

COLORADO COURT OF APPEALS

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Court of Appeals No.: 06CA0733  
City and County of Denver District Court No. 05CV4794  
Honorable Michael A. Martinez, Judge

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Anthony Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Denise Lobato, as an individual and as parent and natural guardian of Taylor Lobato and Alexa Lobato; Jaime Hurtado and Coralee Hurtado, as individuals and as parents and natural guardians of Maria Hurtado and Evan Hurtado; Janet L. Kuntz, as an individual and as parent and natural guardian of Daniel Kuntz and Stacey Kuntz; Pantaleón Villagomez and Maria Villagomez, as individuals and as parents and natural guardians of Chris Villagomez, Monique Villagomez and Angel Villagomez; Linda Warsh, as an individual and as parent and natural guardian of Adam Warsh, Karen Warsh and Ashley Warsh; Elaine Gerdin, as an individual and as parent and natural guardian of N.T., J.G. and N.G.; Dawn Hartung, as an individual and as parent and natural guardian of Q.H.; Paul Lastrella, as an individual and as parent and natural guardian of B.L.; Woodrow Longmire, as an individual and as parent and natural guardian of Tianna Longmire; Steve Seibert and Dana Seibert, as individuals and as parents and natural guardians of Rebecca Seibert and Andrew Seibert; Olivia Wright, as an individual and as parent and natural guardian of A.E. and M.E.; Herbert Conboy and Victoria Conboy, as individuals and as parents and natural guardians of Tabitha Conboy and Timothy Conboy; Terry Hart, as an individual and as parent and natural guardian of Katherine Hart; Larry Howe-Kerr and Kathy Howe-Kerr, as individuals and as parents and natural guardians of Lauren Howe-Kerr and Luke Howe-Kerr; John T. Lane, as an individual; Jennifer Pate, as an individual and as parent and natural guardian of Ethan Pate and Evelyn Pate; Robert L. Podio and Blanche J. Podio, as individuals and as parents and natural guardians of Robert Podio and Samantha Podio; Tami Quandt, as an individual and as parent and natural guardian of Brianna Quandt, Cody Quandt and Levi Quandt; Brenda Christian, as an individual and as parent and natural guardian of Ryan Christian; Toni L. McPeek, as an individual and as parent and natural guardian of M.J. McPeek, Cassie McPeek and Michael McPeek; Christine Tiemann, as an individual and as parent and natural guardian of Emily Tiemann and Zachary Tiemann; Paula VanBeek, as an individual and as parent and natural guardian of Kara VanBeek and Antonius VanBeek; Larry Haller and Pennie Haller, as individuals and as parents and natural guardians of Kelly Haller and Brandy Haller; Tim Hunt and Sabrina Hunt, as individuals and as parents and natural guardians of Shannon Moore-Hiner, Eris Moore, Darean Hunt and Jeffrey Hunt; Mike McCaleb and Julie McCaleb, as individuals and as parents and natural guardians of Rebekka

McCaleb, Layne McCaleb and Lynde McCaleb; Todd Thompson and Judy Thompson, as individuals and as parents and natural guardians of Garson Thompson and Tarek Thompson; Doug Vondy and Denise Vondy, as individuals and as parents and natural guardians of Kyle Leaf and Hannah Vondy; Brad Weisensee and Traci Weisensee, as individuals and as parents and natural guardians of Joseph Weisensee, Anna Weisensee, Amy Weisensee and Elijah Weisensee; Stephen Topping, as an individual and as parent and natural guardian of Michael Topping; Donna Wilson, as an individual and as parent and natural guardian of Ari Wilson, Sarah Patterson, Madelyn Patterson and Taren Wilson-Patterson; David Maes, as an individual and as parent and natural guardian of Cherie Maes; Debbie Gould, as an individual and as parent and natural guardian of Hannah Gould, Ben Gould and Daniel Gould; Lillian Leroux, as an individual and natural guardian of Ari Leroux, Lillian Leroux, Ashley Leroux, Alexandria Leroux and Amber Leroux; Theresa Wrangham, as an individual and natural guardian of Rachel Wrangham and Deanna Wrangham; Alamosa School District, No. RE-11J; Centennial School District No. R-1; Center Consolidated School District No. 26 JT, of the Counties of Saguache and Rio Grande and Alamosa; Creede Consolidated School District No. 1 in the County of Mineral and State of Colorado; Del Norte Consolidated School District No. C-7; Moffat School District No. 2, in the County of Saguache and State of Colorado; Monte Vista School District No. C-8; Mountain Valley School District No. RE 1; North Conejos School District No. RE-1J; Sanford School District No. 6, in the County of Conejos and State of Colorado; Sangre de Cristo School District, No. RE-22J; Sargent School District No. RE-33J; Sierra Grande School District No. R-30; and South Conejos School District No. RE10,

Plaintiffs-Appellants,

v.

