



# Mickey Mouse Strikes Back

## *Voucher wars heat up in Colorado*

by JOSHUA DUNN and MARTHA DERTHICK

In 2002, as the Supreme Court decided the constitutionality of publicly funded voucher programs in *Zelman v. Simmons-Harris*, Robert Chanin, then the general counsel for the National Education Association, said that regardless of the Court's decision, voucher opponents would have many options

under state constitutions. They contained, he said, a variety of "Mickey Mouse provisions" suitable for legal assaults. Following Douglas County's adoption of a voucher program in 2011, Colorado has begun its second round of cartoonish constitutional conflict.

In the first round, the state supreme court in 2004 struck down a statewide voucher program enacted by the legislature for the benefit of students in low-performing districts. The plaintiffs alleged, and the court narrowly concurred, that the program violated a provision of the state constitution that school boards "shall have control of instruction in the public schools of their respective districts." The court held that to require school districts to turn over some locally raised money to private schools, as the law did, offended that provision.

This seemed to suggest that a program adopted by a local school board might survive, and a test recently emerged. Suburban areas with high-performing school districts have shown little support for vouchers, so it was surprising to have the first locally enacted voucher program come from Douglas County, a Denver suburb with one of the highest median incomes in the country. School choice advocates, however, had targeted the district in school board elections. As a result, the normally nonpartisan elections turned partisan in 2009, when the Republican Party endorsed a slate of four candidates and handily defeated candidates endorsed by the teachers union.

Those efforts bore fruit in March 2011 when Douglas County's school board unanimously approved the Pilot Choice Scholarship Program. Through this plan, any student who had been enrolled in district schools for at least one year could apply for a voucher of approximately \$4,600, equal to 75 percent of state per-pupil funding, to attend a "partner" private school, with the school district keeping the other 25 percent. Religious schools would not have to waive admission requirements to participate, but would have to offer an exemption for voucher students who wished to be excused from religious services. Of the 19 initial partner schools, 14 were sectarian. The school board capped the program at 500 students but

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expected it to expand. As the third-largest district in the state, Douglas County serves more than 61,000 students.

The American Civil Liberties Union (ACLU), along with Americans United for Separation of Church and State, sued, citing a host of constitutional offenses, including violating the ban on support for private schools and churches (the

state's Blaine Amendment), the ban on religious tests, the guarantee of religious freedom, the uniformity requirement in the education clause, the prohibition on support for private institutions, and, for good measure, the guarantee of local control. After a three-day hearing in August, state district court judge Michael Martinez granted the ACLU's request for a permanent injunction. Clearly alarmed by the religious instruction that would occur at religious schools—"not only is the risk of religion intruding into the secular educational function great, that risk is inevitable and unavoidable due to the very structure of the Scholarship Program"—Judge Martinez accepted nearly all of the ACLU's claims.

Voucher supporters lined up to assist Douglas County in defending the program. The Daniels Fund, a well-regarded and influential foundation in the Rocky Mountain region, pledged \$530,000 for legal expenses. In addition, the libertarian Institute for Justice filed an appeal on behalf of several families whose children were granted vouchers.

While the ACLU obviously has a grab bag of provisions at its disposal going forward, one risk is its reliance on the state Blaine Amendment. If state courts rule that the amendment requires that religious students and institutions be treated differently than secular ones, as Martinez's ruling seems to imply, it could potentially raise a federal challenge under both the First and Fourteenth Amendments as a violation of free exercise and equal protection. The most promising outcome for Douglas County would be for Mickey Mouse to meet the U.S. Constitution.

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