

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue, Denver, CO 80203

Lower Court: Court of Appeals, State of Colorado
Court of Appeals Case Number: 06CA733

District Court, City and County of Denver, CO
Trial Court Judge: Hon. Michael A. Martinez
Trial Court Case Number: 05 CV 4794

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and
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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. RE1J; 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.

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BRIEF OF *AMICUS CURIAE* PADRES UNIDOS AND META

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Padres Unidos and the Multicultural Education, Training & Advocacy, Inc. (“META”) submit this brief as *amicus curiae* in support of Appellants-Plaintiffs, Anthony Lobato, *et al.* Padres Unidos and META respectfully urge the Court to reverse the decision of the lower courts and remand this case to the district court for a trial on the merits.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Padres Unidos is a parent and community organization borne out of the struggle for educational justice. Padres Unidos is a multi-generational organization led by people of color who work for equality and justice in education, racial justice for youth, immigrant rights and the right to quality healthcare for all. In the area of education, Padres Unidos has advocated on behalf of low income and English Language Learner (“ELL”) students¹ and their parents in schools across the State of Colorado. Padres Unidos realizes that often the true educational needs of the low income and ELL children and parents it represents are not heard in the General Assembly. Accordingly, Padres Unidos submits this brief to safeguard the rights of children to seek redress in the courts when the

¹ For purposes of this brief, students lacking English proficiency are referred to as English Language Learner students (“ELL students”), which shares the same meaning as “students whose dominant language is not English” under the English Language Proficiency Act, COLO. REV. STAT. ANN. § 22-24-103 (2007).

General Assembly fails to provide them with an adequate education as required under the Colorado Constitution.

META is a national non-profit organization formed in 1983 to further the interest of low income ELL children. META's work includes policy research, parent training and direct advocacy around ELL issues including a focus on the need for adequate funding for specialized programs for ELL students that will allow their full participation in the education system and, ultimately, allow them to participate fully in the economic, political and social realms of society. In particular, META has worked in Colorado directly with community organizations in the Latino community as well as with individual parents of ELL students. META believes that the need for adequate funding of ELL programs in Colorado raises profoundly important issues which affect the rights of ELL students and their families and that these students and families deserve their day in court.

SUMMARY OF ARGUMENT

Colorado schoolchildren and public school districts should not be denied their day in court to prove whether Defendants have failed in their duty to provide for “a thorough and uniform system of free public schools throughout the state” as

required by the Colorado Constitution. COLO. CONST. Art. IX, § 2. Under the State's educational system, Defendants have continued to ratchet up the standards both in the State's required curriculum programs and in the accountability systems for both students and school districts. While neither Padres Unidos nor META complain about the more challenging standards, they do argue that Defendants have paid no mind to the continuing obligation to fund adequately the educational needs of students in order to meet those rising standards.

Defendants' failure is particularly woeful when considering the needs of some of the State's most vulnerable student groups, English Language Learner ("ELL") and at-risk students. Although both student groups encompass a broad spectrum of race and socioeconomic categories, ELL and at-risk students are largely comprised of minority and low-income students. *See* Complaint ¶ 25 (CR00025).² Resultantly, their true educational needs are often neglected by the state legislature. *Id.*

Padres Unidos and META do not seek to invade the province of the General Assembly, but only to hold the Assembly itself accountable to the students' educational needs as required by the Colorado Constitution. The State of

² "CR" refers to the District Court Clerk's Record.

Colorado has undergone a significant swing in the demographics of its population over the last 10 years, and it is incumbent upon Defendants and the State as a whole to abide strictly by their obligations set forth in the Constitution. Padres Unidos and META ask that this Court allow public school students and school districts the opportunity to prove their claim that the General Assembly has not fulfilled their constitutional duty to provide a thorough and uniform system. Otherwise, the State's most vulnerable students, including ELL and low income students, may never acquire the educational opportunities that enable them "to participate meaningfully in the civic, political, economic, social and other activities of our society and world . . ." *Id.* (CR0004).

ARGUMENT

The State of Colorado has undergone a significant change in the demographics of its public schools over the past decade. What was once a relatively affluent, substantially Anglo-majority public school student population has now become much more diverse in terms of race and socioeconomic status. For example, in 2007, Colorado enrolled in its public schools 802,639 students.³ Of that figure, Latino students represented 27.9% (a 69% increase over the last ten years), and minority students overall constituted 38.5% of the public school

enrollment. *Id.* Meanwhile, the percentage of white students fell from 71.3% in 1997 to 61.5% in 2007. *Id.*

Between 2000 and 2006, the State's rate of children living in poverty increased more rapidly than any other state.⁴ In 2007, students participating in the Free and Reduced Price Lunch Program constituted 35% of the total student population (27.88% on the Free Lunch Program and 6.97% on the Reduced Price Lunch Program).⁵ *See* App. 001.

