

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

District Court of the City and County of Denver
Honorable Hebert L. Stern, III
Case No. 2014CV32543

In Re:

Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terri Siewiyumptewa, as an individual and as parent and natural guardian of Shane Siewiyumptewa and Kristen Johnson; Tracey Weeks and Monty Weeks, as individuals and as parents of Jared Weeks and Jordyn Weeks; Terri Piland and Jeffrey Piland, as individuals and as parents of Joseph Piland and George Piland; Colorado Rural Schools Caucus a/k/a Rural Alliance; East Central Board of Cooperative Educational Services; Colorado PTA; Boulder Valley School District; Colorado Springs School District No. 11; Mancos School District; Holyoke School District; and Plateau Valley School District 50

v.

The State of Colorado; Robert Hammond, in his official capacity as Commissioner of Education of the State of Colorado; and John Hickenlooper, in his official capacity as Governor of the State of Colorado.

▲ COURT USE ONLY ▲

Case No. 2015SA_____

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PETITION FOR RULE TO SHOW CAUSE

Pursuant to Colorado Appellate Rule 21 and Article VI, Section 3 of the Colorado Constitution, Petitioners the State of Colorado, Robert Hammond, in his official capacity as Commissioner of Education of the State of Colorado, and John Hickenlooper, in his official capacity as Governor of the State of Colorado, hereby petition this Court to issue a rule that Amendment 23 allows the General Assembly to reduce total state funding for public education as long as it increases the statewide base per pupil funding amount by at least the rate of inflation.

INTRODUCTION

Since 2010, the Colorado General Assembly has included a negative factor in its public school finance formula to stabilize the state budget. Yet every year, it still has increased its base level of funding for students statewide, as required by Amendment 23 to the state Constitution. Although it plainly refers to this “base” amount, Respondents ask the judiciary to extend Amendment 23 to require increases to the total annual funding school districts receive from the State. By inexplicably finding Respondents’ claim viable, the district court calls into question the entire state general fund budget at the commencement of a new legislative session. If the negative factor is unconstitutional, the General

Assembly must either find nearly one billion dollars in new revenue or cut that much in spending on essential state services. Because this claim presents a narrow, straightforward matter of constitutional interpretation not dependent on any factual development, Petitioners ask this Court to intervene now and provide the final interpretation of Amendment 23 that the General Assembly needs to set the State's annual appropriations.

A. Identity of the Parties

Petitioners are the State of Colorado, Robert Hammond, in his official capacity as Commissioner of Education of the State of Colorado, and John Hickenlooper, in his official capacity as Governor of the State of Colorado. The proposed Respondents are the following: Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terri Siewiyumptewa, as an individual and as parent and natural guardian of Shane Siewiyumptewa and Kristen Johnson; Tracey Weeks and Monty Weeks, as individuals and as parents of Jared Weeks and Jordyn Weeks; Terri Piland and Jeffrey Piland, as individuals and as parents of Joseph Piland and George Piland; Colorado Rural Schools Caucus a/k/a Rural Alliance; East

Central Board of Cooperative Educational Services; Colorado PTA; Boulder Valley School District; Colorado Springs School District No. 11; Mancos School District; Holyoke School District; and Plateau Valley School District 50.

B. Identity of the Court Below

The Court below is the District Court for the City and County of Denver, Colorado, the Honorable Herbert L. Stern, III presiding. The underlying proceeding is captioned as follows: *Lindi Dwyer and Paul Dwyer, as individuals and parents of Jayda Dwyer, Joslyn Dwyer, Janesha Dwyer, and Jentri Dwyer; Terri Siewiyumptewa, as an individual and as parent and natural guardian of Shane Siewiyumptewa and Kristen Johnson; Tracey Weeks and Monty Weeks, as individuals and as parents of Jared Weeks and Jordyn Weeks; Terri Piland and Jeffrey Piland, as individuals and as parents of Joseph Piland and George Piland; Colorado Rural Schools Caucus a/k/a Rural Alliance; East Central Board of Cooperative Educational Services; Colorado PTA; Boulder Valley School District; Colorado Springs School District No. 11; Mancos School District; Holyoke School District; and Plateau Valley School District 50 v. The State of Colorado; Robert Hammond, in his*

official capacity as Commissioner of Education of the State of Colorado; and John Hickenlooper, in his official capacity as Governor of the State of Colorado. The case number of the underlying matter is 2014CV32543.

