

No. 25-581

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In the  
**Supreme Court of the United States**

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ST. MARY CATHOLIC PARISH IN LITTLETON,  
ST. BERNADETTE CATHOLIC PARISH IN LAKEWOOD,  
DANIEL SHELEY, LISA SHELEY, AND THE ARCHDIOCESE  
OF DENVER,

*Petitioners,*

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS EXECUTIVE  
DIRECTOR OF THE COLORADO DEPARTMENT OF EARLY  
CHILDHOOD, AND DAWN ODEAN, IN HER OFFICIAL  
CAPACITY AS DIRECTOR OF COLORADO'S UNIVERSAL  
PRESCHOOL PROGRAM,

*Respondents.*

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On Petition for Writ of Certiorari to the  
U.S. Court of Appeals for the Tenth Circuit

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**BRIEF IN OPPOSITION**

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## QUESTIONS PRESENTED

Colorado's Universal Preschool Program offers free preschool to all four-year-old Coloradans through a system that includes faith-based providers along with other private and public providers. All participating providers—whether religious or secular—must ensure that children have equal opportunity to enroll in and receive preschool services regardless of those children's (or their families') religious affiliation, race, ethnicity, sexual orientation, gender identity, lack of housing, income level, or disability.

Petitioners seek an exemption from this law to allow them to receive public funding while turning away preschoolers because of their, or their parents', gender identity or sexual orientation.

But the Tenth Circuit held that Colorado's law, as written and as implemented, does not allow for *any* exceptions from its equal-opportunity requirements.

The questions presented are:

1. Whether the Tenth Circuit correctly interpreted state law as allowing no exceptions (and conferring no discretion to create any exceptions) to the equal-opportunity requirements.

2. Whether the First Amendment allows Colorado to ensure, through a neutral and generally applicable program, that preschoolers have equal opportunity to enroll in and receive publicly-funded preschool services regardless of their, or their parents', protected-class status.

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## INTRODUCTION

The Tenth Circuit determined that Colorado’s Universal Preschool Program (“UPK”) affirmatively welcomes faith-based providers while allowing no exceptions from its equal-opportunity requirements.

The petition nevertheless argues that Colorado violates the Free Exercise Clause by purportedly granting secular exemptions while denying Petitioners’ requested religious exemption—adding, they say, to a split over how “to determine which secular exemptions undermine general applicability in the free exercise context.” Pet. 13. But after carefully examining the text of the state law and the facts about its implementation as developed at trial, the Tenth Circuit held that Colorado’s law, as written and as implemented, does not allow for *any* exceptions from its equal-opportunity requirements. Pet. App. 29a–38a.

Petitioners essentially ignore that holding, which vitiates the premise of their central argument. They instead attack the Tenth Circuit’s statement that—assuming, *arguendo*—certain secular exemptions were to exist, Colorado law would nonetheless still qualify as generally applicable. Regardless of whether this comparability discussion is *dicta* or an alternative basis for decision, it does not warrant this Court’s review when the threshold holding does not warrant review because it simply presents a matter of state statutory interpretation.

And the Tenth Circuit’s interpretation of Colorado’s statute does not merit this Court’s review. This Court generally accords great deference to the federal courts of appeals’ interpretations of state law to avoid unnecessary review of those decisions and because

lower federal courts often have greater familiarity and experience with the laws of their states. Here, the district court and appellate court reached their holdings based on state statutory interpretations and supporting factual findings regarding state agency practice that are specific to this case. No courts have reached a contrary conclusion, so there is no conflict for this Court to resolve.

Nor is there any error to correct. The Tenth Circuit correctly interpreted the state statute to allow no exceptions—and to confer no discretion to create any exceptions—to its equal-opportunity requirements, and affirmed the district court’s finding that the Colorado Department of Early Childhood (“CDEC”) allows no such exceptions in implementing the program.

None of the three provisions Petitioners cite allows, or has ever been used to allow, any exception to the equal-opportunity requirements. Regarding disability and income, this Court’s jurisprudence establishes that legislatures may enact equal-opportunity protections regarding disability and income that protect only individuals with disabilities from disability-based discrimination and only low-income individuals from income-based discrimination. And the unanimous Tenth Circuit, like the district court before it, correctly interpreted UPK’s statutory equal-opportunity requirements to protect children *with* disabilities and children from *low*-income families. Pet. App. 35a–38a. As it determined, the UPK Act’s text and express objectives make clear that preschools that prioritize children with disabilities and children from low-income families do not deny equal opportunity based

on disability or income level in violation of UPK’s statutory equal-opportunity requirements. Pet. App. 35a–38a.

Regarding the so-called “catchall” preference, the unanimous Tenth Circuit, like the district court before it, carefully examined all the evidence in correctly determining that this preference does not allow, and has not been used to allow, any exceptions from the equal-opportunity requirements. Pet. App. 32a.

Finally, like the district court before it, the unanimous Tenth Circuit correctly determined that the statute’s temporary-waiver provision expressly precludes even temporary exceptions from the equal-opportunity requirements. Pet. App. 33a–34a.

Because this case involves neither any exceptions nor the discretion to create exceptions, it is not an appropriate vehicle for addressing the question of what sorts of exceptions would render the government’s action not generally applicable.

The Tenth Circuit’s decision also aligns with this Court’s precedent. Petitioners rely on *Carson v. Makin*, 596 U.S. 767 (2022), which held that strict scrutiny applies to the government’s intentional exclusion of religious actors, based on those actors’ religious character, from public funding programs. *Id.* at 780. But as the Tenth Circuit correctly decided, *Carson* does not apply to this case because UPK does not exclude religious schools: indeed, UPK welcomes them in a program where public funding turns not on providers’ secular or religious character, but instead on providers’ compliance with UPK’s equal-opportunity requirements.

Finally, this Court has repeatedly rejected invitations to reconsider *Employment Division v. Smith*, 494 U.S. 872 (1990), and nothing about this case warrants this Court’s reconsideration.

This Court should deny certiorari.

### STATEMENT OF THE CASE

#### **I. Colorado becomes a national leader in providing universal preschool through a “mixed-delivery” system that affirmatively includes faith-based providers.**

In 2020, Colorado’s electorate voted overwhelmingly to offer free preschool to every four-year-old Coloradan. Colo. Rev. Stat. (“C.R.S.”) §§ 26.5-4-202(1)(a)(V); 26.5-4-204(1)(a). The General Assembly then enacted the “Early Childhood Act,” and created CDEC to implement this ground-breaking program. H.B. 21-1304, 73rd Gen. Assemb., Reg. Sess. (Colo. 2021) (enacted).

Through what is called a “mixed-delivery” approach to universal preschool, the Act establishes a program that affirmatively includes a wide variety of public and private community providers, including faith-based and in-home preschool providers. C.R.S. § 26.5-4-202(1)(b); Pet. App. 59a–60a. All children in Colorado are eligible for up to 15 hours of free preschool per week in the year before they start kindergarten. Pet. App. 188a, 301a.

From UPK’s inception, CDEC has welcomed faith-based providers. It convened an interfaith working group to solicit, and respond to, religious providers’ questions and suggestions—a group that included a

representative from Petitioner St. Mary Catholic Parish. Pet. App. 60a; Supp. App. 55a–56a. CDEC’s response to those providers’ feedback included its initial development of a “congregation preference” to enable religious providers to prioritize “members of the community that the faith-based provider serves as the faith-based provider defines that community.” Supp. App. 8a; 58a; Pet. App. 135a–36a; 340a–41a.

More than forty faith-based providers, including six Catholic Charities preschools that are part of the Petitioner Archdiocese of Denver, have participated in UPK since year one. Supp. App. 2a; 41a.

**II. UPK offers free, high-quality preschool to all four-year-old Coloradans regardless of their, or their parents’, protected-class status.**

To ensure that every preschooler in UPK-funded preschools has access to safe, healthy, and high-quality learning environments, the UPK statute requires CDEC to establish quality standards that reflect “national and community-informed best practices with regard to school readiness, academic and cognitive development, healthy environments, social-emotional learning, and child and family outcomes.” C.R.S. § 26.5-4-205(1)(a). These standards include requirements that publicly-funded providers ensure all eligible children receive “an equal opportunity to enroll and receive preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child’s family.” C.R.S. § 26.5-4-205(2)(b).

Under UPK’s equal-opportunity requirements, faith-based providers, like other providers, remain free to teach what they want, as CDEC doesn’t review or regulate curriculum. Supp. App. 74a–75a; Pet. App. 64a. No publicly-funded preschool, however, can turn away children and families based on their protected-class status. This ensures that all Colorado parents—including Catholic parents and same-sex parents—know their children will not be excluded, because of their protected-class status, from the publicly-funded preschool that best meets their families’ needs.

As explained below, the UPK program—as enacted into statute and as implemented by CDEC—includes several features to ensure the success of its “mixed-delivery” approach by enabling participation by a wide range of providers. At the same time, the statute and its implementation make clear that all participating preschools must comply with the statute’s equal-opportunity requirements.

**A. Allowing providers to prioritize children from low-income families and children with disabilities does not deny equal opportunity in violation of the statute.**

The UPK Act defines UPK’s “mixed delivery system” as including “head start agencies” and defines the “preschool providers” eligible to participate in UPK to include “head start program[s].” C.R.S. § 26.5-4-203(12), (14)(e). Head Start programs are operated by local public or private nonprofit agencies designated and funded by the federal government. C.R.S. § 26.5-4-103(6). These programs prioritize the

children of families who are living in poverty or otherwise have low income, as well as children with disabilities. Pet. App. 336a.

The UPK Act also requires that “every child who is three or four years of age and is a child with disabilities must be offered preschool services in accordance with the child’s individualized education program [IEP, which supports specific services for children with disabilities].” C.R.S. § 26.5-4-204(3)(a)(II); *see also* §§ 26.5-4-202(4), 26.5-4-204(1)(c), and 26.5-4-206 (emphasizing UPK’s commitment to complying with the federal Individuals with Disabilities Education Act (“IDEA”) and the importance of serving preschoolers with IEPs pursuant to IDEA). The UPK Act specifies that its definition of “children with disabilities” is the same as the definition found elsewhere in the Education Code, C.R.S. § 26.5-4-203(3). Under that provision, “children with disabilities” are those who are “unable to receive reasonable benefit from general education” and therefore require an IEP, as outlined in C.R.S. § 22-20-103(5)(a), (15). Under IDEA, school districts must provide children with IEPs access to specialized resources and services that other preschools would not be able to accommodate. Pet. App. 71a; 334a.

Finally, the UPK Act prioritizes children with disabilities and children in low-income families by allowing those children to receive publicly-funded preschool hours beyond the hours available to all four-year-old Coloradans. C.R.S. §§ 26.5-4-202(3); 26.5-4-204(1)(b), (3)(a)(II), (V).

To fulfill the statute's multiple directives, CDEC created preferences to ensure that providers could prioritize children who qualify for Head Start and children with IEPs, as required by the UPK statute. Pet. App. 209a.

**B. UPK's preferences help preschools maintain ongoing relationships and areas of focus without allowing exceptions from the equal-opportunity requirements.**

UPK allows families to select and rank up to five participating providers through an online application. Pet. App. 64a; 303a. UPK's software then uses an algorithm to match a family with one of their choices (and enables the family to select additional providers if none of their initial choices are available). *Id.*; Supp. App. 59a–60a.

Because this matching algorithm could not account for pre-existing relationships and commitments, providers expressed concern that it would not allow them to serve the families and communities they were designed to serve, like continuing students, or children living within a school district's boundaries. Pet. App. 7a; 65a–69a; 328a–32a; Supp. App. 56a–59a. To cure the software's technical limits, CDEC developed a series of specific matching "preferences" to enable providers to maintain ongoing community relationships and specialized areas of focus.

These preferences enable school districts to match with children residing within their district boundaries; enable preschool co-ops to match with children of families participating in the co-op; enable providers to

match with their employees' children; enable providers to match with continuing students (and those students' siblings) to ensure continuity of care; enable dual-language providers to match with children who speak the requisite languages; and enable Head Start providers and providers that serve children with IEPs to match with children of low-income families and children with disabilities. Pet. App. 209a–11a.

The rule establishing these preferences makes clear that providers *may not* use them to deny equal opportunity based on children's, or their parents', religion, race, sexual orientation, gender identity, or other protected class status. Pet. App. 29a–30a; 68a–69a; 72a–73a; 211a; 332a–40a; 343a–45a; Supp. App. 56a–59a.

And because CDEC could not anticipate each of the nearly two thousand providers' pre-existing commitments, the agency created an additional “programmatic preference” (referred to by Petitioners as the “catch-all” preference) to address the individual programmatic commitments of providers with needs unaddressed by the other preferences Pet. App. 210–11a; 343a–45a. In UPK's inaugural year, CDEC approved 17 providers' requests to utilize this preference. Pls. Ex. 34, Record 607; *see also* Pls. Ex. 30, Record 607. None of these preferences, however, drew any distinctions based on any of the characteristics protected by the statutory equal-opportunity requirements: religious affiliation, race, ethnicity, sexual orientation, gender identity, disability, income level, and lack of housing. Pet. App. 32a–33a. Like the other preferences, the rule that creates the programmatic preference itself prohibits it from being used to deny equal

opportunity in violation of the statutory requirements. Pet. App. 29a–30a; 65a–69a; 211a–12a; 327a–32a; Supp. App. 56a–59a.

**C. The statute’s temporary waiver provision includes express limitations that preclude even temporary exceptions from the equal-opportunity requirements.**

The UPK statute includes a provision that authorizes CDEC to grant a temporary waiver to “allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time while working toward compliance with the quality standards.” C.R.S. § 26.5-4-205(1)(b)(II). This provision seeks to give providers time to come into compliance with requirements that enhance quality preschool education, but with which they may have had no previous experience. Pet. App. 323a–25a. For example, in-home childcare providers that have never formally documented their on-site observations of children’s progress, as required by UPK, could be granted additional time to learn how to do so. Pet. App. 324a; C.R.S. § 26.5-4-205(b)(II); *see* Pet. App. 209a–11a.

The equal-opportunity requirements are not eligible for waiver. This is clear from two express statutory limitations on temporary waivers’ availability. First, temporary waivers are available only to providers that are “working toward compliance with the quality standards.” C.R.S. § 26.5-4-205(1)(b)(II). Although it may take time for a provider to learn and implement the statute’s quality-control procedures, it takes no time to stop excluding children because of their, or

their parents', religion, race, sexual orientation, gender identity, or other protected-class status. Second, the statute prohibits temporary waivers of those "quality standards relating to health and safety as a condition of participating in the preschool program," *id.*, and the equal-opportunity requirements are health and safety standards. Pet. App. 326a.

**III. Because the statute allows no exceptions from its equal-opportunity requirements, CDEC did not grant Petitioners' request to deny equal opportunity.**

Petitioners sought permission to receive public funding while excluding children based on their—or their parents'—gender identity, sexual orientation, or religious affiliation. Pet. App. 283a–87a; 316a–17a; 319a. Because the statute does not allow any exceptions (also referred to as "exemptions") from the equal-opportunity requirements, CDEC denied Petitioners' request. Pet. App. 288a–90a.

**IV. Proceedings Below.**

**A. The trial court determined that UPK's equal-opportunity requirements allow no exceptions, and are neutral and generally applicable.**

Shortly after the start of UPK's inaugural school year, Petitioners filed their complaint challenging CDEC's refusal to grant them their requested exceptions. Amended Complaint at 3–4, *St. Mary Catholic Parish v. Roy*, No. 1:23-cv-02079 (D. Colo. Sep. 13, 2023), Dkt. No. 30. After disposing of various motions, the district court held a three-day bench trial with testimony from ten witnesses.

At trial, Petitioners' witnesses testified that they would "welcome" children who were not Catholic. Supp. App. 43a; *see also* Supp. App. 48a–49a (Wellspring admits non-Catholics); Supp. App. 44a (testimony of Tracy Seul) (St. Mary admits non-Catholics). At the same time, Petitioners' witnesses also testified that they would deny enrollment to a gender-diverse child or the child of same-sex or gender-diverse parents seeking to enroll in their preschool. Pet. App. 317a (enrollment of a child of same-sex or gender-nonconforming parents "would not be possible"); *see also* Pet. App. 77a–78a; 251a–59a; 272a–75a; Supp. App. 46a–47a (Petitioner Wellspring denied enrollment to a fifth-grade child of same-sex parents). Petitioners also testified that continued enrollment of a child who later identified as gender-diverse would "not be possible." Supp. App. 39a–40a; *see also* Pet. App. 78a; 251a–59a; 272a–75a.