Colorado's student population has not only become more racially and economically diverse, but the number of students entering the public schools lacking English proficiency has also risen. Over the last thirteen years, Colorado's ELL enrollment grew at a rate of 297% compared to the State's total growth rate

³ App. 001, Colorado Dept. of Educ., Pupil Counts by Racial/ Ethnic Group.

⁴ *See* App. 007, Colorado Dept. of Educ., *English Language Learners in Colorado: a State of the State 2008* 13, http://www.cde.state.co.us/cde_english/download/Resources-Links/State%20of%20the%20State%202008.pdf (last visited Nov. 21, 2008).

⁵ To be eligible for free lunch, children must come from a household with an income at or below 130 percent of federal income poverty guidelines. Reduced price lunch eligibility includes children from household income between 130 percent and 185 percent of poverty guidelines. USDA National School Lunch Program, *Fact Sheet*, <http://www.fns.usda.gov/cnd/Lunch/AboutLunch/NSLPFactSheet.pdf> (last visited Nov. 24, 2008). For purposes of this brief, "low income" students is defined as students on the Free and Reduced Price Lunch Programs.

of 16.6%. *See* App. 004. In the school year 2007-08, ELL students comprised 12% of the total student population.⁶

As the increasing diversity brings benefits to the learning environment, the increasing number of low income and ELL students also presents new challenges to the public schools. Nobody can dispute the fact that all children can succeed, if given the proper resources, support and teaching. However, as the State's accountability standards for the school districts and the individual students continue to increase, the funding system should reflect the additional resources that are necessary in order to provide a thorough and uniform system that brings equal opportunities to all children. Otherwise, not only will those students never realize their full potential, but the State of Colorado will not reap the benefits and could, instead, burden itself with the consequences of a poorly educated workforce.⁷

⁶ *See* App. 011, CDE Public Finance Unit, *Understanding Colorado School Finance and Categorical Funding* (2007). Colorado divides ELL students into three subgroups: 1) a student who comprehends or speaks a language other than English and does not speak English ("NEP"); 2) a student who comprehends or speaks some English but whose predominant comprehension and speech is in a language other than English ("LEP"); and 3) a student who comprehends or speaks English and one or more other languages and whose dominant language is difficult to determine ("FEP"). *Id.*

⁷ *Cf.* App. 013-014, Steve H. Murdock, *The Texas Challenge in the Twenty-First Century: Implications of Population Change for the Future of Texas*, p. 398 (December 2002), full text available at <http://txsdc.utsa.edu/download/pdf/TxChall2002.pdf>. (warning that if existing gaps between Anglos and minorities in educational attainment levels and household income persist, Texas will:

I. English Language Learner and At-Risk Students Have a Justiciable Claim to a Constitutionally Adequate Public School Finance System.

A. The Challenges Faced by ELL Students

Colorado recognizes that some students enter its public school system without full English language proficiency and that those students require special language programs in order to become academically proficient in English. The State’s English Language Proficiency Act mandates that language programs “improve the English language skills” of students “whose educational potential is severely restricted because a language other than English is their primary means of communication.” COLO. REV. STAT. ANN. § 22-14-102 (2007). In order to carry out the transitional programs, the State directs school districts to: 1) identify those students whose dominant language may not be English; 2) assess such students and monitor their progress; 3) submit certifications to the Department on number

have a population that not only will be poorer, less well educated, and more in need of numerous forms of state services than its present population but also less able to support such services. It is likely to be less competitive in the increasingly international labor and other markets. [However] if socioeconomic differentials between demographic groups were to be reduced through increased education and other means, Texas’ population growth could be a source of increased private and public sector resource. Coupled with such growth would be increased competitiveness and a population whose diversity may create a competitive advantage relative to that of other states in competing in international markets.)

Although this state demography report concerns Texas, the warnings are relevant to the similar challenges faced by Colorado.

of ELL students and the number of language; and 4) administer and provide programs for these students. *Id.* § 22-24-105.

In selecting an appropriate program, school districts are not free to submerge the ELL students in English instruction without any modifications. *See Lau v. Nichols*, 414 U.S. 563, 568 (1974); *see also Keyes v. School Dist. No. 1*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (citing *Castañeda v. Pickard*, 648 F.2d 989, 1008 (5th Cir. 1981)). Rather, the ELL programs must be based on sound pedagogical theories and the districts must implement the programs with the appropriate resources necessary to carry out the program so ELL students may become proficient in the English language.⁸ *Id.* The programs must also be successful. *Id.* Although the nature of the programs may differ from district to district,⁹ there are a number of important research-based components and related programs that schools districts must consider adopting, regardless of the type of language program selected. Those components and programs include adequate

⁸ *See also* App. 018, Colorado Department of Education, *Guidebook on Designing, Delivering, and Evaluating Services for English Language Learners* 20 (Rev. April 2008) (“2008 ELL Guidebook,” hereafter), http://www.cde.state.co.us/cde_english/download/ELLGuidebook/Final%20Guidebook07-08.pdf (last visited Nov. 20, 2008) (acknowledging that all ELL students “must be placed in a sound LEIP [Language Instructional Educational Program]”).