State of Colorado; Colorado State Board of Education; William J. Moloney, in his official capacity as Commissioner of Education of the State of Colorado; and Bill Ritter, in his official capacity as Governor of the State of Colorado,

Defendants-Appellees.

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JUDGMENT AFFIRMED

Division IV  
Opinion by: JUDGE WEBB  
Casebolt and Terry, JJ., concur

Announced: January 24, 2008

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This case questions the adequacy of Colorado's school finance system under the state constitution. Plaintiffs, Anthony Lobato, as an individual and as a parent and natural guardian of Taylor and Alexa Lobato, and forty-six other persons in their capacities as taxpayers and parents of children in various Colorado school districts (parents), together with fourteen school districts in the San Luis Valley (school districts), appeal the judgment in favor of defendants, State of Colorado, Colorado State Board of Education, William J. Moloney, in his official capacity as Commissioner of Education of the State of Colorado, and Bill Ritter, in his official capacity as Governor of the State of Colorado, dismissing the complaint for lack of standing and failure to state a claim.

We conclude that as political subdivisions, the school districts lack standing, and that the parents' challenge to the adequacy of school financing is a nonjusticiable political question. Having so concluded, we do not decide whether the parents' claims, if justiciable, are nevertheless precluded by Colorado Constitution article IX, section 17 (Amendment 23). Therefore, we affirm.

## I. Background

### A. Colorado Constitutional Provisions

Three constitutional provisions are at issue in this case: (1) article IX, section 15 (Local Control Clause); (2) article IX, section 2 (Education Clause); and (3) Amendment 23.

The Local Control Clause states in relevant part: “The general assembly shall . . . provide for organization of school districts . . . in each of which shall be established a board of education, to consist of three or more directors . . . . Said directors shall have control of instruction in the public schools of their respective districts.”

The Education Clause states in relevant part: “The general assembly shall . . . provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.”

Amendment 23 states in relevant part:

(1) . . . . In state fiscal year 2001-2002 through state fiscal year 2010-2011, the statewide base per pupil funding . . . for public education . . . and total state funding for all categorical programs shall grow annually at least by the rate of inflation plus an additional one percentage point . . . .

(2) . . . . “Categorical programs” include transportation programs, English language proficiency programs, expelled and at-risk student programs, special education programs (including gifted and talented programs), suspended student programs, vocational education programs, small attendance centers, comprehensive health education programs, and other current and future accountable programs specifically identified in statute as a categorical program . . . .

(3) . . . . [T]he general assembly may annually appropriate, and school districts may annually expend, monies from the state education fund created . . . .

(4)(b) . . . . Monies in the state education fund may only be used to comply with subsection (1) [categorical programs] and for accountable education reform, for accountable programs to meet state academic standards, for class size reduction, for expanding technology education, for improving student safety, for expanding the availability of preschool and kindergarten programs, for performance incentives for teachers, for accountability reporting, or for public school building capital construction.

### B. Plaintiffs’ Allegations

Plaintiffs alleged that (1) the current school finance system violates the mandate of a “thorough and uniform” public education system under the Education Clause; (2) the General Assembly has enacted education reform legislation imposing state-wide education standards and instructional goals which were established without determining whether sufficient financial resources exist to

accomplish those goals; and (3) the school finance system fails to provide sufficient funding to permit school districts either to meet accountability standards and goals, or to provide necessary staffing, services, programs, and facilities to fulfill the goals under federal and state education reform legislation.

Plaintiffs sought a declaration that (1) the Education Clause requires the General Assembly to “provide the financial resources necessary, sufficient, and appropriate to assure that all [school-age children] have an equal opportunity to obtain a constitutionally adequate, quality education”; (2) the school finance system fails to provide funding in an amount and manner to meet the mandate of the Education Clause; and (3) the school finance system violates the rights and authority of the school districts’ local boards of education as provided in the Local Control Clause.

They also sought an injunction compelling defendants to design, enact, fund, and implement a school finance system that provides sufficient funding to maintain a thorough and uniform system of free public schools, and prohibiting defendants from further executing and implementing the current school finance

system. Finally, they asked the trial court to retain jurisdiction over the matter until defendants have complied.