C. Identity of the Persons against Whom Relief is Sought

Petitioners seek relief against all Respondents.

D. Rulings Complained of and Relief Sought

Petitioners seek relief from the district court's November 12, 2014 order (Ex. A), denying their Motion to Dismiss Respondents' Complaint under Colorado Rule of Civil Procedure 12(b)(5) for failure to state a claim upon which relief can be granted.

Respondents, a group of parents, associations, and school districts, allege the Colorado General Assembly's enactment of a negative factor in the public school finance formula violates Amendment 23 to the state Constitution. Specifically, Respondents allege "the Negative Factor dramatically reduces the amount of per pupil spending . . . under the statutory formula" (Ex. B, Resp'ts' Compl., ¶35 at 9), and imposes a "[f]unding cap" that "negates the PSFA formula and the express will of Colorado's voters" (*Id.*, ¶36 at 10). Respondents ask the district court to declare the negative factor violates Amendment 23, "[e]njoin [Petitioners]

from implementing [the negative factor,] and require that education funding be made consistently with Amendment 23.” (*Id.* at 11–12).

Petitioners moved to dismiss these allegations because, among other reasons, Amendment 23 plainly requires only the starting variable in the finance formula—the “statewide base per pupil funding” amount—to increase, COLO. CONST. Art. IX, sec. 17(1), and as a matter of law, it has. *Cf.* § 22-54-104(5)(a)(VII), C.R.S. (2001), *with* § 22-54-104(5)(a)(XXI), C.R.S. (2014). (*See generally* Ex. C, Pet’rs’ Mot. to Dismiss). Nothing in the unambiguous language of Amendment 23 supports Respondents’ demand that the yield or end product of the finance formula—that is, the total state funding for public education—increase with the rate of inflation.

Following the filing of Respondents’ Response to the Motion to Dismiss (Ex. D), and Petitioners’ Reply in support thereof (Ex. E), the district court declined to address Petitioners’ contentions and summarily denied the motion to dismiss in just three sentences:

Amendment 23 prescribes minimum increases for state funding of education. *Lobato v. State*, 218 P.3d [358,] 376 [(Colo. 2009)]. [Respondents] assert, that when implemented, Subsection (g) [the negative factor] reduces the amount of funding for school districts below the level

required by Amendment 23. [Respondents] have alleged sufficient facts.

(Ex. A at 4.)

Petitioners seek an order from this Court that the General Assembly's increase of the statewide base per pupil funding amount by the rate of inflation satisfies the plain requirement of Amendment 23.

E. Reasons Why No Other Adequate Remedy is Available

To exercise its original jurisdiction, this Court typically requires the absence of any "adequate 'conventional appellate remedies.'" *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1228 (Colo. 2003) (citing, *inter alia*, *Leaffer v. Zarlengo*, 44 P.3d 1072, 1077 (Colo. 2002)).

The denial of a Rule 12(b) motion to dismiss a complaint is not a final order that may be directly appealed to the Colorado Court of Appeals. *E.g.*, *Awad v. Breeze*, 129 P.3d 1039, 1045 (Colo. App. 2005) (citing § 13-4-102, C.R.S. (2004); *Feigin v. Digital Interactive Assocs., Inc.*, 987 P.2d 876, 880 (Colo. App. 1999)). Interlocutory appeal under Colorado Appellate Rule 4.2, to the extent it could be considered a conventional appellate remedy, is not a viable alternative because it requires either Respondents' stipulation or the district court's certification. During conferrals, Respondents have made it clear they

want to proceed with discovery, and trial is scheduled to begin on November 2, 2015. Moving for certification would be futile because the district court's order clearly indicates it does not believe the merits of Respondents' claims involve an unresolved question of law. *See* C.A.R. 4.2(b)(2).

Given the upcoming trial, a conventional appeal will not be available until well after the just-commenced legislative session, and final determination of the minimum level of funding required by Amendment 23 would be many months, possibly years thereafter. Because the negative factor currently amounts to more than \$800 million, eliminating it would require significant cuts to other state services. Respondents' attack thus places a considerable cloud on the entire state general fund budget, and postponing final determination of the purely legal question at issue is an untenable and inadequate remedy.

F. Issue Presented

Does Amendment 23 allow the General Assembly to increase the statewide base per pupil funding amount by at least the rate of inflation while at the same time making other policy choices that reduce total

state funding for public education?