⁹ For example, bilingual programs use the student’s native language as a tool to help them learn English. In contrast, transitional English as a Second Language programs incorporate a number of teaching strategies and modifications to help students learn English but do not primarily focus on using the student’s native language. *See* App. 018-019, 2008 ELL Guidebook.

materials, preschool programs, extended learning time, tutoring, family support and parental involvement, professional development and support, class size and technology.

1. Adequate Materials

Because transitional language programs supplement and modify the State's general curriculum programs, they require additional books and other curricular materials. For example, students in dual language or bilingual instructional programs require books in their native language to help them learn both the content (i.e., science or social studies) and the English language.¹⁰ In addition, schools serving ELL students need libraries and materials that span more than one language and often cross many grade levels so students can sustain good reading habits and literacy.¹¹

2. Preschool

School districts must also consider quality preschool programs for ELL

¹⁰ Dual language programs, also known as Two-Way Bilingual Immersion, include models in which the students in one-half of the class are native English speakers and the other half are ELL students. These transitional programs are found to be among the most successful models to date. See Wayne P. Thomas & Virginia P. Collier, *The Astounding Effectiveness of Dual Language Education for All*, NABE Journal of Research and Practice, Vol. 2: 1, 12 (Winter 2004), <http://njrp.tamu.edu/2004.htm> (last visited Nov. 23, 2008).

¹¹ Patricia Gandara & Russell M. Rumberger, *Resource Needs for California's English Learners*. *University of California* 54 (Language Minority Research Institute) (Dec. 30, 2006),

students to help them begin to learn the English language at the earliest time possible. In a study of Mexican American families from homes where Spanish was the primary language, children who participated in the pre-school language program at the Houston Parent-Child Development Center were less likely to be considered limited in English proficiency at the time they enrolled in kindergarten when compared to similar children in the control group (14% vs. 36%).¹² More recently, researchers found that attending preschool raises reading and math scores as much for immigrant children as for other children and also raised the English-language proficiency of immigrant students.¹³

3. Extended Learning Time

ELL students are also affected by the amount of instructional time they

http://lmri.ucsb.edu/publications/07_gandara-rumberger.pdf (last visited Nov. 23, 2008); *see also* App. 020, 2008 ELL Guidebook 37 (“instructional materials”).

¹² *See* Lynn L. Karoly, *et al.*, *Investing in Our Children: What We Know and Don't Know About the Costs and Benefits of Early Childhood Interventions* 28 (RAND Corporation 1998), http://www.rand.org/pubs/monograph_reports/MR898/MR-898.Ch2.pdf. (last visited Nov. 23, 2008). Similarly, in a study of the effects of Oklahoma's pre-K program on Hispanic children that controlled for age and other demographic variables, researchers found that Hispanic students experienced substantial improvements in pre-reading, pre-writing, and pre-math skills, and that students whose parents speak Spanish at home or were born in Mexico benefited most. William T. Gormley, *The Effects of Oklahoma's Pre-K Program on Hispanic Children* 2 (2007) (Paper presented at the Annual Association for Public Policy Analysis and Management), <http://www.crocus.georgetown.edu/reports/CROCUSworkingpaper11.pdf> (last visited Nov. 23, 2008). Students whose teacher spoke Spanish seemed to benefit more than other students. *Id.*

receive in a given day. For example, ELL students in the extended learning program “LA’s Best,” “were more likely to become proficient in English than their nonparticipating peers.”¹⁴ Other research has demonstrated that additional time such as a longer school day or year is critical for ELL students so that they can meet the goal of a comprehensive instructional program that addresses both English language development and the core curriculum.¹⁵

4. Tutoring

ELL students also benefit from tutoring. The most powerful and effective strategy to help ELL students meet state standards is individual one-to-one tutoring provided by licensed teachers.¹⁶ In a series of studies of one-to-one tutoring programs in early childhood schools, researchers found that comprehensive programs that were designed for ELL students and employed certified teachers were successful in helping students attain English language

¹³ Katherine Magnuson, *Preschool and School Readiness of Children of Immigrants* 87 SOC. SCIENCE QUARTERLY 1241-1262 (2006), abstract available at <http://www3.interscience.wiley.com/journal/118550980/abstract> (last visited Nov. 24, 2008).

¹⁴ MARY M. BRABECK, ET AL., MEETING AT THE HYPHEN: SCHOOLS-UNIVERSITIES-COMMUNITIES-PROFESSIONS IN COLLABORATION FOR STUDENT ACHIEVEMENT AND WELL BEING, 102nd Yearbook of the National Society for the Study of Education, Part II (University of Chicago Press 2003).

¹⁵ See *supra* n.11.