### C. Defendants' Response

Defendants moved to dismiss under C.R.C.P. 12(b)(1) and 12(b)(5). Defendants asserted that, as political subdivisions, the school districts lacked standing because they cannot challenge statutes directing the performance of their duties; that plaintiffs presented a nonjusticiable political question because the Colorado Constitution commits the determination of educational adequacy to the General Assembly and judicial standards for measuring educational adequacy do not exist; that by adopting Amendment 23, the voters have exercised their constitutional authority to determine the constitutionally required level of state funding; and that the school finance system satisfies Amendment 23. They make the same arguments on appeal.

### D. Trial Court's Judgment

The trial court dismissed plaintiffs' claims without taking evidence. It concluded that the funding levels dictated by Amendment 23 were consistent with the Education Clause; that because the school finance system is in accord with Amendment

23, their claims were nonjusticiable; and that as political subdivisions, the school districts lacked standing. The court did not define the phrase “thorough and uniform” contained within the Education Clause.

## II. Standard of Review

C.R.C.P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. *Egle v. City & County of Denver*, 93 P.3d 609, 611 (Colo. App. 2004). A court may determine the jurisdictional issue as a matter of law if it accepts all the plaintiff’s assertions of fact as true. *Hansen v. Long*, 166 P.3d 248, 250 (Colo. App. 2007). On appeal from a dismissal for lack of subject matter jurisdiction, we review a trial court’s factual findings for clear error and its legal conclusions de novo. *Egle*, 93 P.3d at 611.

A C.R.C.P. 12(b)(5) motion to dismiss tests the sufficiency of the complaint. *Wagner v. Grange Ins. Ass’n*, 166 P.3d 304, 306 (Colo. App. 2007). A reviewing court must “accept all matters of material fact in the complaint as true and view the allegations in the light most favorable to the plaintiff.” *Id.* at 306-07 (quoting *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004)). A C.R.C.P. 12(b)(5) motion should only be granted when “the

plaintiff's factual allegations cannot support a claim as a matter of law." *Id.* at 307 (quoting *BRW*, 99 P.3d at 71).

We review such a ruling de novo. *Id.* Notwithstanding the allegations of a complaint, interpretation of a constitutional provision remains a question of law that we also review de novo. *See Bd. of County Comm'rs v. City & County of Broomfield*, 62 P.3d 1086, 1088, 1091 (Colo. App. 2002)(motion for judgment on the pleadings).

### III. Standing

Standing is a limitation on a court's subject matter jurisdiction that we review de novo. *People in Interest of J.C.S.*, 169 P.3d 240, 243 (Colo. App. 2007); *First Horizon Merch. Servs., Inc. v. Wellspring Capital Mgmt., LLC*, 166 P.3d 166, 180 (Colo. App. 2007). It has been described as a component of justiciability. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436 (Colo. 2000).

A plaintiff has standing if (1) the plaintiff suffered an actual injury (2) to a legally protected interest. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004); *J.C.S.*, 169 P.3d at 245.

“A plaintiff satisfies the injury in fact requirement by demonstrating that the activity complained of has caused or has threatened to cause injury to the plaintiff . . . .” *J.C.S.*, 169 P.3d at 245 (quoting *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992)). The injury-in-fact limitation is necessary under the separation of powers doctrine in the Colorado Constitution. *Ainscough*, 90 P.3d at 856.

The legally protected interest requirement presents the question whether the plaintiff has a claim for relief under the constitution, the common law, a statute, a rule, or a regulation. *Id.*

#### A. School Districts’ Standing

The school districts contend the trial court erred when it concluded that, as political subdivisions, they lack standing. We disagree.

A political subdivision lacks standing to challenge the constitutionality of a statute concerning its performance. *Denver Ass’n for Retarded Children, Inc. v. Sch. Dist. No. 1*, 188 Colo. 310, 316, 535 P.2d 200, 204 (1975); *Clear Creek Sch. Dist. RE-1 v. Holmes*, 628 P.2d 154, 155 (Colo. App. 1981).

A school district is a subordinate division of the state, exercising authority to effectuate the state's education purposes. *Holmes*, 628 P.2d at 155; *Bagby v. Sch. Dist. No. 1*, 186 Colo. 428, 435, 528 P.2d 1299, 1302 (1974).