At trial, CDEC offered extensive expert testimony about the importance of equal opportunity to access and receive preschool services regardless of children's and parents' gender identity and sexual orientation. The district court found the experts' testimony to be "reliable and persuasive." Pet. App. 94a. Petitioners offered no expert testimony of their own.

The district court concluded that UPK doesn't bar religious providers because of their religious character or exercise, Pet. App. 107a–08a; UPK does not seek to suppress religious practice and is thus neutral toward religion, Pet. App. 108a–09a; UPK's statute does not allow any exceptions from its equal-opportunity requirements, Pet. App. 53a, 120a–21a, 123a, 129a–35a; CDEC has granted no secular exceptions from UPK's

equal-opportunity requirements, Pet. App. 120a–21a, 125a, 134a–35a, 144a;<sup>1</sup> and neither the statute nor CDEC have created a mechanism for individualized exceptions, Pet. App. 123a. For these reasons, it denied Petitioners’ request for a permanent injunction exempting them from the equal-opportunity requirements regarding sexual orientation and gender identity. Pet. App. 166a; 171a–72a.

**B. The Tenth Circuit determined that UPK’s equal-opportunity requirements allow no exceptions, and are neutral and generally applicable.**

The Tenth Circuit unanimously affirmed, holding that Petitioners did not meet their burden to show

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<sup>1</sup> As noted, *supra* at 5, CDEC’s matching preferences initially included a “congregation preference” that allowed faith-based providers to prioritize “members of the community that the faith-based provider serves as the faith-based provider defines that community.” Supp. App. 8a. The district court determined, however, that the statute’s equal-opportunity provisions prohibit providers from drawing distinctions based on religious affiliation. Pet. App. 135a–37a; 151a–52a. Committed to complying with all statutory requirements, CDEC then undertook a rulemaking process to remove the congregation preference. As the Tenth Circuit observed, “[CDEC] added [the congregation] preference to accommodate faith-based providers. However, once the district court determined that this preference was incompatible with the non-discrimination requirement, it was removed. [CDEC] has tried repeatedly to accommodate faith-based providers, but when it comes to the nondiscrimination provision, it can make no exceptions because the provision is required by statute.” Pet. App. 32a–33a; *see also id.* at 36a n.16 (“[T]he congregation preference no longer exists, and thus cannot undermine the law’s general applicability.”).

that UPK’s equal-opportunity provisions are not neutral or not generally applicable, as required to trigger strict scrutiny under the Free Exercise Clause. Pet. App. 5a; 28a; 32a-43a; 47a.

The Tenth Circuit determined that the statute does not allow, and has not been implemented to allow, exceptions from the equal-opportunity requirements. First, based on the statutory text, the Tenth Circuit interpreted the equal-opportunity requirements as protecting children with disabilities and children from low-income families from the denial of equal opportunity based on their disability and low income. Pet. App. 37a–38a. It thus rejected Petitioners’ argument that the preferences allowing providers to prioritize children with disabilities and children from low-income families deny equal opportunity based on disability and income level in violation of the statute. Pet. App. 36a–38a.

The Tenth Circuit then observed that “[e]ven assuming, *arguendo*,” that those preferences were somehow understood as exceptions from the equal-opportunity requirements, they would not be exempting secular activity “comparable” to excluding children based on their or their parents’ gender identity or sexual orientation, and thus would remain generally applicable. Pet. App. 38a–40a; *see also id.* at 41a (“Even if the Parish Preschools are correct (which we do not decide that they are), and the IEP and Head Start preferences are unlawful under the nondiscrimination requirement, it simply means that those preferences could possibly be challenged separately. It does not mean that all other protected classes should then be

denied the benefit of the nondiscrimination requirement.”).

Second, the Tenth Circuit rejected Petitioners’ characterization of UPK’s programmatic preference as an exception from the equal-opportunity requirements, instead affirming the district court’s factual findings that the agency’s witnesses understood themselves to have no discretion to approve exceptions from the statutory requirements and had not applied that preference to allow any exception. Pet. App. 29a–30a; *see also id.* (concluding that “the catchall preference is not a system of individualized exemptions from the nondiscrimination requirement”).

Third, the Tenth Circuit rejected Petitioners’ argument that the UPK statute’s temporary waiver provision provides CDEC with the discretion to create exceptions from UPK’s equal-opportunity requirements, interpreting the statute expressly to reject any discretion. Pet. App. 33a–35a.

Finally, the Tenth Circuit distinguished Petitioners’ invocation of *Carson* and other cases invalidating the exclusion of religious entities from government benefits based on their religious character, holding that UPK affirmatively includes religious preschools while requiring them to comply with the same requirements applied to all publicly-funded preschools. Pet. App. 21a–22a.

The Tenth Circuit then concluded that Colorado’s neutral and generally applicable law triggers, and satisfies, rational-basis review. Pet. App. 47a.

## REASONS FOR DENYING THE PETITION

### I. **The Tenth Circuit’s decision does not implicate the asserted lower court split that is the basis of Petitioners’ request for review.**

Petitioners claim a conflict over what sorts of exceptions render a law not generally applicable, but the Tenth Circuit interpreted the state statute as allowing *no* exceptions and *no* discretion to create exceptions. This case is thus not an appropriate vehicle for addressing Petitioners’ asserted split.<sup>2</sup> *See DeVillier v. Texas*, 601 U.S. 285, 292–93 (2024) (“It would be imprudent” to decide a question whose premise “does not hold.”). To reach the question Petitioners raise would require this Court to review and reject the Tenth Circuit’s state statutory interpretation and affirmance of district-court factual findings regarding state agency practice specific to this case—questions that do not merit this Court’s review.

#### A. **The Tenth Circuit—like the trial court before it—correctly interpreted the UPK statute as allowing no exceptions, and providing no discretion to create exceptions, from the equal-opportunity requirements.**

This Court “generally accord[s] great deference to the interpretation and application of state law by the

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<sup>2</sup> To be clear, Respondents do not concede there is any split, as the different decisions in the cases Petitioners cited may be explained by courts’ application of the same rule to different fact patterns, thus justifying different results without creating any split.

courts of appeals.” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (citation omitted); see also *Bishop v. Wood*, 426 U.S. 341, 346 & n.10 (1976) (observing the Court’s practice of deferring to “the interpretation of state law in which the District Court and the Court of Appeals have concurred”); *Price v. Montgomery County*, 144 S. Ct. 2499, 2500 n.1 (2024) (explaining that the Court may deny certiorari when “the facts presented by a petition do not clearly or cleanly implicate a division of authority among the lower courts”). The Tenth Circuit (and the trial court before it) correctly concluded that none of the three provisions Petitioners cite allows, or has been implemented to allow, any exception to the equal-opportunity requirements.

**1. Allowing providers to prioritize children from low-income families and children with disabilities does not deny equal opportunity in violation of the statute.**

Because Petitioners seek exceptions from the statute’s equal-opportunity requirements, Petitioners must show that Colorado allows exceptions from those requirements in order to establish that UPK is not generally applicable. Petitioners assert that the preferences allowing providers to prioritize children “with” disabilities and children from families “with” low income create exceptions from the equal-opportunity requirements regarding disability and income level. But their argument misinterprets the statute.

The unanimous Tenth Circuit—like the district court before it—correctly interpreted the statute to protect children with disabilities and children from

low-income families from the denial of equal opportunity based on those characteristics. As the Tenth Circuit stated, “[i]t is farcical to say that non-disabled children are being discriminated against by being denied special education designed for disabled students, or that high-income students are discriminated against by preschools participating in Head Start.” Pet. App. 36a–38a; *see also id.* (concluding that the preferences for providers serving children with IEPs and Head Start providers “are not exceptions to the nondiscrimination requirement.”).

The UPK Act’s text and express objectives support the lower courts’ interpretation. First, the Act defines UPK’s “mixed delivery system” as including “head start agencies” and defines the “preschool providers” eligible to participate in UPK to include “head start program[s].” C.R.S. § 26.5-4-203(12), (14)(e).

Second, the Act expressly ties its definition of “children with disabilities,” C.R.S. § 26.5-4-203(3), to the definition provided elsewhere in the Education Code that defines “children with disabilities” as those “unable to receive reasonable benefit from general education” and who thus require an IEP. C.R.S. § 22-20-103(5)(a); *see also* §§ 26.5-4-202(4), 26.5-4-204(1)(c), and 26.5-4-206 (emphasizing UPK’s commitment to complying with IDEA and the importance of serving preschoolers with IEPs pursuant to IDEA).

Third, the Act expressly prioritizes children with disabilities and children in low-income families by allowing those children to receive publicly-funded preschool hours beyond the hours available to all four-

year-old Coloradans.<sup>3</sup> C.R.S. §§ 26.5-4-202(3); 26.5-4-204(1)(b), (3)(a)(II), (V).

As the Tenth Circuit correctly ruled, these provisions make clear that preschools that prioritize children with disabilities and children from low-income families do not deny equal opportunity based on disability or income level under UPK’s statutory requirements, thus sensibly reconciling all of the statute’s directives. Pet. App. 37a–38a; *see also* C.R.S. § 2-4-201(1)(b) (declaring state legislature’s presumption that “entire statute is intended to be effective”); *In re W.P.*, 295 P.3d 514, 519 (Colo. 2013) (“In interpreting a statute, we ascertain and give effect to the General Assembly’s intent, reading applicable statutory provisions as a whole in order to accord consistent, harmonious, and sensible effect to all their parts . . . . When interpreting a comprehensive legislative scheme, we construe each provision to further the overarching legislative intent.”). In other words,

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<sup>3</sup> The Solicitor General quotes selectively from one of the General Assembly’s findings, Brief for the United States as Amicus Curiae (“SG”) Supporting Petitioners, *St. Mary Catholic Parish v. Roy*, No. 25-581 (U.S. filed Jan. 30, 2026), at 14, n.3. The full passage instead states that “[r]esearch demonstrates that economically disadvantaged children derive greater benefits from preschool programs in states that offer universal programs than in states that offer preschool programs specifically for economically disadvantaged children.” C.R.S. § 26.5-4-202(1)(a)(IV). Indeed, as Ms. Odean explained during her testimony, this was among the reasons Colorado changed from its predecessor income-based program to a universal program. Supp. App. 67a–69a. At the same time, however, UPK’s implementation had to ensure that children with disabilities and from low-income families did not experience “diminished” access to preschool services with the move to a universal program. *Id.*

what Petitioners incorrectly describe as “word play,” Pet. 24, instead draws directly from the statute’s text.<sup>4</sup>

Moreover, to interpret the prioritization of children with IEPs and children from low-income families as denying equal opportunity based on disability and income level would defy not only the statute’s express directives but also common sense. Legislatures are free to enact equal-opportunity protections regarding disability and income that protect only individuals with disabilities from disability-based discrimination and only low-income individuals from income-based discrimination—just as they are free to enact equal-opportunity protections regarding veteran status and age that protect only veterans from discrimination based on military status and only older individuals from age-based discrimination. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–42 (1985) (government’s disability-based distinctions don’t trigger heightened scrutiny); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 620 (1985) (government’s distinctions based on veteran status don’t trigger heightened scrutiny); *Harris v. McRae*, 448 U.S. 297, 323 (1980) (government’s income-based distinctions don’t trigger heightened scrutiny); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (government’s age-based distinctions don’t trigger heightened scrutiny).

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<sup>4</sup> For the same reasons, because the statute’s text makes clear that prioritizing children from low-income families does not deny equal opportunity in violation of the statute, allowing providers to prioritize families who receive public assistance benefits based on their low income does not deny equal opportunity in violation of the statute, notwithstanding the Solicitor General’s assertions to the contrary at SG 16.

Legislatures frequently make precisely those choices. *E.g.*, Americans with Disabilities Act, 42 U.S.C. §§ 12112, 12102 (prohibiting discrimination “on the basis of disability” and defining “disability” to mean having a disability); Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(2) (prohibiting creditors from discriminating against applicants who receive public assistance from programs available only to those with low income); Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 623(a), 631 (prohibiting age-based employment discrimination against individuals at least 40 years of age); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593 (2004) (interpreting ADEA to allow employers to favor comparatively older workers over younger workers—but not vice versa—within the protected age group); Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(a) (protecting individuals who serve in the uniformed services, but not individuals who do not serve in the uniformed services, from discrimination based on their military status).

Colorado is thus free to enact equal-opportunity protections regarding disability and income level that apply only to those with disabilities and those with low income. And the UPK statute’s text and express objectives make clear that the General Assembly did exactly that. The Tenth Circuit, like the trial court before it, correctly understood that allowing providers to prioritize children from low-income families and children with disabilities does not deny equal opportunity in violation of the statute.

**2. The programmatic preference allows no exceptions, allows no discretion to create exceptions, and has never been applied to create exceptions, from the equal-opportunity requirements.**

Petitioners argue that the programmatic preference (what they call the “catchall” preference) allows exceptions from UPK’s equal-opportunity requirements, Pet. 9–10, 23. The district court rejected this argument, and the Tenth Circuit affirmed the district court’s findings. Pet. App. 29a–30a (concluding that “the catchall preference is not a system of individualized exemptions from the nondiscrimination requirement”). As explained, *supra* at 8–9, this preference addresses the matching software’s technical limits while allowing no exceptions from the equal-opportunity requirements. Pet. App. 29a–30a; 65a–69a; 209a–15a; 327a–32a; Supp. App. 56a–59a.

Petitioners nevertheless point to cherry-picked portions of trial testimony by Ms. Odean, a nonlawyer, when she was asked to speculate on-the-fly about hypothetical providers’ hypothetical requests to use this preference to serve only gender-nonconforming children, children of color, or the LGBTQ community. Pet. 9–10, 23. But that account disregards the full factual record and the lower courts’ considered assessment of it.

Notably, Ms. Odean clarified that CDEC had never received such requests and that she had never before considered them; that she lacked sole authority to approve any preference along these lines; that agency leadership and counsel would necessarily be

involved in reviewing any such proposal; and that CDEC would not approve a request that violates the equal-opportunity requirements. Pet. App. 32a; 132a–34a; 369a–71a.

That testimony was consistent with that of other agency officials. CDEC representatives uniformly testified that the agency cannot, does not, and has not allowed exceptions to the equal-opportunity requirement. Most notably, Executive Director Dr. Roy—the Department’s highest-ranking official—explained that she “do[es] not have the authority to create an exemption” from the statute and that any such exemption would be “void under the State Administrative Procedure Act,” because only the legislature may alter statutory mandates. Pet. App. 289a–90a (citing C.R.S. § 24-4-103(8)(a)).

Considering the testimony as a whole, the trial court found that “Ms. Cooke, Ms. Odean, and Dr. Roy have been unwavering in their assertions that [CDEC] cannot permit a participating provider to violate the equal-opportunity requirement.” Pet. App. 72a–73a; *see also id.* at 133a–34a (crediting Ms. Odean’s testimony as “confirm[ing] that [CDEC] does not have the authority to grant any exemption from the equal-opportunity requirement”).

The trial court properly focused on the dispositive question: whether the agency understood itself to have the power to exercise discretion to authorize exceptions from the equal-opportunity requirements—not whether a single witness (without authority to make final determinations about what would violate those requirements) mistakenly speculated when pressed with hypotheticals she had never contemplated. As

that court explained, “I cannot conclude that Defendants have the discretion to grant such exemptions based merely on hypotheticals and speculation when nothing in the UPK Statute or official documents from [CDEC] supports that it does.” Pet. App. 134a. And, of course, the factual record also confirms that no such exceptions have ever even been requested, much less granted. Pet. App. 132a–34a; 369a–71a.

The unanimous Tenth Circuit affirmed the district court’s findings: “We do not interpret Director Odean’s testimony to imply that [CDEC] was using the catchall preference to violate the nondiscrimination requirement. If anything, Director Odean’s insistence that [CDEC] follow the nondiscrimination requirement when considering a requested catchall preference suggests the opposite: that the statutory nondiscrimination requirement is a hard limit.” Pet. App. 32a; *see also id.* (“In practice, we can see that the Department has followed state law on nondiscrimination . . . . Finding a system of individual exemptions would require that we invert a clear reading of [CDEC]’s regulations based not on their language or operation, but a series of hypotheticals posed unexpectedly to one witness at trial.”).

In short, the Tenth Circuit not only correctly interpreted the state statute to allow no exceptions—and to confer no discretion to create any exceptions—to its equal-opportunity requirements, but also affirmed the district court’s factual findings that CDEC’s witnesses understood themselves to have no discretion to grant exceptions and had granted no exceptions. And where “an intermediate court reviews, and affirms, a trial court’s factual findings, this Court

will not ‘lightly overturn’ the concurrent findings of the two lower courts.” *Easley v. Cromartie*, 532 U.S. 234, 242–43 (2001) (citing *Neil v. Biggers*, 409 U.S. 188, 193 n.3 (1972)).

