

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLORADO

3 Civil Action No. 23-cv-2079-JLK

4 ST. MARY CATHOLIC PARISH IN LITTLETON, et al.,

5 Plaintiffs,

6 vs.

7 LISA ROY, et al.,

8 Defendants.

9

10 REPORTER'S TRANSCRIPT

11 Bench Trial, Vol. 3

12

13 Proceedings before the HONORABLE JOHN L. KANE, Judge,
14 United States District Court for the District of Colorado,
commencing on the 4th day of January, 2024, in Courtroom A802,
15 United States Courthouse, Denver, Colorado.

15

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P R O C E E D I N G S

(Proceedings commenced at 9:03 a.m.)

THE COURT: And you know where you're supposed to be.
Cross examination, please.

CROSS EXAMINATION

BY MR. REAVES

Q Good morning, Dr. Tishelman.

A Good morning.

Q You provided your direct testimony yesterday; is that
right?

A Yes, it is.

Q And are you aware that today you're under the same oath
that you took yesterday?

A Yes, I am.

Q And did you meet with anybody after testifying yesterday to
talk about your testimony?

A Informally.

Q And with whom did you meet?

A Well, I went out for some wine yesterday with a couple of
people.

Q Okay. Thank you. Switching gears, then, what materials
did you review when preparing to give your expert opinion in
this case?

A I reviewed the materials that I cited in the report that I
wrote, and I reviewed the materials that were provided to me

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1 related to this case. I reviewed my own CV, and I'm not sure if
2 I reviewed anything else.

3 Q Okay. Just one or two specific questions about that. Did
4 you read the Archdiocese guidance for issues concerning the
5 human person and sexual identity when you were preparing for
6 this case?

7 A I don't recall.

8 Q Did you review the Catechesis of the Good Shepherd Catholic
9 preschool curriculum when you were preparing for this case?

10 A I may have looked at it if it was provided to me, but I
11 don't remember it very well. If you would like me to discuss
12 it, I would appreciate being able to review it again.

13 Q Sounds good.

14 A May I ask you to speak a little louder or closer to the
15 microphone? Because I'm a little hard of hearing.

16 Q Absolutely. I'm sorry about that. Are you aware of how
17 often St. Mary's and Wellspring have had to deny enrollment to a
18 preschool family?

19 A I don't recall.

20 Q Have you ever conducted research regarding the
21 psychological impacts of denying a family enrollment in a
22 Catholic school?

23 A No.

24 Q I'd like to pull up your expert report, which should be on
25 the screen momentarily, and it's marked as Exhibit 47. And I'd

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1 like to look at page seven at the end of the first full
2 paragraph specifically. And this is where you talk about your
3 research regarding the effects of bullying, and you state in
4 this portion -- let's see. You state in this portion that,
5 quote, these data pertain to adolescents. Did I read that
6 correctly?

7 A Yes. Can you point to where that is? But I remember
8 writing it. I don't actually see it.

9 Q Yeah. It's the end of the first full paragraph.

10 A Yes. I see it.

11 Q These data pertain -- yes. Thank you. And one of the
12 studies you cited in this portion is the 2021 Trevor Project
13 study. Are you familiar with that study?

14 A Yes, I am.

15 Q And are you aware that this study only covered middle
16 school and high school students?

17 A I am. That's why I wrote that although this pertains to
18 adolescents, it likely can be extrapolated to affect children.

19 Q And what is the Trevor Project?

20 A The Trevor Project is actually a project that does research
21 pertaining to LGBTQ communities.

22 Q So, this report is not a peer-reviewed study?

23 A No.

24 Q And this wasn't conducted by academics who are neutral on
25 these issues. This was conducted by an advocacy organization?

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1 A Yeah. I can't tell you who the -- what the background is
2 of the researchers, but I do know that they are people who are
3 in support of LGBT communities.

4 Q Have you ever studied LGBTQ bullying in preschools?

5 A No.

6 Q Are you aware of studies specific to preschool on LGBTQ
7 bullying?

8 A No.

9 Q You similarly testified yesterday that this research on
10 bullying is, quote, usually with older children, but can be
11 presumed to be relevant to younger children as well. Do you
12 recall that?

13 A Yes, I do.

14 Q In addition to conducting research, you also treat
15 patients; is that right?

16 A I'm not currently treating patients, but I have treated
17 many patients in the past.

18 Q Roughly how many transgender youth have you treated in your
19 career?

20 A Gosh. I don't know. Honestly, quite a few. But I don't
21 actually know that number. So, I'm afraid of misleading the
22 Court.

23 Q That's totally fine. How many of those people you've
24 treated were preschoolers?

25 A Quite a few were preschoolers, because I co-founded a

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1 clinic for children who are gender diverse and transgender in
2 approximately 2015, and then I was myself referred many of those
3 children. Also in my career, I have treated many preschoolers
4 for other reasons.

5 Q So, I guess specific to transgender preschoolers, you said
6 you've also treated preschoolers for other reasons, but just
7 talking about transgender preschoolers, is that a large
8 percentage of the transgender students you -- or transgender
9 patients you treat, or a small percentage?

10 A Well, I'm not treating them now, but for a while it was --
11 younger children, many of whom were preschoolers were a large
12 bulk of the children I was treating.

13 Q Yesterday you testified about a number of specific
14 examples. You talked about, you know, specific cases of
15 individuals. Do you recall that?

16 A Yes, I do.

17 Q Were any of those examples preschool students?

18 A I don't remember all the examples I told you -- I presented
19 to you, but I did have quite a few preschool children who I saw.

20 Q Were any of the examples of students enrolled in public
21 schools?

22 A Were any of them students enrolled in public schools?
23 Probably. I don't recall.

24 Q One thing you testified about yesterday was policies
25 regarding locker rooms and bathrooms for transgender students?

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1 A Yes.

2 Q Do you recall that? Are you aware of the testimony in this
3 case and specifically some of the documents submitted in this
4 case about how in preschool, the preschool students do not use
5 locker rooms?

6 A I'm aware that in preschools, often children don't use
7 locker rooms.

8 Q And similarly, some of the deposition testimony elicited in
9 this case and some of the documents in this case show that
10 preschool students use a single bathroom, one at a time, and
11 that they don't have a -- typically have a shared bathroom?

12 A In my experience, that can vary from school to school.

13 Q Yeah.

14 A But perhaps in your schools, that's the case.

15 Q That's fair. It does vary, but I think some of the
16 testimony was that regardless, there's always an adult
17 supervising the bathroom situation as well?

18 A There should be.

19 Q Yes. In your expert report, you defined adverse childhood
20 experiences as, quote, experiences that have the potential to
21 cause significant detriment to a child's well-being, both
22 emotional and physical, and are often traumatic; is that right?

23 A Yes.

24 Q And you gave examples yesterday of different adverse
25 childhood experiences, including neglect, physical abuse, sexual

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1 abuse, emotional neglect, being physically attacked at school,
2 death of a parent, homelessness, extreme stress and trauma, and
3 chronic illness; is that right?

4 A I'm not looking -- I don't have it on my screen, but I will
5 trust you that that's correct.

6 Q Generally speaking, those types of things would be adverse
7 childhood experiences?

8 A As well as gender minority stress, which I discussed.

9 Q Are you aware of any evidence presented in this case about
10 instances of these type of, to quote your own language, often
11 traumatic childhood experiences occurring at either St. Mary's
12 or Wellspring's preschools?

13 A No.

14 Q Okay. And in fact the testimony already in the record
15 confirms the opposite, that there's no evidence of even any
16 complaints from LGBTQ individuals about discrimination; is that
17 right?

18 A I believe so.

19 Q And the evidence in the record also shows that neither
20 school has enrolled an LGBTQ child in preschool to the best of
21 their knowledge; is that right?

22 A Yes.

23 Q And in fact --

24 A From what I recall.

25 Q Yes. And in fact Dr. Goldberg testified yesterday that

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1 when possible, LGBTQ families seek out LGBTQ-affirming schools;
2 is that right?

3 A In my experience, that's not always true.

4 Q Okay. And then the department has also repeatedly told
5 this Court that no LGBTQ preschool student has been denied
6 enrollment at either St. Mary's or Wellspring; is that right?

7 A That's what I recall, and I trust you are conveying
8 accurately.

9 Q So, instead of a case about severe childhood trauma, this
10 is a case about the Archdiocese and its schools' ability to
11 maintain their religious beliefs while participating in the UPK
12 program; is that right?

13 A I have a different thought about that, if I may?

14 Q Yeah. Briefly.

15 A I think that it's about access to religious institutions
16 for people -- partly, at least, for people who do or may start
17 to while they're enrolled identify as transgender or gender
18 diverse or in the LGBTQ community, whether in my own research
19 and my clinical work with families, they often draw on religion
20 and faith as a source of -- as a source of solace to them.
21 Their religious beliefs help sustain them, and some families may
22 want to seek out religious institutions for that reason and not
23 be excluded on that basis, because that could be a terrible loss
24 of community and faith that's important for them.

25 Q So, you think it's important, and you think this case is

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1 about whether the Archdiocese would change its position on
2 letting in LGBTQ families?

3 A I don't think I'm saying that, but I'm saying that
4 excluding people of faith on -- even if there's some differences
5 in belief systems, can be hard on families and children. And if
6 children are already at a school and start to identify as within
7 a LGBTQ community and need to be then excluded from a community
8 that they have -- that they -- that they support and a community
9 that means something to them, that can be a significant
10 adversity and loss.

11 Q So, you teach at a Catholic school; is that right?

12 A What?

13 Q You teach at a Catholic school, Boston College?

14 A I teach at a Jesuit school, yes.

15 Q So, presumably you think that sending a child or anyone's
16 child to a Catholic school is not itself wrong or harmful?

17 A Yes.

18 Q Similarly, you would say sending your child to a Jewish
19 school is not itself wrong or harmful?

20 A Yes. I would say that people have various faiths, even at
21 the Jesuit school I teach at, and there's a recognition and
22 respect for differences in faith that I appreciate.

23 Q Yeah. I'd like to talk a little bit more about that,
24 actually, but I'd like to start with that in the context of
25 bullying. Your testimony yesterday talked a lot about the

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1 harmful effects of bullying; is that right?

2 A I don't remember how much I talked about it, but I know I
3 talked about it.

4 Q Do you know if either of the plaintiff preschools in this
5 case have policies that categorically prohibit bullying?

6 A I recall that you -- that the policies prohibit bullying,
7 but that -- those policies on the ground when I've worked with
8 schools don't always prevent bullying.

9 Q But you have no evidence that they do or don't work in this
10 case?

11 A No, I don't.

12 Q Okay.

13 A That's just a general statement.

14 Q Sure. I'd like to pull up Exhibit 17, and I will represent
15 to you that this is the stipulated exhibit showing St. Mary's
16 school handbook. And I'd like to go to page 47 at the second
17 full paragraph. Yeah. There it is. And it says, quote, the
18 Archdiocese of Denver and St. Mary Catholic Virtue School
19 prohibit the harassment and/or bullying of one student by
20 another student, parent, or staff member.

21 And then going down to the next page, under the header,
22 actions to take, it says, all reports of harassment and bullying
23 will be treated seriously and investigated. Did I read that
24 correctly?

25 A Yes.

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1 Q And then on the same page, it defines "bullying," and then
2 states in the next section, harassment and/or bullying -- I
3 think a little bit lower down, actually. There it is.
4 Harassment and/or bullying of any kind will not be tolerated by
5 the administration, faculty, and staff of this school. Did I
6 read that correctly too?

7 A Yes.

8 Q Okay.

9 A May I ask a question?

10 Q Sure.

11 A When I looked this over, I wasn't quite sure what -- how to
12 discriminate between bullying and teasing, because teasing isn't
13 included as bullying, but many people might consider teasing,
14 especially on the basis of gender, to be a kind of bullying.
15 And I'm not quite sure why that isn't considered harassment or
16 bullying.

17 Q I'm not an expert on teasing and bullying either, so we can
18 move on from there.

19 A I didn't say I wasn't an expert.

20 Q Okay. So, just to circle back to something I think we
21 briefly touched on, but I'm not sure if I was specific before,
22 are you aware of any instances of bullying specifically on
23 account of sexual orientation or gender identity at St. Mary's
24 or Wellspring?

25 A No, but I wouldn't be.

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1 Q Right. Do you think that just because someone has a
2 sincere religious belief about sexual orientation and gender
3 identity, they would permit LGBTQ students to be bullied?

4 A No. But it looks like they might permit them to be teased,
5 which I might consider part of bullying.

6 Q Are you aware of studies which show that students are less
7 likely to be bullied in private schools than public schools?

8 A No.

9 Q I'd like to pull up Exhibit 5, which I will represent to
10 you is stipulated as an authentic copy of the Archdiocese's
11 policy guidance on issues relating to sexual orientation and
12 gender identity in its Catholic Schools. And on page three of
13 this document, the second full paragraph, it's talking about how
14 to provide pastoral care on issues related to sexual orientation
15 and gender identity, and it states -- yeah. Second full
16 paragraph. Right there. Situations involving individuals
17 should be addressed with pastoral care that is rooted in love
18 and concern for the person. Did I read that correctly?

19 A I'm not a -- I'm sure you did, but I'm not seeing it
20 myself. Oh. I do see it. I just found it.

21 Q Great. And then also on that page, at the end of the
22 second full paragraph, it says, each person deserves to be heard
23 and treated with respect. It is our responsibility to respond
24 to their concerns with compassion, mercy, and honesty. Did I
25 read that correctly too?

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1 A Yes, you did.

2 Q You also briefly touched on individuals who are intersex in
3 your testimony yesterday; is that right?

4 A Yes. We didn't always call them intersex. The terminology
5 is in flux. So, I don't usually refer to them as intersex, but
6 I understand what you're talking about.

7 Q Okay. Thanks. I'm glad that we understand each other.
8 Are you aware that the Archdiocese and the Catholic Church have
9 provided specific guidance on issues surrounding individuals who
10 are intersex?

11 A I don't -- I am aware, but I don't recall what the guidance
12 is.

13 Q Okay. Are you aware -- well, I guess if you're not aware,
14 that's -- that's fine, then. I'd like to talk a little bit
15 about your testimony regarding enrollment rejections yesterday,
16 you know, what might happen if a student is not admitted to a
17 school. You were asked yesterday about what harm could result
18 from being denied enrollment in a preschool. Do you recall
19 that?

20 A I don't recall it very clearly, actually.

21 Q Okay. One thing you mentioned during that exchange was
22 about how you frequently -- or more frequently encounter
23 students, quote, who had negatively experienced -- who had
24 negative experiences at school than children who were actually
25 not admitted to the school. Does that ring a bell?

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1 A Well, I work with families who are trying to decide which
2 school would be the best school to send their children to based
3 on concerns about their well-being. And I know that for some
4 families, it would be their preference to be able to send their
5 child to a religious institution, and that, again, religion and
6 faith for many people in the United States is really important,
7 but that they sometimes opt not to do it because of concerns of
8 what the experience of the child will be. Then I've also worked
9 with children who are already enrolled in a school and not
10 comfortable or feeling safe, who had to, for their well-being,
11 leave the school.

12 Q And you described your testimony yesterday about enrollment
13 as speculative; is that right?

14 A Enrollment where?

15 Q Oh. Your testimony about enrollment decisions as
16 speculative?

17 A Well, I have worked with families clinically where, to help
18 and share decision-making about enrollment in terms of what
19 would be the best thing to do. I've also worked with families
20 who are grappling with the issue of whether to talk with their
21 faith communities about their children and their children's
22 status as either having a variation in sex trait or being gender
23 diverse, just because -- because religion can be so central for
24 many people, it does come up in clinical work.

25 Q Sorry. Just a few more questions. Let me take a look at

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1 my notes here. You testified yesterday in response to the
2 question should a parent be allowed to decide what is best for
3 their child in the realm -- in this realm, we're talking about,
4 of gender-diverse and transgender children.