¹⁶ Allan Odden, et al., *Moving From Good to Great in Wisconsin: Funding Schools Adequately and Doubling Student Performance* (Prepared for Wisconsin State and Local Policymakers, Educators and Citizens, Consortium for Policy Research in Education, Univ. of Wisconsin-Madison) (2007), <http://cpre.wceruw.org/finance/WI%20March%201%202007%20Adequacy%20Report1.pdf> (last visited Nov. 23, 2008).

proficiency and by increasing literacy rates.¹⁷

5. Family Support and Parental Involvement Programs

Sufficient and appropriate student and family support can help build families' knowledge of appropriate academic behavior, student and family responsibilities and school expectations. *See* App. 021, 2008 ELL Guidebook at 38. Newcomer programs that provide orientation for immigrant ELL students and additional school staff such as tutors and counselors and native-language support for parents are necessary tools for learning English, as are community liaison personnel, health care workers, and social workers. Thus, independent of the instructional strategies offered, every school with ELL students needs bilingual personnel because families and schools must be able to communicate.¹⁸ Like family support programs, quality parental involvement programs allow parents to participate in their child's education thus enabling the students to learn English and succeed in the classroom. *See* App. 025, 2008 ELL Guidebook at 58.

6. Professional Development

High quality, ongoing professional development is also a necessary

¹⁷ Barbara E. Wasik & Robert E. Slavin, *Preventing early reading failure with one-to-one tutoring: A review of five programs*, Reading Research Quarterly, Vol. 28: 2, 179-200 (1993), http://www.successforall.org/_images/pdfs/tutoring.htm (last visited Nov. 23, 2008).

¹⁸ *See supra* n.11.

component of successful ELL programs. As the Colorado Department of Education (“CDE”) acknowledges, “High standards for the education of ELLs cannot exist without high standards for professional development.” App. 021. In an extensive survey of exemplary practice for secondary level ELL students, researchers concluded that professional development should include supporting teachers in gaining competency in a variety of instructional approaches that assist students in developing language skills and academic literacy.¹⁹ Other research has similarly concluded that teachers of ELL students need long-term professional development to understand how to connect the teaching of ELL students with curricular standards.²⁰ These examples of sound, essential professional development programs are consistent with those recommended by the CDE.²¹ See

¹⁹ Shelley Spaulding, *et al.*, *Immigrant Students and Secondary School Reform: Compendium of Best Practices* 7 (Council of Chief State School Officers) (2004), <http://www.ccsso.org/content/pdfs/BestPractices.pdf> (last visited Nov. 23, 2008).

²⁰ Comprehensive School Reform Quality Center *Works in Progress: A Report on Middle and High School Improvement Programs* 21 (2005), <http://www.csrq.org/worksinprogress.asp> (last visited Nov. 23, 2008).

²¹ Continuous teacher support with well-trained coaches is another important example of professional development for ELL teachers that positively affects student outcomes. Margarita Calderon, *Innovative Policies & Practices for Developing Teachers to Work with English Language Learners* 3-7 (Presentation at Educational Testing Service Symposium 2008), http://www.ets.org/Media/Conferences_and_Events/pdf/ELLSymposium/Calderon.pdf (last visited Nov. 23, 2008). The researcher describes a comprehensive training approach that includes 15-20 days a year of training in English and in the native language and weekly coaching and feedback throughout the school year, professional development for coaches and administrators, shadowing by coaches and administrators, teachers learning communities and follow-up refresher workshops. *Id.*

App. 022-23, 2008 ELL Guidebook at 49-50.

In addition to professional development, teachers of ELL students also need professional support from their administration and peers to be successful.²² This could include a well-implemented mentoring program, which the CDE recognizes “can provide the necessary framework for teachers to have conversations and develop tools for improving teaching and increasing student achievement.” App. 023, 2008 ELL Guidebook at 49.

7. Class Size

Smaller class sizes are also important because they help school districts meet the needs of ELL students. Research has determined that reduced class size can improve the achievement of ELL students. In a study of the impact of elementary school class size reduction on student achievement in Los Angeles, researchers found that ELL students with 3 years of reduced class sizes had significantly higher gains than ELLs with only 1 year of reduced size classes.²³ Reduced class size in secondary schools has also been shown to improve the academic success of ELL students and allows students more individualized

²² See *supra* n.11.

instruction and more interaction time to practice their English.²⁴

8. Technology

ELL students particularly benefit from access to computers and other technology. *See* App. 020, ELL Guidebook at 38. Computers are critical resources for ELL students because they not only allow students to move at their own pace but they also help accelerate their learning outside of class or school.²⁵

B. The Challenges Faced by Low Income Students

Like ELL students, low income students and the school districts serving those students face unique challenges in meeting the standards imposed by Defendants. However, unlike an ELL student whose primary challenge is to overcome language barriers, a low income student's primary challenge is to overcome the effects of poverty in the home. As the CDE notes,

“Children born into poverty: are half as likely to have access to preschool; are twice as likely to repeat a grade or be suspended or expelled; are twice as likely to drop out of school; and are

²³ *See* Peggy Fidler, *The Impact of Class Size Reduction on Student Achievement* (Planning, Assessment and Research Division Publication No. 109, Los Angeles Unified School District) iii (2001), http://notebook.lausd.net/pls/ptl/docs/PAGE/CA_LAUSD/FLDR_ORGANIZATIONS/FLDR_PLCY_RES_DEV/PAR_DIVISION_MAIN/RESEARCH_PLANNING/PUBLICATIONS/REPORTS/CSR_22702.PDF (last visited Nov. 23, 2008).