**3. The statute’s temporary-waiver provision likewise does not allow exceptions from the equal-opportunity requirements.**

Petitioners argue that the UPK statute’s temporary-waiver provision provides CDEC with the discretion to create exceptions from UPK’s equal-opportunity requirements. Pet. 10. But Petitioners ignore the statute’s two separate and independent provisions that make clear that the equal-opportunity requirements are not eligible for waiver, period, and thus that the temporary-waiver provision does not invite the government to consider the particular reasons for a request to waive those requirements. *See Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021).

First, the temporary-waiver provision authorizes CDEC to “allow a preschool provider that does not meet the quality standards to participate in the preschool program for a limited time *while working toward compliance* with the *quality standards*.” C.R.S. § 26.5-4-205(1)(b)(II) (emphasis added). But a provider seeking permission to deny equal opportunity based on religion, race, sexual orientation, or other protected characteristic cannot simultaneously be working towards compliance with the equal-opportunity requirements. A publicly-funded preschool either ensures equal opportunity, or it does not: it takes no time to repeal a policy that denies equal opportunity. Contrast an example where a preschool needs time to train its

teachers on how to document observations of students' behavior or academic progress as required by UPK. Pet. App. 324a. For this reason, the unanimous Tenth Circuit (like the district court before it) correctly interpreted this statutory provision to prohibit "even a temporary exception to the nondiscrimination requirement." Pet. App. 34a.

Second, the statute's temporary-waiver provision also separately forbids waiver of any of UPK's "quality standards relating to health and safety," C.R.S. § 26.5-4-205(1)(b)(II). The Act directed CDEC to establish quality standards that ensure safe and healthy learning environments by reflecting best practices regarding "school readiness, academic and cognitive development, healthy environments, social-emotional learning, and child and family outcomes" and then expressly required those quality standards to include the equal-opportunity requirements. C.R.S. § 26.5-4-205(1)(a), *see also* §§ 26.5-1-109(1)(a); 26.5-1-113(1)(a). Because the equal-opportunity requirements help ensure safe and healthy learning environments, they are among UPK's mandatory health and safety standards that the statute bars from waiver even on a temporary basis. Pet. App. 326a.

As the district court recognized, this limitation provides an additional and independent basis for interpreting the temporary-waiver provision as prohibiting any exceptions to the equal-opportunity requirements. Pet. App. 120a; *see also id.* at 34a ("Based on expert testimony, [the district court] found

that ‘discrimination can be harmful, both mentally and physically’ to children” (quoting Pet. App. 119a).<sup>5</sup>

**B. Because this case involves no exceptions, it is not an appropriate vehicle for determining what sort of exceptions would render the government’s action not generally applicable.**

In asserting a split, Petitioners cite free-exercise decisions where the challenged programs included secular exceptions or the discretion to create such exceptions. In those cases, the parties disputed the implications of such exceptions for the requirements’ general applicability. But the Tenth Circuit’s decision here does not contribute to any asserted split because it correctly determined that UPK allows no exceptions and confers no discretion to create them.

Petitioners nevertheless assert that it contributes to a split because the Tenth Circuit further indicated that “[e]ven assuming, *arguendo*,” that the preferences allowing providers to prioritize children with disabilities or children from low-income families were somehow understood as exceptions from the statute, the equal-opportunity requirements would remain generally applicable. More specifically, the Tenth Circuit determined that any denial of equal opportunity by the IEP and Head Start preferences would pose barriers distinct from the “completely different and

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<sup>5</sup> The Tenth Circuit did “not find it necessary to decide this issue.” Pet. App. 34a–35a (“Even without [the prohibition on waiving any of the health and safety standards], the temporary waiver provision cannot be reasonably understood to give [CDEC] discretion to allow a preschool to ignore the nondiscrimination requirement.”).

thus not comparable” barriers posed by sexual orientation and gender identity.<sup>6</sup> Pet. App. 38a–40a. But, again, this Court cannot reach that comparability question unless and until it has rejected the Tenth Circuit’s decision that the state statute as enacted and as implemented allows no exceptions to the equal-opportunity requirements. The Tenth Circuit held that (1) as a matter of state law, there are no exceptions to the equal-opportunity requirements; and (2) if the IEP and Head Start preferences were understood (arguendo) as exceptions to the equal-opportunity requirements, those preferences would likely be unlawful under *state* law. *Id.* Regardless of whether this comparability discussion is dicta or an alternative basis for decision, it does not warrant this Court’s review, particularly when the threshold holding on matters of state statutory interpretation do not warrant review.

More specifically, Petitioners and the Solicitor General point to decisions that, unlike the decision here, required comparability analysis because the law included exceptions. For example, the challenger in *Emilee Carpenter, LLC v. James* sought a religious exception from New York’s statute prohibiting public accommodations from discriminating on a variety of characteristics. 107 F.4th 92, 96 (2d Cir. 2024). Be-

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<sup>6</sup> Mischaracterizing nonrecord deposition testimony from another case, Petitioners assert that CDEC “conceded” that its interest is the “same” for each of the identified protected characteristics in the equal-opportunity provision. Pet. 5. CDEC did not concede this. CDEC has maintained—and the district court found—that its interest in each aspect of the equal-opportunity provision is distinct. Pet. App. 128a.

cause the statute allowed exceptions for sex discrimination, the Second Circuit applied *Fulton*'s comparability analysis; it then held the law generally applicable because it found that the exempted secular conduct did not undermine the state's equality interests "in a similar way" to the requested religious exception regarding sexual orientation. *Id.* at 110–11 (quoting *Fulton*, 593 U.S. at 534).

The other decisions cited are distinguishable from the case at hand for the same reason: in those cases, the government's programs included exceptions, thus requiring comparability analysis. *See Miller v. McDonald*, 130 F.4th 258, 267–68 (2d Cir. 2025);<sup>7</sup> *Smith v. City of Atlantic City*, 138 F.4th 759, 771 (3d Cir. 2025); *Lowe v. Mills*, 68 F.4th 706, 714–17 (1st Cir. 2023); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 285–86 (2d Cir. 2021), *cert. denied*, *Dr. A v. Hochul*, 142 S. Ct. 2569 (2022); *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 480–82 (6th Cir. 2020); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004); *Fraternal Ord. of Police v. Newark*, 170 F.3d 359, 365 (3d Cir. 1999); *Civ. Rts. Dep't v. Cathy's Creations, Inc.*, 109 Cal. App. 5th 204, 268 (Cal. Ct. App. 2025), *cert. denied*, *Miller v. Civ. Rts. Dep't*, No. 25-233, 2025 WL 3506999 (U.S. Dec. 8, 2025); *Spillane v. Lamont*, 323 A.3d 1007, 1025–28 (Conn. 2024); *Mitchell County v. Zimmerman*, 810 N.W.2d 1, 15–16 (Iowa 2012); *State v. Spell*, 339 So. 3d 1125, 1135–37 (La. 2022).

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<sup>7</sup> This Court granted the petition, vacated the judgment, and remanded *Miller v. McDonald* for further consideration in light of *Mahmoud v. Taylor*, 606 U.S. 522 (2025). *Miller v. McDonald*, No. 25-133, 2025 WL 3506969 (U.S. Dec. 8, 2025).

The Tenth Circuit’s decision doesn’t conflict with any of these decisions because it concluded that UPK, as enacted and as implemented, allows no exceptions, thus obviating comparability inquiry. Pet. App. 35a–36a.

Petitioners also cite decisions holding that laws failed general applicability because they conferred governmental decisionmakers with some sort of discretion to grant exceptions. *Fellowship of Christian Athletes v. S.J. Unified Sch. Dist. Bd. of Educ.* (“FCA”), for example, involved a school district’s policy requiring student groups to use non-discriminatory criteria for membership decisions, where all agreed that the policy conferred the board with discretion to grant exceptions. 82 F.4th 664, 687–88 (9th Cir. 2023). The Ninth Circuit concluded that the “mere existence of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable.” *Id.* The court also determined that the board had exercised that discretion to allow secular student groups to limit membership based on sex and ethnicity and that those exceptions posed risks to the district’s equality interests comparable to those posed by the requested religious exception. *Id.* at 689–90.

In contrast, the Tenth Circuit held that UPK as enacted and implemented confers *no* discretion (fettered or unfettered, objective or subjective) to make individualized exceptions. Pet. App. 41a–43a. Indeed, the Tenth Circuit specifically distinguished *FCA* on the ground that “the school district in *FCA* was freely granting exemptions at its discretion, while [CDEC] does not have the discretion to make exceptions to the nondiscrimination requirement.” Pet. App. 41a. For

the same reason, UPK is distinguishable from the other cases cited where the government had some power to grant exceptions but the parties disputed whether that power rendered the program not generally applicable. See *Bates v. Pakseresht*, 146 F.4th 772, 796–98 (9th Cir. 2025); *Smith v. City of Atlantic City*, 138 F.4th at 771; *We the Patriots*, 17 F.4th at 288–89; *Spillane*, 323 A.3d at 1025–28; *Blackhawk*, 381 F.3d at 209–10; *State v. Armitage*, 319 P.3d 1044, 1067 (Haw. 2014).<sup>8</sup>

In sum, Petitioners point to decisions that required comparability analysis because they involved programs that included exceptions or mechanisms for individualized exceptions. But this case does not. As the Tenth Circuit held, UPK as enacted and implemented allows no exceptions and confers no discretion to create exceptions. Pet. App. 33a. This case is thus not an appropriate vehicle for engaging questions regarding the sorts of exceptions, or discretionary mechanisms for creating exceptions, that render a government’s action not generally applicable.

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<sup>8</sup> Nor, notwithstanding Petitioners’ claim to the contrary, does the Tenth Circuit’s decision conflict with *North Coast Women’s Care Medical Group v. Superior Court*, 189 P.3d 959, 966–69 (Cal. 2008) (considering, and rejecting, hybrid-rights arguments) or *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231–33 (11th Cir. 2004), *cert. denied*, 543 U.S. 1146 (2005) (upholding statutory free-exercise challenge to an ordinance that expressly excluded religious assemblies, based on their religious identity, from town’s business district).

**C. Petitioners conjure a crisis where none exists, adding to the reasons this is a poor vehicle to address any question presented.**

Petitioners urge this Court to grant certiorari to address their concerns about *other* publicly-funded preschool programs that expressly exclude private providers from state funding programs or that deny public funding for religious activities or teachings—when UPK does neither. Indeed, stripping Colorado of the ability to enforce neutral and generally applicable requirements could discourage other states from adopting Colorado’s mixed-delivery approach that affirmatively includes faith-based and other private preschools. Petitioners also assert, without evidence, that UPK is to blame for some of their schools’ financial challenges.

**1. Petitioners express concerns about faith-based providers’ exclusion from *other* publicly-funded preschool programs when UPK includes faith-based providers.**

Petitioners assert the need for this Court’s review to address what it calls the “pervasive” exclusion of religious providers from publicly-funded preschool programs. Pet. 34. But the (nonrecord) article Petitioners cite focuses on other publicly-funded preschool programs that it describes as expressly excluding private providers or prohibiting religious activities or teachings. *Id.*

Colorado’s UPK program does neither. Not only does it include faith-based and other private provid-

ers, CDEC affirmatively sought to include and accommodate religious providers by convening an interfaith working group that included a representative from Petitioner St. Mary Catholic Parish. Pet. App. 12a; 60a. Tellingly, six Catholic Charities providers—each belonging to the Archdiocese of Denver—participate in UPK to this day, as do 40 other faith-based providers. Pet. App. 303a; Supp. App. 92a–95a.

And UPK neither reviews nor regulates providers’ religious curriculum. Pet. App. 163a; Supp. App. 74a–75a. Instead UPK ensures that publicly-funded preschools provide equal opportunity, regardless of protected-class status, to the children and families who seek the curriculum those preschools choose to provide. This protects religious families too: UPK ensures that Catholic parents and same-sex parents alike know that they will not be turned away, based on their protected-class status, from the publicly-funded preschool that best meets their families’ needs.

**2. With no record evidence, Petitioners baldly assert that UPK is to blame for Petitioners’ financial challenges.**

Petitioners suggest, incorrectly and without evidence, that UPK is the source of Petitioners’ financial challenges. *See* Pet. 35 (“Since litigation began, two Archdiocesan preschools have closed, and enrollment at Archdiocesan preschools is down almost twenty percent.”).

First, Petitioners fail to mention that the Archdiocese itself explained that it decided to close and consolidate schools (including Petitioner St. Bernadette Catholic Parish’s school) after a report it commissioned confirmed “negative enrollment trends across

the state due to a decline in the number of Colorado’s school-aged children” since 2021, prior to the implementation of UPK. *See Archdiocese Restructuring Catholic Schools’ Footprint For Ongoing Vitality*, Denver Catholic (Sep. 13, 2024), <https://www.denvercatholic.org/archdiocese-restructuring-catholic-schools-footprint-for-ongoing-vitality> (on file with the Colorado Attorney General’s Office).

Second, Petitioners fail to mention that the schools that closed are schools that include preschool classes as only one of nine grades of children, *id.*, when UPK funds only preschools.

Moreover, Petitioners ignore the record evidence demonstrating that at least one of the now-closed preschools had suffered decreased enrollment for years prior to UPK, and had to close for a year due to a change in the school’s administration and what Petitioners’ own witness had heard was a “toxic culture” at that school, *see* Supp. App. 87a; 89a–90a. Petitioners similarly ignore that the record includes testimony by the Superintendent of Catholic Schools for the Archdiocese of Denver stating that Archdiocesan preschools had not experienced “a major hit on enrollment” because of UPK and that enrollment numbers were “probably still holding steady.” Supp. App. 91a.<sup>9</sup>

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<sup>9</sup> Petitioners also assert, without record evidence, that demand for UPK’s services outstrips supply. Pet. 6. They cite an unverified news article that does not address UPK as a whole and to which no finder of fact had access for vetting purposes. *Id.*

## II. The Tenth Circuit’s decision is consistent with this Court’s precedent.

The Tenth Circuit’s decision also aligns with this Court’s precedent. Petitioners rely on *Carson*, which held that strict scrutiny applies to the government’s intentional exclusion of religious actors, based on those actors’ religious character, from public funding programs. 596 U.S. at 780. But as the Tenth Circuit correctly decided, *Carson* does not apply to this case because UPK does not exclude religious schools: indeed, UPK welcomes them in a program where public funding turns not on providers’ secular or religious character, but instead on providers’ compliance with UPK’s equal-opportunity requirements.

*Carson* involved a free-exercise challenge to a state’s choice to provide tuition support to private schools except for private schools “associated with a particular faith or belief system and which, in addition to teaching academic subjects, promotes the faith or belief system with which it is associated and/or presents the material taught through the lens of this faith.” 596 U.S. at 775 (citation modified). This Court held that Maine’s exclusion of religious schools “solely because of their religious character” triggered, and failed, strict scrutiny. *Id.* at 780 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)) (emphasis added). In contrast, “the government is generally free to place incidental burdens on religious exercise so long as it does so pursuant to a neutral policy that is generally applicable.” *Mahmoud v. Taylor*, 606 U.S. 522, 564 (2025). As explained above, the rule challenged here is such a neutral and generally applicable policy.

Petitioners point to *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981) to support their claim of a “separate public benefits line of” cases under the Free Exercise Clause. Pet. 26. But no such separate line of cases exists. The unemployment benefits programs in *Sherbert* and *Thomas* allowed individualized “good cause” exemptions, for secular reasons, from the general rule denying benefits to those refusing suitable work—but did not grant such exemptions to those refusing suitable work for religious reasons. *Sherbert*, 374 U.S. at 400–01, 406; *Thomas*, 450 U.S. at 711–12. Itself an unemployment benefits case, *Smith* distinguished *Sherbert* and *Thomas* not because public benefits were at stake but instead because those states’ programs allowed “individualized governmental assessment of the reasons for the relevant conduct.” 494 U.S. at 884; *see also Fulton*, 593 U.S. at 533–34 (describing *Sherbert* as not generally applicable because it allowed individualized exemptions). UPK allows for no individualized exceptions from the equal-opportunity requirements.

