

<p>DISTRICT COURT, DENVER COUNTY, COLORADO  Denver City and County Building  1437 Bannock St.  Denver, Colorado 80202</p>	
<p><b>Plaintiffs:</b> ANTHONY LOBATO, et al.  and  <b>Plaintiff-Intervenors:</b> ARMANDINA ORTEGA, et al.  v.  <b>Defendants:</b> THE STATE OF COLORADO, et al.</p>	
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**PLAINTIFFS' MOTION TO STRIKE DEFENDANTS'  
SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES AND  
REQUEST FOR ORAL ARGUMENT**

Pursuant to Colorado Rules of Civil Procedure 12(c) and 12(f), Plaintiffs Anthony Lobato, *et al.* ("Plaintiffs") hereby move for an order striking the second, third, and fourth affirmative defenses asserted in the Answer of Defendants State of Colorado, *et al.* ("Defendants"). In support of this motion, Plaintiffs state as follows:

**Certification Pursuant to C.R.C.P. 121 § 1-15(8)**

Undersigned counsel conferred with counsel for Plaintiff-Intervenors and Defendants, about the relief sought by this motion. Counsel for Plaintiff-Intervenors states that Plaintiff-Intervenors agree with this motion and do not oppose the relief sought by this motion. Counsel for Defendants states that Defendants oppose the relief sought by this motion.

## INTRODUCTION

Plaintiffs are twenty-one school districts from across Colorado and school children and parents of children who attend public school in an additional six districts. They contend that their children are being denied the right to a quality public school education, in violation of the state constitutional mandate of a “thorough and uniform” system of public education. *See* Colo. Const. art. IX § 2 (the “Education Clause”); Second Amended Complaint at ¶¶ 23-55, 175-93. A quality education is, at a minimum, one that prepares children for the workforce, post-secondary education, and meaningful participation in civic, political, and economic life. Second Amended Complaint at ¶¶ 2, 178.

The violation of Plaintiffs’ constitutional rights is caused by the failure of the Colorado system of public school finance, including the Public School Finance Act of 1994 (“PSFA”), “categorical” funding programs, and capital construction funding. *Id.* at ¶ 3. The public school finance system allocates funds on an arbitrary basis that is not rationally related to the accomplishment of the qualitative mandate of the Education Clause of the Colorado Constitution or the goals of the General Assembly as expressed in education reform legislation. *Id.* Moreover, the State has persistently failed to fund education at the levels required to meet constitutional and statutory standards of quality. *Id.* Because of the irrationality of the funding formula and the lack of access to adequate financial resources, school districts are not able to provide – and school children do not receive – the educational programs, services, instructional materials, equipment, staffing, and facilities necessary to assure a constitutionally adequate, quality education. *Id.* at ¶ 15.

Plaintiffs further contend that the State’s failure to fund public education in a rational and sufficient manner prevents local boards of education from effectively exercising control over instruction in their schools, in violation of the Local Control Clause of the State Constitution. *See* Colo. Const. art. IX § 15; Second Amended Complaint at ¶¶ 4, 194-96. All Plaintiffs assert identical claims based on the Colorado Constitution, *see* Second Amended Complaint at ¶¶ 175-196, and seek declaratory and injunctive relief to enforce their constitutional rights. *Id.* at pp. 35-36 (“Prayer for Relief”) ¶¶ 1-6.

In their answer, Defendants raise several affirmative defenses, including that Plaintiffs have failed to join all necessary and indispensable parties under C.R.C.P. 19 and 57(j), Plaintiffs lack standing to assert claims on behalf of “the children of the State of Colorado”, the parent Plaintiffs lack standing on their own behalf as taxpayers and on their children’s behalf, and the school district Plaintiffs lack standing as political subdivisions of the state. *See* Answer to Plaintiffs’ Second Amended Complaint (“Answer”) at pp. 25-26 (“Affirmative Defenses”) ¶¶ 2, 3, 4.

As shown below, the Rule 19 defense fails as a matter of law because it is unnecessary for Plaintiffs to join *all* Colorado school districts and *all* Colorado school children in this action. The Court can grant complete relief with the parties it has before it, and determine the constitutionality of Colorado’s school finance system without impeding the rights of absentee districts and children or risking multiple or inconsistent obligations. The issues of school district and individual Plaintiff standing have already been adjudicated by the Colorado Supreme Court in Plaintiffs’ favor.