An exception to the political subdivision rule is recognized when the constitution or a statute grants a political subdivision express or implied authority to file a civil action against the state. *Romer v. Fountain Sanitation Dist.*, 898 P.2d 37, 40 (Colo. 1995); see also *East Grand County Sch. Dist. No. 2 v. Town of Winter Park*, 739 P.2d 862, 865 (Colo. App. 1987)(school district had standing to challenge enactment of urban renewal plan because a statute allowed "an affected school district to participate in an advisory capacity with respect to the implementation of tax increment financing in an urban renewal project").

We reject the school districts' assertion that this exception applies because the Local Control Clause vests in them a legally protected interest in controlling instruction in schools, including funding.

The Local Control Clause links control over instruction to locally raised funds, not to state funding. See *Owens v. Colorado*

*Congress of Parents, Teachers & Students*, 92 P.3d 933, 943 (Colo. 2004)(state program requiring school districts to pay funds from locally raised tax revenues to parents, who then must pay those funds to nonpublic schools, denied local school districts discretion to allocate locally raised funds under the Local Control Clause); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982)(Local Control Clause protects school districts against legislative efforts to require them to spend locally raised funds on instruction that the school district does not control); *Belier v. Wilson*, 59 Colo. 96, 98, 147 P. 355, 356 (1915) (taxes raised in one school district cannot be used to fund a school in another district under the Local Control Clause).

Therefore, we conclude that the trial court properly dismissed the school districts for lack of standing because the Local Control Clause does not give them authority to challenge how the General Assembly appropriates state funds to finance education.

#### B. Parents' Standing

The jurisdictional nature of standing permits a judicial inquiry, even if lack of standing was not raised by the parties. *Romer v. Bd. of County Comm'rs*, 956 P.2d 566, 586 (Colo. 1998);

*J.C.S.*, 169 P.3d at 244. We address sua sponte whether the parents have standing, and conclude that they do.

### 1. Injury-in-Fact

“To determine whether there is an injury-in-fact, we accept as true the allegations set forth in the complaint.” *Ainscough*, 90 P.3d at 857. Parents can sue on behalf of their children. *See Barlett v. Elgin*, 973 P.2d 694, 697 (Colo. App. 1998), *aff’d*, 994 P.2d 411 (Colo. 1999).

Here, the parents allege that the cost of educating students in accordance with the Education Clause and education reform legislation exceeds the maximum amount of funding available under the current school finance system, and thus without sufficient financial resources, students do not have adequate access to (1) instructional materials (i.e., textbooks, computers, software, audio-visual equipment, and library books) and (2) programs and services for underserved and at-risk students, gifted and talented students, and non-college bound students.

Accepting these allegations as true, we conclude that inadequate access to public education is an injury-in-fact. *See Ainscough*, 90 P.3d at 856 (Colorado case law provides “broad

taxpayer standing in the trial and appellate courts”; standing is conferred when “a plaintiff argues that a governmental action that harms [the plaintiff] is unconstitutional”); *Barber v. Ritter*, 170 P.3d 763, 768 (Colo. App. 2007)(*cert. granted* Nov. 13, 2007)(“In cases involving a taxpayer’s standing, general allegations of injury are sufficient . . . .”).

## 2. Legally Protected Interest

An interest is legally protected if the constitution, the common law, a statute, a rule, or a regulation provides the plaintiff with a claim for relief. *Ainscough*, 90 P.3d at 856. This interest may be “having a government that acts within the boundaries of our state constitution.” *Id.*

According to the parents, the Education Clause gives children a legally protected interest in a “thorough and uniform” free public school education system that guarantees them “a constitutionally adequate, quality public education.” Under the parents’ interpretation of the Education Clause, they have identified a legally protected interest at issue. *See Dunlap*, 829 P.2d at 1289 (whether a plaintiff has standing is inextricably tied to the merits of the case); *Wilson v. Prentiss*, 140 P.3d 288, 290 (Colo. App. 2006)(“Standing is

a threshold jurisdictional question that must be determined before a case may be decided on the merits.”).

Thus, having subject matter jurisdiction because of the parents’ standing, we turn to the political question limitation on justiciability. Because we have concluded that only the parents have standing, the remainder of this opinion is limited to their allegations.

#### IV. Justiciability

We conclude that the parents’ claims are barred by the political question doctrine, but unlike the trial court, we do not rely on Amendment 23.

##### A. *Lujan* and Justiciability

Initially, we reject the parents’ argument that *Lujan* impliedly establishes claims concerning the quality and level of funding under the Education Clause to be justiciable.