Petitioners inaccurately suggest, Pet. 29, that *Mahmoud v. Taylor* supports their misplaced claim of a separate public benefits line of cases. *See Mahmoud*, 606 U.S. at 561 (“[W]hen the government chooses to provide public benefits, it may not ‘condition the availability of [those] benefits upon a recipient’s willingness to surrender his religiously impelled status.’”) (alteration in original) (quoting *Trinity Lutheran*, 582 U.S. at 462). But Petitioners’ selective quotation of *Mahmoud* unmoors it from its context: *Mahmoud* was quoting *Trinity Lutheran*’s discussion of a policy that

“expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character.” *Trinity Lutheran*, 582 U.S. at 462. And the *Trinity Lutheran* quotation itself quoted *McDaniel v. Paty*’s discussion of state law that disqualified clergy from running for state office solely because of their religious character. *Id.* (quoting *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)).

In contrast, UPK does not require providers to surrender their religious character: it affirmatively includes religious preschools regardless of their curriculum or who teaches it. UPK’s equal-opportunity requirements instead ensure that all Colorado parents—Catholic parents as well as same-sex parents—know that their children will not be turned away, because of their protected-class status, from the publicly-funded preschool that best meets their families’ needs.<sup>10</sup>

The Tenth Circuit correctly distinguished the *Carson* trilogy as involving laws that “targeted ‘religious status’ and ‘religious use’ on the explicit basis that

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<sup>10</sup> Petitioners also assert, inaccurately, that UPK impermissibly differentiates among religious providers based on religion. Pet. 29 (citing *Cath. Charities Bureau, Inc. v. Wisconsin Lab. & Indus. Rev. Comm’n*, 605 U.S. 238, 249 (2025)). Not so. The state program and state-court interpretations at issue in *Catholic Charities* defined eligible entities in expressly religious terms. See *Catholic Charities*, 605 U.S. at 250 (distinguishing, for purposes of determining eligibility for tax exemption, religious actors that engage in proselytization or that only serve co-religionists from religious actors that do not). UPK, in contrast, draws no such distinctions. It instead defines eligibility based on providers’ compliance with the equal-opportunity requirements, regardless of those providers’ religious or secular character.

they were religious and not secular.” Pet. App. 19a–22a. In sharp contrast, Colorado “did not exclude faith-based preschools from participating in UPK. Indeed, they welcomed and actively solicited their participation.” Pet App. at 21a; *see also* Pet. App. 62a; 303a. Participation in UPK turns not on a preschool’s religious character or exercise, but instead on its compliance with UPK’s equal-opportunity requirements.

**III. Nothing has changed that warrants this Court’s reconsideration of *Employment Division v. Smith*.**

Petitioners ask the Court to overrule *Smith*, even though the Court has recently declined numerous requests to revisit that decision. *E.g.*, *Miller v. Civ. Rts. Dep’t*, No. 25-233, 2025 WL 3506999 (U.S. Dec. 8, 2025); *We The Patriots USA, Inc. v. Conn. Office of Early Childhood Dev.*, 144 S. Ct. 2682 (2024) (No. 23-643); *Tingley v. Ferguson*, 144 S. Ct. 33 (2023) (No. 22-942); *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (No. 21-1143); *Ricks v. Idaho Contractors Bd.*, 141 S. Ct. 2850 (2021) (No. 19-66); *Calvary Chapel of Bangor v. Mills*, 142 S. Ct. 71 (2021) (No. 20-1346); *see also* 303 *Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (No. 21-476) (limiting cert grant to non-*Smith* question). Nothing has since changed that warrants this Court’s reconsideration of *Smith*.

**CONCLUSION**

The Court should deny the petition.

Respectfully submitted,

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March 2, 2026

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**APPENDIX A — SUPPLEMENTAL  
DECLARATION OF DIRECTOR DAWN ODEAN,  
OCTOBER 27, 2023**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-cv-02079-JLK

ST. MARY CATHOLIC PARISH IN LITTLETON;  
ST. BERNADETTE CATHOLIC PARISH IN  
LAKEWOOD; LISA SHELEY; DANIEL SHELEY;  
AND THE ARCHDIOCESE OF DENVER,

*Plaintiffs,*

v.

LISA ROY, IN HER OFFICIAL CAPACITY AS  
EXECUTIVE DIRECTOR OF THE COLORADO  
DEPARTMENT OF EARLY CHILDHOOD; AND  
DAWN ODEAN, IN HER OFFICIAL CAPACITY  
AS DIRECTOR OF COLORADO'S UNIVERSAL  
PRESCHOOL PROGRAM,

*Defendants.*

October 27, 2023

**SUPPLEMENTAL DECLARATION  
OF DAWN ODEAN**

I, Dawn Odean, pursuant to 28 U.S.C. § 1746, do  
depose and state as follows:

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1. I am over 18 years of age. I am a citizen of the United States and resident of the State of Colorado. I am competent to make this declaration under oath, and make this declaration based on my personal knowledge.

2. I am the Director of the Universal Preschool Program (the “UPK Program”) for the Colorado Department of Early Childhood. I assumed my position as Director of the UPK Program on August 15, 2022.

**Catholic Preschools Participating in the UPK Program**

3. I recently learned that six preschools affiliated with the Archdiocese of Denver signed the UPK Program agreement and are participating in the UPK Program.

4. The six preschools are:

- a. Child Development Head Start;
- b. Garfield Head Start;
- c. Mariposa Center;
- d. Kentucky Head Start;
- e. Margery Reed Mayo Day Nursery; and
- f. Quigg Newton.

5. Colorado children were matched to these schools as part of the UPK matching process and these schools

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have been reimbursed for the services provided to those children.

6. The Colorado Department of Early Childhood (“the Department”) has taken no enforcement action against any of these schools based on their policies.

7. The Department has not interfered in any employment decision at any of these schools.

**Ongoing Rulemaking**

8. The Department is currently in the rulemaking process to establish the Quality Standards for the UPK Program.

9. On or about October 30, 2023, the Department will release an initial packet of draft Quality Standards rules for public review and comment.

10. The Department invites and encourages stakeholders to review these rules and provide comment so that the final rules adequately address providers’, families’, and stakeholders’ concerns.

11. One of the key components of these rules is defining the scope of the congregation preference.

12. As I mentioned in previous declarations, Doc. 38-1, the congregation preference grants faith-based providers broad discretion in the UPK matching process, including the ability to decline a match from families outside of a provider’s faith-based congregation.

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13. To that end, the draft rules which will be released in the next few days for public comment include the following definition of “congregation:

“Congregation” means a religious-based convocation, or multiple religious-based convocations, of individuals in a particular geographic area who share a common set of beliefs and who collectively engage in conduct with a direct nexus to that shared common set of beliefs.

14. Again, we encourage stakeholders to provide public comment on the scope of this definition.

15. In addition to rulemaking, the Department intends to amend and update the UPK provider agreement in anticipation of the 2024-2025 school year.

16. One of the areas of the current UPK agreement that the Department may address is Contractual Provision 18(B).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of October, 2023.

/s/Dawn Odean

Dawn Odean

**APPENDIX B — EXCERPTS FROM 8 COLO.  
CODE REGS. § 1404-1 UNIVERSAL PRESCHOOL  
PROGRAM RULES AND REGULATIONS,  
EFFECTIVE MAY 15, 2024**

**DEPARTMENT OF EARLY CHILDHOOD**

**Colorado Universal Preschool Program**

**UNIVERSAL PRESCHOOL PROGRAM RULES AND  
REGULATIONS**

**8 CCR 1404-1**

*[Editor's Notes follow the text of the rules at the end of  
this CCR Document.]*

...

**4.103 DEFINITIONS**

- A. “Additional preschool services” means hours of preschool services provided to a child in the year preceding enrollment in kindergarten that are in addition to the universal preschool services the child receives.
  
- B. “Administrative unit” means a school district, a board of cooperative services, a multi-district administrative unit, a charter school network, a charter school collaborative, or the state charter school institute that is providing educational services to exceptional children and that is responsible for the local administration of the

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education of exceptional children pursuant to article 20 of title 22.

- C. “Applicant 2” means an individual that resides in a family child care home and provides care regularly, in a recurring pattern and must have the same required training as the Primary Provider as specified in the “Rules Regulating Family Child Care Homes” located in 8 CCR 1402-1, rule section 2.304(A)(5).
- D. “Child Find” means the program component of IDEA that requires states to find, identify, locate, evaluate, and serve all children with disabilities, from birth to twenty-one (21) years of age. Child Find includes: (a) Part C child find, which is the program component of IDEA that requires states to find, identify, locate, evaluate, and serve children with disabilities from birth through two (2) years of age; and (b) Part B child find, which is the program component of IDEA that requires states to find, identify, locate, evaluate, and serve children with disabilities from three (3) to twenty-one (21) years of age.
- E. “Children with disabilities” has the same meaning as provided in section 22-20-103, C.R.S.
- F. “Classroom” means the educational or instructional location used to support a preschool program by any Preschool Program provider, including schools, child care centers, family child care homes, or other

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approved Colorado Universal Preschool Program locations.

- G. “Colorado Academic Standards” means the comprehensive set of academic standards across all content areas adopted by the State Board of Education pursuant to section 22-7-1005, C.R.S.
- H. “Colorado Early Learning and Development Guidelines” means the set of guidelines across all early childhood domains endorsed by the early childhood leadership commission that includes approaches to learning, health and physical development, social and emotional development, language, literacy, numeracy, logic and reasoning, and other subject-specific learning.
- I. “Colorado Shines Quality Rating and Improvement System (QRIS)” means the system developed by the Department pursuant to section 26.5-5-101, C.R.S., which measures the level of preparedness of, and quality of services provided by, an early childhood education program to prepare children to enter elementary school.
- J. “Colorado Universal Preschool Program” or “Preschool Program” means the program established within the Department pursuant to section 26.5-4-204, C.R.S., and includes all participating preschool providers.
- K. “Colorado’s Competencies for Early Childhood Educators and Professionals” means the set

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of content areas, or domains, that describe the knowledge and skills early childhood educators need to work effectively with children, and are updated, maintained, and published by the Department.

- L. “Congregation” means members of the community that the faith-based provider serves as the faith-based provider defines that community.
- M. “Cooperative Preschool Provider” means an eligible preschool provider which requires participating families to be meaningfully involved in the operation of the cooperative and which is at least substantially operated, maintained, or administered by participating families.
- N. “Department” means Colorado Department of Early Childhood.
- O. “ECEA” means the “Exceptional Children’s Educational Act”, Article 20 of Title 22, and its implementing rules.
- P. “Early childhood mental health program” means a program which supports the mental wellness of children, or promotes the knowledge, ability, and capacity of individuals who support the mental wellness of children to address and enhance the social, emotional, cognitive, or behavioral developmental needs of children, including children aged birth to six (6).

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- Q. “Early learning and assessment approach” means the eligible preschool provider’s chosen methods for selecting, planning, and implementing activities; observing; documenting; and monitoring designed to support children’s learning and development, in alignment with the Colorado Early Learning and Development Guidelines, and includes curricula and other pedagogical methods.
- R. “Eligible child” means a child who is eligible to receive preschool services as provided in section 26.5-4-204(3), C.R.S.
- S. “Eligible preschool provider” means a preschool provider that is actively participating in the Colorado Universal Preschool Program and in good standing with the Department. As used in this context, “good standing” means that the preschool provider has either a permanent, provisional, or probationary license issued by the Department, as those terms are defined and used in 8 CCR 1402-1, rule sections 2.107, 2.108, and 2.109.
- T. “Equally qualified provider” means an employee of a family child care home that has the same required trainings and qualifications as the primary provider as specified in the “Rules Regulating Family Child Care Homes” located in 8 CCR 1402-1, rule section 2.304(A)(29).
- U. “Federal Poverty Level” (FPL) or “Federal Poverty Guidelines” (FPG) refers to figures set by

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the federal government annually. These figures, based on gross monthly income levels for the corresponding household size, are included in the table in rule section 4.105(A).

- V. “Foster care home” has the same meaning as provided in section 26-6-903(10), C.R.S.
- W. “Full-day” means thirty to forty (30 to 40) hours of preschool service per week.
- X. “Half-day” means fifteen to twenty (15 to 20) hours of preschool service per week.
- Y. “Head Start program” means a program operated by a local public or private nonprofit agency designated by the federal department of health and human services to operate a head start program pursuant to the provisions of Title V of the federal “Economic Opportunity Act of 1964”, as amended.
- Z. “IDEA” means the federal “Individuals with Disabilities Education Act”, 20 U.S.C. sections 1400 through 1491, as amended, and its implementing regulations at 34 C.F.R. Parts 300 and 303 (2023), herein incorporated by reference. No later editions or amendments are incorporated. These regulations are available at no cost from the United States Department of Education at [www.ecfr.gov](http://www.ecfr.gov). These regulations are available for public inspection and copying at the Colorado Department

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of Early Childhood, 710 S. Ash St., Denver, CO 80246, during normal business hours.

- AA. “Individualized Education Program” or “IEP” means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with part 1 of article 20 of title 22, C.R.S., and the rules promulgated by the Colorado State Board of Education. BB. “Instructional supervisor” means the employee who is responsible for the direct supervision of an employee who is required to meet the ongoing professional development requirement of rule sections 4.114(B) and (C), and who as part of that direct supervision is responsible for overseeing the delivery of instruction or related services. For an eligible preschool provider who is a family child care home, the instructional supervisor shall mean the primary provider. For an eligible preschool provider who is a child care center (including a large child care center, small child care center, preschool, mobile part-day preschool program, or a combination thereof), the instructional supervisor shall mean the director of the child care center who is qualified and designated as the director as specified in 8 CCR 1402-1 rule sections 2.214, 2.215, 2.217 and 2.243, and also includes any other supervisory staff who meet this definition.
- CC. “Lead teacher” means the employee of an eligible preschool provider that is primarily assigned to a

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Preschool Program classroom and responsible for delivering instruction or leading activities. A “lead teacher” means:

1. The primary provider of a family child care home; or
  2. The early childhood teacher (as specified in 8 CCR 1402-1 rule section 2.216(A)) of a large child care center, small child care center, preschool, or mobile part-day preschool program as those terms are defined in rule section 2.204(B), who is responsible for delivering instruction or leading activities in their primarily assigned Preschool Program classroom.
- DD. “Low-income” means that the child’s parent or guardian’s gross income must not exceed 270% of the Federal Poverty Guideline (FPG).
- EE. “Multilingual” means a child who is learning two (2) or more languages at the same time, or a child who is learning a second (2nd) language while continuing to develop their first (1st) language.
- FF. “Noncertified kinship care” means a child is being cared for by a relative or kin pursuant to 19-1-103(102), C.R.S., who has a significant relationship with the child in circumstances when there is a safety concern by a county department of human or social services and where the relative or kin has not met the foster care certification requirements

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for a kinship foster care home or has chosen not to pursue that certification process.

- GG. “Parent” has the same meaning as provided in section 22-20-103, C.R.S.
- HH. “Part-time or slot” means ten (10) hours of preschool service per week.
- II. “Primary provider” means the person that resides in a family child care home and provides direct care, supervision, and education to child(ren) in care for at least sixty percent (60%) of the daily hours of operation of the family child care home.
- JJ. “Preschool provider” means any of the following entities that are licensed pursuant to part 3 of article 5 of this title 26.5:
1. A family child care home, as defined in section 26.5-5-303, C.R.S.;
  2. A child care center, as defined in section 26.5-5-303, C.R.S.;
  3. A school district licensed to operate as a public preschool provider;
  4. A charter school licensed to operate as a public preschool provider; or
  5. A head start program.

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- KK. “Provider rate formula” means the formulas for setting the per-child rates for universal preschool services, for preschool services for children with disabilities, for preschool services for eligible children who are three (3) years of age or younger and for additional preschool services.
- LL. “Preschool services” means instructional and educational services provided to an eligible child by an eligible preschool provider pursuant to the Colorado Universal Preschool Program.
- MM. “Qualifying factor” means a child or family circumstance, as identified by department rule pursuant to section 26.5-4-204(4)(a)(II), C.R.S., that may negatively impact a child’s cognitive, academic, social, physical, or behavioral health or development.
- NN. “Qualified substitute” means a substitute provider of a family child care home that has all required trainings and qualifications as determined in the Department’s “Rules Regulating Family Child Care Homes” located in 8 CCR 1402-1 rule section 2.304(A)(71).
- OO. “Resource Bank” means the collection of preschool curricula and other approved educational approaches, toolkits, self-assessments, templates, training, and other resources for use by participating preschool providers that is created, administered, and updated by the Department pursuant to section 26.5-4-205(3), C.R.S.