5 And your response was, yes. Usually parents make
6 important decisions on behalf of their children under the law,
7 except in extreme circumstances when a child may be subject to
8 unacceptable behaviors on the part of a parent, such as sexual
9 abuse or other extreme and illegal behaviors; is that correct?

10 A That sounds correct.

11 Q And the bottom line, the last sentence in your expert
12 report says, it is especially important that policies not
13 undermine a parent's best efforts to accept and support their
14 child or to advocate for their child's well-being in any
15 environment; is that right?

16 A Yes.

17 Q So, is it your position that if a parent's best effort to
18 accept and support their child and advocate for their child's
19 well-being is to send them to a Catholic school like one of the
20 schools in this case, you would argue that no policies should
21 undermine their decision; is that right?

22 A Well, I know that for families that I've worked with who
23 have always drawn on their faith and their faith communities for
24 support, it can be a difficult decision about where to enroll a
25 child, if that would be their preference. And that's something

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1 that people grapple with, but it also can come up after a child
2 is enrolled in a school already, that a child is starting to be
3 perceived as gender diverse. And then it raises a different
4 issue about whether to stay in that setting or go someplace
5 else.

6 MR. REAVES: Okay. No further questions. Thank you.

7 THE COURT: Redirect, please?

8 MS. RUST: Good morning, Your Honor.

9 THE COURT: Good morning.

10 **REDIRECT EXAMINATION**

11 BY MS. RUST

12 Q Good morning, Dr. Tishelman.

13 A Good morning.

14 Q So, I'm going to pick up right where you left off about the
15 examples of enrollment you were giving. So, just to be clear,
16 is it possible for a child to enroll as cisgender in a school in
17 August, and then be revealed as gender diverse in March during
18 the school year?

19 A Yeah.

20 Q Okay. So, if a school determines to disenroll that child,
21 what is the harm?

22 A Well, of course it would depend individually. Some
23 families might prefer for their child to leave that environment,
24 but assuming that that's not the case, it's a -- one of the
25 stressors for children is often even starting school and meeting

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1 new people. It's hard to imagine, but for children, changing
2 environments and beginning school can be really stressful. If a
3 child is happy in a school, has made friends, is feeling
4 supported and accepted by the teachers, having to leave a school
5 is hard to explain to a child that they need to leave a school
6 because of who they are, including something that they can't
7 change, and lose that support.

8 And even more, if a child has been schooled in a
9 particular religion and taught faith, losing and not
10 understanding why they're not able to be part of a community of
11 faith that is important to their family can be really hard as
12 well.

13 Q Would not letting them use their pronouns be harmful?

14 A Yes. And it can be very confusing.

15 Q Would not letting them use their bathrooms be harmful?

16 A If there are bathrooms that are -- that are male and
17 female, and they don't have access to the bathrooms that
18 coincide with their understanding of themselves, it can be
19 harmful.

20 Q Would not allowing them to dress in the dress code they
21 prefer be harmful?

22 A Yes. In certain situations, that can be harmful.

23 Q One second. Can you tell us why those situations would be
24 harmful?

25 A Yes. Because those are situations in which a child's

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1 understanding of themselves that is often shared with their
2 family is not being recognized in the school setting, and that
3 can be -- can instill a sense that they are not themselves
4 acceptable the way that they are, especially about something
5 that they can't change.

6 As I gave as an example yesterday, if I was in a school
7 and they had a code that you had to be over 5'5", and I was the
8 shortest kid at school, which I always was, and somebody said
9 you can't be here because you're not tall enough, that would
10 have been confusing to me. It would have made me feel like who
11 I was in something I couldn't change and had no control over was
12 not acceptable. And so it's kind of a parallel situation.

13 Q And are those types of confusion and struggles with
14 self-identity examples of what we talked about yesterday that
15 can lead to gender minority stress, or toxic stress?

16 A Yes. And it can lead to the internalization of a sense of
17 being flawed and not good enough. It can really lower a child's
18 confidence. I've seen this in many ways. Transgender and
19 gender-diverse children are one example, but that can happen
20 with children who have intellectual challenges, children who are
21 neurodiverse, autistic, children of certain races or ethnic
22 backgrounds who don't feel as accepted, and that is very, very
23 hard for children.

24 And we do know that transgender children often, as they
25 get older, have higher levels of mental health challenges than

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1 their cisgender peers, and that children who are supported in
2 their identities tend to have much better mental health than
3 those children who are not.

4 Q And to put a fine point on it, have you personally observed
5 this with your work with preschoolers in your clinic?

6 A I couldn't hear you. I'm sorry.

7 Q To put a finer point on it, have you personally observed
8 this with preschoolers that you worked with clinically?

9 A Yes. I observed it with preschoolers I've worked with, and
10 I've observed it in preschoolers who are really hesitant, they
11 even know then, to tell people. Like, I've had preschoolers
12 say, my gender is still a secret at school, because they're
13 afraid of the ramifications. And I've had children who as soon
14 as they come home change their dress and hair, and realize that
15 it would be stressful at school. But that's having to keep a
16 part of yourself secret that's important to you can be really
17 difficult.

18 Q Okay. And, Dr. Tishelman, the examples we just talked
19 about, the bathrooms, the dress code, the pronouns, are those
20 examples of harmful conduct, in your opinion?

21 A You're saying if children are not allowed to use the same
22 pronouns in school that they use at home?

23 Q Yes.

24 A Yes. And I think, you know, we've talked about the
25 importance of home-school collaborations and consistency, and

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1 that sort of defies that logic.

2 MS. RUST: Nothing further, Your Honor. Thank you,
3 Dr. Tishelman.

4 MR. REAVES: Just a few more questions?

5 THE COURT: Okay. Go ahead.

6 MR. REAVES: Thank you.

7 **RECROSS EXAMINATION**

8 BY MR. REAVES

9 Q Dr. Tishelman, you were just talking about consistency
10 between home and school; is that right?

11 A Yes.

12 Q And in your report, you talk about how research supports
13 the positive effects on children of consistent -- consistency
14 and mutual support across settings; is that right?

15 A Yes.

16 Q So, you would say it's important that parents and teachers
17 are on the same page regarding what's being taught in the school
18 and what's being affirmed in the home?

19 A I'm saying that it's important that children -- children's
20 identity be the same at home and at school, or their ability to
21 express themselves in terms of gender is important between a
22 home and school.

23 Research also shows that disciplinary actions at home
24 and at school can be coordinated. It's possible that children
25 will -- any child will go to a school where something is taught

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1 that the family doesn't believe. I mean, I think that happens
2 quite a bit. But -- and those are things that people need to
3 grapple with.

4 Q You also talked briefly in redirect on the outcomes for
5 transgender students who socially transition, and in your
6 report, you cite a couple studies. Have you done any research
7 specifically in this area?

8 A Of social transition?

9 Q I think you have one called social supports. Do you recall
10 that study?

11 A Yes. That was a retrospective study in which we looked at
12 children's well-being and what they reported about their social
13 support. And children who have social support at school and
14 peer support are more likely to have more positive mental
15 health.

16 Q And that study specifically looked at students between nine
17 and 18 years old; is that right?

18 A Yeah. Approximately.

19 Q Okay. And the report said the findings were, quote,
20 preliminary, and you found that additional research needed to be
21 done in this area; is that right?

22 A Yes.

23 Q Okay. During your testimony today, you talked a lot about
24 your own clinical work and individuals you've met with in that
25 work; is that right?

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1 A Yes.

2 Q So, these examples are offered as anecdotal examples.

3 These aren't peer-reviewed studies; is that correct?

4 A Yes.

5 Q So, unlike peer-reviewed research, these may not be truly
6 representative of the experiences of families more broadly; is
7 that right?

8 A Yes.

9 Q Okay. How do LGBTQ youth benefit from the fact that
10 St. Mary's and Wellspring have been excluded from the UPK
11 program?

12 A I couldn't hear the end of your sentence.

13 Q I'm sorry. How do LGBTQ youth benefit from the fact that
14 St. Mary's and Wellspring have been excluded from the UPK
15 program?

16 A How do they benefit? I don't understand the question, I
17 think.

18 Q Yeah. So, this case is about whether St. Mary's and
19 Wellspring can participate in the UPK program, and I'm trying to
20 figure out how it's beneficial to LGBTQ youth to keep these two
21 schools out of the program.

22 A I don't know that I can answer that question.

23 MR. REAVES: That's all, Your Honor. Thank you.

24 THE COURT: Any surredirect?

25 MS. RUST: No, Your Honor, but I have a quick --

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1 sorry. No, Your Honor. I'm done with Dr. Tishelman. But when
2 she steps down, I just have a quick housekeeping matter, if it
3 pleases the Court.

4 THE COURT: Well, Dr. Tishelman, thank you. You may
5 stand down.

6 THE WITNESS: Thank you very much.

7 MS. RUST: Your Honor, I have to apologize to the
8 Court. In our scramble with what was going on with our office
9 this week, I misidentified some exhibit numbers during
10 Dr. Goldberg's testimony. So, I just wanted to correct that for
11 the record.

12 So, my apologies to the Court, but for Dr. Goldberg's
13 testimony, when we were discussing the journal articles in order
14 of my discussion, the correct numbers of exhibits are
15 Exhibit 55, Exhibit 57, Exhibit 56, and Exhibit 54. Thank you,
16 Your Honor.

17 THE COURT: Okay. Thank you. I suppose it's not
18 really relevant, but your closing down of your offices is
19 compounded by the fact that today at noon is the National
20 Western Livestock Parade on 17th Street, and so not only are you
21 not permitted to go into your offices, but you should step very
22 carefully when you cross the street.

23 MS. RUST: Yes. We let our colleagues know that that
24 was happening too.

25 THE COURT: Next witness, please?

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1 MS. CARRENO: Thank you, Your Honor. The next witness
2 is Jesse Burne.

3 (The Witness is Sworn)

4 THE COURTROOM DEPUTY: Please be seated. Please state
5 your full name for the record, and spell your last name.

6 THE WITNESS: My name is Jesse Brandon Burne, and last
7 name is spelled B-U-R-N-E.

8 **DIRECT EXAMINATION**

9 BY MS. CARRENO

10 Q Good morning, Mr. Burne.

11 A Good morning.

12 Q Can you please tell us what your current employment
13 position is.

14 A I am the division director for early learning access and
15 quality at the Colorado Department of Early Childhood.

16 Q And what does that mean?

17 A In my capacity within this role, I oversee a division that
18 includes the Colorado Child Care Assistance Program, also known
19 as CCCAP, Colorado Shines, as well as many of our stimulus
20 grants. There's approximately 30 staff within my division that
21 range from policy analysts to administrators, compliance
22 specialists, grant administrators, various different roles. We
23 are focused on providing these types of programs and services to
24 families across Colorado.

25 Q And before you were employed in this position, where were

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1 you working?

2 A I worked for the Denver Housing Authority, managing and
3 overseeing initiatives and programs that cut across all public
4 housing communities within Denver, surveying residents of
5 various ages. I've been in executive director roles that serve
6 children and youth. The pretty consistent theme within my
7 career has been low-income communities.

8 Q And what is your highest level of education?

9 A I have a master's degree in social work and administration.

10 Q You said that you are the director of early learning access
11 for CCCAP, or the Colorado Child Care Assistance Program. Can
12 you tell us what CCCAP is.

13 A Yes. The CCCAP program is basically Colorado's child care
14 subsidy program. It is meant to help support low-income
15 children and families across the state by offsetting the cost of
16 child care. It has been around for over 20 years, and serves
17 approximately around 26 to 27,000 children each year. It should
18 be noted that it has a pretty wide age range. So, we serve
19 birth all the way through 13 years old.

20 The program, as I mentioned, is really focused on
21 low-income communities, and so there are tiered income levels
22 that determine a family's eligibility, unless they are
23 185 percent below federal poverty guidelines, which in that
24 instance they are eligible for the program.

25 Q And so you said that CCCAP serves children up to 13 years

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1 old?

2 A Yes.

3 Q And that's unlike the UPK program that serves children up
4 to four years old?

5 A Yes. That is correct.

6 Q How do families sign up for CCCAP?

7 A So, I can walk us through the process. So, families will
8 hear about CCCAP through various sources. It could be online.
9 It could be within their county. I want to add another critical
10 detail here, which is that CCCAP is considered a
11 state-supervised, county-administered program. And so the work
12 that we do at the County is really important in terms of the
13 program itself, the operations of the program, but also bringing
14 about awareness so that families understand that CCCAP, if they
15 meet the criterias available to them, and they will often apply
16 for the program within their local county human services office.

17 Q And when you say that it's a state-supervised,
18 county-implemented program, who from the State supervises, or
19 what agency from the State supervises those counties?

20 A Colorado Department of Early Childhood and the -- myself
21 and the CCCAP staff, as well as just our overall executive team
22 has the responsibility of overseeing the program and ensuring
23 compliance.

24 I want to note that CCCAP, which is also perhaps a
25 significant difference with UPK, is really federally regulated.

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1 It uses federal funds, and so there are a lot of compliance
2 topics that are required, and that is within our responsibility
3 as the State.

4 Q And is one of those federal requirements that families
5 sign -- or providers sign a fiscal agreement to participate in
6 CCCAP?

7 A Yes. That is correct. The fiscal agreement serves as a
8 contract, if you will, that outlines what the requirements and
9 expectations are for any provider that is participating in the
10 CCCAP program. The fiscal agreement is between the County and
11 the provider, and it outlines everything from how reimbursement
12 occurs, rates within the program, attendance tracking,
13 eligibility within the program, and several other requirements.

14 Q Can a provider participate in the CCCAP program without
15 signing that contract or that fiscal agreement that you just
16 described?

17 A No, they cannot.

18 Q When do providers that participate in CCCAP sign that
19 fiscal agreement?

20 A They typically sign it when they have made their own
21 determination that they would like to participate in the CCCAP
22 program. You know, and for a lot of providers, connecting you
23 back to the fiscal agreement, the fiscal agreement outlines a
24 lot of content when it comes to reimbursement and rate setting,
25 and that is a major draw for providers to participate in the

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1 program to be able to have access to those types of funds to
2 help support children within their program.

3 The offset of the cost that is used, the reimbursement,
4 goes directly to the provider on behalf of that child that is in
5 their program. And given how thinly a budget -- a budget is
6 developed for many child care providers, the access to a funding
7 source becomes critical for many of them in terms of their
8 operations.

9 Q And so based on what you just described, is it typical that
10 CCCAP providers sign the fiscal agreement before children are
11 actually matched to them?

12 A Yes. They need to have a signed fiscal agreement in place.
13 That is one of the -- that is the primary document that a County
14 uses to then authorize care at that provider. And without that
15 agreement, a County would not be allowed nor really maybe even
16 have awareness that that provider wants to be in the CCCAP
17 program without that fiscal agreement.

18 Q And it's possible that a CCCAP provider that signs the
19 fiscal agreement for children that are initially matched may be
20 matched with further children later in the school year?

21 A Yes. That's correct.

22 Q I want to turn your attention to what's been marked as
23 Exhibit 42, which is the -- one of the CCCAP fiscal agreements.
24 And, Mr. Burne, do you recognize this document?

25 A Yes, I do.

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1 Q And what is this document?

2 A This is -- well, the first page that we're looking at, as I
3 alluded to a moment ago, is the notification of the rate
4 schedule. This is a critical topic for all providers. And it
5 is part of the attachment to the broader fiscal agreement.

6 Q And if I could turn your attention to page four, what is
7 this part of the document?

8 A So, that's what I was referencing. That is the primary
9 fiscal agreement language within this document.

10 Q And who is the CCCAP provider for this contract?

11 A St. Mary Preschool.

12 Q And what are the effective dates of this agreement?

13 A The effective date is -- so, the effective date is usually
14 whenever it is -- I believe it's when it's signed, so we would
15 have to scroll down to the date in which it's signed.

16 Q Okay. Can we scroll down to the signature page, please.

17 A So, in this instance, the effective date would have been
18 August 24th, 2023.

19 Q And who signed this fiscal agreement?

20 A Both the child care provider and the local county human
21 services department. And in this case, Jeff. Co., Jefferson
22 County.

