DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: ANTHONY LOBATO, as an individual and as parent and natural guardian of TAYLOR LOBATO and ALEXA LOBATO; *et al.*, and **Plaintiff-Intervenors**: ARMANDINA ORTEGA, as an individual and as next friend of her minor children S. ORTEGA and B. ORTEGA, *et al.* v. **Defendants**: THE STATE OF COLORADO; *et al.*	▲ **COURT USE ONLY** ▲
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PLAINTIFF-INTERVENORS' TRIAL BRIEF

Plaintiff-Intervernors Armandina Ortega, *et al.*, file this Trial Brief to assist the Court in its review of the evidence concerning Plaintiff-Intervenors' claims related to a "thorough and uniform" system and the exercise of local control pursuant to Article IX, sections II and 15 of the Colorado Constitution, respectively.

BACKGROUND

Plaintiff-Intervenor parents and their minor children, who are low-income[1] and/or English Language Learner ("ELL") students enrolled in property-poor school districts in Colorado, challenge the constitutionality of the public finance system in Colorado, seeking injunctive and declaratory relief against the current inadequate and irrational school funding scheme. *See* Plf-Intvs.' Am. Compl. in Interv'n ("Complaint") at 4-5. Over the past twenty years, Colorado's public education enrollment has undergone significant demographic changes with an enrollment that today is poorer and higher in the number and percentages of minority and ELL students than ever before. From 1991 to 2010, the percentage of non-Hispanic[2] White children fell from 74.9% to 56.8% while the number of minority children (largely Latino) increased from 25.1% to 43.2% of the total enrollment. *See* Murdock Expert Report, Ex. 5901 at 4. The percentage of Latino children nearly doubled over that same period, increasing from 16.6% in 1991 to 31.6% in 2010. *Id.* From 2000 to 2010, the number of Latino children in the population

[1] "Low income students" refers to students identified as being eligible for free or reduced priced lunch under the National School Lunch Act.
[2] For purposes of this brief, the terms "Hispanic" and "Latino" connote the same meaning and are used interchangeably.

increased by 115,503—accounting for 92.5% of the total increase of 124,814 children from 2000 to 2010. *Id.*

The number and percentage of students identified as low income have also increased. Today, nearly two out of every five students (39.9%) qualifies for free and reduced priced lunch. *Id.* at 5. Moreover, the ELL population increased by *260%* in Colorado over the last ten years and now accounts for roughly one out of every eight public school students. Ex. 151 at 11. Among this ELL population, approximately 83% are Latino/Hispanic and altogether, they speak more than 165 different languages. *Id.* at 17-18.

Given these dramatic demographic changes in Colorado's public schools, it is incumbent upon the State (both in the interest of the students and the future of the State) to adequately provide for every child's education—particularly at a time when the State continues to ante up the rigor and the standards. The State holds all students, with the exception of certain special education students, to the same academic students and Plaintiff-Intervenors would not want it any other way. *See* Defs.' Resp. to Request of Adm. No. 6. ELL and low income students, however, are among the lowest performing groups of students in the State as reflected in their low proficiency rates on standardized tests, high dropout rates and low graduation rates and are ill-prepared to meet the increasing demands placed upon them by the State. Yet these students are not simply a lost cause because even Defendants must admit that these students can perform on par with other students if provided sound, effective educational programs. *See* Defs.' Resp. to Request for Adm. Nos. 2 & 5.

However, the current school finance system is not designed to address student educational needs, particularly those who face the greatest challenges both at home and in school such as ELL and low income students. The irrational system ultimately forces school districts to choose between "robbing Peter to pay Paul" or simply leveling down the system for all students.

Consequently, Plaintiff-Intervenors seek relief under article 9, § 2 of the Colorado Constitution, because the State's inadequate funding bears no rational relationship to its constitutional duty to fund a "thorough and uniform" system of free public education. Am. Compl. in Interv'n at 18. Plaintiff-Intervenors also seek relief under article 9, § 15 because Defendants have stripped local communities of their ability to exercise meaningful local control of their instructional programs by providing insufficient funds and at the same time imposing additional, costly mandates. *Id.*

LEGAL ANALYSIS

I. The Meaning of a "Thorough and Uniform" System.

Under Article 9, section 2 of the Colorado Constitution, the General Assembly is charged, in part, with the duty to "provide for the establishment and maintenance of a thorough and uniform system of free publics schools throughout the state. . ." Plaintiff-Intervenors bear the burden of "demonstrat[ing] that the school finance scheme is not rationally related to the constitutional mandate of a 'through and uniform' system of public education." *Lobato v. Colorado*, 218 P.3d 358 (Colo. 2009). The Court "may appropriately rely on the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education." *Id.* The Court must also "give significant deference to the legislature's fiscal and policy judgments." *Id.*