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- PP. “School District” means a school district organized pursuant to article 30 of title 22, C.R.S., that provides preschool services and is licensed pursuant to part 3 of article 5 of title 26.5, C.R.S., as a preschool provider; or a board of cooperative services organized pursuant to article 5 of title 22, C.R.S., that provides preschool services and is licensed pursuant to part 3 of article 5 of title 26.5, C.R.S., as a preschool provider.
- QQ. “School year” means the full school year as defined by the local school board of education.
- RR. “Short term basis” means work performed in place of a regular staff member or volunteer who is unable to work their normally scheduled work hours due to a planned or unplanned event that requires the regular staff member or volunteer to be on leave for no more than two (2) calendar weeks and exclusively includes work performed by an assistant early childhood teacher providing substitute services under 8 CCR 1402-1 rule section 2.216(F)(2), or a public school substitute providing services under 8 CCR 1402-1 rule section 2.243(C).
- SS. “Sibling” means one (1) or more individuals having one (1) or both parents in common.
- TT. “Staff aide” means an individual who assists the primary provider in a family child care home in the care of children at the family child care home. A staff aide must never be allowed to supervise a child(ren) alone. The primary provider, applicant 2,

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equally qualified provider, or qualified substitute provider must be present at all times when the staff aide is providing care for a child(ren).

UU. “Substitute” means a paid, volunteer, or contract individual of a family child care home responsible for caring for the children in the capacity of the employee, staff aide, or staff member. The primary provider, applicant 2, equally qualified provider, or qualified substitute must always be present at all times when a substitute is providing care for children.

VV. “Universal preschool services” means ten (10) hours of preschool services per week made available, at no charge, to children in the state during the school year preceding the school year in which a child is eligible to enroll in kindergarten.

...

**4.109 GENERAL REQUIREMENTS AND PROVISIONS**

A. Beginning July 1, 2024, and continuing thereafter, all eligible preschool providers must meet the following minimum requirements as a condition of participating in the Preschool Program:

1. The minimum number of planned teacher-pupil contact hours of instructional services scheduled to be delivered by an eligible

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preschool provider for all students enrolled in the Preschool Program shall not be less than three-hundred and sixty (360) hours per school year.

- a. When fulfilling this requirement, eligible preschool providers may take into consideration the number of available teacher-pupil contact hours left in the school year based on when a child enrolls in the Preschool Program, and this requirement shall not be construed as requiring three-hundred and sixty (360) planned teacher-pupil contact hours of instructional services when a child is not enrolled in the Preschool Program for the entire school year.
- B. Eligible preschool providers must ensure that children receive an equal opportunity to enroll and receive universal preschool services regardless of race, ethnicity, religious affiliation, sexual orientation, gender identity, lack of housing, income level, or disability, as such characteristics and circumstances apply to the child or the child's family.
- C. Eligible preschool providers shall maintain educator-to-child ratios and group sizes in accordance with the applicable maximum staff-child ratios and group sizes determined in the

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“Rules Regulating Child Care Centers” located in 8 CCR 1402-1, rule section 2.217(A), or “Rules Regulating Family Child Care Homes” located in 8 CCR 1402-1, rule sections 2.305 through 2.310. Beginning on July 1, 2025, no classroom of an eligible preschool provider shall have an educator-to-child ratio that exceeds 1:11, or a maximum group size that exceeds twenty-two (22); and beginning July 1, 2026, no classroom of an eligible preschool provider shall have an educator-to-child ratio that exceeds 1:10, or a maximum group size that exceeds twenty (20). The approved maximum educator-to-child ratios and group sizes of this rule shall not supersede the maximum staff-child ratios and group sizes allowed, based on a primary provider’s license type for a family child care home, as determined in 8 CCR 1402-1, rule sections 2.305 through 3.310.

1. Exceptions to the maximum educator-to-child ratios and group sizes in this rule may be applied if an eligible preschool provider has a quality rating of four (4) or five (5) from the Department’s Colorado Shines Quality Rating and Improvement System, and will be allowed to serve children up to the maximum staff-child ratio and group size as determined in 8 CCR 1402-1, rule section 2.217(A).
2. If an eligible preschool provider has a Department approved wavier pursuant to 8 CCR 1402-1, rule section 2.115, the eligible

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preschool provider is permitted to serve larger group sizes than allowed per rule section 4.109(C), provided the group sizes are in accordance with the terms of the waiver received, and all other requirements are met.

3. This rule section shall not restrict an eligible preschool provider from having multiple groups that are not separated from each other by permanent or portable dividers or walls, or limit any other conduct allowed in 8 CCR 1402-1 rule sections 2.217(A)(15) (a)-(f), provided all other requirements are met.

D. Qualifications for lead teachers.

1. Eligible preschool providers must ensure that all teachers, educators, or other employees are qualified in accordance with their applicable requirements identified in the “Rules Regulating Child Care Centers” located in 8 CCR 1402-1, rule section 2.216; or in accordance with the primary provider’s license type for a Family Child Care Home, and the “Rules Regulating Family Child Care Homes” located in 8 CCR 1402-1, rule sections 2.311 through 2.315.
2. This rule section shall not prevent an eligible preschool provider from enacting additional requirements for their employees, provided

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the employee(s) meet all other qualifications as required by these rules.

- E. Pursuant to section 22-33-106.1, C.R.S., all eligible preschool providers must abide by the limitations and procedures set forth regarding suspensions and expulsions for preschool through second (2nd) grade.
- F. Educating Children with Disabilities.
  - 1. All eligible preschool providers educating children with disabilities shall ensure full compliance with the “Standards for Placement of Preschoolers with IEPs in Educational Programs (October 2023)”, herein incorporated by reference. No later editions or amendments are incorporated. These standards are available at no cost from the Colorado Department of Education, 201 East Colfax Avenue, Denver, CO 80203; or at <https://www.cde.state.co.us/cdesped/appropriateenvironments>. These standards are also available for inspection and copying at the Colorado Department of Early Childhood, 710 S. Ash Street, Bldg. C, Denver, Colorado 80246, during regular business hours.
  - 2. Eligible preschool providers educating children with disabilities shall ensure compliance with the applicable provisions of

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the “Individuals with Disabilities Education Act” (IDEA), as incorporated by reference in rule section 4.103(Z).

3. Eligible preschool providers educating children with disabilities shall ensure compliance with the “Exceptional Children’s Educational Act” (ECEA) sections 22-20-101 through 22-20-206, C.R.S., and applicable provisions of the “Rules for the Administration of the Exceptional Children’s Educational Act” located in 1 CCR 301-8, herein incorporated by reference. No later editions or amendments are incorporated. These standards are available at <https://www.coloradosos.gov/>. These standards are also available for inspection and copying at the Colorado Department of Early Childhood, 710 S. Ash Street, Bldg. C, Denver, Colorado 80246, during regular business hours.
  - a. This includes, but is not limited to, an eligible preschool provider’s obligation to ensure children with disabilities are served in a manner which conforms to the training, certification, referral, identification, licensing, authorization, and dispute resolution requirements found in 1 CCR 301-8, rule section 3.02(3).

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**4.110 PROVIDER MATCHING CRITERIA**

- A. Eligible preschool providers may utilize the following programmatic preferences to the deferred acceptance algorithm component of the matching process:
1. Faith-based providers granting preference to members of their congregation;
  2. Cooperative preschool providers requiring participation in the cooperative;
  3. School districts maintaining enrollment consistent with their established boundaries;
  4. Participating preschool providers reserving placements for a student(s) with an Individualized Education Program (IEP) to ensure conformity with obligations incurred pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. section 1400 (2004), or the Exceptional Children's Education Act, Article 20 of Title 22, C.R.S.;
  5. Head Start programs' adhering to any applicable federal law requirements including eligibility requirements;
  6. Participating preschool providers granting preference to an eligible child of one (1) of their employees;

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7. Participating preschool providers granting preference to an eligible child to ensure continuity-of-care for that child;
8. Participating preschool providers granting preference to an eligible child to keep siblings similarly located;
9. Participating preschool providers granting preference to an eligible child who is multilingual, to ensure proper delivery of services to that child.
10. Participating preschool providers may grant preference to an eligible child based: on the child and/or family being a part of a specific community; having specific competencies or interests; having a specific relationship to the provider, provider's employees, students, or their families; receiving specific public assistance benefits; or participating in a specific activity. Participating preschool providers seeking to utilize this preference, must ensure:
  - a. That the specific community, competencies or interests, relationship, public assistance benefit, or activity being required of children and/or families who attend, is a requirement of all participating children and/or families.

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- b. That implementation of requiring the specific community, competencies or interests, relationship, public assistance benefit, or activity does not conflict with any other provision of the Colorado Universal Preschool Program statutes at sections 26.5-4-201 through 26.5-4-211, C.R.S., nor with any other applicable law or regulation.
  
- c. Examples of approved preferences include, but are not limited to: participating preschool providers who require a focus in a certain knowledge area (such as science, technology, engineering, and math (“STEM”)); providers who serve families with a family member who works or attends school at a specific site(s) or location(s); providers who serve families within a specific geographical catchment area; providers who require a certain amount of volunteering or participation by the participating family; providers who require certain vaccinations for the health and safety of its staff and students; and providers who serve families who are receiving a specific public assistance benefit(s) such as housing assistance.

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- B. In utilizing these programmatic preferences, eligible preschool providers must still comply with rule section 4.109(B).

**4.111 INSTRUCTIONAL PRACTICE REQUIREMENTS**

- A. Learning Approaches.
  - 1. Beginning July 1, 2025, and continuing thereafter, all eligible preschool providers must utilize an early learning and assessment approach approved and included in the Resource Bank by the Department, and that:
    - a. Aligns with the Colorado Early Learning and Development Guidelines and the Colorado Academic Standards;
    - b. Uses assessment findings for instructional decision-making;
    - c. Is culturally, developmentally, and linguistically appropriate; and
    - d. Is inclusive of and appropriate for the diverse needs of each individual learner.

*Appendix B***B. On-Site Observations.**

At least every three (3) years, eligible preschool providers will receive an independent on-site observation of environmental quality conducted by the Department. The Department will conduct these observations, in alignment with existing on-site observations performed pursuant to participation in Colorado Shines, the state quality rating and improvement system established pursuant to section 26.5-5-101, C.R.S. The Department shall conduct the observations only using staff who are trained in and familiar with assessing program environmental quality in the preschool setting. The Department shall ensure that observational methods and related resources that meet this requirement are included in the Resource Bank and will be considered and reviewed in accordance with sections 26.5-4-205(3)(b) and (c), C.R.S.

1. Measurement of a preschool provider's environmental quality shall include, but not be limited to:
  - a. The quality of adult-child and child-child interactions; and
  - b. The quality of the overall learning environment, including student and staff supportive services.
2. The Department shall ensure observations are conducted in an individualized and differentiated manner so that they are

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specific to each provider in supporting quality improvement for educators and classrooms while incorporating that provider's level of access to resources to ensure these standards are supported and implemented with fidelity.

- C. This rule section does not affect an eligible preschool provider's right to engage in privately funded, inherently religious activity or affect the independence of eligible preschool providers, including any rights protected by the Colorado and U.S. Constitutions, and applicable law.

**4.112 HEALTHY DEVELOPMENT REQUIREMENTS**

- A. Beginning July 1, 2025, and continuing thereafter, eligible preschool providers must meet the following requirements as a condition of participating in the Preschool Program:
  - 1. Within six (6) months of participating in the Preschool Program, eligible preschool providers must create, make publicly available and to the Department (either on the provider's website or in a handbook distributed to all participating families), and implement policies and procedures to administer the following services in an individualized manner taking into account what other services the child has received:

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- a. Voluntary developmental screening services (including vision, hearing, dental, and health as well as fine and gross motor, social-emotional, cognitive, and language);
  - b. Referrals for children and families seeking specialized services, upon request; and
  - c. Translation services for children and families to access information in their home language.
2. The Department shall ensure that the assessments, tools, and related resources that meet the requirements of this rule section 4.112(A)(1), and are included in the Resource Bank and will be considered and reviewed in accordance with sections 26.5-4-205(3)(b) and (c), C.R.S.
  3. Eligible preschool providers will be responsible for ensuring the development of the policies and procedures as outlined in this rule section 4.112(A)(1), as well as ensuring family access to the screening services, referral processes, and translation services as described in this rule section 4.112(A)(1). The entity or individual actually conducting the screening services, referral processes, and/or translation services,

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are responsible for ensuring that those services are conducted using valid and reliable methods as described in this rule section 4.112(A)(4), and are included in the Resource Bank as described in this rule section 4.112(A)(2).

4. Any screening services, referral processes, or translation services administered, when appropriate, pursuant to this rule section 4.112(A)(1), must be conducted using valid and reliable screening tools and other related resources that are developmentally, culturally, and linguistically appropriate, and must:
  - a. Require, when appropriate, the screening services to be offered or coordinated within forty-five (45) calendar days of when a child first attends the eligible preschool provider;
  - b. Entail the use of research-based developmental standardized screening tools;
  - c. Meaningfully incorporate other information from family members, teachers, or other individuals with familiarity with the child's typical behavior;

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- d. Be tailored and conducted in a manner which promotes and allows for individualized usable information;
  - e. When involving a child suspected to need specialized instruction, the provider must comply with all Child Find referral procedures established by the Department of Education and refer the family to the Child Find contact in the child's administrative unit of residence; and
  - f. Ensure that participating children and families have a pathway to access early childhood mental health programs.
5. All eligible preschool providers must notify families of the opportunity to participate in an annual survey of families' experiences in regard to screening, referral, and early childhood mental health best practices to be conducted by the Department.

**4.113 FAMILY AND COMMUNITY ENGAGEMENT REQUIREMENTS**

- A. Beginning July 1, 2024, and continuing thereafter, eligible preschool providers must meet the following requirements as a condition of participating in the Preschool Program:

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1. Within six (6) months of participating in the Preschool Program, preschool providers must create, make available publicly (either on the provider's website or in a handbook distributed to all participating families) and for the Department, and implement policies and procedures which ensure:
  - a. The usage of interpreters or other language resources to effectively communicate with families in their home language;
  - b. Seeking input from participating families on priorities, interests, home routines, and cultural and social practices;
  - c. Engaging families around goals which inform the preschool provider's interactions and instruction with children, including multilingual learners;
  - d. Engaging families and community partners in decision-making regarding the preschool provider's operations;
  - e. Involving families in the transition of their children into and out of the Preschool Program, including

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between classrooms within the  
Preschool Program and into  
Kindergarten; and

- f. The quality of program-family and  
program-staff interactions.
- 2. All eligible preschool providers must notify  
families of the opportunity to participate in  
an annual survey of families' experiences  
with meaningful and culturally appropriate  
involvement in the program to be conducted  
by the Department.

**4.114 PROFESSIONAL DEVELOPMENT  
REQUIREMENTS**

- A. The Department shall ensure that professional  
development hours required pursuant to this  
rule section be in alignment with Colorado's  
Competencies for Early Childhood Educators  
and Professionals, including alignment with the  
competency areas as defined in 8 CCR 1402-1 rule  
sections 2.213(M) and 2.312(R)(1).
  - 1. This includes alignment with the seven (7)  
competency areas of:
    - a. Child growth and development, and  
learning;
    - b. Child observation and assessment;

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- c. Family and community partnerships;
  - d. Social-emotional health and development promotion;
  - e. Health, safety and nutrition;
  - f. Professional practice; and
  - g. Teaching practices.
2. Professional development courses taken to complete the requirements of 8 CCR 1402-1, rule sections 2.213(M) or 2.312(R)(1), to meet the Child Care Licensing requirements of fifteen (15) clock hours annually, may also be used to satisfy the professional development requirements of this rule section, provided all other requirements are met.
  3. Lead teachers licensed by the Colorado Department of Education may use the professional development courses required to renew their teaching license pursuant to article 60.5 of title 22, C.R.S., to also satisfy the professional development requirements of this rule section, if applicable.
  4. Nothing in this rule section shall be construed as requiring these trainings for staff aides of a family child care home or child care center, or individuals who are

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employed or volunteer only on a short term basis.

5. Verifying documentation shall be submitted demonstrating completion of the applicable professional development in accordance with policies and procedures established by the Department and published by the Department in an easily accessible manner including, but not limited to, being posted on the Department's website. These verification policies and procedures by the Department may include, but are not limited to, attestations, maintenance of an individual employee's profile within the Colorado Shines Professional Development Information System (PDIS), and the submission by employees or providers of any required information requested by the Department in a timely manner.