The majority opinion does not mention justiciability. Although the *Lujan* court exercised jurisdiction, “there is a significant difference between determining whether a . . . court has ‘jurisdiction of the subject matter’ and determining whether a cause over which a court has subject matter jurisdiction is ‘justiciable.’”

*Powell v. McCormack*, 395 U.S. 486, 512 (1969)(citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)).

In *Baker*, the Supreme Court explained the distinction between “lack of federal jurisdiction” and “inappropriateness of subject matter for judicial consideration.” See *Nebraska Coalition for Educ. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 174-75 (Neb. 2007). “Unlike the standing doctrine of justiciability, the political question doctrine is not entangled with subject matter jurisdiction.” *Id.* at 175 (citing *Powell* and *Baker*)(footnote omitted).

#### B. The Majority Rule

The parents assert that the trial court disregarded the “overwhelming majority” of jurisdictions which have held that challenges to their states’ school finance systems under the relevant education clauses are justiciable. They cite to *Neeley v. West Orange-Cove Consolidated Independent School District*, 176 S.W.3d 746, 780-81 nn.182-83 (Tex. 2005), as demonstrating that states addressing this issue are split fifteen to four in their favor.

Based on our review of this authority (see Appendix A), we feel no compulsion to follow the majority rule because of anomalies such as the following:

- The constitutions of Idaho, New Jersey, Pennsylvania, Ohio, West Virginia, and Wyoming include the word “thorough.” Of these states, only Pennsylvania has held the funding dispute nonjusticiable. But in New Jersey, West Virginia, and Wyoming, education is a fundamental constitutional right. By contrast, the *Lujan* majority held that “[a] heartfelt recognition and endorsement of the importance of an education does not elevate a public education to a fundamental interest warranting strict scrutiny.” 649 P.2d at 1018.
- The constitutions of Arkansas, Florida, Kentucky, and Illinois contain the term “efficient,” but not “thorough.” These states are evenly split on justiciability.
- Language most consistent with a qualitative guarantee (“high quality”) appears in the constitutions of Florida and Illinois, but both states have ruled the funding issue nonjusticiable.
- The constitutions of Massachusetts and New Hampshire contain only very general language (“to cherish the interests of literature and the sciences”), but both states have found justiciability.

- Comparably amorphous language appears in the constitutions of Nebraska (“free instruction in the common schools”) and Oklahoma (“a system of free public schools”), but neither state has found justiciability.

In our view, none of these terms has sufficient intrinsic meaning to explain such different resolutions of similar funding claims. We perceive that these diverse outcomes are not based on the constitutional language at issue alone, but often “revolve around policy choices and value determinations.” *Heineman*, 731 N.W.2d at 177 (citing *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

Instead of dealing with “policy choices and value determinations,” we adopt the minority view that such claims raise a nonjusticiable political question because, as discussed in the remainder of this section IV, that view is more consistent with the principle of judicial restraint. *See People v. Summit*, 183 Colo. 421, 426, 517 P.2d 850, 853 (1974)(refusing to strike the statutory classification of marijuana as a narcotic because it was “a matter strictly for the legislature”); *cf. Deriso v. Cooper*, 272 S.E.2d 274, 277 (Ga. 1980)(declining to address “the myriad other matter

involved in everyday administration of a public school system which the courts would face were they to embark upon the course of judicial activism desired by the school patrons. Resolution of these discretionary policy determinations can best be made by other branches of government.”).

### C. Nonjusticiable Political Question

*Baker* sets forth six independent factors to review in determining whether a nonjusticiable political question has been raised: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department”; or (2) “a lack of judicially discoverable and manageable standards for resolving it”; or (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”; or (4) “the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government”; or (5) “an unusual need for unquestioning adherence to a political decision already made”; or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Vieth v. Jubelirer*, 541 U.S. 267,

277-78 (2004)(quoting *Baker*, 369 U.S. at 217); *Meyer v. Lamm*, 846 P.2d 862, 872-73 (Colo. 1993).

These factors are “probably listed in descending order of both importance and certainty.” *Vieth*, 541 U.S. at 277. A court should not dismiss a case for lack of justiciability “[u]nless one of these formulations is inextricable from the case at bar.” *Baker*, 369 U.S. at 217; see *Schneider v. Kissinger*, 412 F.3d 190, 194 (D.C. Cir. 2005)(“To find a political question, we need only conclude that one factor is present, not all.”). Claims that present a political question must be dismissed. See 13A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3534.3 (2007).