²⁴ *See e.g.*, Debra Short & Shannon Fitzsimmons, *Double the Work, Challenges and Solutions to Acquiring Language and Academic Literacy for Adolescent English Language Learners, A Report to Carnegie Corporation of New York* 57 (2006), <http://www.all4ed.org/files/DoubleWork.pdf> (last visited Nov. 23, 2008).

²⁵ *See supra* n.11.

significantly less likely to be at grade level in reading, writing and math.”

App. 008, English Language Learners in Colorado: a State of the State 2008.

Recognizing that barriers for low income children are not insurmountable and that all students can succeed, many states provide compensatory education programs for low income students to help make up for the loss in human capital in low income populations compared to higher income populations.²⁶ This human capital includes higher education degrees for parents; computers, books and other learning materials in the homes; relationships with other successful persons; as well as access to higher quality instructional programs, school facilities, teachers and administrators. *Id.*

To meet the educational needs of low income students, school districts may adopt and implement a number of different programs.²⁷ For example, extended learning days and summer programs allow low income students greater

²⁶ GEORGE FARKAS, HUMAN CAPITAL OR CULTURAL CAPITAL? 9-12 (Aldine de Gruyter 1996), book preview with selected excerpts available at: http://books.google.com/books?id=_CmvGsWXwYcC&dq=George+Farkas,+Human+Capital+or+Cultural+Capital%3F++Ethnicity+and+Poverty+Groups+in+an+Urban+School+district,+Social+Institution+and+Social+Change+Series.&pg=PP1&ots=B-Ba8dwNWl&source=bn&sig=0ILRcld6M58GaH0ysMXofVn8V2c&hl=en&sa=X&oi=book_result&resnum=4&ct=result#PPP1,M1 (last visited Nov. 24, 2008).

²⁷ See e.g., TEX. EDUC. CODE § 29.081 (West 2008) (Subchapter C- Compensatory Education Programs; Texas allowing districts to spend compensatory education funds on many programs

opportunities to learn the curricula and develop good studying habits.²⁸ Tutoring allows teachers to understand the needs of individual students who may be distracted as a result of other challenges in the home. *Id.* In addition, low income students can benefit from reduced class size and quality preschool programs. *Id.* at 47. These programs are essential to enabling low income students to close the achievement gaps with higher income students, increase graduation rates, and lower dropout and grade retention rates.

C. The State’s Practice of Funding (or not Funding) the Needs of ELL and Low Income Students

As expected, each of the above components costs money. The State recognizes as much and provides supplemental funding to school districts. *See* COLO. REV. STAT. ANN. § 22-24-104. However, that funding is set arbitrarily and does not reflect the true costs of providing successful English language acquisition programs. For example, although state law requires funding Category A (“NEP”) and Category B (“LEP”) students at an amount of \$400 per year or an amount

including Mentoring Services, After-School and Summer programs, and dropout recovery programs.).

²⁸ P. LAURER, ET AL., U.S. DEPARTMENT OF EDUCATION, THE EFFECTIVENESS OF OUT-OF-SCHOOL-TIME STRATEGIES IN ASSISTING LOW ACHIEVING STUDENTS IN READING AND MATHEMATICS: A RESEARCH SYNTHESIS 1-4 (2003), http://eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED483021&ERICExtSearch_SearchType_0=no&accno=ED483021 (last visited Nov. 24, 2008).

equal to twenty percent of the state average per pupil operating revenues, the General Assembly fails to appropriate the necessary funds to meet the statutory requirement. *Cf.* COLO. REV. STAT. ANN. § 22-24-104(4)(c)(I) (2007). In fact, for the year 2007-08, the State allocated a mere \$7.2 million for the ELL programs for the 100,000 ELL students—an average of approximately \$72 per ELL student.²⁹ *See* App. 011, Colorado Department of Education, Public School Finance Unit, *Understanding Colorado School Finance and Categorical Program Funding*, 10 (July 2007). Not only does the appropriation fall far short of the actual costs of educating ELL students, but for no apparent reason it pales in comparison to the \$8 million budgeted for the 56,000 students in the gifted and talented enrichment program. *Id.* at App. 011-012.