B. All Staff Professional Development Requirements.

Beginning July 1, 2025, within twelve (12) months of employment at an eligible preschool provider, all staff responsible for the direct care of eligible children receiving preschool services (including primary providers, applicant 2s, equally qualified providers, equally qualified substitutes, and substitutes of a family child care home, and early childhood teachers and assistant early childhood teachers of a child care center) must complete annually, at a minimum:

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1. Four (4) hours of professional development in the competency area of social-emotional health and development promotion, with at least one (1) of those hours of training in trauma-informed practices specific to each staff member's professional role;
2. Two (2) hours of professional development in the competency area of teaching practices; and
3. Two (2) hours of professional development in the competency area of family and community partnerships, with at least one (1) of those hours of training in suspension and expulsion practices.

C. Instructional Supervisor Professional Development

Beginning July 1, 2026, within twelve (12) months of employment at an eligible preschool provider, instructional supervisors must complete annually, at a minimum, at least three (3) hours of professional development in the competency areas of child observation and assessment, and teaching practices, with at least one (1) hour of training in each competency area.

1. Any educator who is required to complete both the all-staff and instructional supervisor professional development requirements contained in rule sections 4.114(B) and (C), may use hours of professional development

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to fulfill both requirements concurrently,  
provided the applicable requirements are  
met.

**Editor's Notes**

**History**

New rule emer. rule eff. 09/29/2022.

Rules 4.101, 4.104, 4.105 emer. rules eff. 11/21/2022.

Rules 4.100-4.103 eff. 01/14/2023.

Rules 4.101, 4.104, 4.105 eff. 03/17/2023.

Rule 4.105 emer. rule eff. 06/23/2023.

Rule 4.105 eff. 09/30/2023.

Entire rule emer. rule eff. 01/22/2024.

**APPENDIX C — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, CHILELLI TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (D. COLO. JAN. 2, 2024)**

\* \* \*

[36]up of parishes, schools, and other ministries that help communicate the message of Jesus Christ.

Q And on that last note, what is the purpose of the Archdiocese?

A Sure. The purpose of the Archdiocese of Denver is to establish ministries across northern Colorado in order to communicate the message of the gospel, the message of Jesus, and in that way, in order to rescue -- provide the rescue of Jesus Christ and lead the faithful and the non-faithful to the rescue of Jesus Christ and for the glory of the Father.

Q And education, is that part of how the Archdiocese pursues that purpose?

A Yes. Education is critically important to the mission of the Archdiocese. We understand the human person as being endowed of being able to come to know and understand reasonably all of reality, both naturally and supernaturally. And so the educational mission of the school is incredibly important for forming young people especially in coming to understand reality itself.

Q Okay. And does that educational portion of what the Archdiocese does, does that include operating preschools?

A Yes. We have many preschools at many of our schools across the Archdiocese.

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Q Okay. Do you know how many preschools are operated by the Archdiocese or one of its parishes?

[37]A Yes. We have 36 preschools in the Archdiocese of Denver.

Q Does that number, 36, include St. Mary in Littleton?

A Yes. It includes St. Mary.

Q And then Wellspring Catholic Academy of St. Bernadette?

A Yes. Wellspring is also in that 36.

Q About how many students attend Archdiocese preschools?

A Approximately 1,500.

Q And what is the Archdiocese's relationship to the preschools?

A Yeah. It's just that. It's a relationship. So, all of our preschools exist, like I mentioned before, as a ministry of the Archdiocese, and so in that way they exist in the hierarchy of the Catholic Church here locally in Colorado. So, that hierarchy begins with Archbishop Aquila, who then delegates his teaching authority to school pastors or through his Office of Catholic Schools, me as the acting superintendent. So, we oversee schools -- preschools, excuse me, that are run by school pastors, or in some cases regional schools are directly overseen by us.

And so in order to fulfill the mission of Catholic Schools, there's a hierarchy of delegating teaching authority. And so because of that, the Archbishop issues and promulgates policies, directives, guidance so that

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the mission at the school level is incarnated or operates from his same teaching authority in ministry. And so the policies are expected to be implemented

\* \* \*

[53]our school leaders to please not admit the child out of abundant respect for the family.

Q Okay. And flipping over to the bolded page six, is this the part of the guidance that speaks to the situation you were just addressing?

A I'm sorry. What was the page?

Q Page six. Maybe start with page five. Page five and six?

A Yes.

Q Thank you, Ms. Chilelli. And then just one more situation. Does this document include any guidelines on how to handle a situation in which a student is enrolled in a school but begins asserting an identity that's at odds with his or her biological sex?

A Yes. It includes guidance for that particular situation.

Q And what is that guidance?

A Sure. The guidance is that assuming and hoping for a relationship with the parents to share with the parents the church's teaching on identity as being inextricably linked with biology, observable reality, and so in that way, the school leader is asked to share with the family how we understand biological sex.

And because of that, out of abundant respect for the good of the child's body and their identity that's linked

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with that, we ask our school leaders to explain that we would not be able to make accommodations that we might see in secular [54] institutions, but those kinds of accommodations wouldn't be able to be made. And so in communication and conversation with the parents, we specifically say in the guidance, reference to a few different accommodations that we could not honor or provide in the Catholic school.

For example, we can't use pronouns -- we wouldn't be able to use pronouns inconsistent with the child's biological sex. We wouldn't be able to allow things like bathroom use for use of a bathroom inconsistent with a child's biological sex. We also wouldn't be able to perhaps allow a child -- in this guidance allow a child to wear a uniform that may be inconsistent with their biological sex.

And so after explaining those conditions to the parents, if the parents decide that they would like those accommodations or they would like their child's identity that they're sharing with us to be affirmed, we explain that maintaining the relationship with the family with the child's enrollment would not be possible. The school wouldn't be able to fulfill their mission to support parents in their education of their children.

Q Okay. And are the Archdiocese preschools expected to follow this guidance?

A Yes. Every preschool is expected to follow this guidance.

Q Great. Thank you, Ms. Chilelli.

A Sure.

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[65]And then when we read the user agreement for CCCAP, our understanding is that the nondiscrimination clauses here are related not to the family, but rather the child. And so in that way, sexual orientation of the four-year-old is not typically a difficulty that would come with regards to enrollment at the preschool level.

Q And if you were wrong in your understanding of CCCAP in any of the ways that you just discussed, would the Archdiocese change its mind about whether its schools could participate?

A Yes. Again, any program that we participate in that would compromise Catholic faith or morals and our policy -- our ability to operate within our local policies, we would cease operations with if there became apparent to us a conflict.

Q Thank you. Are you aware that Catholic Charities operates some preschool programs within -- in the Denver area?

A I am aware of that, yes.

Q Okay. What is Catholic Charities?

A Sure. Catholic Charities operates under the umbrella within the Archdiocese of Denver. It's a beautiful ministry that exists to exercise what we call the Corporal -- Corporal Works of Mercy: feeding the hungry, housing the homeless, providing monetary help for the poor. And so within that assistance, especially to parents who are homeless or significantly at a significant poverty level, Catholic Charities operates Head Start programs or Early Head Start programs,

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[67]A Yes. I'm aware of that provision.

Q And why isn't that sufficient for the Archdiocese to be able to participate in UPK?

A Sure. Largely because of how we understand the notion of congregation and how our own churches are organized. So, the notion of a congregation is a group of faithful; right? Belonging to a particular church, good, but it's separate and different than how we understand our churches.

Our churches are set up as parishes. Parishes represent a geographic reality. So, churches are established across -- parishes, excuse me, are established across northern Colorado. Anyone in that region who lives in that parish is a parishioner. Any Catholic, excuse me, is a parishioner of that parish. You could be formally enrolled at the parish, but anyone in that geographic area is a parishioner.

And so in that way, it's different than a congregation in that there's an incredible amount of numbers, excuse me, of Catholics. There's a difficulty with the provision related to congregation in that we have a number of parishes, 136, I believe -- maybe it's 140. Excuse me. A high number of parishes, but a limited number of preschools. So, we operate 36 preschools. So, by ratio, if we were to limit our preschool enrollment to only those members of that parish, it would significantly limit the number of families -- Catholic families who could be served by that preschool.

[68]And then on the other end, I suppose of the understanding of this, is that our Catholic Schools certainly prioritize and exist for Catholic parents to

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be able to fulfill their duties, but we also welcome non-Catholics into our schools. And so in that way, if we were limited to our own congregation, we wouldn't be able to fulfill the mission of supporting any parent who desires the church's assistance in fulfilling their duties as parents.

We call this evangelization, but certainly many non-Catholics see the beauty happening in our schools and desire it as the education for their children. And so being limited to congregation wouldn't allow us to do that.

Similarly, there are Catholics who are baptized Catholics who enroll in our -- who desire to enroll in our Catholic Schools who wouldn't be able to sign the statement of community beliefs or the local school's handbook that delineates those beliefs, because though they're Catholic, they may not desire to form their children in the church's teachings. And so limiting it to our congregation wouldn't allow us to have that discernment process with the families where we ask them to take seriously the teaching of their children in the beliefs, faith, morals that we're going to teach in the school.

Q And those last two points you mentioned, evangelization and the inability of even some Catholics to agree with the school on all issues, those would still be there even if "congregation"

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**APPENDIX D — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, SEUL TESTIMONY, *ST. MARY  
CATHOLIC PARISH V. ROY*, NO. 23-CV-2079  
(D. COLO. JAN. 2, 2024)**

\* \* \*

[81]transgender?

A Not to my knowledge.

Q And has St. Mary's ever received a complaint from an LGBTQ person about discrimination?

A No.

Q If you were to have a preschool waitlist, how would St. Mary's decide which preschoolers and families to admit?

A We prioritize admission based on a number of different factors. We start with people who are parishioners -- or, I'm sorry -- siblings of our parishioners or siblings of our students. And then we would go to the parishioners of our St. Mary. Then the next on the list would be people who are affiliated with other Catholic churches in the area, parishes in the area. We would then go to people who have moved into the area from other Catholic churches or other Catholic Schools. And then we would then offer it to unaffiliated Catholics and non-Catholics.

Q And why does St. Mary's prioritize these types of students?

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A Well, we're obligated to start with our parishioners first, because we're a ministry of the parish. But then we're obligated also to make sure that we provide Catholic education for those Catholic parents who want that for their children.

Q Now, are parents required to be Catholic to send a child to St. Mary's?

A No.

\* \* \* \*

**APPENDIX E — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, COATS TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (D. COLO. JAN. 2, 2024)**

\* \* \*

[113]Q Does Wellspring consider itself bound by this guidance?

A Yes.

Q And do you follow it in running this preschool?

A Yes.

Q Ms. Coats, in your time at the school, has Wellspring ever determined that admitting a family or a student would cause a conflict?

A Yes.

Q Are there any recent examples of that?

A Yes. Last year we had a fifth grade student whose parents were interested in enrolling --

MS. RUST: Your Honor, I would like to object to relevance.

THE COURT: I'm sorry. I can't hear you.

MS. RUST: Sure. Is this -- can you hear me better now, Your Honor?

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THE COURT: Yes.

MS. RUST: I would like to object to relevance. I know this testimony was previewed in the opening and that it will be about a fifth grade student, but I do think we're here today talking specifically about preschoolers and the circumstances of preschoolers in the UPK program and these parish schools.

THE COURT: The objection is overruled. Go ahead, please.

[114]Q. (By Mr. Varberg) Ms. Coats, you can continue.

A We had a family inquire last year, and we -- they did the inquiry. We invited them for a tour. I actually never met the student. It was just the parents. The parents were a same-sex couple. And we met a couple different times and discussed the mission and the family dynamics, just our normal procedure. We ultimately decided that would not be a good fit, because we teach what's called Theology -- Theology of the Body.

It's a crucial part of our curriculum for theology, Catechesis and theology, and we were concerned that this teaching would cause great conflict within their own family system and their own family structure. So, we didn't feel like it would be a good fit for us at that time.

MS. RUST: And, Your Honor, could we just ask the witness to elaborate as to who "we" is that she keeps stating?

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MR. VARBERG: Your Honor, I find this inappropriate. If she would like to cross examine her about that --

THE COURT: You can bring that up in cross. Go ahead.

Q. (By Mr. Varberg) Ms. Coats, does Wellspring often receive inquiries from same-sex parents or students?

A No. This is the only one, to my knowledge.

Q And, Ms. Coats, I would actually like to return to that situation you were describing a moment ago with the fifth grader and the same-sex parents. Did this process occur while you were principal and head of school at Wellspring?

\* \* \*

[116]mission, who desire us. We then partnership -- or we then prioritize St. Bernadette, because we're a ministry of this parish, so when they thrive, we thrive. And then we prioritize other Catholic families, because we just share a foundational mission in life.

Q And has a family that went through any part of the process ever determined that Wellspring is not a good fit?

A Yes.

Q Does Wellspring require parents to be Catholic to send a child to the preschool?

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A No.

Q So, are there any requirements for parents with respect to the Catholic faith?

A We would -- we ask the same of non-Catholic employees. We ask that they abide by -- they uphold the values of the Catholic Church, that we partner together in the education of their children, that they fully understand our mission and would support it in their own home as well.

Q And, Ms. Coats, have you ever enrolled a non-Catholic family in your preschool?

A Yes.

Q And how many preschool students and their families are Catholic?

A The majority. I don't have an exact number, but the majority.

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**APPENDIX F — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, COOKE TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (D. COLO. JAN. 2, 2024)**

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[136]Q And does that accurately reflect your qualifications and experience?

A Yes, it does.

Q Thank you. You mentioned the Colorado Department of Early Childhood, or the CDEC. What is that department?

A So, if I can go back to the passage of Proposition EE, once that ballot amendment was passed which created Universal Pre-K for the State of Colorado, there was much discussion and deliberation amongst advocates and state agencies around how to proceed with placement of that program and where it should reside.

And it was through those discussions that the Early Childhood Leadership Commission made a recommendation -- a formal recommendation to designate the last constitutional remaining department to early childhood so that we could remove the silos that existed across state government for early childhood and house everything in one place.

Q And when was the, I guess, formal creation of the department?

A So, House Bill 1304 did designate that final state cabinet level department to early childhood. What followed

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was a very robust stakeholder process that was led by the Early Childhood Leadership Commission to talk about what that state department should look like. And what followed that process was additional legislation to operationalize the department, which opened on

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[138]Q And what type of feedback did these stakeholders offer?

A We had certainly a variety of feedback as we were working. And, again, this was a two-pronged effort, establishing the department and also Universal Pre-K, but a tremendous amount of feedback, especially from the provider community, about how implementation of pre-K would affect their programs, some of the unique circumstances of the various programs.

Q And what were some of those unique circumstances?

A Well, I will talk about school districts first. School districts, we continued to meet with a group of school district preschool administrators, and we had a number of different groups that we met with in addition to our town hall efforts and other efforts to solicit feedback.

But for our school district partners, there were concerns around boundary issues. As we all know, there are approximately 176 or 178 school districts in Colorado, and they all have unique boundary lines. And they have different requirements relative to open enrollment across boundary lines. And so there were concerns with school

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districts about how boundaries would be managed. Also, students with individualized education programs, or IEPs.

Q And just so we're clear on the timeline, were these conversations happening before the July -- you know, July 1, 2022, implementation of the department?

A Yes. They were. They were happening right along with the

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[147]Q So, does this language track the language in House Bill 1295?

A Oh, I'm sorry. You were asking about the language here. My apologies. Yes. And I misunderstood that you were asking about 1295. This language on the page I'm looking at now under quality assurance is literally a cut and paste in its entirety from 1295.

And the reason for that is that we knew once we got deeply into this provider agreement drafting that we were not going to be able to have quality standards adopted in time for year one of UPK. And we had providers that were very hesitant to sign a provider agreement, and understandably so, without knowing what was going to be adopted in rule and placed upon them as a potential burden or requirement as a participant in the program.

So, we made the determination to take the language directly from House Bill 1295 and place it into this provider

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agreement, giving our providers clear understanding of the direction we were headed in adopting quality standards for year two.

Q And did these quality standards go to the health and safety of the children?

A Yes. Our goal in the mixed delivery program was to recruit and engage providers, again, of all types, school districts, center-based, home-based, faith-based, that could provide a [148]safe, nurturing, inclusive, nondiscriminatory environment for children.

Q And did you draft -- I think this is a 39-page agreement. Did you draft the entirety of the agreement?

A No.

Q And which part were you responsible for?

A So, we drafted -- and I'm not certain of exactly how many pages this goes, but we drafted the agreement up to the exhibits. There are two exhibits to this agreement, Exhibit A and Exhibit B, that were put together by the contracts and procurement offices for Department of Human Services and for the state comptroller's office. They put those pieces together that became part of this agreement.