23 Q And the child care provider was St. Mary in this case?

24 A Yes. That is correct.

25 Q And you would agree that this document was signed by Tracy

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1 Seul?

2 A Yes. That is correct.

3 Q And if we could go back up to page four again. In the
4 first line under provider ID, how long is this agreement
5 effective?

6 A It's usually effective for a year, and the provider can
7 then renew it each year.

8 Q And so can you please read the line under provider ID
9 1541340 that starts with, this agreement.

10 A Yes. My apologies. So, the agreement shall be in effect
11 from August 4th, 2023, through July 31st, 2026. So, they are on
12 three-year periods. Yes.

13 Q And if I could direct your attention to page five of this
14 document, paragraph number 12. And can you please read that
15 paragraph aloud.

16 A Which one?

17 Q Paragraph number 12.

18 A Twelve, okay. Accept referrals for child care without
19 discrimination with regard to race, color, national origin, age,
20 sex, religion, marital status, sexual orientation, or physical,
21 intellectual, or mental health disability.

22 Q What does this paragraph mean?

23 A This paragraph means that a provider is not allowed to
24 discriminate based on those categories that are outlined.

25 They're not able to discriminate against a child or a family in

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1 accepting referrals, which in this instance is accepting the
2 child into their program.

3 Q And so you said that this applies to both children and
4 their families?

5 A That is correct. The intention of this document is -- and
6 CCCAP in general is to not just support a child. It's to
7 support the entire family.

8 Q And what are referrals in the CCCAP process?

9 A So, a referral for us for the State of Colorado is there
10 are two different options that we consider a referral. So, a
11 family that is interested in participating in CCCAP and wants to
12 understand if there's any local CCCAP providers that are close
13 to them and their community can go to our Colorado Shines
14 website, which is also outlined in this agreement, and be able
15 to enter their address.

16 And then the website is able to provide who those CCCAP
17 providers are that are closest to them. I think they can even
18 choose geographic distance, five miles, ten miles. And then
19 from there, that gives them the information within that program,
20 and they can then seek out a visit with that provider to learn
21 more.

22 Or they can also contact our Colorado Shines hotline
23 that we work through Mile High United Way where that family can
24 then speak in real time with a live person, so not just online,
25 and that person can help them think through what providers might

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1 be of interest to them.

2 At the heart of the referral process within CCCAP is a
3 really strong focus on family choice. And so we don't
4 necessarily have a matching process. It's really up to a family
5 whether they're looking at one or two providers in
6 consideration, or 12, which one they feel is the best fit for
7 them through those two different referral options.

8 Q So, despite there not being a matching process, would you
9 agree that similar to the UPK program, CCCAP is based on choice
10 of a family?

11 A Yes.

12 Q And so if a family chose a CCCAP provider and that provider
13 was a registered CCCAP provider, would that provider be
14 obligated to accept that family regardless of discrimination?

15 A If they sign a fiscal agreement, yes.

16 Q And in the case of St. Mary's, would this apply to any
17 families referred to St. Mary's after August 23rd of 2023?

18 A Yes.

19 Q What would the department consider a violation of this
20 provision number 12 that you've just discussed?

21 A So, we would consider a violation being if a provider used
22 any of those categories, race, color, national origin, sexual
23 orientation -- if a provider had used any of those as a basis to
24 reject the referral, reject the enrollment of the child into
25 their program, we would consider that a violation within that

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1 clause.

2 Q And that would be regardless of how the referral occurred?

3 A That's correct.

4 Q Are you aware of any complaints against St. Mary for
5 violating that provision since they've entered into the CCCAP
6 contract?

7 A No, I am not.

8 Q And is your understanding that St. Mary's has been
9 compliant with that provision number 12?

10 A To the best of my knowledge.

11 MS. RUST: Those are all the questions I have at this
12 time, Your Honor.

13 THE COURT: Thank you. Cross examination, please.

14 **CROSS EXAMINATION**

15 BY MR. REAVES

16 Q Good morning, Mr. Burne.

17 A Good morning.

18 Q I'd like to take a look back at that nondiscrimination
19 provision we were just looking at, which is Exhibit 36. And we
20 will pull that up on the screen. And this is, again, paragraph
21 12 on page two. Do you see that provision there?

22 A Yes, I do.

23 Q And that clause says that providers agree to accept
24 referrals without discrimination with regard to, and it lists a
25 number of characteristics?

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1 A Yes.

2 Q Is gender identity listed on there?

3 A No, it is not.

4 Q Does the provision say anything about considerations
5 regarding a child's family?

6 A Not in this clause. No, it does not.

7 Q I'd like to take a look at Exhibit 37, which we will pull
8 up as well. And I don't know how well you can see that, but can
9 you identify this document?

10 A Oh, yeah. This is the -- if we can scroll up to the very
11 top, that would be great. Yeah. This is the fiscal agreement
12 for St. Mary Preschool.

13 Q Okay. And do you see the dates on there, or the date on
14 there at the top?

15 A Yeah. July 16th, 2021.

16 Q Okay. And let's go down to page PL 683, and you can see
17 the signature -- the signatures on there. And do you see who
18 signed that one?

19 A Yes. Ms. Seul.

20 Q I'd like to go back to paragraph six on page one of this
21 agreement. And do you see a nondiscrimination clause in
22 paragraph six there?

23 A Yes, I do.

24 Q And does that one mention either sexual orientation or
25 gender identity?

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1 A No, it does not.

2 Q For how many years have Archdiocesan preschools
3 participated in CCCAP?

4 A I would want to confirm in the exhibit, but I believe since
5 April of -- since March of 2020.

6 Q And you testified earlier that CCCAP does not have a formal
7 matching process; is that right?

8 A Yeah. I wouldn't describe it as a formal matching process.

9 Q Do families apply directly to CCCAP or to your office, or
10 do they apply directly to a school to enroll?

11 A It happens at the county level. That's where they apply is
12 through their human services county office.

13 Q For the CCCAP funding?

14 A That's correct.

15 Q But to enroll in a school, would a family still have to
16 send in an application to that school?

17 A Yeah. Depending on the school, if that school requires an
18 application.

19 Q When does a provider receive CCCAP funding? Is it before
20 or after they've enrolled a particular family in their school?

21 A After. It's a reimbursement model.

22 Q Can a family approach a provider directly and then enroll
23 in CCCAP afterwards?

24 A Yes. Whether they apply before or after, we do encourage
25 parents to meet with providers to understand if that provider is

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1 a fit for their child.

2 Q You talked earlier about your understanding of the term
3 "referral" in the contract; is that right?

4 A Yes.

5 Q Now, this contract is entered into between the County and
6 the school; is that right?

7 A Yes.

8 Q So, it's not really your understanding of the contract
9 provision today, but it's the understanding of the County and of
10 the school entering into this agreement based on the text of the
11 contract; is that right?

12 A Yes. And based on the rationale of why we included that
13 clause to begin with, which I can walk us through if needed.
14 It's tied to federal requirements.

15 Q Does the fiscal agreement cover private non-funded
16 activities of preschools?

17 A No. I don't believe it does.

18 Q And you testified earlier that CCCAP funding goes directly
19 to pay for the tuition of a student; is that right?

20 A Help offset the cost, yes.

21 Q So, a school couldn't use that to, say, you know, build a
22 new classroom or something like that?

23 A That would not be federally allowable.

24 Q And I guess circling back to referrals, you know, you
25 mentioned previously that there are two different ways that you

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1 understand a referral to happen; is that right?

2 A Yes.

3 Q And so one is when a family goes to a website and then
4 contacts a school after seeing them on the website; is that
5 right?

6 A Correct.

7 Q In that situation, does your office, or does the County
8 tell the provider that a family looked at their website and then
9 is coming to look at the school?

10 A No. There's not a level of coordination to that degree.

11 Q And when a family calls the hotline that you mentioned,
12 does the person who speaks with them on the phone call the
13 provider and say, I spoke to this family, they're going to come
14 and look at your school? Do they make that contact as well?

15 A No. The expectation, again, is that we will encourage the
16 family to make contact with that provider after they learn more
17 in their initial contact with the hotline or the website, and
18 then be able to learn more from there.

19 Q So, in both instances, a provider might not know if a
20 family that comes to them has looked at the CCCAP website or
21 spoken to a CCCAP representative on the phone; is that right?

22 A Yes. I would say that's rare. Usually families, similar
23 to UPK, would want to contact the provider to learn if it's a
24 good fit, but I could see there being an instance where what
25 you're describing could occur.

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1 Q And, sorry. I meant to clarify, because I think I agree
2 with you. I was saying CCCAP won't necessarily tell a provider
3 beforehand that a family is coming to them, but the family might
4 just come directly?

5 A That's how it happens most often.

6 Q Yeah. So, there's no -- there's no process where CCCAP,
7 for lack of a better term, sends a family to the school and
8 says, we are assigning you to this school?

9 A We don't assign anybody, because, again, it's based on
10 family choice. So, it's not the State or the County's or the
11 providers' ability to assign anything. It's a family choosing
12 that provider and learning more about what they have to offer
13 for their child.

14 Q Okay. And when did the department come up with its
15 understanding of -- that these two processes are what
16 constitutes a referral? When did that first become your
17 understanding of what a referral is?

18 A So, I've been with the CCCAP program for two years. It
19 predated my arrival, but it has been a practice since I've been
20 within my role and from my understanding of those avenues as a
21 referral source have been present within the CCCAP program for
22 several years.

23 Q And is the term "referral" defined somewhere in the
24 agreement?

25 A Not to my knowledge. I would have to confirm that.

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1 MR. REAVES: Your Honor, let me confer with my
2 colleagues briefly. Nothing further, Your Honor. Thank you.
3 Thank you, Mr. Burne.

4 THE WITNESS: Thank you.

5 **REDIRECT EXAMINATION**

6 BY MS. CARRENO

7 Q And, Mr. Burne, you were just asked to look at Exhibit
8 Number 36. Do you recall reviewing that exhibit?

9 A Yes.

10 Q And that was not the most current version of the CCCAP
11 agreement that St. Mary entered into; is that correct?

12 A Yes.

13 Q And was Exhibit 42 that you reviewed on your direct
14 examination the most recent CCCAP agreement that St. Mary's
15 entered into?

16 A Can we pull that up again? My recollection is that
17 August 2023 was the most recent.

18 Q Sure. And let's pull up Exhibit 42 again, and turn to the
19 signature page.

20 A Yup. I actually see it right there. Received August 2023.

21 Q And so Exhibit 42 is the terms that St. Mary's has agreed
22 to in August of this year?

23 A That's correct.

24 Q And those are the terms that currently apply to St. Mary's?

25 A That's correct.

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1 Q I want to turn your attention back to paragraph 12 on page
2 four of that same document. And you were asked whether the word
3 "family" specifically appears in paragraph number 12; is that
4 correct?

5 A Correct.

6 Q Why does the department and why do you understand this
7 paragraph to apply to children and families?

8 A Because the totality of all of this language applies to
9 families within the agreement. There is language here that
10 discusses parents or adult caretakers. I can actually see that
11 here within line 15, further down. There is reference to
12 caretakers, teen parents, families. You can see that language
13 throughout the entirety of the fiscal agreement.

14 Q And when paragraph 12 says without discrimination, the same
15 way it doesn't say as to parents, would you agree it also
16 doesn't say as to children?

17 A Correct.

18 Q And like the UPK program, CCCAP is also based heavily on
19 the choices of a family?

20 A Yes.

21 Q And regardless of how a referral gets to a CCCAP provider,
22 they are obligated to accept that referral; is that correct?

23 A Yes. Once they've signed the fiscal agreement.

24 Q And if during the meeting a provider told a family that
25 they wouldn't qualify for preschool there, or they wouldn't be

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1 able to accept CCCAP benefits at that school because of the
2 child or the family's sexual orientation, would that be a
3 violation of the CCCAP fiscal agreement?

4 A Yes. It would be a violation of the CCCAP fiscal
5 agreement. I would add that really the only grounds that if a
6 provider has signed the fiscal agreement that they can say no to
7 enrolling a child is if they don't have enough spots within
8 their program, which the County would be aware of.

9 I believe even some of the providers listed on the
10 website child care, our Colorado Shines website will indicate
11 whether there are CCCAP spots available. So, capacity is really
12 the only primary allowable rationale for why a provider who has
13 already signed an agreement would not enroll a child. Not
14 enrolling them based on discriminating within any of these
15 categories would not be allowable.

16 Q And paragraph 12, does that come from a federal requirement
17 under CCCAP?

18 A Yes. So, I recall that we had -- let me just kind of back
19 up a bit. So, CCCAP is funded with the majority of federal
20 funds. It comes from CCDF, which we -- is called the Colorado
21 Child Care Development Fund. Large, large block grant that
22 comes from the Administration for Children and Families Office
23 of Child Care. And it was through that entity, which is not
24 unusual -- we receive guidance from them all the time -- our new
25 policies or procedures or legal requirements that all states

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1 must follow in order to be eligible to continue to receive those
2 federal funds.

3 And so this particular clause was a requirement that
4 came down from the federal government, and that we needed to
5 include so that the State continued to be eligible to receive
6 funds to support CCCAP across the state.

7 Q And so --

8 MR. REAVES: Your Honor, I would just like to object
9 that this is well beyond the scope of cross examination, and I
10 don't think this is appropriate additional testimony.

11 THE COURT: Overruled. Go ahead.

12 Q. (By Ms. Carreno) And just two more questions. And so the
13 terms "sex" and "sexual orientation" came from federal
14 requirements?

15 A Yes. That's correct.

16 Q And you said that CCCAP, unlike UPK, goes up to 13 years of
17 age; is that correct?

18 A Yes. That is correct.

19 MS. CARRENO: Those are all the questions that I have,
20 Your Honor.

21 THE COURT: I'm going to permit any additional cross.
22 Go ahead.

23 **RECROSS EXAMINATION**

24 BY MR. REAVES

25 Q Thank you for your patience, Mr. Burne. Earlier when you

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1 and I were speaking about the two different types of referrals,
2 it was apparent that CCCAP directly -- does not directly tell
3 the provider about a referral; is that right?

4 A That's correct.

5 Q So, a provider might not know that a family coming to them
6 and seeking to enroll is receiving or will receive CCCAP
7 funding; is that right?

8 A Can you repeat that question again?

9 Q Yes. So, CCCAP doesn't tell the provider that this is a
10 referral, and a family might just look at the website, like you
11 said, and then go directly to the provider. The provider won't
12 know if the family coming in the door is a referral family; is
13 that right?

14 A They would if they shared that with them. Hey, where did
15 you learn about us? Oh. I saw you on the Colorado Shines
16 website.

17 Q But there's no obligation that families tell a provider, I
18 found you on the CCCAP website?

19 A No. I think it's standard business practice to where a lot
20 of our providers understand that that's where families are
21 getting connected through, and so there might not be an explicit
22 acknowledgment of that within the visit, but that is a primary
23 source that providers across the state ensure that families
24 understand what programs they offer if they are -- if they have
25 spots available, and how close they are in proximity to that

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1 family.

2 Q So, at St. Mary's, they have over 50 students enrolled in
3 their preschool, but only one CCCAP student; is that right?

4 A To my knowledge, yes.

5 Q And so when you testified earlier about having to accept
6 every referral from the department, you're imposing an
7 obligation that a provider might not know is being imposed on
8 them if they don't know that a family coming to them is a
9 referral; isn't that right?

10 A Once they sign this agreement, they are agreeing to
11 accepting CCCAP children into their program as long as they have
12 space available.

13 Q So, this agreement affects the ability of every provider
14 that has signed it -- it requires every family [sic] to accept
15 any family that comes to them at all, because they might not
16 know if it's a referral or not?

17 A It's not based on whether -- whether the -- whether the
18 families saw the provider on a website or whether they, you
19 know, heard from their neighbor that this is a fantastic
20 provider. I mean, it's -- it doesn't change the language within
21 this agreement in terms of the provider has already acknowledged
22 that they will accept these referrals and not discriminate
23 within these categories. And so once that is signed, yes, they
24 are obligated to serve that child, unless they have no space
25 within their program.