G. Facts Necessary to Understand the Issue Presented

There are no substantive facts necessary for this Court to understand the issue presented, and the procedural history of the underlying action is recounted above. Although the Constitution and state statutes speak for themselves, a brief discussion of the public school finance formula, Amendment 23, and the negative factor frame this Court's consideration of an exercise of its original jurisdiction.

In 1994, the General Assembly codified Colorado's public school finance formula. §§ 22-54-101 *et seq.*, C.R.S. (2014). The first variable is the "statewide base per pupil funding" amount, which is the same for all school districts and set annually by the General Assembly. § 22-54-104(3), (5)(a). This amount is modified by certain factors to arrive at a unique "district per pupil funding" amount for each of Colorado's 178 school districts:

$$\begin{aligned} & ((\text{Statewide base per pupil funding} \times \text{District} \\ & \text{personnel costs factor} \times \text{District cost of living} \\ & \text{factor}) + (\text{Statewide base per pupil funding} \times \\ & \text{District nonpersonnel costs factor})) \times \text{District size} \\ & \text{factor} = \text{District per pupil funding} \end{aligned}$$

Id., -104(3). The district per pupil funding amount is then multiplied by a

district's funded pupil count and added to the district's at-risk funding to yield a "district total program" amount for every district:

$$\text{(District per pupil funding} \times \text{District funded pupil count)} + \text{District at-risk funding} = \text{District total program}$$

Id., -104(1)–(2)(a)–(b) (providing also alternative calculations to allow higher district total program amounts). On top of the state share of its total program amount, a school district may receive additional state funding to help pay for certain categorical programs including gifted education, English language development, and special education. *E.g.*, § 22-20-114(1)(c), C.R.S. (2013); § 22-20-205, C.R.S. (2013); §22-24-104, C.R.S. (2013).

In 2000, the People adopted Amendment 23 to the Colorado Constitution. Amendment 23 provided that for the 10 fiscal years from 2001–02 to 2010–11, the "statewide base per pupil funding" and "total state funding for all categorical programs" "shall grow annually at least by the rate of inflation plus an additional one percentage point." COLO. CONST. Art. IX, sec. 17(1). Thereafter, Amendment 23 provides that both the "statewide base per pupil funding" and the "total state funding for all categorical programs" "shall grow annually at a rate set by the general

assembly that is at least equal to the rate of inflation.” *Id.*

The General Assembly complied, increasing the statewide base per pupil funding amount from \$3,390 in the 1994–95 budget year, § 22-54-104(5)(a)(I), 9 C.R.S. (1995 Repl. Vol.), and \$4,002 in 2000–01, § 22-54-104(5)(a)(VII), C.R.S. (2001), to \$ 6,121 in the current 2014–15 year, § 22-54-104(5)(a)(XXI), C.R.S. (2014). Over the same time, the General Assembly also has increased funding for categorical programs. *Compare e.g.*, Ch. 283, S.B. 95-214, 60th Gen. Ass., 1st Reg., 1995 COLO. SESS. LAWS 1815, at 1860–61, *with, e.g.*, Ch. 420, H.B. 14-1336, 69th Gen. Ass., 2d Reg., 2014 COLO. SESS. LAWS 2381 at 2415.

In 2010, the General Assembly determined “stabilization of the state budget require[d] a reduction in the amount of the annual appropriation to fund the state’s share of the total program funding for all districts.” § 22-54-104(5)(g)(I), C.R.S. (2013). To accomplish the reduction, the General Assembly added a negative factor to the school finance formula to ensure the total program funding for all districts did not exceed a sum certain to be determined annually:

$$\begin{aligned} & ((\text{District per pupil funding} \times \text{District funded} \\ & \text{pupil count}) + \text{District at-risk funding}) \times \text{negative} \\ & \text{factor} = \text{District total program} \end{aligned}$$

Id., -104(5)(g)(I)(A)–(E). In the current 2014–15 budget year, the negative factor amounts to a total state funding reduction of \$894,202,067.00. (Ex. F, Pet’rs’ Answer, ¶ 1 at 1).

H. Reason to Issue a Rule to Show Cause and Grant Relief

The minimum level of funding required by Amendment 23 is a narrow and straightforward question of law that needs to be decided now.