Q Did you consider doing rule-making to create the quality standards at the -- during the time you were drafting this contract?

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A We did. And we actually were really optimistic that we would be able to get that done before preschool launched in August of 2023. Our hope was to go to rule-making in the May or June timeframe, giving providers time to see the quality standards and to opt out of the agreement before school started if there was something contrary to what they were hoping to see. We realized as we got into this work that it was not going to be possible to achieve a rule-making process before the start of year one. And so that's why we put this language here

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[151]but we did conduct outreach in other ways. We also continued, as I said, to host our town hall meetings monthly, which did attract providers. We reached out to provider organizations that were umbrella organizations, to also work with them to bring providers to the table.

Q And can you tell me about what kind of feedback you got from providers during this process?

A The feedback was really very positive. Providers were excited about this opportunity and the opportunity it would afford their families. Certainly providers have their questions or concerns, some of which I have raised earlier, about how this program would affect them specifically or how they operate their program. But generally, the response was very good. And when the provider portal opened, the response there really emphasized that.

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Q I know you were on -- here for this morning's testimony, and I heard some mention of a faith-based working group. Do you recall that?

A Yes.

Q Were you involved with the faith-based working group?

A Yes. I actually created that working group.

Q And how did that come about?

A I had been working with a particular faith-based organization just to answer questions of this organization, always be available. It was always our goal to be transparent [152]and meet with any individuals that were interested in the program and wanted to meet. And so I had been working with this particular program. And through discussion, we thought it made good sense and would be of interest to open it up to other faiths.

Q And what -- so, who is the faith-based provider you were working with at that point?

A Yes. So, it was the Efshar Project, which is an umbrella organization for Jewish preschools.

Q And who participated in this faith-based working group?

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A So, we did some outreach to try to let faith-based preschool providers of various faiths know that we were convening this group as an informal working group. And we ended up with participation from not just the Efshar Project and members of those preschools, but also St. Mary's participated. Tracy Seul was one of our early and lasting members. We had members of the Lutheran faith, Presbyterian. We had a representative from the Colorado Council of Churches and the Interfaith Task Force, and nondenominational Christian representation.

Q And how often did this group meet?

A We began meeting weekly because this was such a, you know, a lot of work that was condensed into a short period of time to get Universal Pre-K launched. And so we met weekly. And then as time went on we went to every other week, and then to [153]monthly.

Q And so what topics did these providers raise at these meetings?

A Yes. So, we talked about a variety of topics. We talked -- the two that we probably spent the most time on once we had been meeting for a short period of time were the equity statement in House Bill 1295 and in the provider agreement. And we spent time talking about the provider rate that had been established.

Q And what concerns did providers have about the nondiscrimination statement?

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A The concerns that were raised went squarely to sexual orientation and gender identity.

Q And who raised those concerns?

A So, they were raised by Tracy Seul, and we also had a representative from a Lutheran network of preschools that affirmed that that network was also in discussions with their leadership about those provisions.

Q And how did CDEC respond to those concerns?

A We had already been working on a number of preferences that we would be able to provide for providers of different types. These preferences were meant to really identify and acknowledge certain relationships, I guess I would say that existed between the provider and the community the provider served or families the provider served.

[154]And so in looking at some of these situations -- and I will go to school districts as my first example. In looking at the school district's concerns that had been raised around boundaries, we determined that we could offer the school district a preference that would allow them to decline a student that was outside of their boundary or require that student to go through the open enrollment process for that particular school district.

And so the preference really was designed to protect, I guess I would say the seats in a particular provider

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setting from the unintended consequences of our computer algorithm which managed matching.

Q So, was the preference targeted at the matching process?

A It was totally targeted at the matching process. It was not in any way giving a provider any kind of exception to the agreement or to anything in rule or statute, but rather to address circumstances with the particular provider by going to the matching process.

Q Now, did CDEC try to work with Ms. Seul and the Lutheran providers who raised concerns about the sexual orientation?

A Yes. So, what we had been working on, and I shared with that working group, was a preference for all faith-based organizations, regardless of denomination, that would allow them to -- to designate a number of seats for members of their congregation. So, their church family, their church community, [155]their parish, whatever that might be, such that they could hold all or a portion of their seats. They did not have to dedicate all of their seats, but they could, or they could dedicate a portion of their seats for members of their church family -- church community.

Q I'm going to ask you to turn to Exhibit 24, which I believe is in that plaintiffs' binder. And, Jen, if you could pull that up on the screen. Do you recognize this?

A Yes. That is the UPK provider guide, which we created as a tool for providers.

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Q And I'm going to ask you to turn to page 37.

A Okay.

Q And so what does that header say next to 14?

A Indicate if you are one of the following exception criteria for your program.

Q And so what are exception criteria?

A So, again, these are exceptions to the matching process. And so these are preferences that, again, that we agreed to with certain provider types, faith-based, for instance, the co-op, the co-op requiring family participation as a part of its preschool program. We had granted a preference for the co-op to limit their participation for Universal Pre-K to members of the co-op.

Q And why are they called exception criteria?

A The term "exception" I believe was part of the software [156]system, or used in the BridgeCare system. BridgeCare is, again, software as a solution product that has been used in multiple states, as well as in other areas of Colorado for other purposes. And so much of the language that is in that software or in that portal was already developed in the BridgeCare system.

Q So, BridgeCare wasn't a custom product?

A It's customizable. It is an off-the-shelf, or a software product that is customizable.

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Q And so how did these -- what this provider guide calls exception criteria, and we've been calling preferences, how did they work?

A So, the way a preference would work, any one of these. So, faith-based provider, that may require families to be part of their congregation. When the computer algorithm matches families, and they will only -- it would only match families to one of the family's choices. Families were given at the time up to five choices of a preschool provider.

So, it didn't randomly match families to a provider they weren't interested in, but when that algorithm would match families to a preschool provider, if the faith-based provider was a participating provider and received -- once the algorithm ran, the providers receive a list of the families that have been matched to them, the children that have been matched, the provider then has an opportunity to review those matches and to

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[160]authority to -- by rule or policy, to grant an exception to statute.

Q And why did the department say that?

A Well, it's factual that Dr. Roy would not be able to change law unilaterally. And also, as is stated here, Dr. Roy made it clear that only the legislature has the authority to do so. And so that was an appropriate response.

Q And looking at the last paragraph on page one, what does that last paragraph mean?

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A That paragraph really invites the providers to participate in the Universal Pre-K program and to work with our faith-based working group, and to participate there as well with other members of the faith communities.

Q And why did the CDEC state that faith-based providers were welcome to participate?

A Faith-based providers have always been envisioned to be part of the mixed-delivery model. We had a mandate to deliver a mixed-delivery model, and that includes faith-based providers. That's an important component of family choice, and mixed delivery is really grounded in family choice. And we wanted to certainly give families every opportunity to seek a provider of their choosing, and that includes faith-based providers.

MS. FISCHER: Your Honor, if I could have a moment just to check in with my colleagues?

THE COURT: Yes.

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**[177]REDIRECT EXAMINATION**

BY MS. FISCHER

Q Ms. Cooke, were the preferences intended to provide an exemption or exception from any of the quality standards?

A Absolutely not.

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Q And is any preference an exemption from a statutory provision?

A Absolutely not.

MR. REAVES: Objection, Your Honor, to the extent it calls for a legal conclusion.

THE COURT: Overruled.

Q. (By Ms. Fischer) And, Ms. Cooke, are you here today testifying for the general assembly?

A I am not.

Q And are you testifying as to the department implemented what you read of the statute?

MR. REAVES: Objection. Vague, Your Honor.

THE COURT: Overruled.

THE WITNESS: Can you repeat that, please? Thank you.

Q. (By Ms. Fischer) Are you here today testifying as to the department implemented the statute?

A Yes.

Q And just one clarification. You've testified you no longer work for the department?

A Correct.

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**APPENDIX G — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, ODEAN TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (D. COLO. JAN. 2, 2024)**

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[186]organizations, or OCLs -- LCOs. Can you describe the work that you've done with local coordinating organizations?

A We have 32 local coordinating organizations around the state, and they are critical in our efforts to ensure that local communities have an understanding of our programs and our department. The first year working with LCOs, the priority has been navigating Universal Preschool, so helping families locally understand what the opportunities might be and get connected and engaged, and as well as providers.

And so their local relationships and local voice have really been critical with the new state department for me particularly being new in the role, not having local relationships that -- to the depth that they have around the state has been really important for us to kind of have those trusted partners and really be able to be responsive to the startup of the program.

Q Besides working with other state agencies and states and LCOs, have you worked with stakeholders or providers in the startup of the Universal Preschool Program?

A Yes, I have. We have. That's a priority for us. So, it's part of our daily work, working with families, working

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with providers, certainly in conversations with our direct customers, if you will, on a daily basis, but also have really worked hard even under the compressed timeline to ensure that we're engaging and hearing, really listening and being responsive so that we [187]can continuously improve our efforts, and have worked to be very intentional and thoughtful about being inclusive to stakeholders, to providers in this new model of mixed delivery and ensure that families have the opportunities that are set forth for them through our program.

Q Before working in your role as UPK director, what was your employment position?

A I was the executive director of early learning for Jeff. Co. Public Schools.

Q And what did you do in that position?

A In that position, I oversaw the preschool programming for Jefferson County Public Schools. At the time we had about 93 classrooms serve 2,500 to 3,000 students each year, threes and fours. Supported each school leadership, training, professional learning and development, really worked to align the transition into preschool with our early childhood providers in the community and other resources for families, as well as their transition into kindergarten and through third grade. So, at the district level, we were really working toward longterm outcomes that we could gain by providing quality programming for preschool in the district.

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Q How long were you in that position?

A I started in that position in 2016 and worked there until I attained this position in 2022.

Q And before that position, what were you doing?

[188]A I was an elementary school principal. Prior to that, I was an instructional coach. And prior to that, I was an elementary teacher.

Q And I want to direct your attention to the screen to Exhibit 49. Ms. Odean, do you recognize this document?

A Yes. That's my current resumé.

Q And is that resumé a true and accurate representation of your qualifications?

A Yes.

Q And who prepared that resumé?

A I did.

Q And is that resumé up to date?

A It is.

MS. CARRENO: And, Your Honor, I would like to proffer Exhibit 49.

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THE COURT: All right.

Q. (By Ms. Carreno) Now, Ms. Odean, I want to turn to some more of the background on the Universal Preschool Program and the system. And you heard Ms. Cooke describe yesterday the process for the creation of the new department and the Universal Preschool system. She also talked a little bit about the Colorado Preschool Program. And so can you describe what if any experience you had with the Universal Preschool -- sorry. What if any experience you had with the Colorado Preschool Program?

A In my role in Jeff. Co. Public Schools, we coordinated with [189]the Colorado Department of Education for the Colorado Preschool Program to serve students in Jefferson County. The Colorado Preschool Program was the previously state-funded preschool opportunity in Colorado, which was school-district-managed. So, it wasn't mixed delivery, unless the school district chose to contract with outside community partners.

And it was targeted. So, different than universal in that it was for children with specific risk factors. And so we implemented that -- I think that was in place probably for 30 years. So, that was implemented well before I was in the role, but certainly continued that effort to ensure that families had access to funding for preschool prior to universal.

Q Now, when you say it was targeted at certain risk factors, what were those risk factors?

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A So, risk factors included families living in poverty, included children with a native language other than English, developmental delays, foster care. That's what I can remember off the top of my head.

Q And how many children did the Colorado Preschool Program serve?

A Statewide, I believe 18,000 was the last count. Right around 18,000.

Q And so if Colorado already had the Colorado Preschool Program, what was the need for the Universal Preschool Program?

A I think what we saw with the Colorado Preschool Program was [190]it did what it was intended and really supported children in their growth and development. And so the universal opportunity was so that more children could have access to that leading up to their kindergarten year.

Q And was the Colorado Preschool Program income-based?

A That was one of the risk factors.

Q So, why universal rather than a targeted program?

A So, universal allows for all children in the year before they're eligible for kindergarten to have 10 to 15 hours

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of free preschool access. And that's important so that all of those children can have access to that high-quality environment and get to the learning outcomes that we know come from a high-quality program. But it also allows for families to have opportunity and options, all families. And uniquely in the Colorado statute that gives us the foundation for the program, it certainly recognizes what CPP was able to accomplish and calls out what some priorities -- the same children.

So, we're thinking about children with disabilities, children who are low-income and so forth on the risk factors to ensure that the work of the Colorado Preschool Program wasn't diminished through going to a universal model, but to continue to be thoughtful about ensuring those outcomes continue for children who haven't had that opportunity historically.

Q And how did the department go about ensuring that those families that benefited from CPP weren't harmed by the universal [191]system?

A Well, again, we really wanted to understand providers' experiences with families and with children and where they've gotten to those positive outcomes and what would be helpful. We certainly built the application system to ensure that we understood who was applying and what might be helpful for them to find the best provider for that particular family, but also knew that, for example, with school districts and their federal mandates around IDA, that there would be considerations we needed to make to ensure that it was a fluid process for families, and that

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it didn't compromise the expectations of school districts to serve.

Q And can you talk a little bit about what the qualifying factors are.

A Sure. So, the qualifying factors are put in place in rule based on what the expectation was in statute for. If there is funding remaining after the initial ten hours are served and students with IEPs are served, that qualifying factors could allow for families to receive additional hours for free.

Q And what were the specific qualifying factors that were established in rule?

A So, the qualifying factors established in rule were what was called out in statute, which are low-income families, families with children with disabilities, or an individualized education program. Dual language or multi-language families and [192]their children, and we also added homelessness through rule. That was from the stakeholder input and feedback, as well as foster or kinship care.

Q And yesterday you heard Michael Cooke's testimony about the quality standards, and I want to talk about how the department went about implementing those quality standards into the system and in practice. So, if I could direct your attention back to the screen, to section 26.5-205. In looking at subsection (1)(a) of the quality standards statute, I want to ask you about what some of these terms mean and how the department has implemented them into

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the UPK program. So, let's start with within section (1) (a), the statute refers to national and community-informed best practices. Can you please tell the Court what that means and how that was implemented into practice in the UPK system.

A Best practices are associated with how we get to the best child outcomes in the preschool setting in early childhood in general, and then specifically for us in the statute for Universal Preschool. And we know that locally we have done a lot of work around quality. So, the Office of Early Childhood, previous to the new department, built the Colorado Shines program that really was thoughtful about what are those best practices, and what are we looking for, and how can we support high quality across programs?

And then individual providers have different frameworks [193]that they've utilized as well. So, if you think about Head Start, they have a framework that is the foundation of the work that they build on, primarily focused on trauma-informed care and best practices to support families and children in that environment.

There's -- school districts have educator effectiveness and performance programs, unified improvement plans where they're really being thoughtful about strategies and outcomes and how they get to the best child outcomes they can in a safe and healthy environment.

Nationally, there certainly are different frameworks that have been developed by different organizations as

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well. And so the statute really called for us to consider those frameworks locally and nationally to ensure that we were being really thoughtful about what's worked and what might work in Colorado, and where do we have some challenges or gaps that we can through this new program and the new department collectively kind of raise the bar in support of providers and educators and young children.

Q And, Ms. Odean, can I just encourage you to maybe speak up a little bit more, or get closer to the microphone just to make sure that we can hear you.

A Is that better?

Q I think so, yes.

A Okay.

[194]Q And so also looking at that same subsection (1)(a), can you tell me about the term "cognitive development" and how that was implemented in practice within the UPK system?

A Yes. So, what you see here is really an acknowledgment of how important whole child development is, cognitive development being one of those areas that are critical to a child's development. And that's typically associated with academics or thinking. So, it might be early literacy, early communication, early numeracy components of cognitive development. So, the statute is asking us through our quality standards to be thoughtful about ensuring that we're including that, as well as the whole child.

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Q What is whole child development?

A So, whole child, you will see here, that main domains are covered in ensuring that children have access to the cognitive development, but also inclusive of physical development, as well as social-emotional development.

Q And then moving on to healthy environments, what are healthy environments, and how were those incorporated into the UPK system?

A Healthy environments are really critical to ensure that, one, we're being supportive of the child and their family in that they have access to resources around their child's health, but the environment component is really contemplating being thoughtful about the actual environment that a child is in.

[195]So, we know we have licensing child care regulations for health and safety, but this kind of goes beyond that in a way that ensures children in the classroom are in a space where they can learn and grow. So, it's physical safety, yes, but also that they're in an environment that's welcoming, that they feel a part of, and maximizes through best practices that development.

Q And then the last term within the section I want to ask you about is social and emotional learning. Can you describe how the department has implemented that in its quality standards?