Based on the facts presented in the pleadings and the reasons discussed below, these defenses fail as a matter of law. Thus, Defendants' second, third, and fourth affirmative defenses should be stricken from the pleadings.

## ARGUMENT

### **I. LEGAL STANDARD**

Under C.R.C.P. 12(f), a court may strike a responsive pleading when it “fails to state a legal defense.” A motion to strike for failure to state a legal defense is analogous to a C.R.C.P. 12(b)(5) motion and governed by the same standards. *Wagner v. Grange Ins. Ass’n*, 166 P.3d 304, 308-09 (Colo. App. 2007) (citations omitted). A motion to strike should be granted when the defendant’s “factual allegations cannot support a defense as a matter of law.” *Id.* (quoting *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004)).

The standard for a C.R.C.P. 12(c) motion for judgment on the pleadings is “essentially consistent with that employed in resolving a motion to dismiss for failure to state a claim.” *Connecticut Gen. Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684, 687 (Colo. App. 1995). A motion for judgment on the pleadings should be granted when, construing the allegations against the movant, “the pleadings themselves show that that matter can be determined on the pleadings.” *Id.* (citing *Strout Realty, Inc. v. Snead*, 530 P.2d 969 (Colo. App. 1975)).

**II. DEFENDANTS' SECOND AFFIRMATIVE DEFENSE SHOULD BE STRICKEN BECAUSE ALL NECESSARY PARTIES TO THIS ACTION HAVE BEEN JOINED.**

Defendants' claim as their second affirmative defense that Plaintiffs have failed to join all necessary and indispensable parties as required by C.R.C.P. 19 and 57(j).<sup>1</sup> See Answer at p. 25, ¶ 2. Specifically, Defendants contend that all Colorado school districts and all Colorado school children, as well as the General Assembly, are necessary and indispensable parties. See Defendants' Responses to Plaintiffs' First Set of Discovery, at pp. 10-11, attached in pertinent part hereto as Exhibit A). Because all necessary parties to this action have been joined, this defense fails as a matter of law.

C.R.C.P. 19(a) requires joinder of a person subject to service of process if:

(1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Not every person who has an interest in issues raised in a particular civil action must be joined as a party to that action. *Brody v. Bock*, 897 P.2d 769, 778 (Colo. 1995). An absentee party need not be joined if "the interests of the parties before the court may be finally adjudicated without adversely affecting the rights of an absent person." *Id.* (absent parties not necessary

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<sup>1</sup> Both C.R.C.P. 57 and the Declaratory Judgment Act include a clause mandating that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." C.R.C.P. 57(j); Colo. Rev. Stat. § 13-51-115 (2009). Courts generally use C.R.C.P. 19 principles when interpreting and applying C.R.C.P. 57. See *Denver v. Arvada*, 556 P.2d 76 (Colo. 1976); see also *Bd. of County Comm'rs v. Roberts*, 159 P.3d 800, 808 (Colo. App. 2006).

where plaintiff can obtain complete recovery from named defendant); *see also Bd. of County Comm'rs v. Roberts*, 159 P.3d 800, 807 (Colo. App. 2006) (“Mere interest in the subject matter of litigation, even if the interest is substantial, is insufficient to make a party indispensable.”).

A plaintiff challenging a legislative enactment need not join all persons affected by the challenged enactment. *Harmelink v. City of Arvada*, 580 P.2d 841, 842 (Colo. App. 1978) (“it is not necessary for one objecting to the ordinance to join as plaintiffs all other objectors”). A plaintiff is also not required to join absentees where the absentees share “only the common interest of all persons” subject to the challenged law or rule. *See Talbott Farms, Inc. v. Bd. of County Comm'rs*, 602 P.2d 886, 888 (Colo. App. 1979).

Defendants bear the burden to show that absent parties are necessary and indispensable. *Williamson v. Downs*, 829 P.2d 498, 500 (Colo. App. 1992). As shown below, Defendants have not met – and cannot meet – their burden to show that the absence of certain school districts, school children, or the General Assembly would: (a) prevent complete relief among the parties (Rule 19(a)(1)); (b) impair or impede the ability of absent parties to protect any interest they have in this action (Rule 19(a)(2)(A)); or (c) leave any of the named parties subject to a substantial risk of multiple or inconsistent obligations (Rule 19(a)(2)(B)).