Furthermore, the State also arbitrarily limits the supplemental funding to a maximum of two years—regardless whether the ELL students learn English and successfully exit the program. COLO. REV. STAT. ANN. § 22-24-104(3) (2007). The two-year limitation finds no basis in research, which to the contrary

²⁹ The \$72 does not represent the actual dollar amount received by districts for Category A and B students but is only representative of an average across all ELL students. In reality, the State distributes a greater portion of the appropriated amount to Category A and B students. However, even that amount falls short of the minimum for Category C students (“FEP”), which mandates that districts receive funds for ELL programs at an amount greater than \$200 per year or an amount equal to ten percent of the state average per pupil operating revenues. COLO. REV. STAT. ANN. § 22-24-104(4)(c)(II) (2007).

demonstrates that ELL students require from four to seven years to become academically proficient in English.³⁰ In fact, the problems of minimal funding coupled with the two-year limitation, place school districts in precarious situations and unnecessarily force them to make harmful decisions. For one, the school districts cannot simply discontinue the programs after two years, placing ELL students in a “sink-or-swim” situation because they have duties under state and federal law to help those students overcome their language barriers. *See, e.g.* COLO. REV. STAT. ANN. § 22-24-105(d) (districts must administer and provide programs for students whose dominant language is not English).³¹ Second, neither State Defendants nor school districts can use federal funds to supplant the lack of state funds. The U.S. Department of Education recently clarified to states and local education agencies that they can use federal funds for ELL students to supplement but not supplant local funding. *See* App. 026-027, Letter from U.S. Dept. of Educ. to Chief State Officers, dated October 2, 2008. The arbitrary

³⁰ *See, e.g.,* Kenji Hakuta, *et al.*, *How Long Does It Take English Learners to Attain Proficiency?* The University of California Linguistic Minority Research Institute Policy Report 2000-1 (2000), <http://caselinks.education.ucsb.edu/casetrainer/CLADContent/CladLanguage/node7/theory/HowLong.pdf> (last visited Nov. 24, 2008).

³¹ *See also* 20 U.S.C. § 1703(f), the Equal Educational Opportunities Act, stating: No State shall deny equal educational opportunity on account of his or her race, color, sex or national origin by . . . the failure by an education agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional program.

funding practices of Defendants forces school districts either to use the federal funds to supplant the insufficient local funds, or “rob Peter to pay Paul” by diverting funds from other programs (including, for example, gifted and talented programs or general education programs) to make up for the shortfall.

For low income students in Colorado, their educational needs face a similar fate. For example, Colorado provides supplemental funding for students identified as “at-risk,” but limits at-risk funding to students whose families are eligible for free lunch only under the National School Lunch Act. This limitation, for no valid reason and contrary to the funding practices in many other states and the federal government, excludes children from families that are eligible for reduced price lunch, thereby under-funding necessary, supplemental resources for those children. The funding that is made available, ranging from 12% to 25% of the standard cost of an education depending on the percentage of at-risk students, does not cover the costs for supplemental programs needed to bring the at-risk children up to state standards.

As described above, the Defendants’ funding practices related to ELL and low income students fail to follow any clear, guiding principles and are unrelated to the actual costs of providing those students with meaningful educational

opportunities in order to meet the state standards. However, the General Assembly's task is not difficult. In order to provide adequate funding under the Colorado Constitution, State Defendants need only to demonstrate clearly the link between the state funding made available to all public school districts and the achievement of the state standards by all children. If the State is required to abide by such a mandate, the General Assembly will have clear guidance to fulfill its duty to provide a constitutionally adequate system to every child in Colorado. The Court can, thereby, enforce the constitutional provision of adequacy by obligating Defendants to provide sufficient resources to all districts so that all children, including the special-needs children such as ELL and low income children, can have the opportunity to achieve the standards imposed by the State.

D. The Dismal Performance Data of ELL and At-Risk Students Warrants a Constitutional Review of the Funding Practices of Defendants.

Although poor student achievement data may not, standing alone, conclusively determine that the State's funding practices violate the "thorough and uniform" mandate in the education clause, students should not be denied their day in court to prove that the data is evidence of an unconstitutionally inadequate system. *See e.g., Hoke County Bd. of Educ. v. State*, 358 S.E.2d 605, 627 (N.C.

2004) (acknowledging test scores, graduation rates, dropout rates, and other factors as sufficient evidence to consider in determining whether the state defendants had provided a sound basic education as required under the constitution). As stated earlier in Sections I(A) and I(B), ELL and low income students require a number of different educational resources and programs to succeed, yet those resources and programs are not considered by the State when setting the funding limits. Not surprisingly, ELL and low income students are failing in nearly every metric reported by the State.

1. Colorado Student Assessment Program

Stark achievement gaps exist between ELL students and students who are not ELL (“non-ELL”), as well as between low income and non-low income students across subject areas on the Colorado Student Assessment Program (“CSAP”), the State’s standardized test exam.³² For example, in 2008, 69% of ELL students identified as NEP achieved unsatisfactory results on the fourth grade reading test compared to 7% of non-ELL students.³³ On the eighth grade reading

³² The CDE reports achievement levels on the CSAP as: “Unsatisfactory,” “Partially Proficient,” “Proficient” or “Advanced”). See App. 028, Colorado Dept. of Educ. Unit of Assessment, *CSAP Achievement Levels*.