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1 Q And you testified on redirect that the nondiscrimination
2 provision at paragraph 12 here was not drafted by you; is that
3 right?

4 A That's correct.

5 Q Okay. So, you're not necessarily the authoritative -- the
6 authoritative interpreter of that provision either; is that
7 right?

8 A No. I don't have any legal background. I am responding to
9 it through a programmatic lens.

10 MR. REAVES: Okay. Thank you. No more questions.

11 THE COURT: You get the last bite.

12 MS. CARRENO: Nothing further, Your Honor.

13 THE COURT: Okay. Thank you. You may stand down.

14 MS. CARRENO: Hold on one second, Your Honor. Okay.

15 Thank you, Your Honor.

16 THE COURT: All right. Mr. Burne, you may stand down.

17 Thank you. As I advised you earlier in the week, there's a
18 10:30 matter I must attend to, and take your computers and
19 overcoats with you. This should take probably 15 minutes at the
20 most. We'll be in recess.

21 (Recess at 10:18 a.m., until 11:02 a.m.)

22 THE COURT: Sorry for that interruption in this case,
23 but the rain falls on the just and the unjust. Okay. Next
24 witness, please.

25 MS. FISCHER: Defense calls Elsa Holguín.

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1 (The Witness is Sworn)

2 THE COURTROOM DEPUTY: Please be seated. State your
3 full name for the record, and spell your last name.

4 THE WITNESS: Elsa Holguín, H-O-L-G-U-I-N.

5 **DIRECT EXAMINATION**

6 BY MS. FISCHER

7 Q Good morning.

8 A Good morning.

9 Q Ms. Holguín, what is your current job title?

10 A Yes. I am the president and CEO of the Denver Preschool
11 Program.

12 Q And what did you do before that?

13 A I was the senior program officer for child and family
14 development at Rose Community Foundation.

15 Q And how long have you worked in early childhood education?

16 A I've been in early childhood education for close to 30
17 years.

18 Q And how long have you been the CEO of the Denver Preschool
19 Program?

20 A Four and a half years.

21 Q And what is your highest level of education?

22 A I have a master's in public administration.

23 Q And in addition to being the CEO of DPP, do you work for
24 any other organizations?

25 A I have. I worked for Women's Foundation of Colorado, Hunt

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1 Alternatives Fund, and Mi Casa Resource Center.

2 Q And are you a member of any professional organizations?

3 A I am. I am part -- I have been part of the national
4 network of early childhood providers, and I'm on the board of a
5 national organization, Tools of the Mind, which is an outreach
6 curriculum.

7 Q And what does your role as CEO of DPP entail?

8 A My role entails the administration of sales tax that we
9 receive from the City. We get a portion of the Denver sales
10 tax. And we provide -- so, in coordination with the board, I
11 ensure that we provide tuition support for four-year-olds in
12 Denver to attend preschool, and some three-year-olds to attend
13 preschool as well.

14 Q And have you received any awards for your work at DPP?

15 A I have been very lucky to receive several awards. I think
16 this year we have received a Partner in Philanthropy award from
17 the Denver Business Journal. I also was the finalist for the
18 Nine News Leader of the Year from the Denver Chamber of
19 Commerce. And I received an award from an organization that is
20 called CLLARO, which is the Colorado Latino and Resource
21 Organization, and is a leadership award for my work.

22 Q And, Ms. Holguín, my colleague asked if you can scoot a
23 little closer to the mic.

24 A I will. I can't move the chair, so I'm going to move this.
25 I think I'm there.

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1 Q I'd like to -- Jen, can you please pull up Exhibit 51. It
2 should come up on the screen there. If it doesn't, it's in
3 defendants' binder.

4 A Here -- oh. My resumé? No.

5 Q Yeah. Do you recognize that document?

6 A That's my resumé.

7 Q And does that accurately reflect -- did you prepare that
8 document?

9 A Yes, I have.

10 Q And does it accurately reflect your qualifications and
11 experience?

12 A Yes.

13 Q And is it up to date?

14 A Yes.

15 MS. FISCHER: Your Honor, at this time I would like to
16 tender Exhibit 51 for consideration later.

17 THE COURT: It will be considered with all of the
18 other exhibits, but you can examine on it if you want to.

19 Q. (By Ms. Fischer) Ms. Holguín, I've got some questions
20 about DPP. First of all, just generally, what is it?

21 A Yes. DPP is the local Denver preschool initiative. So, we
22 administer Universal Preschool for Denver's children. We
23 provide primarily tuition support. 70 percent of our funding
24 goes to tuition support. A portion of our funding also goes for
25 quality improvements in addition to evaluation, communication,

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1 and also the work that we do to support providers to access
2 other resources as well.

3 So, it is our primary function to provide tuition
4 support. We work with 270 providers, preschool providers.
5 Sixty percent of our providers are part of Denver Public
6 Schools. Forty percent of our providers are what we call
7 community providers, which are nonprofit, for-profit. The
8 nonprofit includes small centers, big centers, religiously
9 affiliated, and we also work with and support home-based
10 providers.

11 Q And when was DPP implemented?

12 A DPP is now 17 years old. It started in 2016 [sic] as a tax
13 initiative. It was approved by the voters in 2014, and we got
14 started in 2016.

15 Q And who is eligible for DPP?

16 A The primary eligibility is that it has to be a
17 four-year-old child that lives in Denver.

18 Q And do all families living in Denver qualify?

19 A All families qualify. We're a universal program, so all
20 families qualify for support.

21 Q So, why did DPP implement a Universal Preschool system?

22 A We strongly believed that we wanted to have a program for
23 all children to have access, because we believed that when all
24 children have access, we can actively improve the quality of
25 education in Denver.

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1 Q How do providers sign up?

2 A Providers sign up through an application that is open year
3 round. So, they can sign up at any time throughout the year.
4 Our application requires that they are serving a child that
5 lives in Denver. So, we do have a couple of providers that are
6 outside of Denver, usually in the surrounding areas, but they
7 must serve a child that lives in Denver.

8 Q So, just to clarify, a provider can be outside of Denver as
9 long as the child is in Denver?

10 A That is correct.

11 Q How do families sign up?

12 A Families sign up through a -- an application system that we
13 have available in several languages. They can sign up online,
14 they can sign up by calling, or they can fill out an application
15 at a preschool that is already signed up as a Denver preschool
16 provider.

17 Q And now how does a family get paired with a school?

18 A Families make the choice. So, families have the ability to
19 use our navigation tool that we have available online. The
20 navigation tool can give them options based on criteria that
21 they specify, and often it is that proximity to either their
22 home or their work, as well as the quality of the preschool, as
23 well as the cost.

24 Q And what are some of the -- to the extent you haven't
25 already answered this, what are some factors that families use

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1 to select a preschool provider?

2 A It is -- besides proximity, they are looking at the cost.
3 They are looking at the quality, and they are also looking at
4 the availability of hours, because some families are looking for
5 part-time support, you know, where they need just a few hours a
6 day. Some are using what we call a full-day support, which is a
7 schoolday. And some are looking for extended-day support. So,
8 they are looking to match their criteria.

9 And based on that, they make the selection. They do
10 have to select from the preapproved Denver Preschool Program
11 providers, because we do have to ensure that they are approved
12 as providers before the family applies. Once the family is
13 accepted into the program, then we are also able to provide the
14 financial support.

15 Q Are you familiar with the term "mixed delivery"?

16 A Yes. Absolutely.

17 Q Is DPP a mixed-delivery system?

18 A Absolutely. It's one of our highest values that we have a
19 mixed-delivery system in that the families have an opportunity
20 to choose what makes the best sense for them.

21 Q And why is that one of your highest values?

22 A Because families have very unique needs, and especially
23 when you're dealing with younger children, they have criteria
24 that they are looking at places that they can easily access,
25 perhaps places where they have other children, or perhaps a

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1 community where they feel that they can belong. So, for us it's
2 very important that they have a lot of choices, and it must
3 include family providers as well.

4 Q What is the tuition credit rate for DPP?

5 A The tuition credit rate for DPP on average is about \$800
6 per month, year round. We are on a scale, so our scale at the
7 lowest level, which is the lowest quality, the highest income,
8 and at that level of support it's probably about \$40 per month.
9 At the highest level is \$1,290 per month. But the average is
10 about \$800.

11 Q And so what is that scale -- I guess what determines that
12 scale?

13 A Yeah. We determine the scale based on the income of the
14 family, based on the quality rating of the providers. So, the
15 higher the quality rating of the provider, the more support that
16 we provide. And it's also based on the number of family members
17 that are -- that determines the support that we provide with our
18 tuition.

19 Q And how is that paid out?

20 A We provide the providers directly, because they are DPP
21 providers. Part of their application process is that we set up
22 the payment system. And so we pay the providers directly.

23 Q You testified earlier about your long experience in early
24 childhood education. Do you feel that you can speak about the
25 benefits of early childhood education?

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1 A Absolutely. Not only have I seen the benefits, and it is
2 the reason why I'm in the field of early childhood, but we also
3 have evaluation at Denver Preschool Program.

4 Q Evaluation of the providers?

5 A Evaluation of the children and the providers and the
6 family. So, we have three evaluations. We have a longterm
7 evaluation where we have been following our children that are
8 now in college. We have been following them for several years.
9 We have a short-term evaluation, and we have a process
10 evaluation.

11 Q So, why is preschool important?

12 A Preschool is very important to ensure that children have
13 equal access and equal support to be ready to access school, to
14 be ready for school, but also to be ready for life. We believe
15 that preschool provides children the ability to have not just
16 the academic, but most important to have the social-emotional
17 readiness to be able to succeed in school.

18 Q So, do all licensed child care providers have to provide an
19 education?

20 A Yes. A licensed provider for the Denver Preschool Program
21 and for us is what we know that it has to be a quality
22 education, and quality education means that they have to have a
23 curriculum. They have to be able to provide the additional
24 supports that they need, and we look at the more comprehensive
25 whole-child education that is needed.

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1 Q Just to clarify, you're talking about requirements or
2 qualifications you look for for a Denver preschool provider?

3 A Absolutely.

4 Q Can you talk about any additional requirements for a
5 preschool provider specifically you look for?

6 A Yes. So, at the Denver Preschool Program, we look for
7 first and foremost that they have -- that they are licensed, and
8 that they are insured. Those are the two primary
9 qualifications. And the third and very important for us is
10 their quality rating.

11 And in Colorado, we have a Colorado rating system that
12 goes from one to five. For the Denver Preschool Program, they
13 have to be a minimum of three, three-level quality rating. We
14 do grow them to go from a level one to a level three. And then
15 we work really hard to maintain them at a level three, because
16 we know that if they are not a quality provider, we are not
17 going to get the results that we are seeking.

18 Q So, you mentioned being licensed. Is that like the floor?

19 A Absolutely the floor. Yes. Safety.

20 Q But would being licensed and meeting safety standards, is
21 that enough?

22 A It is not enough.

23 Q Does the concept of safety just include licensing?

24 A Safety is more than just licensing. It includes that there
25 is an environment where children are also able to read -- are

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1 able to acquire the skills that they need to be able to succeed.
2 So, it requires more than just the basic level of safety. It
3 requires that there is an environment where children can thrive.
4 It's not a place to keep children. It's a place for children to
5 thrive.

6 Q So, would it be fair to say the concept of health and
7 safety has evolved to include the whole child?

8 A Absolutely. And we have learned that it's so important.
9 It's not just whole child. We have also learned that
10 social-emotional development is critical, and it is the most
11 important skill that children need to have to be ready for
12 school.

13 Q And is having access to preschool part of that
14 social-emotional development?

15 A Yes. It is access to an environment that is -- has the
16 ability to prepare them to be ready for school. We know that in
17 many cases, in many of our children, they don't come from
18 environments where they can have a place where they can have
19 that support that they need, that interaction that they need
20 with other children, the ability to be in a place where they are
21 acquiring the skills to be able to succeed.

22 MR. REAVES: Your Honor, I would object to the
23 questioning as leading questions, and would ask that they ask
24 questions that are open-ended on direct.

25 THE COURT: They are leading questions. The objection

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1 is sustained.

2 Q. (By Ms. Fischer) In your experience, how does a child
3 benefit from early childhood education?

4 A What we know from our evaluation and from the work that we
5 have in the field of early childhood is that access to preschool
6 allows children to be able to be ready for school, and the
7 results that we have seen is that children are more likely to
8 read at grade level by third grade. They are less likely to
9 repeat a grade. They are more likely to graduate. They are
10 more likely to access college or higher education.

11 And not from our evaluation, but from national
12 evaluation, including the Head Start evaluation, we know that it
13 has a multiplying effect, and the children that attend
14 children -- the children of the children that attend preschool
15 are also benefiting. So, we know that it is a key element for
16 children to be able to succeed, and an equalizer for many
17 children that don't have the opportunity to be in a place where
18 they can acquire those skills.

19 Q And the flip side of that question, in your experience, how
20 does it harm a child not to have access to early childhood
21 education?

22 A Not having access to early childhood education impacts the
23 children's readiness to succeed. What we know is that children
24 that come to school with the skills to be ready to learn are
25 more likely to succeed. So, we know that for many children,

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1 it's detrimental in that we see that they are held behind, more
2 likely to be in special education, and less likely to succeed
3 academically and socially and emotionally as well. So, the
4 impact is profound, particularly for some of our communities
5 that don't have access to those resources.

6 Q You mentioned that you -- that you track the development of
7 children in DPP. Do you recall that?

8 A Yes. We track the development. So, we have been tracking
9 the development both because we are city-funded. So, we need to
10 make sure that we're reporting on an annual basis about the
11 results of our program, but also because it is important for us
12 to know how effective our program is. And we are pleased to see
13 that the results have been very successful.

14 Q So, just generally, what have you found through this
15 tracking study?

16 A What we found is that children are able to academically
17 perform in terms of school readiness with -- readiness for math,
18 readiness for learning, readiness for reading, but we also know
19 that they are emotionally ready to perform in the classrooms
20 from what we know teachers are indicating is one of the most
21 important elements that they have seen. They can graduate on
22 time. They can be able to succeed.

23 And so we know that it is effective for the child, and
24 we know it's also effective for the family. Preschool is one of
25 those interventions that is what we call a two-generation in

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1 that it benefits the child, but it also benefits the family,
2 because it also allows the parents the ability to go to work, to
3 bring more financial resources to the household, and to be able
4 to succeed as a family as well.

5 Q I'm going to ask Jen to pull up Exhibit 43 on the screen.
6 You should see that come up in a few minutes.

7 A Yes.

8 Q Ms. Holguín, do you recognize this document?

9 A Yes.

10 Q And what is it?

11 A It is a renewal application for providers.

12 Q I'm going to ask Jen to scroll to page three and direct
13 your attention to paragraph 26. Maybe. Or, I'm sorry. Page
14 26, paragraph three. Apologies for that.

15 A I have it in front of me.

16 Q Okay. And what does that paragraph say?

17 A Would you like me to read it?

18 Q Sure.

19 A Providers shall not discriminate against any person on the
20 basis of race, color, religion, national origin, gender, age,
21 except as to the age of children qualifying for tuition
22 questions, military status, sexual orientation, gender variance,
23 marital status, or physical or mental disability, except as such
24 disability may materially and adversely affect proper
25 administration of the preschool program.

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1 Q And did you draft this language?

2 A Yes.

3 Q Who does it apply to?

4 A All the providers that apply to be a Denver Preschool
5 provider.

6 Q And does every provider have to sign this agreement?

7 A Yes.

8 Q And would a provider be able to participate if they don't
9 sign the agreement?

10 A No.

11 Q So, why did DPP include this clause in paragraph three in
12 the contract?

13 A First because we believe that nondiscrimination is an
14 important element of the implementation of our program, but also
15 because we are funded through a Denver sales tax, and I am under
16 contract with the City. We are required to have a
17 nondiscrimination statement.