A So, the social-emotional learning component is required for us in statute to consider in our quality

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standards specifically to be thoughtful about how children engage in their community, how they engage with other children, how they engage with adults, how they interact with the environment. And, again, it's all with that focus on a supportive nurturing environment for their growth and development.

Q And then I want to ask you about Roman numeral IV, but before we get to Roman numeral IV, (1)(a) states that in developing, reviewing, revising, and adopting the quality standards, the department shall consider four things. Before we get to number four, do you remember what the first three factors are that the department must determine in developing the quality standards?

A So, the statute asks us to ensure that all children have

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[232]employment decisions based on this provision?

A No.

Q Why not?

A We were completely focused on support and expectations of the program, the child, and their family. In recruiting providers, it certainly wasn't part of our understanding that we would have any authority on hiring practices beyond licensing credentials, expectations for workforce.

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Q And do you recall providing a disavowal in regard to this litigation for faith-based providers?

A I do.

Q And what was the purpose -- what was the reason for providing that disavowal?

A To give assurances that that wasn't action that would be taken by the program or by the department.

Q This contractual provision 18B, is this going to be included in year two of the provider agreement?

A It is not.

Q And why not?

A For that exact reason.

Q Will this provision apply to any providers?

A No.

Q We can close out of this exhibit. You heard the testimony from St. Mary's and Wellspring's witnesses yesterday talk about their religious curriculum. Does the department have any [233]intention of interfering with the curriculum of faith-based providers?

A No.

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Q Why not?

A Again, it's to honor mixed delivery and what each provider uniquely brings to the preschool setting for children and for families.

Q I want to direct your attention back to the same exhibit we've just been talking about, Exhibit 71 of the proposed rules, on page eight. And under subsection C, can you please read that language.

A Nothing in these rules shall be construed to affect an eligible preschool provider's right to engage in privately funded, inherently-religious activity, or affect the independence of eligible preschool providers, including any rights protected by the Colorado and U.S. Constitutions and applicable law.

Q Why is this language included in the proposed rules?

A Again, to give assurances that we will be inclusive in mixed delivery.

Q Had the department heard any concerns from faith-based providers about the prior version of the rules?

A There were questions and concerns around if the day would have to be delegated, if you will, by what was Universal Preschool and what was programmatically specific to that [234]provider. And so we wanted to give assurances that that wasn't the case.

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Q And this language applies to all types of faith-based providers?

A It does.

Q Are there any faith-based providers that are participating in the Universal Preschool Program currently?

A We have 40 faith-based providers participating currently.

Q And what type -- do you know what types of faith-based providers are participating?

A It's a variety. Many types, I would say. Nondenominational Christian, Catholic Charities, the Efshar Jewish Early Childhood community group has participants.

Q And was the department hoping that as many different types of faith-based providers would participate in the UPK program?

A Yes. We really worked for expansive of mixed delivery and have an inclusive environment for providers to participate in.

Q And did the department work with other types of providers that decided not to participate in the UPK program?

A Yes.

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Q And did that include Catholic providers?

A It did.

Q How many children have been matched to faith-based providers in year one?

A I think we're currently at just over 900.

[235]Q And you had mentioned Catholic Charities as participating in the UPK program. Do you understand Catholic Charities to be associated with the Archdiocese of Denver?

A I do.

Q And was there any attempt on the department's behalf to limit the participation of the Catholic Charities preschools from participating in the preschool program?

A No.

Q Why not?

A To ensure that as many providers could be accessed for families as possible, and certainly new families were interested in attending their programs.

MS. CARRENO: And if I could just have one moment to confer with my colleagues, Your Honor?

THE COURT: Yes.

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(Pause in the proceedings.)

MS. CARRENO: No further questions at this time, Your Honor.

THE COURT: Thank you. Let's take a ten-minute break, and we will come back and have cross.

(Recess at 10:42 a.m., until 10:57 a.m.)

THE COURT: Before we go with the cross, I have one minor scheduling matter. That's tomorrow at 10:30, I have to recess this case for about 20 minutes, because I have a criminal matter that will be here at 10:30. And for reasons of courtesy

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**APPENDIX H — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, GOLDBERG TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
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[287]A They're actually found in all environments. You know, they're all over the country in every -- they've established every county, every zip code. They do -- you know, they're in suburban, urban, rural environments. When you look within same-sex couples in various geographic regions, there is a disproportionate number of LGBTQ parents parenting in rural areas, meaning when you look at same-sex couples in rural areas, a greater percentage of them will be parents than, say, in urban areas.

Q Okay. How about, has your research found that LGBTQ parents compared to heterosexual parents in terms of socioeconomic status?

A Yeah. So, it's not my specific research, but it's the research of many, you know, well-known demographers in the field. We're usually using national data to establish that LGBT parents are about twice as likely to live in poverty as compared to heterosexual cisgender parents. I think the number was 29 percent.

Q Do environments of poverty in rural environments constrain LGBT families when they are looking for early childhood education options?

A Yes. Parents who have less money have fewer options. They can't afford private preschools, so they're

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often limited in terms of what public or free options are available, which obviously constrains their options.

\* \* \*

[323]Q Were you ever given documents to review regarding funding of any of the Colorado programs at issue here today?

A No.

Q You also were asked questions on direct regarding an online guide you had authored for LG parents looking for a school. Do you recall that?

A I do.

Q Is that guide meant for a parent with all school options available to them?

A It is a nonspecific guide, really supposed to be the first kind of -- first stop for a parent who is just starting to think about preschool.

Q In your research, do LGBTQ parents always have all the options available to them as their cisgender peers?

A No.

Q What kind of constraints are usually on LGBTQ parents' search for schools?

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A Well, as I noted, they're often more constrained by things like income. They are also constrained by the fact that some schools will deny them. Whether or not they're clear that that's related to their sexual orientation or gender identity, you know, they may say that they don't have room for them for other reasons, but we know from other research that that's not always the full story.

Q Okay. And in your research regarding LGBTQ parents who are [324]living in poverty, does that mean they might have restricted access to transportation?

A Yes.

Q Does it mean they might have -- that their transportation might be unreliable?

A Yes.

Q Does that mean that they may have to utilize public transportation?

A Yes.

Q Does it also mean that those parents might have a work location that also must utilize public transportation?

A Yes.

Q So, did you find in your research that LGBTQ parents who are living in poverty and when they are looking for

*Appendix H*

an early childhood program often have to consider how to get their child to that school?

A Yes.

Q How did that weigh in in their factoring of a school environment?

A Well, I had to consider, for example, where they worked compared to where the school was located, the hours that the school operated, whether it was even possible for them to get their kid to their school and to get to their own place of work. They had to consider cost, both gas or public transportation.

Q Okay. And did that in your research limit the amount of [325]early childhood options available to those parents?

A Yes. Significantly.

Q All right. How does living in a rural area limit the options of early childhood education available to LGBTQ parents?

A Well, there are fewer early childhood education environments in rural areas. They're much more spread out, and there's just fewer options, and folks have to drive a lot farther to actually access those options.

Q In your research of LGBTQ parents in rural environments, did you find that sometimes the only option available to them was a religious early childhood provider?

*Appendix H*

A Yes. There were instances of parents who had, you know, one, maybe two options, and one or both of them were religiously affiliated.

Q Okay. So, in that situation, if a parent had to choose a less-affirming environment, would that be understandable?

A Yes.

Q And I know, Dr. Goldberg, you note the basics about Colorado's UPK program. And you were asked by counsel various questions about LGBTQ families' experiences in a metro area and Denver, but is it your understanding that the Colorado's Universal Preschool only applies to Denver?

A My understanding is it does not just apply to Denver.

Q Is it your understanding that it just applies to metropolitan areas?

\* \* \* \*

**APPENDIX I — EXCERPTS FROM TRANSCRIPT  
OF BENCH TRIAL, TISHELMAN TESTIMONY,  
*ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (D. COLO. JAN. 4, 2024)**

\* \* \*

[382]when possible, LGBTQ families seek out LGBTQ-affirming schools; is that right?

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

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

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

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

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

Q Yeah. Briefly.

A I think that it's about access to religious institutions for people -- partly, at least, for people who do or may start to while they're enrolled identify as transgender or gender diverse or in the LGBTQ community, whether in my own research and my clinical work with families, they often

*Appendix I*

draw on religion and faith as a source of -- as a source of solace to them. Their religious beliefs help sustain them, and some families may want to seek out religious institutions for that reason and not be excluded on that basis, because that could be a terrible loss of community and faith that's important for them.

Q So, you think it's important, and you think this case is [383]about whether the Archdiocese would change its position on letting in LGBTQ families?

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

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

A What?

Q You teach at a Catholic school, Boston College?

A I teach at a Jesuit school, yes.

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

*Appendix I*

A Yes.

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

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

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

\* \* \* \*

**APPENDIX J — EXCERPTS FROM DEPOSITION  
OF COATS, *ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (NOVEMBER 28, 2023)**

\* \* \*

[74]Q. Uh-huh.

A. What do you mean by that?

Q. Just what is your impression of the types of children and families who make up the preschool?

MR. DAVIS: Objection to the form of the question.

A. I don't know how to answer that. Are you asking my opinion of our demographics?

Q. (BY MS. RUST) Yes.

A. I love our community.

Q. How many preschool students are enrolled this year?

A. 14, I believe.

Q. How many were last year?

A. 16 or 17, I believe.

Q. Okay. And the year before that?

A. I don't know the exact number.

*Appendix J*

Q. Okay. How many of the currently enrolled students have siblings at Wellspring?

A. I want to say around four or five. It could be more.

Q. How many of the enrolled Pre-K students are parishioners?

MR. DAVIS: Niki, feel free to ask these questions. You know, the interrogatory responses, I

\* \* \*

[78]Q. Okay. Do you know whether those inquiring families found a UPK placement?

A. I don't know.

Q. Okay.

A. I believe --

Q. Sorry.

A. I don't know. I think one may have, yes, but I'm not certain.

Q. Okay. Are any current enrollees in preschool children of a Wellspring employee?

A. Yes.

*Appendix J*

Q. How many?

A. One.

Q. And then how many 4-year-old students started Wellspring before their 4th birthday but continued care after their 4th birthday?

A. Oh, gosh. Are you asking this school year? In the last five years?

Q. This school year.

A. Okay. I know of four birthdays for sure. There could have been more.

Q. Okay. And then has Wellspring ever suffered from decreased enrollment in the past?

A. Yes.

Q. What caused that decrease?

[79]A. I can't be certain. I have thoughts.

Q. What are your thoughts?

A. Well, a change in administration statistically offers a pretty big decrease in enrollment.

Q. When did this happen?

*Appendix J*

A. The change in administration was July 2022.

Q. And then what was the reason for St. Bernadette School to get shut down for a year?

MR. DAVIS: Objection to the form of the question. Lacks foundation.

A. I wasn't there. I know that -- I believe that there was a decline in enrollment and a toxic culture has been the reason I've heard.

Q. (BY MS. RUST) Okay. If you know, what does toxic culture mean?

A. I don't think there was much unity among the faculty and staff in all definitions of that.

Q. All right. Ms. Coats, I want to just run through with you what's described in paragraph 86 of the amended complaint, Wellspring's priorities for enrollment.

Is Wellspring's first priority for enrollment siblings of current students?

\* \* \* \*

**APPENDIX K — EXCERPTS FROM DEPOSITION  
OF MOO, *ST. MARY CATHOLIC PARISH V. ROY*,  
NO. 23-CV-2079 (NOVEMBER 27, 2023)**

\* \* \*

[110]numbers are holding steady despite the current do-not-participate directive. What does that mean?

A. Yeah. We polled our preschools to identify to what extent they had seen enrollment hits because of UPK launching and Catholic preschool programs not participating yet.

And so at the time, there did not seem to be a major hit on enrollment, so that's what this is referring to here.

Q. Did that change at some point?

A. Yeah. I think it depends on the school. I would say at this point, largely, numbers are probably still holding steady. But, yeah. Have we seen a significant change one way or another? Probably not.

Q. I'm sorry. Can you say that last sentence again?

A. Yeah. Have we seen a significant shift one way or another on enrollment numbers to a large increase or a large decrease? No. Probably not.

Q. In that same bullet it says, "Impact on low- to middle-income families," with a -- "Impact on low- to middle-income families," with a question mark. What does that mean?

A. One of the real concerns we have had and

\* \* \* \*

**APPENDIX L — EXCERPTS FROM DEFENDANTS’  
RESPONSES TO INTERROGATORIES,  
OCTOBER 30, 2023**

\* \* \*

gathering public comment and stakeholder feedback as part of its rulemaking process, which will include defining the term “congregation” in rule for the 2024-2025 school year. The most recent definition of “congregation” the Department is submitting to stakeholders means a religious-based convocation, or multiple religious-based convocations, of individuals in a particular geographic area who share a common set of beliefs and who collectively engage in conduct with a direct nexus to that shared common set of beliefs. This definition may change based on public comment and the recommendations of the Rules Advisory Council prior to final adoption of the rule.

4. Identify each of the current UPK Program providers that Defendants understand to be faith-based.

ANSWER: The Defendants reiterate here that they are incorporating the above objections to this Interrogatory. Without waiving any objections, the Defendants respond that they understand the following UPK Providers to be faith-based providers:

Restoration Christian Academy  
Centennial Christian Learning Center  
Miss Sarah’s Schoolhouse  
Little Lambs Preschool  
Darren Patterson Christian Academy Preschool

*Appendix L*

Legacy Preschool  
Ganeinu  
Heaven's Little Steps Day Care  
Summit Early Education Center  
Landmark Christian Preschool  
St Luke's Little School  
Trinity Lutheran Church (tlc) Preschool  
First Light Nature Preschool  
Garden Preschool of Lone Tree  
The Garden Preschool & Early Learning Center  
Sonshine Prs / Greeley First Assembly Of God  
Trinity Lutheran Preschool  
Shepherd of the Hills Lutheran Preschool  
Lord of Life Preschool  
Sunrise Preschool  
Young Tracks Inc  
Apple Tree Christian Preschool & Kindergarten  
Cherry Creek Presbyterian Preschool  
Great Escape Littleton United Meth  
W.c.r.j. Preschool  
Christ Lutheran Early Childhood Center  
Eastern Hills Community Church Preschool  
The Vail Child Development Center  
Partners In Play Preschool  
Christ Lutheran Church Preschool  
Cornerstone Classical Preschool  
Little Explorers Preschool  
Sonshine Patch Preschool  
Little Lambs, Trinity Early Learning Center  
Faith Steps Christian Preschool  
Pepe Early Learning Center  
Trinity Lutheran Preschool/Day Care

*Appendix L*

St Philip Early Learning Center  
Ashleigh Jorun Scholten  
Hope Parent's Day Out And Preschool

5. For UPK Program providers identified in No. 4, describe the criteria employed by Defendants to determine that these providers are faith-based.

ANSWER: The Defendants reiterate here that they are incorporating the above objections to this Interrogatory. The Defendants further objects to this request as it is vague as the Defendants do not

\* \* \*

8. Identify the UPK Program providers, if any, that Defendants believe to be affiliated with the Archdiocese of Denver.

ANSWER: The Defendants reiterate here that they are incorporating the above objections to this Interrogatory. Without waiving any objections, the Defendants respond that they believe the following UPK providers are affiliated with the Archdiocese of Denver:

Child Development Head Start, Garfield Head Start, Mariposa Center, Kentucky Head Start, Margery Reed Mayo Day Nursery, and Quigg Newton.

9. Identify the number of licensed preschool providers in the State of Colorado.

*Appendix L*

ANSWER: The Defendants reiterate here that they are incorporating the above objections to this Interrogatory. The Defendants further object to this request as it is vague in that the Department licenses child care centers and family child homes which serve children between the ages of birth through 18 years of age. These licenses often serve preschool age children ages 2 ½ through 7 years of age even if they do not have a specific preschool license. Only providers that exclusively serve children ages 2 ½ through 7 years of age have a specific preschool license. Without waiving any objections, the Defendants respond that there are 1,584 licensed child care centers, 494 licensed preschool programs and 1,413 family child care homes in Colorado that have preschool capacities as of October 11, 2023.

10. Identify any and all licensed Colorado preschool providers that Defendants understand to be faith-based.

ANSWER: The Defendants reiterate here that they are incorporating the above objections to this Interrogatory. The Defendants further object to this request as it is vague as the Defendants do not characterize child care providers as “faith-based” or keep track of which providers identify themselves as “faith-based” outside of the UPK Program. In addition, it is unduly burdensome for the Defendants

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