The determinative question in the underlying proceeding is whether the negative factor violates Amendment 23 because it reduces the total amount of state spending on public education. Interpretation of the Colorado Constitution is a question of law subject to de novo review. *E.g.*, *Lobato v. State*, 304 P.3d 1132, 1138 (Colo. 2013). “Where the language of the Constitution is plain and its meaning clear, that language must be declared and enforced as written,” *Colo. Ass’n of Pub. Employees v. Lamm*, 677 P.2d 1350, 1353 (Colo. 1984) (citing cases), and “[w]here a constitutional amendment or statute contains plain, clear language,” there is no “resort to rules of construction to construe its meaning,” *Tivolino Teller House, Inc. v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996). For these reasons, no factual development is either necessary or appropriate.

Amendment 23 expressly mandates inflationary increases to “the statewide base per pupil funding, as defined by the Public School Finance Act of 1994.” COLO. CONST. Art. IX, sec. 17(1). As it existed on December 28, 2000, the effective date of Amendment 23, the Public School Finance Act used this same exact phrase—“the statewide base per pupil funding”—to identify the starting monetary variable in the finance formula. § 22-54-104(3). Thus, Amendment 23 leaves no question whatsoever that the base—and only the base—must at least keep pace annually with inflation.

Respondents argue there was a broader intent behind Amendment 23 to increase the finance formula’s amount of district total program funding or even the total amount of state spending on public education. Yet that is not what is expressed in the Amendment’s plain language. Even setting aside that Amendment 23 precisely names the statewide base per pupil funding amount and refers to the Public School Finance Act, the word “base” means base, and in common usage could mean nothing else. Had the People intended that either the finance formula’s per pupil yield or overall state spending on public education increase with inflation, they would have said so.

Even if Amendment 23 were ambiguous, its meaning is still a question of law not dependent upon any alleged or discoverable facts. The intent of proponents or drafters “not expressed in the language of the amendment, is not relevant” and “will not govern the court’s construction.” *Davidson v. Sandstrom*, 83 P.3d 648, 655 (Colo. 2004). The only potentially relevant extrinsic aid in interpreting Amendment 23 is the Blue Book, and its contents are certainly available to this Court. *See, e.g., In re TITLE*, 898 P.2d 1076, 1079 n.5 (Colo. 1995). Respondents are therefore not entitled to a trial just so they can attempt to impeach Amendment 23 with eyewitness and expert testimony.

Not only is the question of the minimum level of funding required by Amendment 23 one this Court can decide without resorting to any factual record, it is “an extraordinary matter of public importance” that ought to be decided now. *People ex rel. Salazar*, 79 P.3d at 1228 (citing *Leaffer*, 44 P.3d at 1077). A new legislative session has begun, along with the yearly setting of the state budget. If the negative factor is unconstitutional, the General Assembly must find nearly \$1 billion in new revenue or cut that much in spending on essential state services. TABOR’s requirement that tax increases be approved in advance by the

electorate means that as a practical matter, the unavailability of a negative factor will lead to the latter. The district court's decision that Respondents present a viable claim thus calls into question the entire state general fund budget at a time when Colorado's lawmakers need to know the constitutional bounds within which they can set the State's annual budget.

As in *Lobato*, which also posed a significant monetary impact on the state budget, this Court will be called upon to resolve the meaning of the Colorado Constitution as it pertains to the level of state spending on public education. In addition to providing certainty for Colorado's lawmakers as they begin a new legislative session, interpreting Amendment 23 now would promote finality and conserve limited state resources, including those of the judiciary.

I. List of Supporting Documents

Exhibit A: District Court's Order Re: [Petitioners'] Motion to Dismiss [Respondents'] Complaint

Exhibit B: Respondents' Complaint

Exhibit C: Petitioners' Motion to Dismiss [Respondents'] Complaint

Exhibit D: Respondents' Response to Motion to Dismiss [Respondents'] Complaint

Exhibit E: Petitioners' Reply to [Respondents'] Response to Motion to Dismiss

Exhibit F: Petitioners' Answer

WHEREFORE, Petitioners ask this Court to exercise its original jurisdiction and issue a rule that Amendment 23 allows the General Assembly to reduce total state funding for public education as long as it increases the statewide base per pupil funding amount by at least the rate of inflation.

Dated this 22nd day of January, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2015, the foregoing **PETITION FOR RULE TO SHOW CAUSE** was filed via hand-delivery to the Court and served via U.S. Mail, postage prepaid, and ICCES as follows:

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