**A. Complete Relief Can Be Accorded Among Those Already Parties.**

The absence from this action of some Colorado school children, some Colorado school districts, and the General Assembly will not prevent the Court from granting complete relief. The Plaintiffs seek a declaratory judgment that Colorado’s current system of public school finance violates the Colorado Constitution, and an injunction compelling Defendants to implement a system of public school financing that is in compliance with the mandates of the

Colorado Constitution. The Court can decide these issues and grant complete relief in the absence of the remaining school districts and school children as long as at least one party has standing to bring the claims.

In *Harmelink*, for example, the court held that it was “not necessary for one objecting to the ordinance to join as plaintiffs all other objectors” because the plaintiff’s claims were based upon his own injury and damage and his right to sue is not affected by whether “he brings others with him or attempts to represent those who have not appeared.” 580 P.2d at 842. Similarly here, it is not necessary for Plaintiffs to join all parties injured by Colorado’s school finance system because Plaintiffs are entitled to sue.

Plaintiffs may also obtain the complete relief sought in the absence of the General Assembly. The judiciary routinely rules on the constitutionality of statutes enacted by the General Assembly and orders appropriate relief where the General Assembly is not named as a defendant. *See, e.g., Lujan v. Colorado State Bd. of Educ.* 649 P.2d 1005, 1010 (Colo. 1982), (reaching the merits of Plaintiffs’ constitutional challenge to the Public School Finance Act of 1973 even though the General Assembly was not a party to the action); *Mesa County Bd. of County Comm’rs v. State*, 293 P.3d 519 (Colo. 2009) (ruling on the constitutionality of amendments to the 1994 Public School Finance Act despite the absence of the General Assembly as a defendant). Moreover, the Supreme Court has acknowledged, in this case, that if this Court finds the current system of public school finance unconstitutional, the General Assembly will have an appropriate period of time to design and fund a constitutionally compliant system. *Lobato v. State*, 218 P.3d 358, 375; *see also id.* at n.21 (citing other state courts that have found state school funding schemes constitutionally inadequate and then allowed the legislature time to

develop the proper remedy). Nowhere in its analysis of the justiciability of Plaintiffs' claims or description of appropriate relief was the Supreme Court bothered by the absence of the General Assembly as a party in the context of Rule 19. Accordingly, complete relief may be afforded here in the absence of the General Assembly.

Since complete declaratory and injunctive relief can be accorded without all Colorado school districts and school children and without the General Assembly, these parties are not necessary under Rule 19(a)(1).

**B. The Ability of Absentee Parties to Protect Their General Interest in this Action Will Not Be Impaired or Impeded by Their Absence.**

Colorado courts have long held that it is unnecessary to join all parties that stand to benefit from a lawsuit if the existing plaintiffs were to prevail, especially if the absentees have no particularized interest in the case beyond that of the general public. *See Harmelink*, 580 P.2d at 842 (holding not all affected landowners must be joined in suit challenging city ordinance); *Talbott Farms*, 602 P.2d at 888 (holding subdivision residents need not be joined in suit challenging water rates because they have no interest in the outcome of the case beyond that shared by all water users).

Here, the absentee school children and the absentee school districts share Plaintiffs' interest in obtaining a system of public schools that complies with the Constitution. Indeed, all of Colorado shares that interest. However, because the absentee parties have no particularized interest in the outcome of this action beyond that of all individuals and entities involved with Colorado's public school system, their absence will not impede or impair their ability to protect such interests. *See Talbott Farms*, 602 P.2d at 889 (because petitioners "had no interest in the

outcome of the judicial review beyond that shared by all water users in the county, their presence was not necessary for continuation of the action.”).

And, to the extent that absentee parties may have interests dissimilar from Plaintiffs, who include a diverse group of school districts, parents, and children who receive special education, English language, gifted and talented, and at-risk services, such differences are only in the *reasons* why the current public school system is unconstitutional. If absentee parties contend that the current system of schools is not constitutionally compliant for reasons different than those asserted by Plaintiffs, their absence here will not impede or impair their ability to protect that interest because they can intervene here or file their own lawsuit based such different grounds.<sup>2</sup>

Indeed, courts have acknowledged in the context of education legislation that not every party who will benefit from or is affected by the challenged legislation is a necessary and indispensable party. In *School District of the City of Pontiac v. United States Department of Education*, the plaintiffs challenged certain obligations under the No Child Left Behind Act. 584 F.3d 253, 257-58 (6th Cir. 2009).<sup>3</sup> The Sixth Circuit held that individual states, who would be affected by the court’s decision, were not necessary parties because their presence was not needed to determine the constitutional question at issue. *Id.* at 265-66. The individual states had the opportunity to intervene if they so desired, and “it would turn Rule 19 analysis on its head to

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<sup>2</sup> Indeed, a group of parents and children have already intervened in this action to address their own particular interests in the public education system. *See* Plaintiff-Intervenors’ Complaint in Intervention.