For the following reasons, we conclude that the first through fourth *Baker* factors apply to this case, and therefore we agree with the trial court’s dismissal.

1. Textually Demonstrable Constitutional  
Commitment of Issue to Coordinate Political Department

The General Assembly has plenary power to enact legislation, including appropriations. Colo. Const. art. 5, § 32; *Colorado Gen. Assembly v. Owens*, 136 P.3d 262, 266 (Colo. 2006); *Barber*, 170 P.3d at 774. In addition, the Education Clause specifically directs

the General Assembly to establish and maintain the system of free public education. Hence, “the fashioning of a constitutional system for financing elementary and secondary public education in Colorado is not only the proper function of the General Assembly, but this function is expressly mandated by the Colorado Constitution.” *Lujan*, 649 P.2d at 1024.

## 2. Lack of Judicially Discoverable and Manageable Standards for Resolving Issue

“[L]ack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.” *Nixon v. United States*, 506 U.S. 224, 228-29 (1993). Thus, we consider the meaning of “thorough and uniform,” on which the parents base their claims, but discern in this language no such “manageable standards” for determining a qualitative educational guarantee, as the parents assert, with which a trial court could measure the constitutional adequacy of funding for education.

Under article VI, section 1 of the Colorado Constitution, the judicial branch is empowered to construe the constitution’s

meaning. *Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1272 (Colo. 2001).

We afford constitutional language its ordinary and common meaning; where the language is clear, we interpret it as written. *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005). We construe constitutional provisions as a whole, giving effect to every word whenever possible. *Id.*

In addressing the meaning of the Education Clause, the parties cite no constitutional history. Nor did the court in *Lujan* “find any historical background to glean guidance regarding the intention of the framers” regarding the meaning of “thorough and uniform.” 649 P.2d at 1024-25.

The Education Clause contains two operative terms: thorough and uniform. “Thorough” is defined as “marked by completeness” and “carried through to completion esp. [sic] with full attention to details.” *Webster's Third New International Dictionary* 2380 (2002). “Uniform” is defined as “marked by lack of variation, diversity, change in form, manner, worth, or degree.” *Id.* at 2498.

The ordinary meaning of those words does not provide a standard to determine whether there is a qualitative educational

guarantee urged by the parents. *See Gresh v. Balink*, 148 P.3d 419, 423 (Colo. App. 2006) (“[I]nterpretation cannot solve the lack of clarity or definition in the constitutional provision itself. Instead, that uncertainty is for the General Assembly to elucidate with implementing language or, ultimately, for the voting public to ameliorate by amending the constitutional provision.”).

*Lujan* does not support finding such a standard in the term “uniform.” Although the *Lujan* court addressed only equal protection under the Education Clause, it determined that a “thorough and uniform” system did not require identical per pupil educational expenditures. 649 P.2d at 1025.

The *Lujan* majority explained that the Education Clause “mandates the General Assembly to provide to each school age child the opportunity to receive a free education, *and to establish guidelines* for a thorough and uniform system of public schools.” *Id.* at 1018-19 (emphasis added). The reference to “guidelines” in *Lujan* weighs against interpreting “thorough and uniform” as providing the means to define any such qualitative educational guarantee. *See Webster’s Third New International Dictionary* at 1009 (“guideline: . . . (c) an indication or outline of future policy or

conduct (as of a government)"); *cf. Jaynes v. Centura Health Corp.*, 148 P.3d 241, 249 (Colo. App. 2006)(employment performance policy setting forth “guidelines” gave management discretion in dealing with unacceptable employee behavior but did not create an enforceable right).

We are not persuaded otherwise by the parents’ reliance on cases such as *Fangman v. Moyers*, 90 Colo. 308, 311-12, 8 P.2d 762, 764 (1932), which merely stand for the proposition that the Education Clause assures all children access to free instruction in public schools. The parents do not assert that the school finance system fails to provide resources essential to free basic instruction. Rather, they argue that the system is unconstitutional because it does not provide “a constitutionally adequate, *quality* public education.” (Emphasis added.)

But the contours of a “quality” public education cannot be ascertained by judicially discoverable or manageable standards because the Education Clause “provides no principled basis for a judicial definition.” *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996).

Although the *Edgar* court dealt with constitutional language involving an “efficient system of high quality public educational institutions,” such language is less amorphous than “thorough and uniform.” Nevertheless, that court explained:

It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise . . . . Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.