³³ App. 029-030, 2008 CSAP Reading Grade 4 Performance Levels Statewide Summaries. The “non-ELLs” are identified as “Not Applicable” under the category labeled, “English Proficiency.”

test, NEP students registered disparately high unsatisfactory results compared to non-ELL students (80% to 8%, respectively) and on the tenth grade reading test, the results did not change much (72%, NEP; 8%, non-ELL).³⁴

The results are no different in the fourth grade math test with half of the students identified as NEP achieving unsatisfactory results compared to 6% of students who were non-ELL.³⁵ On the eighth grade math test, 79% of NEP and 60% of LEP students registered unsatisfactory results compared to 19% of non-ELL students.³⁶ The results of the tenth grade math test were no different: 84%, NEP; 73%, LEP; and 28%, non-ELL.³⁷ *Id.*

Summaries of the CSAP also clearly reveal a chasm between economically disadvantaged (“ED” or “low income”) student populations and non-economically disadvantaged students (“non-ED”).³⁸ In the fourth, eighth, and tenth grade reading tests only 19%, 21%, and 19% of the ED students, respectively, performed unsatisfactorily, while only 5%, 6%, and 7% of the non-ED students, respectively, performed unsatisfactorily. *See supra nn.33-34.*

³⁴ App. 034, 2008 CSAP Reading Grade 8 Performance Levels Statewide Summaries; App. 036, 2008 CSAP Reading Grade 10 Performance Levels Statewide Summaries.

³⁵ App. 038, 2008 CSAP Mathematics Grade 4 Performance Levels Statewide Summaries.

³⁶ App. 042, 2008 CSAP Mathematics Grade 8 Performance Levels Statewide Summaries.

³⁷ App. 044, 2008 CSAP Mathematics Grade 10 Performance Levels Statewide Summaries.

³⁸ On the CSAP test results reported, low income students are identified as “Free/Reduced Lunch” and non-ED students are identified as “not eligible.”

2. National Assessment of Educational Progress

The achievement gaps between income groups and language groups in Colorado are also evident in the results of the National Assessment of Educational Progress (“NAEP”), a national assessment instrument.³⁹ According to the 2007 NAEP report for Colorado, dramatic achievement gaps persisted between the performance of ELL and low income students and their counterparts. Looking at the same grade levels as noted in the previous section on CSAP scores, on the fourth grade NAEP reading test, 72% of ELL students tested below “basic” as opposed to 24% of non-ELL students.⁴⁰ On the eighth grade reading test, 72% of ELL students tested below “basic” compared to 18% of non-ELL students.⁴¹ Similar disparities in achievement between ELL and non-ELL students can be seen in the results of the fourth and eighth grade NAEP math tests.⁴²

Low income students (identified for NAEP purposes as students on the National Lunch Program, which includes students on the free and reduced lunch program) likewise failed to achieve the “basic” score on the fourth grade reading

³⁹ The NAEP reports scores as “Below Basic,” “At Basic,” “At Proficient” and “At Advanced.” See <http://nces.ed.gov/nationsreportcard/about/tracks>.

⁴⁰ App. 045, NAEP Data Explorer- Data Table: Percentages of students at each achievement level for reading, grade 4, Student in ELL (2007).

⁴¹ App. 046 NAEP Data Explorer- Data Table: Percentages of students at each achievement level for reading, grade 8, Student in ELL (2007).

test at a rate of 49% compared to non-low income students who scored below “basic” at a rate of 18%.⁴³ On the eighth grade reading test, low income students did not fare much better with 36% failing to achieve the minimal basic score compared to 14% of non-low income students.⁴⁴

3. **Graduation Rates**

In Colorado there is not a consistent definition of a graduate, because each district decides the graduation requirements for its district.⁴⁵ Nevertheless, in 2008, the State reported graduation rates for African Americans at 65.4%, Latinos at 57.1% and Whites at 82%.⁴⁶ Over the last five years, graduation rates for Latino students have fallen over 12%, for African American students the rates fell 14%, but rates for white students fell only 5%. *Id.* As for ELL students, the 2006 graduation rate was 65.9% and for low income students the rate was 69.7%.

4. **Dropout Rates**

According to the dropout rates as defined and reported by the State, the

⁴² App. 047-048 NAEP Data Explorer- Data Table: Percentages of students at each achievement level for mathematics, grade 4 and 8, Student in ELL (2007).

⁴³ App. 049, The Nation’s Report Card: Reading 2007, State Snapshot, Grade 4.

⁴⁴ App. 050, The Nation’s Report Card: Reading 2007, State Snapshot, Grade 8.

⁴⁵ App. 051, CDE Graduation Rates, Historical Overview.