<sup>3</sup> On rehearing *en banc*, a majority of the court agreed that the plaintiffs’ claims were not barred by Fed. R. Civ. P. 19. *See id.* at 264-68 (opinion by Cole, J.), 279-83 (opinion by Sutton, J.), 310 (opinion by Gibbons, J.). The *en banc* panel was evenly split on the merits, with eight judges voting to affirm and eight judges voting to reverse. *See id.* at 256.

argue that the States' interest are now impaired because they declined to participate in this much-publicized case." *Id.* at 266 (emphasis omitted).

It is likewise unnecessary to join the General Assembly, which shares the same general interest in a constitutional public school finance system. The General Assembly's ability to protect its interest will not be impeded or impaired by its absence. Nevertheless, the General Assembly can protect any claimed interest by intervening in this case. *See* C.R.C.P. 20(a).<sup>4</sup> The absentee parties are thus not necessary under Rule 19(a)(2)(A).

**C. There Is No Substantial Risk of Multiple or Inconsistent Obligations.**

There is no substantial risk that Defendants could be subject to multiple or inconsistent obligations due to the absence of the remaining school districts and school children. As a general matter, absentee parties could never impose obligations upon Defendants that are inconsistent with the obligations sought to be imposed here because each and every absentee party is guaranteed the same constitutional right: a thorough and uniform system of public schools. Defendants have a singular obligation to follow the law with respect to Colorado's system of public schools and that obligation does not turn on who is a party to this action.

The court in *Pontiac* found that the resolution of a constitutional question in the absence of parties that would be affected by the outcome actually reduces the threat of inconsistent obligations. 584 F.3d at 267. The court reasoned that there would be *less* likelihood of inconsistent obligations because the court's decision would inform both existing and absent

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<sup>4</sup> Although the General Assembly and its members enjoy absolute immunity under the speech and debate clause for actions based on legislative activity, *see Romer v. Colorado Gen. Assembly*, 810 P.2d 215, 223 (Colo. 1991); *Lucchesi v. State*, 807 P.2d 1185, 1190 (Colo. App. 1990), nothing prevents the General Assembly from retaining its own counsel and intervening in this action, of which it undoubtedly has notice.

parties of their rights and responsibilities under the law. *Id.* The same is true here. The Court’s decision will inform all parties what the State’s obligations are with respect to the delivery of a “through and uniform” public education. The absentee parties are therefore not necessary under Rule 19(a)(2)(B).

In short, the law is clear that, in the context of a challenge to a statutory scheme, the absence of parties generally affected by the challenged legislative enactment will not prevent complete relief, impede or impair the absentee parties’ ability to protect their general interests, or subject the named parties to inconsistent obligations. Accordingly, absentee school districts and absentee school children are not necessary parties under C.R.C.P. 19(a) and 57(j). Further, the General Assembly need not be joined because the Supreme Court has outlined a procedure for ensuring that complete relief can be afforded in the absence of the General Assembly.<sup>5</sup> Therefore, as a matter of law, Defendants’ second affirmative defense is without merit and should be stricken from the pleadings.

**III. DEFENDANTS’ THIRD AFFIRMATIVE DEFENSE SHOULD BE STRICKEN BECAUSE PLAINTIFFS ARE NOT ASSERTING CLAIMS ON BEHALF OF ALL CHILDREN IN COLORADO.**

The first part of Defendants’ third affirmative defense is nonsensical; it challenges Plaintiffs’ standing to assert claims that have not been asserted. Plaintiffs consist of numerous individual school children, their parents or guardians, and several school districts across the

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<sup>5</sup> Nor are any of the parties indispensable under Rule 19(b). For the same reasons that the absentee parties are not necessary, *a fortiori* a judgment rendered in their absence will not be prejudicial to either absentee parties or existing parties because of the absence and relief will be adequate. Relief granted by the Court can also be shaped to avoid any prejudice. *See, e.g., Lobato*, 218 P.3d at 375 & n.21 (explaining how remedy can be shaped if district court finds school finance system irrational). Finally, Plaintiffs will have no adequate remedy if the action is dismissed for nonjoinder. *See* C.R.C.P. 19(b).