To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois . . . . In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.

*Id.*; see also *Heineman*, 731 N.W.2d at 180 (“We interpret the paucity of standards in the free instruction clause as the framers’ intent to commit the determination of adequate school funding solely to the legislature’s discretion, greater resources, and expertise.”).

Cases from other jurisdictions such as Idaho, New Jersey, Ohio, and Wyoming, which in addressing similar claims have defined “thorough” based on constitutional history and legislative definitions of constitutional language, are inapposite because these extrinsic resources do not exist in Colorado. (See Appendix B.)

Even without such extrinsic resources, some courts have arrived at different definitions of “thorough,” and those disparate definitions have had a significant impact on the courts’ interpretation of whether a legislative obligation exists to fund a certain level of quality in public education. *Compare Robinson v. Cahill*, 287 A.2d 187, 211 (N.J. Super. Ct. Law Div. 1972)(“thorough” means “more than simply adequate or minimal”), *modified*, 303 A.2d 273 (N.J. 1973), *and Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 920 (Idaho 1998)(“Even without these expressions from the Legislature and the State Board, . . . we conclude that a safe environment conducive to learning is inherently a part of a thorough system of public, free common schools . . . .”), *with Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979)(a system of schools that “develops, *as best the state of education expertise allows*, the minds, bodies and social morality of

its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically” (emphasis added)).

We are unable to discern any textual basis for these different definitions. *Cf. Fraternal Order of Police, Colo. Lodge No. 27 v. City & County of Denver*, 926 P.2d 582, 591 (Colo. 1996)(noting “direct textual support in the Colorado constitution”). The absence of textual support again suggests that these courts are making policy choices based on value judgments. *See Heineman*, 731 N.W.2d at 177. We do not perceive policy arguments as a sufficient basis for divining constitutional standards that a trial court could use to assess the adequacy of educational funding.

Nevertheless, the parents assert that declining to find a qualitative educational guarantee in the Education Clause would abrogate the judicial branch’s obligation to interpret the constitution. To the contrary, we have considered the meaning of “thorough and uniform,” and have concluded that this language does not provide any manageable standard for determining the qualitative guarantee asserted by the parents as a method of assessing adequate funding.

### 3. Impossibility of Deciding Issue Without Making Policy Determinations Requiring Nonjudicial Discretion

A court must not make or weigh policy. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000); *Concerned Parents of Pueblo, Inc. v. Gilmore*, 47 P.3d 311, 313 (Colo. 2002); see also *Martin v. Union Pac. R.R. Co.*, \_\_\_ P.3d \_\_\_, \_\_\_ (Colo. App. No. 05CA1917, Sept. 20, 2007) (“[P]olicy judgments are the exclusive province of the General Assembly.”).

The *Lujan* majority recognized that the “best public policy which can be adopted to attain quality school and equal educational opportunity for all children” lies within the General Assembly’s domain. 649 P.2d at 1018; cf. *Denver Parents Ass’n v. Denver Bd. of Educ.*, 10 P.3d 662, 665 (Colo. App. 2000) (“Plaintiffs cannot hold a public school district to the implementation of its educational objectives in a judicial setting . . . . [S]uch policy issues should be addressed at the ballot box, not presented as a judicially enforceable contract claim.”).

The *Lujan* majority rejected a “direct correlation between school financing and educational quality and opportunity” as the basis for a decision, explaining that any such correlation involved

“the realm of social policy.” 649 P.2d at 1018. Because the relationship between school funding and educational quality also requires weighing federal and state mandates under the education reform legislation, school districts’ local efforts, and the State’s ability to provide funding, courts cannot “make that determination without deciding matters of educational policy in disregard of the policy and fiscal choices” already made by the General Assembly. *Heineman*, 731 N.W.2d at 183; *see also Edgar*, 672 N.E.2d at 1191 (“Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.”); *Oklahoma Educ. Ass’n v. State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1066 (Okla. 2007)(“To do as plaintiffs ask would require this court to invade the Legislature’s power to determine policy. This we are constitutionally prohibited from doing.”); *Marrero v. Commonwealth*, 739 A.2d 110, 111 (Pa. 1999)(“[I]t would be impossible to resolve the claims without making an initial policy determination of a kind which is clearly of legislative, and not judicial, discretion.”).

