To the Members of the Colorado House Education Committee,

We write to express our serious concerns regarding HB26-1292 and respectfully urge the committee to amend the bill to address those concerns or, failing that, to vote no on the legislation.

Policy and Implementation Concerns
As currently drafted, HB26-1292 would impose extensive new state-level requirements on private schools seeking to participate in the new Federal Tax Credit Scholarship Program created by Congress in 2025. These requirements go far beyond those imposed by federal law and, in many cases, would require faith-based schools to violate their sincerely held religious beliefs as a condition of participation.

The result would be predictable: Most private schools in Colorado would be forced to choose between surrendering their constitutional rights, assuming potentially catastrophic financial liabilities, or declining to participate in the program altogether. In practical terms, this means that many schools would be excluded from participation in a federal program specifically designed to expand educational opportunity for students – a program that Governor Polis has lauded as a "no brainer" benefit for Colorado.

Legal Risks
Beyond the policy concerns, the legal risks posed by HB26-1292 are substantial.

The legislation would place Colorado on a collision course with well-established First Amendment precedent from the United States Supreme Court. In multiple recent decisions, the Court has made clear that when government creates generally available public benefit programs, it cannot exclude religious institutions or condition participation on the abandonment of religious character. The Court's decisions in T*rinity Lutheran Church v. Comer, Espinoza v. Montana Department of Revenue,* and *Carson v. Makin* collectively establish a strong constitutional framework protecting the ability of faith-based schools to participate in scholarship and public benefit programs.

HB26-1292 appears poised to repeat precisely the type of constitutional error the Court has repeatedly rejected. Colorado is already facing litigation over nearly identical issues in its Universal Preschool Program. In *Darren Patterson Christian Academy v. Roy* and *St. Mary Catholic Parish v. Roy*, faith-based providers are challenging the state's attempt to impose requirements that conflict with their religious beliefs. Those cases remain active and illustrate the real-world consequences of pursuing policies that raise serious First Amendment concerns.

If HB26-1292 becomes law in its current form, it will almost certainly trigger additional litigation raising many of the same constitutional claims that are already being litigated today. That litigation would be complex, time-consuming, and expensive for Colorado taxpayers—particularly frustrating given that the Supreme Court has already addressed many of the underlying constitutional questions.

There is an additional and equally significant concern: federal preemption. The Federal Tax Credit Scholarship Program is a federal creation administered through federal law. Critically, the U.S. Department of the Treasury has not yet issued the final rules governing the implementation of the program. Those rules will establish the framework under which states and participating organizations operate.

By attempting to regulate the program now—before those federal rules exist—HB26-1292 risks creating a statutory conflict between state law and federal guidance that has not yet been issued. If Colorado adopts restrictions that ultimately conflict with federal rules, those provisions may be preempted under well-established principles of federal supremacy. Indeed, the forthcoming federal regulations may be so pervasive that it leaves no room for state regulation (*i.e.,* "field preemption").

Attempting at the state level to regulate a program whose federal governing framework is not yet known creates unnecessary legal uncertainty for schools, families, scholarship organizations, and the state itself. It would be far more prudent to allow the federal rulemaking process to conclude before taking any legislative action.
Finally, because the bill requires private schools to publish prohibitions related to nondiscrimination on their websites, applications, and enrollment materials, it creates a potential "compelled speech" problem under which schools' First Amendment rights may be further violated.

Closing Thoughts
The legislature does not need to act now in order for Colorado to participate in the program. Once federal Treasury rules are issued, states will be able to implement the federal scholarship framework in ways that align with both federal law and state priorities. Waiting for those rules will allow policymakers to evaluate the final structure of the program and make informed decisions without risking constitutional or preemption conflicts.
In contrast, HB26-1292 would impose sweeping regulatory changes before the legal parameters of the program are even known.

Beyond the policy and legal risks, the fiscal implications are also significant. If private schools are effectively excluded from participation due to the requirements in HB26-1292, Colorado students will lose access to tens of millions of dollars in annual, federally generated scholarship funding that comes at no cost to the state budget.
For these reasons, we respectfully urge the committee to reconsider the current approach.

At a minimum, the bill should be amended to address the significant constitutional and federal preemption concerns outlined above. Alternatively, the committee should decline to advance HB26-1292 and allow the federal rulemaking process to proceed before considering whether any state-level action is necessary.

Colorado has the opportunity to expand educational opportunities for students while avoiding unnecessary legal conflict. We encourage the committee to pursue a path that accomplishes both.

Thank you for your time and consideration.

Sincerely,

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