18 Q Are you aware of any DPP providers turning families away
19 for discriminatory reasons?

20 A No.

21 Q What would DPP do if the program received a report that a
22 provider turned a family away for one of these reasons in the
23 paragraph?

24 A Well, first we will investigate it. We do have an external
25 contractor that looks at the reliability of the administration

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1 of the contract. If that turns out to be the case, we will
2 terminate that contract.

3 Q Are there enough providers to serve the population of
4 families who want to access DPP?

5 A There are never enough, no. There are never enough
6 providers.

7 Q And what are some of the stated reasons for not being able
8 to serve more children?

9 A The primary reason is workforce, that we don't have enough
10 teachers to be able to administer the programs.

11 Q Are you familiar with the UPK program?

12 A The state UPK program? Yes.

13 Q And how are you familiar with the program?

14 A We're an intermediary, which is called a local contracted
15 organization, an LCO. I also participated in the planning
16 process for the development of that program.

17 Q And what is DPP's role as an LCO?

18 A As an LCO, we provide support to local -- to Denver
19 providers to access the state UPK program, and we help the State
20 in ensuring that they are reaching to all the providers that
21 they need to support.

22 Q So, are you familiar with the UPK matching process?

23 A Yes.

24 Q How is DPP's process of placing children with providers
25 different?

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1 A The difference is that we don't do a match. We provide the
2 resources to the families. We provide the list of potential
3 places that they can apply at the Denver Preschool Program. At
4 the state level, there are some similarities in that families
5 can search for providers that meet their criteria, and they pick
6 the providers that are their choices, and then the State has the
7 ability to do the match based on parents that apply for their
8 children on the one side, and on the other with the providers
9 that apply to be a state UPK provider.

10 Q Can a family participate in both Denver Preschool Program
11 and UPK?

12 A Yes.

13 Q What types of conversations in DPP's role as LCO has DPP
14 had with families and providers about UPK?

15 A On the first year of implementation, it was a lot of
16 clarifying questions about the State versus the City, about the
17 application process, about the role, the type of just
18 information when you start a new program.

19 Q And do families participating in UPK also make choices
20 about schools?

21 A Yes.

22 MR. REAVES: Objection. Vague and --

23 THE COURT: Overruled.

24 THE WITNESS: Yes. They do make choices in that they
25 have the ability to look at the list of providers that have

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1 signed up with the state UPK program, and based on their
2 criteria, select the ones that are a good match for them.

3 Q. (By Ms. Fischer) Are there faith-based schools
4 participating in DPP?

5 A Yes.

6 Q Are there Catholic schools participating?

7 A Yes.

8 Q Are there Archdiocese Catholic Schools participating?

9 A Yes.

10 Q Do you recall which schools?

11 A I don't have the list in front of me, but we have 30 that
12 are religiously-affiliated providers, faith-based providers.
13 And out of those 30, ten are part of the Catholic Archdiocese.

14 Q Did you prepare a declaration in this litigation?

15 A Yes.

16 Q Would looking at that declaration help you remember those
17 ten schools?

18 A Yes, it will.

19 Q Okay. I'm just going to show opposing counsel. This is
20 your -- Ms. Holguín's declaration that's been previously
21 submitted. It's being pulled up on screen. And it was
22 attached -- it's document 38.5 in the record. I'm going to ask
23 Jen to pull up paragraph seven. Ms. Holguín, I'm going to ask
24 you just to look at that for a bit.

25 A Yes.

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1 Q And let me know when your recollection has been refreshed.

2 A Yes. I have it in front of me now.

3 Q Jen, can you please pull that down. And after looking at
4 that list, do you recall the names of the schools?

5 A Yes. So, we have Enunciation. We have Guardian Angels.
6 We have Blessed Sacrament. We have St. Bernadette's. We
7 have -- oh, I'm sure I'm going to forget some, but I don't have
8 the whole list.

9 Q It's okay. Roughly how much money does the DPP pay out to
10 Archdiocese schools?

11 A It is -- through those ten Archdiocese schools, I believe
12 last year was close to a million dollars.

13 Q I'm going to ask Jen to pull up Exhibit 43 again, which
14 we've already looked at. And just looking at the first page,
15 which schools -- can you tell me just looking at that number
16 one, which school's contract this is?

17 A Wellspring Catholic Academy.

18 Q And is that part of St. Bernadette?

19 A Yes.

20 Q And how long has Wellspring been participating with DPP?

21 A They participated last year, and they are -- they have an
22 incomplete application this year.

23 Q So, you said St. Bernadette participated last year?

24 A Yes.

25 Q How much money have they received in the past?

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1 A I believe last year they had two children enrolled in the
2 program, and they received \$10,000 from us.

3 Q And do all participating schools have to sign the DPP
4 agreement?

5 A Yes.

6 Q Jen, if you could scroll down to the last page, to be the
7 signature page. Just looking at the signature, can you tell me,
8 is this agreement signed?

9 A Yes.

10 Q And who signed it?

11 A Karina Campa.

12 Q Thank you. Jen, can you scroll up two pages, bottom of
13 page 15. Ms. Holguín, I'm going to call your attention to the
14 last paragraph on the page numbered eight, which I -- there it
15 is. And the portion I'm interested in is actually at the top of
16 page 16. Can you read the last sentence in that paragraph.

17 A Nothing in this agreement shall be construed to affect the
18 provider's right to engage in privately-funded,
19 inherently-religious activity or affect the independence of
20 providers, including any rights protected by the Colorado and
21 U.S. Constitutions and applicable law.

22 Q I'm going to call your attention now back to the top of
23 page 26 to that paragraph three. Do you remember talking about
24 this clause?

25 A Yes.

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1 Q Does that language on the top of page 16 exempt a program
2 from complying with paragraph three?

3 A No.

4 Q And in your experience, why is nondiscrimination language
5 like paragraph three important to the implementation of a
6 successful preschool program?

7 MR. REAVES: Your Honor, I would object to the extent
8 that she's offering expert testimony on nondiscrimination
9 requirements. I don't think they have offered her as an expert
10 on that, and we would generally object to her qualification as
11 an expert, as we did in our motion to exclude her testimony.

12 THE COURT: She can testify as to what the practice
13 is, but not her opinion on it.

14 MR. REAVES: Thank you, Your Honor.

15 Q. (By Ms. Fischer) So, how does DPP apply the clause in
16 paragraph three?

17 A The Denver Preschool Program believes that access to
18 preschool is essential, and that having a nondiscriminatory
19 environment for our children is the social and emotional
20 preparedness that they need, as well as having access to
21 preschools that are providing an equity environment for all
22 children.

23 Q And does DPP interpret this provision to allow a provider
24 to refuse an LGBTQ child?

25 A They cannot refuse an LGBTQ child.

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1 Q And does DPP interpret this provision to allow a
2 faith-based provider to refuse to enroll an LGBTQ child?

3 A A faith-based provider -- this does not allow a religious
4 provider to not allow an LGBTQ child.

5 Q And are any DPP providers allowed to discriminate against
6 LGBTQ families?

7 A No.

8 MS. FISCHER: Thank you.

9 **CROSS EXAMINATION**

10 BY MR. REAVES

11 Q Good morning, Ms. Holguín.

12 A Good morning.

13 Q My name is Nick Reaves. I am one of the attorneys for
14 plaintiffs in this case.

15 A Good to meet you.

16 Q You talked earlier about the matching process for UPK.
17 Does DPP have a centralized matching process in the same way?

18 A Not in the same way. We have a referral process so that
19 families can search for providers based on their criteria.

20 Q What is the first step for a family interested in receiving
21 DPP funding to take in order to participate?

22 A The first step is to find a provider of their choice.

23 Q And I'd like to pull up a copy of the DPP website just for
24 you to take a look at. We will pull that up quickly here. I'd
25 like to take a look at that portion of the -- sorry. Could you

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1 just identify what this is.

2 A Yes. This is the first page to start their tuition
3 application -- their application for tuition support.

4 Q Thank you. And I'd just like to scroll down to the portion
5 of the page that shows how to sign up. Do you see that
6 provision there?

7 A Yes.

8 Q And could you just read that sentence, I guess it's two
9 sentences, after number one, that first paragraph.

10 A Yes.

11 MS. FISCHER: Your Honor, can I ask counsel to
12 identify on the record if this is an exhibit that's already been
13 submitted?

14 MR. REAVES: No, Your Honor. I don't want to
15 introduce this as an exhibit. This is for purposes of
16 impeachment testimony, and to show the witness.

17 THE COURT: Go ahead.

18 THE WITNESS: How to sign up. Enroll your child in a
19 participating preschool. Use our find a preschool tool and how
20 to choose a preschool checklist to get started. Please contact
21 the school of your choice directly to apply. If you plan on
22 enrolling --

23 MR. REAVES: That's okay. Just that first sentence is
24 fine. Okay. That's all I had to show you on that one. You can
25 take that one down. Thank you.

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1 Q. (By Mr. Reaves) What kind of information do preschool
2 providers have to provide DPP to participate in the program?

3 A In addition to the information about the location and the
4 hours and all those things, they have to give us information --
5 they have to ensure that they are licensed, that they have
6 insurance, liability insurance, and that they have a quality
7 rating from the State.

8 Q And I'd like to go back to that nondiscrimination
9 requirement we were looking at before. We will pull that up
10 now, and this is marked as Exhibit 35. Do you recognize this
11 document?

12 A Yes.

13 Q And we will go down to page 21 of this, and it's paragraph
14 number three there. Do you see the nondiscrimination provision
15 there?

16 A Yes.

17 Q Does DPP regulate the employment decisions of providers?

18 A We ensure that they meet the qualifications to be teachers
19 in those classrooms.

20 Q So, do you have licensing requirements, essentially, for
21 teachers?

22 A Yes.

23 Q But you don't -- DPP doesn't have a practice of enforcing
24 requirements about whether a provider hires or fires with a
25 teacher normally?

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1 A We don't, unless they don't have the qualifications to be a
2 teacher.

3 Q Okay. So, in this provision, the language says, provider
4 shall not discriminate against any person. Do you see that
5 language there?

6 A I do.

7 Q What is "any person" referring to?

8 A A child, a parent, or a teacher.

9 Q Okay. But you did say earlier that this doesn't cover
10 employment decisions; is that correct?

11 A That is correct.

12 Q Okay. And this nondiscrimination provision, it doesn't
13 mention the word "enrollment" in there, does it?

14 A No.

15 Q And you testified earlier that the DPP funding goes
16 directly to subsidize the tuition cost of a student; is that
17 right?

18 A Yes.

19 Q Okay. And those funds can't be used for the general
20 operations of a school or for something else the school would
21 do; is that right?

22 A We don't mandate how the tuition is implemented once they
23 start with the tuition. Our tuition usually covers teacher
24 salaries and overhead for the school.

25 Q Right. But to confirm, it has to be -- the money has to be

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1 used to offset tuition costs?

2 A That is correct.

3 Q Yes. Thank you. Earlier you were discussing the DPP
4 nondiscrimination provision, which we're looking at, and that's
5 part of the provider agreement; is that right? Part of this
6 document here?

7 A Yes.

8 Q I'd like to look at the second half of paragraph eight on
9 page 11 of this document. And I know you read this language
10 earlier, so I won't make you read it again. I will just read it
11 off. It says, nothing in this agreement shall be construed to
12 affect the provider's right to engage in privately-funded,
13 inherently-religious activity, or affect the independence of
14 providers, including any rights protected by the Colorado and
15 U.S. Constitution and applicable law.

16 Where did this language come from?

17 A Our contract with -- no. This doesn't come from the
18 contract with the State. This comes from our original agreement
19 that -- in setting up the Denver Preschool Program, in which we
20 wanted to ensure that we were working with
21 religiously-affiliated providers. So, it was our attorneys at
22 the very beginning of the program that ensure that this was
23 available.

24 Q And do you provide providers with any guidance on how to
25 interpret this particular sentence?

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1 A Yes. Because they often are asking questions about the
2 hours that they are providing religious education versus the
3 hours that they are not providing the religious education, which
4 is what we fund.

5 Q Has the department defined what it means for a provider to
6 maintain independence as it's used in this sentence?

7 A No. Except to the extent that we don't mandate what
8 happens in the hours that we don't fund.

9 Q And this also mentions the Colorado and U.S. Constitutions
10 and applicable law. Do you have a specific list of what laws
11 that includes, or do you have an understanding of what that term
12 means?

13 A For us, it's the law that we have to comply with as being a
14 city-funded program, and part of what is in our contract with
15 the City.

16 Q And right at the beginning of that sentence, it says,
17 nothing in this agreement shall be construed. What agreement is
18 that referring to?

19 A The provider agreement.

20 Q And that's the document we're looking at here today?

21 A Yes.

22 Q So, nothing in this agreement shall be construed to affect.
23 And that applies to the entire agreement?

24 A Correct.

25 Q You testified about having a shortage of DPP providers; is

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1 that right?

2 A Yes.

3 Q So, you're always trying to get more schools to sign up and
4 participate in DPP?

5 A Yes.

6 Q Is it important that religious schools participate in the
7 program?

8 A Yes.

9 Q Do you know for how many years Archdiocesan preschools have
10 participated in the DPP program?

11 A Since the very beginning.

12 Q And you've never had any concerns with their participation
13 in the program?

14 A No.

15 Q And when we were talking about the need for more
16 preschools, you testified that some current -- I'm sorry. Let
17 me rephrase that. You testified earlier about the need for more
18 preschool providers. If some of the DPP providers stopped
19 participating, presumably that would be harmful for families who
20 need this benefit?

21 A Yes.

22 Q And you talked earlier in your testimony about tracking and
23 reviewing any complaints about violations of this agreement; is
24 that right?

25 A That's correct.

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1 Q And you retain complaints that are filed with DPP?

2 A Yes.

3 Q And I believe you included this in your declaration as
4 well, but do you recall if there have been any complaints about
5 Archdiocesan schools participating in this program?

6 A No.

7 Q So, no LGBTQ complaints?

8 A No.

9 Q Nothing specific?

10 A No complaints.

11 Q So, you have no reason to conclude that Catholic Schools
12 have been unable to comply with the DPP requirements?

13 A That's right.

14 Q You testified earlier about the harmful -- sorry. You
15 testified earlier about the -- I guess the importance of early
16 childhood education; is that right?

17 A That's correct.

18 Q Is that something you've studied in an academic setting?

19 A No. It is my work that has been done -- not from academia,
20 but from being in the field and funding for almost 30 years.

21 Q And you talked about the importance of a quality education,
22 and you focused on the Colorado Shines ratings; is that correct?

23 A That's correct.

24 Q And do you recall the Colorado Shines ratings of the two
25 preschools in this case, Wellspring and St. Mary's?

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1 A I believe they are both level three.

2 Q Okay. And if I were to tell you that I think they're level
3 four, would you think that's unreasonable, or may that be
4 correct?

5 A That may be correct. It changes every year. So, it could
6 have been level three last year, and it can change the following
7 year.

8 Q And your testimony earlier was that anything level three or
9 above would qualify?

10 A As a quality --

11 Q As a quality program.

12 A Yes.

13 MR. REAVES: Just one second. Let me confer with my
14 colleagues. Thank you. Thank you. Nothing further, Your
15 Honor.

16 THE COURT: Thank you. Redirect, please?

17 MS. FISCHER: One moment, Your Honor.

18 **REDIRECT EXAMINATION**

19 BY MS. FISCHER

20 Q So, Ms. Holguín, is access to -- strike that. Is access
21 the only thing that matters in selecting -- in making preschool
22 available?

23 MR. REAVES: Objection, Your Honor. Leading question.

24 THE COURT: It is. Sustained.

25 Q. (By Ms. Fischer) What does DPP look for when it selects

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1 providers?

2 A DPP is looking to provide families with their choice of
3 providers, which includes providers that are providing
4 accessibility by being close to their home or close to their
5 work, as we know that's the number one criteria for families.
6 In addition to that, we also ensure that the families are
7 selecting quality providers, because we know that that's where
8 we're going to get quality results, when we have providers that
9 can provide that support.

