assembly's allocation to the College Opportunity Fund." COF Policy § 4.01. Students pursuing a professional degree in theology are not eligible to receive the stipend. § 23-18-102(5)(a)(II)(C.5). Students may, however, take religious classes from private religious institutions such as Colorado Christian University, Regis University, and the University of Denver. COF Frequently Asked Questions at 3.

Other Programs. Many other programs apply state-funded financial aid to tuition at institutions of higher education, including private religious institutions. In general, these programs provide tuition assistance on the basis of need, merit, or work-study. *See* §§ 23-3.3-101, *et seq*. These programs include:

- The Colorado Student Grant Program,
- The Colorado Graduate Grant Program,
- The Colorado Leveraging Educational Assistance Partnership Program,
- The Supplemental Leveraging Educational Assistance Partnership Program,
- The Centennial Scholars Program,
- The Colorado Graduate Scholars Program,
- The Dependents Tuition Assistance Program, and
- The Work-study Program.

Standards for student eligibility vary for each program, but they all allow public funds to be spent at private institutions, including those with religious affiliations. *See* §§ 23-3.3-101.