Under this framework, Plaintiff-Intervenors respectfully urge the Court to defer to the State's pronouncements. At a minimum, a constitutionally thorough and uniform system entails a quality of education that enables all students to participate meaningfully in the civic, political, economic, social and other activities of society, and to exercise the basic civil and other rights of citizens of the State of Colorado and the United States of America. This definition is consistent with the knowledge, skills and behaviors with which all high school students are expected to acquire upon graduation to be prepared to enter college without remediation and enter the workforce to compete in the global economy, as described by the Colorado Department of Education and Department of Higher Education under their adopted definition of "Postsecondary and Workforce Readiness." *See* Ex. 173. This definition is also supported by the legislative enactment that every child shall have a fundamental right to a free public education that assures they have the opportunity to achieve the content standards adopted by the State at a level that "is sufficient to allow them to become an effective citizen of Colorado and the United States, a productive member of the labor force, and a successful lifelong learner." C.R.S. § 22-7-403(2).

A. Consideration of State Mandates

In order to gauge whether Defendants have met their obligation under Article 9, section 2, the Court can weigh the State's consideration of the costs related to the increasing state mandates and rigor of coursework imposed by the State, including but not limited to: the State model content standards adopted by the Colorado State Board of Education; the State's accountability and accreditation systems; the State's reform efforts

such as the Preschool to Postsecondary Education Alignment Act (also known as CAP4K); and facility requirements imposed by the State.

B. Consideration of the Design of the School Finance System and its Relationship to a Thorough and Uniform System.

The Court can further consider the design of the school finance system in order to determine how it is, or is not, rationally related to a thorough and uniform system. For example, the Court can consider the State's arbitrary limitation of funding under the English Language Proficiency Act (ELPA) to only two years, despite the State's own affirmations in its ELL guidebook acknowledging that on average it takes at least four to seven years to become academically proficient in the English language. *See* 2010 ELL Guidebook, Ex. 154 at 13-14; *see also Lujan*, 218 P.3d at 365 (citing the low level of funding for ELL students and the two-year statutory limitation). The Court can also weigh the State's decision to arbitrarily cap the number of pre-kindergarten students at 20,160 part-time students, despite the growing need for quality pre-K programs, especially among low income and ELL students who would most likely benefit from such programs. *See* Defs.' Resp. to Request for Adm. Nos. 21, 22, and 24 (citing, in part, C.R.S. §§ 22-28-102, 22-28-104(2)(a)(III). The Court can further determine how the State's grossly insufficient funding for facilities impacts property-poor districts that are at a much greater disadvantage than high-wealth districts to raise local revenue and support bonds for capital construction. *See* Defs.' Resp. to Request for Adm. Nos. 29 & 30.

C. Consideration of Educational Outputs

In determining whether the State has carried out its constitutional obligation, it is appropriate for the Court to review and analyze evidence related to various student performance outputs, such as standardized test results, graduation rates, dropout rates and

college remediation rates. The State acknowledges that school districts must adopt, at a minimum, the Colorado Academic Standards covering approximately twelve subject areas. *See* Defs.' Resp. to Request for Adm. Nos. 19. These standards include the Common Core State Standards, which "are designed to be robust and relevant to the real world, reflecting the knowledge and sills that our young people need for success in college and careers." *Id.* at No. 17. The State, itself, uses the CSAP to measure the level at which Colorado students meet Colorado's content standards in the content areas assessed. *Id.* at No. 7. In addition, college remediation rates are an indicator that students are not sufficiently prepared for college. *Id.* at No. 26. Furthermore, the Colorado ACT (for which every 11th grade student is required to take) is used to measure high school achievement and college readiness. *Id.* at No. 8. Accordingly, it makes perfect sense for the Court to reflect upon the educational outputs in the system in order to determine whether students are acquiring a thorough and uniform education.

D. Deference to State's Policy Judgments, but not Full Deference

Although the Court may provide significant deference to the State's policy judgments, this does not mean *full* deference, especially where the policies are at odds with a thorough and uniform system. For example, Plaintiff-Intervenors are expected to offer testimony that many of the performance targets in the State's accountability system are set at a lower level to ensure a large number of districts are not targeted for intervention—as opposed to setting performance targets that ensures each Colorado child will graduate with the essential knowledge and skills to be ready for college and the workforce. Consequently, a State accreditation rating should not be regarded as providing a thorough and uniform system.

E. Consideration of Federal Funding is Unnecessary

Furthermore, because the question before the Court is whether the *State's* funding scheme is rationally related to a thorough and uniform system, evidence related to *federal* funding need not be considered. It is the State's system that must provide for a thorough and uniform system and the State should not be able to rely on the federal government to carry out its obligation to provide an adequate education, especially when it has no statutory authority to do so. In addition, federal funding is unstable and cannot be used to supplant local funds (*see* Defs.' Resp. to Request for Adm. No. 9, latter statement) and therefore, should not be considered in determining whether the State has discharged its constitutional obligation.[3]

II. The Meaning of Local Control

The Colorado Constitution guarantees that "the general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts." Colo. Const. art. IX, § 15. Colorado is one of the few states to have an express constitutional local control requirement. *See Owens v. Colo. Cong. of Parents, Teachers & Students*, 92 P.3d 933, 939 (Colo. 2004). The framers made the choice to place control as near the people as possible, and courts have consistently emphasized the importance of local control to the state's educational system. *See Bd. of Educ. of Sch. Dist. No. 1 in City & Cnty. of Denver v. Booth*, 984 P.2d 639, 646 (Colo. 1999); *Owens v. Colo. Cong.*, 92 P.3d at 939.