10 Q And are there any other factors DPP considers?

11 A The quality providers that we are looking at, I don't --
12 maybe I should just go a little bit into what "quality" means
13 for the quality star rating, because it's pretty comprehensive.
14 It ensures that this is a program that has a curriculum that is
15 a quality curriculum, that has teachers that are qualified to
16 teach at the school and present the curriculum, that it has an
17 active outreach and communication and support the parents so
18 that they have a supporting home environment as well as the
19 tools and resources that they have available in their classroom.
20 And then finally, that it's a safe program -- a safe environment
21 where children are learning.

22 Q And are you familiar with the UPK quality standards?

23 MR. REAVES: Objection, Your Honor. She's not
24 qualified to testify, and Ms. Odean testified yesterday about
25 what the UPK standards are.

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1 MS. FISCHER: And I'm just asking if she's familiar,
2 as DPP is an LCO.

3 THE COURT: The objection is premature. It's
4 overruled.

5 THE WITNESS: I am familiar with the fact that they
6 are in the process of developing the quality standards that have
7 not been finalized at the state UPK program. But I do know that
8 we have provided the State with a lot of information about our
9 own programs. So, we suspect they are going to be very similar
10 to what we have.

11 MS. FISCHER: Thank you. No further questions.

12 THE COURT: Thank you very much. You may stand down.

13 THE WITNESS: Thank you.

14 THE COURT: Next witness, please?

15 MS. CARRENO: Your Honor, that was our last witness.
16 One more point of housekeeping is we just move to admit all of
17 the exhibits that have been proffered. And then another point
18 of housekeeping is there were some deposition designations for a
19 witness, Mr. Moo, who was the Archdiocese 30(b)(6) witness. He
20 was not the witness that testified at trial. We did not have
21 the opportunity to depose Ms. Chilelli. So, we just ask that
22 the deposition designations for Mr. Moo be part of the record.

23 MR. DAVIS: We had some specific objections to parts
24 of those designations, and you will see those when you review
25 them, Your Honor. I will just say that for the record.

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1 THE COURT: Yeah. I will look at the objections and
2 take that into consideration. It's accepted as part of the
3 record.

4 MS. CARRENO: That sounds great. Thank you.

5 MR. DAVIS: Your Honor, plaintiffs would also like to
6 know for the record, I understand you're taking all the exhibits
7 under consideration, but we just want to formally note for the
8 record what we're offering.

9 THE COURT: Let me ask this first. Do you have any
10 rebuttal witnesses?

11 MR. DAVIS: No, Your Honor.

12 THE COURT: Okay. So, that concludes the taking of
13 the testimony. And you're going to check -- why do I say this?
14 Don't make a federal case out of it. If you want to check and
15 make sure all your exhibits are in, please do so. And this is a
16 bench trial, so when I get them is not a matter of great
17 importance. I'd rather you take your time to do that.

18 MR. DAVIS: Yes, sir.

19 THE COURT: To make sure that I have everything that
20 you want me to have. We need to think now, both sides have
21 asked to submit proposed findings of fact and conclusions of
22 law, and I am advised by my courtroom deputy that there's also a
23 desire to make closing arguments. Is that the case?

24 MR. DAVIS: Plaintiffs would like to, Your Honor.

25 THE COURT: I'm sorry?

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1 MR. DAVIS: Plaintiffs would like to, Your Honor.

2 MS. CARRENO: Yes, Your Honor.

3 THE COURT: Okay. Let's do this, then. We will come
4 back at 1:15 for the closing arguments, and the plaintiffs'
5 counsel can do that. I don't like to impose strict time limits
6 on this. I give lawyers a much more frightening attitude, and
7 that is that when you start repeating, I stop listening. So, my
8 suggestion is that you try for about a half an hour, and we will
9 start with the plaintiffs, then defendants, then plaintiffs will
10 have rebuttal as well. Okay?

11 MS. CARRENO: Yes. And, Your Honor, regarding the
12 findings of fact and conclusions of law, right now the current
13 deadline for those, I believe, is January 12th, and I understand
14 that it might be difficult for us to get the transcript with
15 enough time for us to --

16 THE COURT: That's all right. We will take whatever
17 time you need. This is an extraordinary circumstance for you,
18 and if the plaintiffs need more time, the same thing would
19 happen. But when they're locked out of their building, I think
20 that's -- I've never heard that reason given, but it's a valid
21 one.

22 MR. DAVIS: I agree, Your Honor. I think the deadline
23 is actually the 16th, and plaintiffs, to the extent we can,
24 would like to maintain that to keep matters moving along.

25 MS. CARRENO: Apologies. Yes. The 16th. But I

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1 understand that the transcripts might take up to a week for us
2 to get, and then that only gives us a matter of a day or two to
3 get them.

4 THE COURT: I think you need the transcripts for the
5 proposed findings, and that's a legitimate request. It's going
6 to take two weeks from now, which would be basically the 18th,
7 fourteen days from now. So, then I think -- I'm trying to get
8 this matter decided as quickly as possible, but at the same time
9 I want you to have a fair opportunity. So, I think ten days
10 after the 18th would be the time to submit the proposed
11 findings. Does that give you -- that gives you two weeks to go
12 over four days of testimony.

13 MS. CARRENO: And is that ten business days, Your
14 Honor, or ten calendar days? Ten business days or ten calendar
15 days?

16 THE COURT: Well, let's make it business days.

17 MS. CARRENO: Okay. That works for the defendants,
18 Your Honor.

19 THE COURT: It's a First amendment freedom of religion
20 case, so we don't want anybody to have to work on the Sabbath.

21 MR. DAVIS: Yes, Your Honor. Ten business days I
22 think is acceptable to the plaintiffs, but I think it's one week
23 for the transcript, not two. So, if we could go ten days after
24 a week from now.

25 THE COURT: She just told me it was two weeks.

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1 MS. CARRENO: Oh. I apologize. I said one week. But
2 I don't know -- it's up to the transcriber.

3 THE COURT: Let's do this. Let's order it in one
4 week, and if you need more time because the transcripts aren't
5 in, then just file a motion, and I will take care of that. We
6 will adjust to the facts. So, that means that one week would be
7 the 11th. And I don't know if that falls on a weekend or not,
8 but it's business days.

9 MR. DAVIS: I think that's the 25th, is ten business
10 days after -- I think Friday the 26th is ten business days after
11 a week from today.

12 THE COURT: Okay. All right. 26th?

13 MS. CARRENO: Yes.

14 THE COURT: And then you will file simultaneous
15 proposed findings? Is that the idea?

16 MS. CARRENO: That works for defendants, yes.

17 THE COURT: Okay. All right. Let's do that. And we
18 will come back here at 1:15 for the closing arguments. Before I
19 do that, I want to -- I want to thank Counsel. You're all well
20 prepared, and I believe that you have treated one another with
21 the kind of courtesy and civility that is expected in this
22 courtroom. Thank you.

23 (Recess at 11:58 a.m., until 1:43 p.m.)

24 THE COURT: Good afternoon. I need to tell you that
25 the telephone connection that allows people to listen to what's

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1 going on doesn't work, which doesn't really surprise me, but it
2 reminds me there was a challenge made in the Colorado Court of
3 Appeals recently by a defendant who thought he was denied a
4 public trial because the phone system didn't work, and the Court
5 of Appeals told him to take a hike. Well, actually, they told
6 him to stay where he was.

7 It's an unfortunate thing. I wish that these people
8 could listen in, but I can't wait any further and tax your
9 patience with that. I apologize for the delay, but let's go
10 ahead with it.

11 MR. DAVIS: Thank you, Your Honor. And good
12 afternoon. As you've heard this week, this case is about a
13 conflict between two sets of rules: the Catholic Church's
14 religiously-motivated rules for how its parishes operate their
15 preschools, and the State of Colorado's rules setting conditions
16 on participation in the State's Universal Preschool Program.

17 Caught in the middle of this conflict are Catholic
18 families like the Sheleys, who seek to participate in this
19 beneficial new program just like everybody else, but feel
20 sincere religious obligation to provide their children with a
21 Catholic education.

22 So, the question is, what to do about that? And
23 particularly in light of the evidence that you've seen this
24 week, the answer is clear. Under a trilogy of recent
25 squarely-on-point decisions from the Supreme Court, the

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1 conditions on UPK funding challenged in this case violate the
2 First amendment.

3 I will start with the first count of plaintiffs'
4 complaint. Your Honor, in *Carson*, the Court articulated a
5 straightforward rule. States may not deny otherwise available
6 benefits based on a recipient's religious exercise. That rule
7 is triggered here, as the testimony of Ms. Chilelli, Ms. Coats,
8 and Ms. Seul confirmed.

9 St. Mary's and Wellspring exercise their religion by
10 maintaining religiously-motivated enrollment and operational
11 policies that directly conflict with the obligations imposed in
12 the UPK provider agreement. If it weren't for the conditions,
13 St. Mary's and Wellspring could and would sign the agreement,
14 and they would start participating in UPK immediately. They're
15 excluded because of their religious exercise, solely because of
16 that exercise, and for no other reason.

17 This case also provides a dramatic illustration of why
18 the *Carson* rule is so essential. Mere months ago, St. Mary's
19 and Wellspring could compete with non-Catholic preschools on
20 equal footing. Today, however, as Ms. Odean confirmed, the
21 State has made more than 2,000 other preschools free to attend,
22 while families like the Sheleys, who choose St. Mary's or
23 Wellspring, continue to foot the bill.

24 That sort of governmental thumb on the scale is
25 inherently not neutral toward religion. The First amendment

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1 demands a country in which religion flourishes or withers
2 according to its own appeal, not according to governmental
3 carrots and sticks.

4 Your Honor, notably in *Carson*, the Supreme Court did
5 not cite Justice Scalia's decision in *Employment Division versus*
6 *Smith*. Instead, the Court relied on pre-*Smith* cases like
7 *Sherbert* and *Thomas* for the principle that a state may not
8 withhold benefits on the ground that the recipient is exercising
9 his or her religion. That principle, not *Smith*, is the one that
10 governs here.

11 Even aside from *Carson*, defendants' actions still
12 trigger strict scrutiny if they aren't neutral and generally
13 applicable in the sense meant by *Smith*. And this takes us to
14 counts four and five of the complaint. And here, either path,
15 neutrality or general applicability, leads to strict scrutiny.

16 In fact, Your Honor, there's no clearer illustration of
17 that than the testimony that you heard from Ms. Odean yesterday.
18 According to Ms. Odean, under defendants' understanding of the
19 UPK program, a provider whose enrollment is limited to
20 gender-nonconforming children or to LGBTQ children or families
21 could participate in the program, but a provider limited to
22 families who accept and live out the Catholic Church's teachings
23 on marriage and sexuality cannot participate in the program. It
24 is difficult to think of a policy that's less neutral and
25 generally applicable than that one.

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1 But to back up for a moment, Your Honor, and briefly
2 take each of those two requirements, neutrality and general
3 applicability, in turn, on neutrality, defendants have compared
4 plaintiffs to segregation academies in the 1970s. They've
5 likened plaintiffs' millennia-old religious beliefs to bullying
6 and stigmatization.

7 With respect, Your Honor, this is exactly the kind of
8 hostility towards religion that resulted in the defendants'
9 state being reprimanded by the Court in *Masterpiece Cakeshop*,
10 and it demonstrates a lack of neutrality in this case too, and
11 that's especially so whereas here and as plaintiffs anticipated
12 in our opening, this Court hasn't heard about a single LGBTQ
13 family that plaintiffs' preschools have ever harmed.

14 But like *Fulton*, Your Honor, this case might be even
15 more straightforward under the rubric of general applicability.
16 The evidence this week has shown that defendants' exclusion of
17 plaintiffs' preschools was not pursuant to a generally
18 applicable policy. The *Fulton* Court explained that this
19 requirement, general applicability, it's not met if the
20 government has granted exceptions or even if it merely has
21 discretion to grant exceptions to others that undermine its
22 interests in regulating the plaintiffs' conduct. So, to perform
23 this analysis, it's critical for the Court to first figure out
24 what is the policy that we're looking for exceptions from. What
25 is the relevant government interest?

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1 Now, defendants have not made that easy here, as
2 they've asserted a variety of different interests at different
3 times, including in the evidence the Court has heard this week.
4 But no matter which of these various interests the Court takes
5 as its starting point, the evidence shows that defendants'
6 exclusion of plaintiffs' preschools is not generally applicable.

7 First, defendants, in line with Governor Polis' own
8 views, have at times asserted that their interest is in having
9 preschools be open to all children who are matched with them.
10 As Ms. Cooke testified this week, the equal opportunity mandate,
11 quote, ensures that every child will have an opportunity to
12 attend a preschool of their choosing.

13 But with respect to that interest, the rules plainly
14 are not generally applicable. Indeed, that interest is only
15 honored, if it's honored at all, in the breach. As Ms. Odean
16 affirmed, defendants have nine different preferences that
17 function as exceptions from the UPK program's matching rule.

18 Just this week, and halfway through the first day of
19 trial, they announced a new tenth preference, one that is
20 remarkably sweeping, allowing providers to require all their
21 families to be, quote, part of a specific community, share the
22 same, quote, interests, or participate in the same -- or, sorry.
23 Participate in a, quote, specific activity.

24 This preference, Ms. Odean testified, would allow
25 providers to limit enrollment to LGBTQ children or families,

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1 children of veterans, or children of color. And as Ms. Odean
2 also affirmed, over 1,000 providers, around half the total in
3 UPK, have claimed one of these programmatic preferences.

4 Moreover, the department has considered and granted
5 still other exceptions on a case-by-case basis, according to the
6 form that this Court saw as Exhibit 31. So, this interest,
7 serve everybody, is simply not one of the State's rules.

8 So, defendants, they pivot, and they now insist that
9 their alleged interest is specifically in enforcing the terms of
10 what they call the statutory nondiscrimination requirement.

11 According to defendants, none of the preferences allow
12 discrimination on the bases covered by that requirement, so they
13 say their actions are generally applicable. But this pivot does
14 not save them. And to see why, it's helpful to take a step back
15 from the shorthand that the parties have been using, and look at
16 what the statute actually says.

17 Your Honor, on the screen in front of you is the
18 language of the law that's at the core of this case. Now, while
19 defendants' counsel in her opening chided plaintiffs for, quote,
20 wrongly interpreting the statutory term "discrimination," Your
21 Honor can see and Ms. Odean admitted that the statute does not
22 use the terms "discrimination," "nondiscrimination," or
23 "antidiscrimination" at all.

24 What it says is that each preschool must provide that
25 eligible children receive an equal opportunity to enroll and

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1 receive preschool services regardless of race, ethnicity,
2 religious affiliation, sexual orientation, gender identity, lack
3 of housing, income level, or disability as it applies to the
4 child or the child's family.

5 And in light of what we've heard this week, it is
6 simply indisputable that the department has recognized numerous
7 exceptions that do not require providers to provide an equal
8 opportunity to enroll on these bases.

9 First, the statute requires that providers offer an
10 equal opportunity to enroll, regardless of disability. But as
11 Ms. Odean unambiguously admitted, some UPK providers only serve
12 children with certain disabilities.

13 Second, Your Honor, the statute requires that providers
14 offer an equal opportunity to enroll, regardless of income
15 level. But as Ms. Odean unambiguously admitted, Head Start
16 providers are permitted to prioritize low-income families.

17 Third, the statute requires that providers offer an
18 equal opportunity to enroll regardless of religious affiliation.
19 But as Ms. Odean again unambiguously admitted, faith-based
20 providers are permitted to reserve seats to members of their
21 congregations. And that term is defined to hinge on shared
22 religious beliefs and practices. So, as Ms. Odean admitted, a
23 Catholic provider can prefer Catholics, and a Lutheran provider
24 can prefer Lutherans. You see the quote here, a Catholic
25 provider does not have to provide an enrollment opportunity to

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1 Lutherans.