#### 4. Impossibility of Resolving Issue Without Disregarding General Assembly's Authority

Finding and enforcing the parents' standard of a "constitutionally adequate, quality public education" would "present a substantial risk of judicial intrusion into the powers and responsibilities" of the General Assembly. *Coalition for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996). Determining the changes necessary to the school finance system would require a court to weigh the General Assembly's judgments as to both education reform and financing. Hence, such evaluation of the General Assembly's action or inaction as to school financing "would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature." *Ex parte James*, 836 So. 2d 813, 818 (Ala. 2002).

Moreover, because of the funding limitations in Colorado Constitution article X, section 20, the Taxpayer's Bill of Rights (TABOR), a judicial requirement of additional school funding could force the General Assembly to reduce general fund appropriations in other areas. Such action would embroil the courts in the appropriation and budgeting process. *Cf. Chiles*, 680 So. 2d at 406-

07 (refusing to declare that the present school funding level was constitutionally inadequate because “the courts would necessarily be required to subjectively evaluate the Legislature’s value judgments as to the spending priorities to be assigned to the state’s many needs, education being one among them”).

#### 5. *Baker* Factors (5) and (6)

The remaining *Baker* factors have not been discussed in any Colorado case, nor are they well defined in federal precedent or secondary authority. 13A *Federal Practice and Procedure* § 3534. We decline to address these factors because even one factor is sufficient to find that a political question exists, and we have concluded that the first through fourth factors apply. See *Schneider*, 412 F.3d at 194.

In sum, “[d]eciding whether a matter has . . . been committed by the Constitution to another branch of government . . . is itself a delicate exercise in constitutional interpretation.” *Baker*, 369 U.S. at 211. However, “[w]hen a court concludes that an issue presents a nonjusticiable political question, it declines to address the merits of that issue” and “acknowledges the possibility that a

constitutional provision may not be judicially enforceable.” *United States Dep’t of Commerce v. Montana*, 503 U.S. 442, 457-58 (1992).

Accordingly, the political question doctrine compels us to reject the parents’ invitation to have the trial court determine what level of school financing the General Assembly must provide.

#### D. Impossibility of Immediate Resolution

We also feel constrained to resolve any doubt over justiciability of the parents’ claims against them because ongoing judicial review of the school finance system under the Education Clause raises the spectre of lengthy and potentially unending litigation. *See Heineman*, 731 N.W.2d at 173 (“A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.”).

Here, the parents sought injunctive relief, as set forth above, and requested that the trial court retain jurisdiction over the matter until defendants implement and fund a school finance system that meets the Education Clause’s alleged qualitative guarantee. Thus, “if the [c]ourt were to declare present funding levels ‘inadequate,’ presumably the [parents] would expect the [c]ourt to evaluate, and

either affirm or set aside, future appropriation decisions . . . .”

*Chiles*, 680 So. 2d at 407. In such proceedings, “educational philosophy and needs change constantly.” *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1258 (Wyo. 1995).

Despite the parents’ request for injunctive relief, their reply brief acknowledges that judicial power is limited “to the extent that a court may not order the legislature ‘to convene, consider issues, or enact specific legislation,’ *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002),” and states that the parents “do not ask the court to direct the General Assembly to convene or adopt specific legislation.”

The declaratory relief sought by the parents would require the trial court to hear evidence of competing policy choices and prioritize financial resources, a process better suited to legislative inquiry than to judicial fact finding. *Cf. Dean v. District of Columbia*, 653 A.2d 307, 326 (D.C. 1995)(Ferren, J., concurring in part and dissenting in part)(“[T]here is quite a difference between saying a court should not engage in *any* legislative fact-finding and saying a court should stay away from *particular* legislative fact-

efficient” education under its constitution. See *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985); *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973).

We are cautioned by the experience of other courts that have held such challenges to be justiciable but then been unable to achieve prompt resolution.

The Texas Supreme Court has addressed whether its school finance system is “efficient” under its education clause six times since 1989. See *Neeley v. West Orange-Cove*, 176 S.W.3d 746 (Tex. 2005); *West Orange Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991).

Despite “issuing four decisions in this case over the past nine years,” the Alabama Supreme Court conceded that “the pronouncement of a specific remedy ‘from the bench’ would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature.” *Ex parte James*, 836 So. 2d at 816-17.

Therefore, we agree with the Nebraska Supreme Court: “The landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states’ school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp.” *Heineman*, 731 N.W.2d at 183.

Accordingly, we conclude that the parents’ claims were properly dismissed as a nonjusticiable political question.

The judgment is affirmed.

JUDGE CASEBOLT and JUDGE TERRY concur.