[3] Plaintiff-Intervenors would maintain that the federal funding, even when coupled with local and state funding, is insufficient to provide a thorough and uniform education to all students in property-poor school districts such as Greeley, Rocky Ford, Sheridan and Mapleton.

Local control requires some degree of control both over the funding and the content of instruction. *See Owens*, 92 P.3d at 939. More importantly, local control requires a school district to have substantial discretion over any instruction paid with locally-raised funds. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973); *Owens v. Colo. Cong.*, 92 P.3d at 939; *Bd. of Educ. v. Booth*, 984 P.2d at 648. Each district should be free to tailor local programs to local needs. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 49-50. The level of discretion conferred on local school boards by the Colorado Constitution should not be affected by the amount of funding derived from each source. *See Owens v. Colo. Cong.*, 92 P.3d at 943.

Constitutional schemes must strike an appropriate balance between state and local power, where the State has general supervisory powers, but the local districts keep control of instruction. *See Bd. of Educ. v. Booth*, 984 P.2d at, 656. The State may set standards and accountability plans, but may not do so in a manner that completely supersedes the local districts' constitutionally-mandated right to local control. *See Owens v. Colo. Cong.*, 92 P.3d at 939.

In this case, Plaintiff-Intervenors urge the Court to weigh the current mandates against the level of funding and determine whether property-poor districts are required to direct a substantial amount of their local funds to meet the increasing requirements imposed by the State. In essence, Plaintiff-Intervenors will argue that the current system's irrational and insufficient level of funding, coupled with growing state mandates, have stripped away districts' authority to exercise any meaningful discretion over their local programs and instruction.

The decentralization of education funding decisions for locally-raised tax revenues created in article IX, allows district residents to tailor educational policy to meet the needs of the individual districts, without state interference. *See Owens v. Colo. Cong.*, 92 P.3d at 941; *Dolores Huerta Preparatory High v. Bd. of Educ.*, 215 P.3d 1229 (Colo. App. 2009). Having diverse programs offered in different districts creates an "opportunity for experimentation, innovation, and a healthy competition for educational excellence." *San Antonio Indep. Sch. Dist. v. Rodriguez,* 411 U.S. at 49-50. The General Assembly further supported these goals by passing the Charter Schools Act. *See Bd. of Educ. v. Booth,* 984 P.2d at 650.

Having meaningful control over education also requires that a district have facilities of a sufficient quality and quantity to host its educational programs. Without a doubt, lower property wealth districts have less fiscal control than the wealthier ones. *See Lujan v. Bd. of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982). Plaintiff-Intervenors expect to offer evidence demonstrating that the current capitol construction program does not distribute sufficient funds to maintain, replace, and build the facilities required for the State-mandated educational programs, particularly for cash-strapped property-poor districts. While districts with high property values may be able to raise local revenue for the dual-funding system and locally collect funds more easily to support local programs, current laws and economic realities limit districts with lower property values so that their taxes barely cover the dual-funding costs, and any additional funds collected to ensure local discretion are insufficient to give their boards an actual choice among programs.

The adoption and implementation of the various reforms and mandates imposed by the State, absent the funding necessary to achieve those rising standards, have

effectively eliminated local control of instruction. To comply with the school accountability system and avoid its penalties, districts are forced to spend their local funds on measures effectively determined by the State, further depleting the funds available for local control. However, "legislation must not usurp a local board's decision-making authority." *Bd. of Educ. v. Booth*, 984 P.2d 639, 649 (Colo. 1999).

In determining whether Defendants have violated the Local Control Clause, Plaintiff-Intervenors urge the Court to consider, among other things: the level of funding for ELL and low income students, and pre-K and Kindergarten program, and the rationale for the same; the amount of state aid for capitol construction, coupled with any limitations on taxing capacities, and their effects on property-poor school district communities; the impact of funding on property-poor communities' ability to offer a thorough and uniform education to enable their students to achieve their potential and fully participate in the social, economic and educational opportunities of this State and nation; the inadequate funding for transportation, special education and gifted and talented education, among other programs; and all non-discretionary cuts made to instructional programs by districts in order to comply with the state mandates.

CONCLUSION

Because tens of thousands of children are being deprived of a thorough and uniform education, Plaintiff-Intervenors urge the Court to incorporate the above analysis and factors in its careful consideration of whether the State of Colorado has complied with its constitutional duties under both the Education and Local Control Clauses.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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