2 Your Honor, this same testimony answers one of the
3 questions that Your Honor posed in your summary judgment ruling,
4 which was whether the congregation preference that we're
5 discussing here, whether it really does allow providers to offer
6 unequal opportunities based on religious affiliation. And the
7 answer we now know, Your Honor, is absolutely it does.

8 What else are Catholic and Lutheran but religious
9 affiliations? If this isn't an exception to the religious
10 affiliation portion of the equal opportunity mandate, then the
11 preference has no meaning at all.

12 And as this Court said on summary judgment, if the
13 congregation preference is such an exception, quote, that will
14 support a finding that the associated nondiscrimination
15 requirements are not generally applicable. That is exactly
16 right.

17 It's also consistent with Your Honor's well-reasoned
18 decision in *Newland versus Sebelius*, which plaintiffs have cited
19 in this case previously. In that case, this Court held that a
20 religious exemption that the government had extended to some
21 employers undermined the government's interest in requiring the
22 plaintiff religious employer to cover contraceptives in its
23 health plan. And if I could, Your Honor, I'd like to dwell a
24 bit longer on the congregation exception, because I want to note
25 that the plain language of the congregation definition confirms

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1 what we've just been discussing.

2 Defendants' argument appears to be that the preference
3 turns on community or relationships, and not religion. But that
4 simply ignores the text of the definition, which specifies that
5 a congregation must be, quote, religious-based, can be spread
6 across several convocations, and must be composed of individuals
7 who, quote, share a common set of beliefs and collectively
8 engage in conduct with a direct nexus to that shared common set
9 of beliefs. In other words, Your Honor, it's a group of people
10 who are affiliated with the same religion.

11 On top of all this, even if this Court were looking for
12 the most analogous exceptions possible, exceptions that relate
13 specifically to sexual orientation and gender identity,
14 defendants have recognized those too. Now, I mentioned earlier,
15 Ms. Odean's testimony that a school could have a
16 gender-nonconforming preschool, could have an LGBTQ preschool,
17 and Ms. Odean again said she understood that that would be okay.

18 But more than that, Your Honor, Darren Patterson
19 Christian Academy in Buena Vista has similar views on sexuality
20 and gender identity as plaintiffs here. Defendants know this.
21 They are well aware of it, yet Darren Patterson has been
22 participating in UPK from the start.

23 And although the department was enjoined from enforcing
24 the equal opportunity mandate against Darren Patterson months
25 ago, the department has declined to appeal that ruling. So,

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1 right now, a school with the same policies as plaintiffs is
2 actively participating in the program, actively receiving funds
3 from defendants. By letting Darren Patterson participate,
4 defendants have in practice carved out an exception that by
5 definition must undermine the same interest that they're
6 asserting against plaintiffs here.

7 Now, defendants' efforts to explain away these
8 exceptions, they all fall flat. First, defendants have looked
9 to other provisions of the UPK statute, and they say those other
10 provisions support efforts to include certain types of providers
11 regardless of the equal opportunity mandate.

12 But other provisions of the UPK statute, like its
13 instruction that defendants should maximize the number of
14 providers, or like its instruction that defendants should ensure
15 a mixed-delivery system, they also support efforts to include
16 Catholic preschools.

17 Defendants can't on the one hand insist on a rigid
18 reading of the equal opportunity mandate to deny plaintiffs
19 while stretching the text flexibly to accommodate other
20 providers. That's simply an extension of the same
21 discriminatory treatment that plaintiffs are challenging in this
22 case in the first place. And of course, Your Honor, the
23 statute, like defendants' own actions, is itself subject to the
24 First amendment.

25 Next, defendants gesture at defending the merits of the

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1 other exceptions. They say those exceptions are good insofar as
2 they help historically marginalized communities, but to be
3 perfectly clear, Your Honor, plaintiffs are not taking issue
4 with any of these exceptions. These exceptions may well be
5 benign. Several of them seem perfectly sensible. All
6 plaintiffs are seeking is equal treatment, an exception of their
7 own, one that allows them to participate in UPK while also
8 operating consistently with their most deeply-held beliefs.

9 And indeed, Your Honor, defendants' own attempts to
10 explain away the exceptions underscores the First amendment
11 problems here. In their opening, defendants told the Court that
12 these exceptions, quote, benefit children who are from
13 populations that especially benefit from access to preschool.
14 But this is a straightforward value judgment. It's a judgment
15 that is more important to include these children than it is to
16 include children of Catholic families, who feel religiously
17 obliged to send their children to a Catholic preschool.

18 That value judgment may be right, or it may be wrong,
19 but given the First amendment's explicit protection for the free
20 exercise of religion, that's a question that has to be answered
21 on a strict scrutiny.

22 And the already-granted exceptions, that's what we've
23 been discussing. What have they already granted? That's just
24 one of the department's difficulties. The other is that the UPK
25 statute explicitly grants the department discretion to make

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1 exceptions from the quality standards like the equal opportunity
2 mandate on an individualized case-by-case basis. And we know
3 from *Fulton* that if you have discretion like this, even if it's
4 never exercised, that that's enough to trigger strict scrutiny.

5 The department is aware of the problem, so they've now
6 claimed that the equal opportunity mandate is a health and
7 safety provision that is carved out in the statute's grant of
8 discretion. But this is a made-for-litigation position. They
9 never said anything like this before this lawsuit. They've
10 never publicly taken this position anywhere but in their
11 litigation papers. And they're defying the ordinary meaning of
12 language.

13 That's why in defendants' own UPK provider agreement,
14 which was created long before this litigation arose, the
15 department itself distinguished between, quote, quality
16 standards relating to health and safety on the one hand, and the
17 equal opportunity mandate on the other. They were set out as
18 separate standards that a provider would have to meet.

19 Further, Your Honor, to brief the question --
20 another -- briefly answer another question that this Court posed
21 on summary judgment, defendants' say so is not enough to make
22 this a health and safety provision. *Fulton* itself involved the
23 same issue, where the City attempted to engage in post hoc
24 creative readings of its contract in order to argue that it was
25 in fact neutral and generally applicable after all, but the

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1 Supreme Court rejected that argument and interpreted the
2 contract itself.

3 And in any event, the Colorado Supreme Court doesn't
4 recognize any equivalent of agency deference like *Chevron* in
5 interpreting state statutes. So, this is a question for the
6 Court.

7 So, defendants' exclusion of the plaintiff preschools
8 triggers strict scrutiny. That's the strictest standard known
9 to constitutional law, and the evidence this week shows that
10 defendants cannot come close to meeting it.

11 Defendants have offered two expert witnesses, Doctors
12 Goldberg and Tishelman, to testify that it's important for LGBTQ
13 children to have access to affirming preschools. But the
14 problem with this is that excluding the plaintiff preschools
15 does not change that level of access one bit. Over 2,000 other
16 preschools are already participating in UPK, and have signed the
17 provider agreement. Allowing the plaintiff preschools would
18 only add to the options available to Colorado families, making
19 Universal Preschool more truly universal.

20 Defendants' experts cannot and admitted they weren't
21 even trying to show that there's any shortage of affirming
22 preschools participating in the UPK program, much less in the
23 Denver metropolitan area, where the plaintiff preschools are
24 located.

25 Defendants' experts have also emphasized the harms that

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1 can result when there is, as Dr. Goldberg put it, quote,
2 friction, or a, quote, disconnect between what children hear at
3 school and what they hear at home. Dr. Goldberg said that she
4 advised LGBTQ families to specifically seek out affirming
5 schools.

6 In the same way, Dr. Tishelman confirmed that conflict,
7 including over a child's identity, can be harmful to children,
8 but plaintiffs agree with this. That's why they maintain the
9 enrollment policies that they do.

10 In short, Your Honor, if defendants believe that it's
11 harmful for LGBTQ families to be enrolled at plaintiffs'
12 preschools, it makes no sense for Colorado to force plaintiffs'
13 preschools to enroll those families. But obviously, plaintiffs
14 dispute that premise, but the point is the defendants' strict
15 scrutiny theory is incoherent on its own terms.

16 And indeed, what this Court heard from Dr. Tishelman
17 today is that she's not really interested in whether the
18 plaintiffs' preschools participate in UPK or not. Her interest
19 is in whether they can maintain their policies at all.
20 Dr. Tishelman believes that children should have access to
21 Catholic Schools, and also that those schools should be
22 affirming of her and the State's views on human sexuality. At
23 bottom, Your Honor, that's simply an argument that the
24 plaintiffs' schools should change their beliefs, which of course
25 is not a legitimate interest for this Court to consider at all.

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1 Further, to satisfy strict scrutiny, defendants would
2 have to show not only that they have compelling interests in
3 general, but that there are specific harms that they're
4 preventing by excluding the plaintiffs in particular.

5 Yet as the testimony this week has shown, the plaintiff
6 preschools can't recall ever having a single LGBTQ student or
7 family enrolled at their school, as far as they remember. And
8 as defendants themselves have conceded, there has never been a
9 single complaint for LGBTQ discrimination filed against any
10 Archdiocesan school since the advent of Colorado's licensing
11 requirements.

12 Allowing St. Mary's and Wellspring to participate will
13 only further the stated goals of the department and the UPK
14 statute. It will not harm them.

15 So, that's the free exercise clause, but plaintiffs
16 have other claims as well. As they claim in count six of their
17 complaint, defendants' exclusion of plaintiffs' preschools also
18 violates the First amendment's expressive association doctrine.
19 There has never been any dispute in this case that the elements
20 of an expressive association claim are met as they were set out
21 by the Supreme Court in *Boy Scouts versus Dale*.

22 Defendants' argument is simply that the doctrine
23 doesn't apply in the context of religious schools at all. But,
24 Your Honor, exactly the opposite is true. In the *Hosanna-Tabor*
25 case from the Supreme Court, the government argued that the

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1 plaintiff religious schools' associational rights were limited
2 to those that are shared by secular associations, but the
3 Supreme Court nine to zero rejected that argument, explaining
4 that religious schools have greater associational rights given
5 the First amendment's, quote, special solicitude towards
6 religion.

7 As to count six of plaintiffs' complaint, which is
8 denominational discrimination, the department has repeatedly
9 claimed that it's tried to be as inclusive as possible of
10 religious providers, but it turns out that for the department,
11 inclusion only goes so far. Religious providers who adhere to
12 traditional beliefs about marriage and sexuality are out. Those
13 who agree with the department on those issues are in.

14 Finally, Your Honor, on counts two and three, those are
15 plaintiffs' employment-related claims. And here, defendants
16 have run away from plaintiffs' claims altogether. They've now
17 acknowledged that they have no authority to regulate plaintiffs'
18 employment practices -- excuse me -- and have represented that
19 provision 18B -- or paragraph 18B is coming out of the UPK
20 provider agreement entirely. So, the Court should not hesitate
21 to enter judgment for the plaintiffs on those claims.

22 In short, plaintiffs agree with defendants as they said
23 in their opening. Colorado didn't have to create a Universal
24 Preschool Program. The issue is that once it did, it can't
25 exclude St. Mary's families like the Sheleys or like the

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1 disproportionately low-income and English-as-a-second-language
2 families that attend Wellspring Catholic Academy from
3 participating based on their religious exercise.

4 Plaintiffs therefore ask this Court to enter judgment
5 for them and issue an injunction that would allow St. Mary's
6 preschool and Wellspring to participate in the UPK program
7 without having to violate their sincere religious beliefs.
8 Thank you, Your Honor.

9 THE COURT: Thank you.

10 MS. CARRENO: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MS. CARRENO: This case isn't about two sets of rules.
13 There is only one set of rules for everyone, and everyone needs
14 to follow that same set of rules. The plaintiffs, however, seek
15 both to receive public funding and to receive an exemption from
16 a nondiscrimination provision statute, an exemption that no
17 other publicly-funded UPK program provider receives.

18 In closing, plaintiffs stated that they seek equal
19 treatment, but that's not what they're asking for in this case.
20 Plaintiffs seek to participate in the program not on the same
21 terms or not equally in the way that everyone else is
22 participating in this program, but plaintiffs seek to
23 participate in this program on their own terms.

24 We agree with plaintiffs that Colorado didn't have to
25 create a mixed-delivery Universal Preschool Program. It chose

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1 to do so, and it opened that program to public and private
2 schools, including faith-based schools, unlike any other state
3 in the country.

4 You've also heard, and you've heard about a lot of the
5 successes of this groundbreaking program just in year one. The
6 program has doubled the number of four-year-olds that are now
7 receiving access to publicly-funded preschool services across
8 Colorado. UPK is serving over 38,000 children. There are
9 nearly 2,000 preschool providers participating and serving those
10 children.

11 You've heard about all of the work that's gone into
12 making this happen, work by the legislature, work by
13 stakeholders, work by government agencies and partners, work by
14 providers and families. And despite all of the work that's gone
15 into this program and how quickly the department had to move in
16 implementing this program, everything about the Universal
17 Preschool Program has been thoughtful, and it's been
18 intentional, and it's been thoughtful and intentional to benefit
19 children and families.

20 You heard from Ms. Cooke, who was the transition
21 director of the Universal Preschool Program, and you also heard
22 from one of the defendants, Ms. Odean, who is the Universal
23 Preschool Program director. They both talked thoroughly about
24 the text of the UPK statute and how the statutory objectives in
25 that text were enacted by the legislature and were thoughtfully

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1 carried out by the Universal Preschool Program through both
2 implementation and through rule-making.

3 You heard a lot about the mixed-delivery system. A
4 mixed-delivery system provides more options for families. It
5 was statutorily required, and it was contemplated in
6 prioritizing certain populations, like low-income populations,
7 children with disabilities, and dual-language learners to ensure
8 that the new preschool system didn't take away from all of the
9 work that its predecessor, the Colorado Preschool Program, had
10 done.

11 The witnesses in our briefing have explained that the
12 mixed-delivery system is about having preschool providers that
13 provide a healthy, safe, inclusive, and nurturing environment
14 for the children and families they serve. Plaintiffs want to
15 take an out-of-court statement -- out-of-court and
16 out-of-context statement made by the governor about serving all
17 children, and simply interpret that statement to mean something
18 that the UPK system doesn't mean, and isn't how it functions.

19 Again, this is supported by the text of the statute
20 itself. It calls out the quality standards that have to reflect
21 national and community-informed best practices. Those quality
22 standards have to include cognitive development, they have to
23 include healthy environments, and they have to include social
24 and emotional learning.

25 Within that very same statute is the antidiscrimination

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1 provision at issue, because safe and inclusive environments are
2 essential to publicly-funded preschool quality. All of the
3 early childhood professionals that you've heard from have
4 reiterated why quality depends on early learning environments
5 being safe for children. They also explained why safety is
6 about more than just physical safety. It's about inclusive
7 environments which are free from discrimination.

8 This was bolstered by the testimony of our experts,
9 especially you heard yesterday and today from Dr. Tishelman.
10 And she talked about why preschool is such a critical time in
11 the lives of children and families, where children are having
12 their first relationships develop. They're understanding the
13 world as a safe place, and those children and their families,
14 they need to build trust with the adults around them,
15 particularly the primary caregivers in the preschool setting
16 through the publicly-funded program.

17 Harm at this early stage of life has lifelong effects
18 that are both physical, mental, emotional, and social.
19 Dr. Tishelman described them as adverse childhood experiences,
20 or ACEs.

21 Now, you've also heard from plaintiffs that the statute
22 in this case is not neutral and is not generally applicable, and
23 that's been a key issue. But the object of the
24 nondiscrimination or the antidiscrimination provision is to
25 prevent discrimination against children and families in

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1 publicly-funded preschools. The object is not and it's never
2 been to suppress religious practices.

3 Plaintiffs want the Court to equate this case to the
4 Carson case, but that simply isn't the set of facts that we have
5 in this case. As you heard, the department sought out and
6 worked really hard to include providers, including faith-based
7 providers from the very beginning, and they created the
8 faith-based working group.