⁴⁶ App. 052, Colorado Education Statistics; c/o 2007 Graduation Data.

2006-2007 cumulative dropout rate in Colorado was 4.4%.⁴⁷ Latino students' dropout rates were nearly twice the state average at 8.05%, and African American students dropped out of school at rates (5.8%) over twice the rate of White students (2.8%). *Id.* ELL students dropped out at a rate of 9.3% compared to the 5.2% dropout rate of low income students. *Id.*

E. Other State Courts Have Determined That Adequacy Claims are Justiciable

Padres Unidos and META agree that the Generally Assembly enjoys discretion under the separation of powers doctrine in setting the state standards for the public school system, including standards for curriculum, accountability and school finance. However, as with other acts of the legislative branch, that discretion is not limitless and is bound by the standards set forth in the Colorado Constitution. In other words, when the school finance system is not “thorough and efficient” as interpreted by this Court, then Defendants must be held accountable for their unconstitutional acts.

This Court would not be breaking new ground by ruling that the courts can review the constitutionality of legislative acts and, indeed, the United States Supreme Court has long held that matters customarily deemed “political

⁴⁷ App. 053-054, Colorado Education Statistics, Dropout Rates for the 2006-2007 School Year.

questions” may warrant judicial determination. *See e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-178 (1803) (emphasizing the importance of role of the courts to reviewing the acts of the legislature that exceed the limits placed by the Constitution); *see also Baker v. Carr*, 369 U.S. 186, 211-217 (1962). In the landmark federal school finance case, *San Antonio Indep. Sch. Dist. v. Rodriguez*, the U.S. Supreme Court intimated that claims of inefficient school finance systems may be brought in state courts under state education clauses. *See* 411 U.S. 1, 133 n.100 (J. Marshall dissenting) (1973). Since then, a number of state supreme courts have held that their state constitution’s educational clauses do not involve political questions solely to be determined by the legislative branch.⁴⁸

With respect to the needs of low income and ELL students, state courts have also specifically held state defendants responsible for violating the students’ constitutional rights to an adequate education by funding their education at low

⁴⁸ *See, e.g., Neeley v. West Orange Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 777 n.169 (Tex. 2005) (citations omitted) (stating that “the Legislature has the sole right to decide how to meet the standards set by the people in article VII, section 1, and the Judiciary has the final authority to determine whether they have been met.”); *see also Montoy v. State*, 102 P.3d 1160, 1163-64 (Kan. 2005); *Abbeville County Sch. Dist. v. State*, 515 S.E.2d 535, 539 (S.C. 1999); *Leandro v. State*, 488 S.E.2d 249, 253-54 (N.C. 1997); *DeRolph v. State*, 677 N.E.2d 733, 737 (Ohio 1997); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1264 (Wyo. 1995); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 667-68 (N.Y. 1995); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1381 (N.H. 1993); *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E. 516, 550 (Mass. 1993); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 734 (Idaho 1993); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989);

levels unrelated to the actual costs. For example, the Kansas Supreme Court stated that Kansas' constitution required the state legislature to provide for a suitable education for all students. In rejecting a proposed remedy by the state defendants in that case, the Supreme Court of Kansas stated that "the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise." *Montoy v. State*, 278 Kan. 769, 775 (Kan. 2005). The court noted the negative impact such arbitrary actions had on the funding needs of students, including ELL and at-risk students, and ordered the state defendants to present a financing system that met the constitutional requirements. *Id.*

The Colorado Constitution is no different. The State's use of red herrings in the form of never-ending litigation and unenforceable standards are not only unwarranted but also insult the dignity of the Court. As described above, courts have routinely held state defendants to enforceable standards. Indeed, the framers of the Colorado Constitution already spoke of the enforceable claim by requiring the General Assembly to provide a "thorough and uniform" system. Accordingly, Padres Unidos and META request that the Court interpret the State's

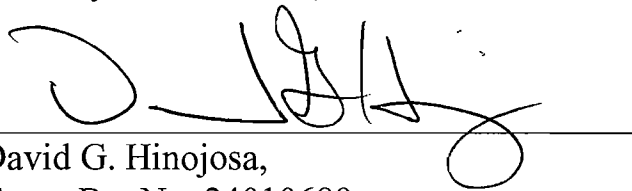
Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 689-90 (Mont. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 870 (W. Va. 1979).

constitutional clause as affording Plaintiff students, parents and school districts a justiciable adequacy claim.

CONCLUSION

For the reasons set forth herein, Padres Unidos and META, as *amicus curiae*, respectfully urges this Court to reverse the decisions of the courts below and allow Plaintiffs' suit to go forward on the merits.

RESPECTFULLY SUBMITTED, this 24th day of November, 2008.



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ATTORNEYS FOR *AMICUS CURIAE*

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing BRIEF OF *AMICUS CURIAE* PADRES UNIDOS and META was served, by depositing same in the United States mail, first-class postage prepaid, on the 24th day of November, 2008, upon the following:

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