State. Paragraphs 20 through 56 of the Second Amended Complaint set forth the identities and grounds for standing for each of the Plaintiffs. Plaintiffs make no allegations that they are asserting claims on behalf of all children in the State.

Defendants presumably have based this defense on Paragraph 2 of the Second Amended Complaint, which states:

Plaintiffs' children and the children of the State of Colorado have been and are being denied their right to a quality public school education that meets the substantive mandate of the Education Clause.

This statement differentiates between the Plaintiff children and all non-party children in the State, and merely alleges that both groups are being denied their rights to a quality education. Nothing in that statement suggests that Plaintiffs are asserting claims on behalf of *all* children in the State of Colorado. Plaintiffs have alleged that the State is violating the rights of the children of the State of Colorado, but have not asserted claims based on the violation of the rights of children not parties to this action.

Given that the Second Amended Complaint provides a detailed list of the particular Plaintiffs involved in this case, Defendants' third affirmative defense has no legal basis – it cannot be a defense to any claim because no claim is brought on behalf of absentee parties. The defense should be stricken from the pleadings.

The second part of this affirmative defense – that Plaintiffs' claims on behalf of themselves as taxpayers, on behalf of their children as recipients of public education, and on behalf of other unnamed parents and students – is presumably directed at the Plaintiff parents, as opposed to the Plaintiff children or Plaintiff school districts. To that extent, the defense should be stricken as a matter of law because binding precedent and law of the case clearly hold that the

Plaintiff parents have standing. *See Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008) (holding that the parent Plaintiffs have standing because inadequate access to public education is an injury-in-fact and the Education Clause provides children with a legally protected interest); *see also Lobato*, 218 P.3d at 367 (Defendants did not contest Court of Appeals’ holding that parents have standing). In any event, for the reasons expressed by the Supreme Court in *Lobato*, “it is not necessary to address the standing of parties bringing the same claims as parties with standing.” *Id.* at 368. Defendants do not assert that school children themselves lack standing, and the parent plaintiffs assert identical claims, so no further inquiry with respect to the parents’ standing is warranted here.

**IV. DEFENDANTS’ FOURTH AFFIRMATIVE DEFENSE SHOULD BE STRICKEN BECAUSE THE ISSUE HAS ALREADY BEEN DECIDED.**

Defendants’ fourth affirmative defense – namely, that the school districts Plaintiffs lack standing as political subdivisions of the state – has already been decided by the Colorado Supreme Court. The Supreme Court reversed on the issue of school district standing and held that school districts “may continue as plaintiffs in this case.” *Lobato*, 218 P.3d at 368 (finding it unnecessary to address the standing of parties bringing the same claims as parties with standing). The “continued participation of the school districts in this case is similar to the role of permissive intervenors and does not require standing independent of plaintiffs with standing.” *Id.* (citation omitted). Since the school district Plaintiffs raise claims identical to those of the Plaintiff parents, who undeniably have standing, *see id.* at 367-68, there is no need to independently evaluate the Plaintiff school districts’ standing. *See id.* Thus, Defendants’ fourth affirmative defense should be stricken.

## CONCLUSION

WHEREFORE, Plaintiffs request that the Court strike Defendants' Second, Third, and Fourth Affirmative Defenses. Plaintiffs additionally request that the Court hold oral argument on this motion. In the event the Court deems any absentee party a necessary party under Rule 19(a), Plaintiffs request leave to join additional parties or move for class certification under Rule 23. *See Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1081 (Colo. App. 2005) (finding when there has been a failure to join an indispensable party, the court should join the necessary party or allow the plaintiff an opportunity to do so); *see also* C.R.C.P. 19(d).

Dated: October 4, 2010

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***The original, executed document is on file at the offices of Davis Graham & Stubbs LLP.***

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 4th day of October, 2010, a true and correct copy of the foregoing **PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES AND REQUEST FOR ORAL ARGUMENT** was served via LexisNexis® File & Serve, addressed to the following:

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