9 And out of that faith-based working group, the
10 congregation preference evolved. That preference was in direct
11 response to the concerns of those faith-based providers and
12 families who expressed the need to protect the unintended
13 consequences of the matching algorithm that serves communities
14 like any other provider. And as Ms. Odean explained, that
15 matching algorithm can take all of the real-world realities of
16 the relationships and why they're so important in the early
17 childhood setting, like continuity of care, into consideration
18 during that computer matching process.

19 You heard not only was there a faith-based work group
20 in this case -- or not in this case. In Colorado. You heard
21 that the -- one of the plaintiffs' preschools, Ms. Tracy Seul
22 from St. Mary's, she participated in that work group. She had a
23 seat at the table. She asked Ms. Cooke for screenshots in order
24 to give to the Archdiocese to figure out a way that she could
25 participate and that her school could participate in the

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1 program. And you heard that Ms. Cooke worked with her in
2 providing those screenshots, and that ultimately Ms. Seul was
3 hopeful about participating in the program.

4 The department did everything they could to work with
5 Ms. Seul and allow all providers that wanted to participate in
6 the program access. Distinct from *Carson*, there are also 40
7 faith-based preschool providers that are currently participating
8 in the program. There are over 900 children that have been
9 matched with those 40 faith-based providers. And I also want to
10 point out that there are six UPK providers that are from
11 Catholic Charities, which plaintiffs concede is under the
12 umbrella of the Archdiocese of Denver.

13 The idea that Catholics are not welcome or were
14 unintentionally left out of the Universal Preschool Program is
15 plainly inconsistent with the facts and the evidence in this
16 case.

17 Now, I want to talk about how this case is also
18 distinguishable from *Fulton*. And defendants have distinguished
19 that in our briefing, but in this case -- in the *Fulton* case,
20 religious organizations were denied a benefit that was available
21 to secular organizations. Again, that's not the set of facts
22 that we have in this case. The statutory nondiscrimination
23 provision is generally applicable, because the department has
24 not permitted and it does not permit any participating preschool
25 provider to discriminate in violation of that provision.

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1 You heard about the State's express objectives and the
2 quality standards that the department is developing to implement
3 those objectives through the rule-making process. Plaintiffs
4 want to argue that safety is only about licensing, but the
5 State's licensing requirements were put in place to regulate
6 daycare providers or child care providers as businesses, not for
7 preschool education, and certainly not for state-funded
8 preschool education that was intended to improve the outcomes
9 for children and families.

10 Plaintiffs' incomplete and inaccurate understanding of
11 the statute's health and safety standards is not only
12 unsupported, but it contradicts the experience-based testimony
13 from Ms. Odean, Ms. Cooke, Ms. Holguín, who you heard from today
14 of the Denver Preschool Program, and both of the defendants'
15 experts. The nondiscrimination provision is among the health
16 and safety standards that protect children and families who are
17 receiving publicly-funded preschool for the Universal Preschool
18 Program.

19 I want to talk a minute about the programmatic
20 preferences. Plaintiffs have also mischaracterized and
21 misunderstand the preferences. They characterize those
22 preferences as exemptions or exceptions from the statutory
23 nondiscrimination requirement. Plaintiffs are wrong that any
24 preference exempts a provider from the statutory
25 antidiscrimination provision.

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1 Again, these preferences were created in response to
2 concerns from providers, and are departures from the
3 algorithm-driven matching process. Ms. Odean testified at
4 length about each and every one of the ten preferences which
5 appear in the proposed rules. She explained why each preference
6 aligns with the statutory objectives, including federal
7 requirements, and also the realities of the early childhood
8 education system.

9 That system has to be able to prioritize certain
10 relationships for the system to work for both families and
11 providers in the statutorily-required mixed-delivery system.
12 None of the preferences permit providers to discriminate in
13 violation of the statute.

14 Going back to the congregation preference, which
15 plaintiff preschools would be able to use if they participated
16 in the program, along with preferences for siblings, employees
17 of their faith-based institutions, and continuity of care
18 preferences, these preferences do not exempt faith-based
19 providers from the antidiscrimination provision.

20 The preferences permit faith-based providers to hold
21 their seats for members of their communities as they define
22 them, just like providers are permitted to serve their
23 self-identified communities by prioritizing the children of
24 certain employers or in certain neighborhoods in a geographic
25 region. In other words, preferring members of your congregation

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1 is a preference based on relationships.

2 I also want to reiterate that the document that was
3 available to the Court and that was presented this week,
4 document number 71, is a proposed rule, and the department
5 invites public -- members of the public, including the
6 plaintiffs, to share their feedback on that rule. As we've
7 mentioned, this is a brand new department. They are moving
8 incredibly fast, and they are following the rule-making process
9 for these preferences the same as every other rule that this
10 department has implemented since its creation.

11 Ms. Holguín -- Ms. Odean explained at length why
12 programs that specialize in serving children with disabilities
13 are able to prioritize those children, and why allowing Head
14 Start programs to preference children who meet federal
15 requirements is not discrimination on the basis of disability or
16 income in violation of statute, but instead it implements the
17 statute's express direction to prioritize those children.

18 Reading the statutes the way the plaintiffs suggest
19 would be an absurd reading. The idea that the
20 antidiscrimination provision prohibits a school that specializes
21 in serving visually-impaired students from saving its seats for
22 those visually-impaired children is not logical. It would also
23 be absurd to interpret the statute's antidiscrimination to
24 prohibit a school that is a Head-Start-funded school to not be
25 able to save seats for low-income children who qualify for the

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1 Head Start program it was created to serve.

2 I want to turn next to the temporary waiver in statute
3 of some of the quality standards. This has also been
4 mischaracterized and misunderstood by the plaintiffs. That
5 provision limits the department's discretion to grant a waiver
6 in several key ways. The first way is that it's available only
7 when necessary to ensure availability of a mixed-delivery system
8 within a community. And as Ms. Odean testified, the department
9 has not utilized that temporary waiver up to this point, because
10 it hasn't been necessary to ensure the availability of a
11 mixed-delivery system.

12 Second, each preschool provider must still meet all
13 quality standards relating to health and safety. Third, it
14 requires the provider to be working toward compliance. And all
15 three of those requirements need to be met before the department
16 can even think about granting a temporary waiver of some of the
17 quality standards.

18 What's also clear is that the quality standards never
19 permit a provider to discriminate in violation of the statute,
20 and that because the nondiscrimination provision is a health and
21 safety standard, that it's never possible to waive that quality
22 standard for any provider, including faith-based providers.

23 The evidence has shown that both the preferences and
24 the waiver simply don't provide exceptions or exemptions from
25 the statutory antidiscrimination provision, but they remain

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1 generally applicable.

2 This case is also, despite plaintiffs' arguments,
3 subject to rational basis. The nondiscrimination provision
4 satisfies the rational basis test, and indeed satisfies any
5 level of scrutiny, because publicly-funded preschool providers
6 are prohibited from discriminating on the basis of sexual
7 orientation or gender identity, and that is necessary to prevent
8 the harms caused by discrimination and to provide safe, healthy,
9 and nurturing environments during this crucial stage of a
10 child's development, again, as our experts made clear, and as
11 documented in their expert reports.

12 In turning to the expressive association claim, you
13 heard testimony from Dr. Tishelman and also from Dr. Goldberg
14 that discriminatory conflict -- conducts. Excuse me. That
15 discriminatory conduct inflicts physical, mental, and other harm
16 on young children. Now, you also heard some examples of those
17 types of harm. One of the examples was treating children
18 differently based on their sexual orientation or their gender
19 identity, and including turning students and families away
20 because of their sexual orientation or gender identity.

21 You also heard another example of -- that that type of
22 harm was treating LGBTQ students already enrolled in a preschool
23 program differently than other students by refusing to let them
24 dress or use bathrooms or pronouns consistent with their gender
25 identity. Treating children enrolled in a publicly-funded

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1 preschool program differently because of their LGBTQ status is
2 discriminatory conduct, and that conduct can and does harm those
3 children.

4 Preventing that conduct or that discrimination against
5 four-year-olds and their families who seek to participate in a
6 publicly-funded preschool program is necessary to achieve the
7 program's legitimate, indeed compelling interest to ensure that
8 children and families in a publicly-funded preschool system
9 receive safe, healthy, inclusive, and nurturing environments.

10 To say that plaintiffs' position has no limiting
11 principle is not to accuse them of racial -- racial prejudice.
12 It's to note that the free exercise clause and expressive
13 association freedoms do not permit Courts to grant exceptions to
14 religions or ideas that those Courts consider to be more or less
15 worthy or more or less longstanding than others.

16 Courts have no power to grant exceptions to religions
17 or ideas based on the age of those beliefs or based on whether
18 the Courts think that some religious or political viewpoints are
19 more honorable than others.

20 Plaintiffs are suggesting that a ruling for them can be
21 limited because of their religious beliefs, and because those
22 beliefs seem to be more honorable than others, but a long line
23 of precedence, again cited in our briefing, is clear that Courts
24 are not competent to distinguish among religions based on the
25 validity or value or wisdom of their religious beliefs.

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1 Turning to the establishment clause claim, as the
2 briefing and the arguments this week have made clear, this
3 program does not discriminate on the basis of religion in
4 violation of the First amendment. It's clear again that
5 Colorado's congregation preference doesn't discriminate against
6 religions, because it's available to all faith-based providers,
7 including the plaintiffs, who had a seat at the table during the
8 implementation of UPK.

9 It's equally available to all denominations. It
10 doesn't prioritize one religion over another. All faiths are
11 encouraged to participate. You heard about how many different
12 type faiths participated in that faith-based work group, and you
13 also heard about how many different types of faiths are
14 participating in the UPK program, but no faith-based provider or
15 any other provider can discriminate against children or their
16 families in violation of the antidiscrimination statute.

17 Before I wrap up, I want to turn the Court's attention
18 to the injunction factors in this case, because the plaintiffs
19 seek a permanent injunction. It's plaintiffs' burden to
20 establish that they have suffered from an irreparable injury,
21 that the threatened injury outweighs the harm, and that the
22 injunction that they seek outweighs the harm that the injunction
23 may cause, and that the injunction, if issued, will not
24 adversely affect the public interest.

25 Turning to irreparable harm, plaintiff preschools

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1 cannot show irreparable harm, as they can and they have signed
2 contracts with similar clauses, and have agreed to that
3 nondiscrimination language with no complaints for years.

4 You just heard plaintiffs' counsel discuss how they
5 haven't had harm in this case. Ms. Holguín of DPP, or the
6 Denver Preschool Program, and Jesse Burne, a manager of the
7 CCCAP program, both testified why these requirements of both of
8 these programs are functionally equivalent to the provision at
9 issue in this case.

10 Both St. Mary and St. Bernadette have been agreeing to
11 those terms, and they have never believed that these types of
12 provisions prevent them from exercising their sincerely-held
13 religious beliefs. It's not logical to look at the language of
14 those agreements and listen to the witnesses who have testified
15 in court to believe that a functionally-equivalent provision in
16 the UPK program would suddenly create harm that's never existed
17 before.

18 When looking at the balance of the harms and the public
19 interest, it's already been discussed at length and described by
20 the expert testimony in this case that the potential harm to
21 LGBTQ families and children and the public interest in ensuring
22 equitable access to publicly-funded preschool for all Colorado
23 children far outweighs any potential harm to the plaintiffs.

24 The mental, emotional, cognitive, and other harms that
25 families and children experience as a result of discrimination

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1 on the basis of sexual orientation and gender identity has been
2 made clear throughout the course of this case. Based on all of
3 the evidence presented throughout the last three days, my
4 clients invite the Court to make findings of fact in defendants'
5 favor, and conclude that the Universal Preschool Program's
6 requirements are neutral, generally applicable, and do not
7 violate the plaintiffs' First amendment rights, and that
8 plaintiffs have not met their burden of establishing the factors
9 necessary to warrant permanent injunctive relief in this case.
10 Thank you.

11 THE COURT: Thank you.

12 MR. DAVIS: Just a few quick points, Your Honor.
13 Thank you, Your Honor. And I will be quite brief. I just want
14 to respond briefly to the point about the Denver Preschool
15 Program and CCCAP that opposing counsel just raised.

16 This is a nonissue, as this Court already recognized in
17 its summary judgment opinion. Plaintiffs reasonably understand
18 those other provisions and those other contracts differently,
19 and nothing that we've heard today changes that.

20 In fact, Your Honor already laid out the reasons why
21 plaintiffs understand those other provisions in those other
22 contracts differently, and I think opposing counsel just called
23 that illogical, which can't be right. Your Honor had it right
24 the first time.

25 Your Honor, opposing counsel raised Exhibit 71, which

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1 is the draft proposed regulations, and I think the purpose of
2 this was to try to run away from some of Ms. Odean's testimony
3 about how under the new preference ten you could have an LGBTQ
4 school or a gender-nonconforming school or a children of color
5 school. But, Your Honor, Ms. Odean testified that those --
6 those types of schools were consistent with her understanding of
7 the statute, that preference ten was consistent with her
8 understanding of the statute. She is the director of the UPK
9 program, and that's what's at issue in this case.

10 In any event, Your Honor, we would just point out that
11 most of the key exceptions, disability, income level, religious
12 affiliation, are all currently in effect, and there's absolutely
13 no dispute about that.

14 Your Honor, defendants just said also that what
15 plaintiffs are seeking is something that no other provider has.
16 Now, that's not true for lots of reasons, but the clearest
17 reason that it's not true is Darren Patterson, who has the same
18 religious beliefs that plaintiffs do, similar religious beliefs
19 as plaintiffs on sexuality and gender identity, they're
20 participating in the program right now. You heard no answer to
21 that from defendants.

22 On the congregation preference, defendants again simply
23 assert it's about relationships. Your Honor, that's what we
24 already discussed in my time, and defendants did not rebut the
25 reading of the definition that we went through. Defendants

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1 simply ignore the key point, and that's that the relationship is
2 defined by reference to religious affiliation.

3 Your Honor, defendants also raise, as they have in
4 multiple points in this case, that a handful of Catholic
5 Charities' Head Start programs are currently participating in
6 the UPK program. It's not totally clear what defendants think
7 that means for the case, but I would just note that the
8 plaintiffs should not be punished because some of their
9 providers are dedicated exclusively to serving the needy rather
10 than raising the next generation in the faith as their main
11 mission. And I would just direct Your Honor to Ms. Chilelli's
12 testimony squarely on that point, which was unrebutted.

13 Your Honor, defendants also say -- they emphasize that
14 harm for young children, harm for preschoolers can have lifelong
15 consequences. The problem is where is the harm? Defendants
16 have not and cannot identify even a single child that has been
17 harmed in any fashion by plaintiffs' policies here. What they
18 want is for Your Honor to define Catholic Schools as inherently
19 unsafe and unhealthy. Catholic beliefs are, in their view,
20 inherently harmful to children.

21 That is not a compelling interest. It's not even a
22 legitimate interest, and it's impossible to square with what the
23 Supreme Court said at the same time that it legalized same-sex
24 marriage in *Obergefell*. It said that plaintiffs' religious
25 beliefs are, quote, decent and honorable, and that the First

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1 amendment ensures that religious organizations like plaintiffs
2 are given, quote, proper protection as they seek to teach those
3 beliefs to the next generation.

4 Your Honor, in emphasizing state-funded, you heard that
5 over and over again just now, defendants seem to believe that he
6 who pays the piper, plays the tune. That would work if Colorado
7 were a large private corporation. But Colorado is a state
8 actor, and it's therefore required to accommodate religion.
9 Your Honor, defendants' actions here, they violate *Carson*,
10 they're not neutral and generally applicable, and they fail
11 strict scrutiny. Thank you, Your Honor.

12 THE COURT: Thank you. Okay. We'll get the proposed
13 findings in due course once the transcripts are there, and then
14 I will commence to work where you don't have to anymore. Thank
15 you all for your efforts in this case. We will stand in recess,
16 and the case will stand as submitted.

17 (Proceedings concluded at 2:42 p.m.)
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Dated this 9th day of January, 2024.

Kevin P. Carlin, RMR, CRR
Official Court Reporter

Kevin P. Carlin, RMR, CRR