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PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 56(h) MOTION

Plaintiffs, Anthony Lobato, et al., ("Plaintiffs"), hereby submit this response to Defendants' Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) ("Motion").

INTRODUCTION AND ANALYSIS OF THE SUPREME COURT'S OPINION

This action is brought by the Plaintiffs – parents, students, and public school districts in the State of Colorado – for declaratory and injunctive relief against the State of Colorado, the Colorado State Board of Education, the Commissioner of Education, and the Governor. The Plaintiffs claim that the Colorado system of public school finance violates the mandates of Article IX, sections 2 and 15 of the Colorado Constitution.

Article IX, section 2 (the Education Clause) provides in pertinent part that:

> The General Assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.

Article IX, section 15 (the Local Control Clause) directs the General Assembly to "provide for the organization of school districts of convenient size," governed by locally elected boards of education and empowers the directors of the local boards of education with the "control of instruction in the public schools of their respective districts."

The Colorado Supreme Court provided the framework for this action in *Lobato v. State*, 218 P.3d 358 (Colo. 2009) (*Lobato*). Pertinent aspects of the Court's holdings and framework are discussed here. As discussed fully below, the arguments asserted in Defendants' Motion are

contrary to the express holdings in *Lobato*, as well as the legislative scheme governing public education in Colorado.

A. Plaintiffs' Claims Are Justiciable.

The principal issue in *Lobato* was whether the Education Clause claims were justiciable, that is, whether they were subject to judicial review and, if so, on what terms. Defendants argued that whether the legislature was meeting the mandate of the Education Clause was exclusively the province of the legislature. Indeed, they argued that, beyond assuring that there was as little as a single dollar appropriated for public education, the courts had no power to review the constitutionality of the public school finance system.

The Supreme Court disagreed, holding that "[a] ruling that the plaintiffs' claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a 'thorough and uniform' system of public education." *Lobato*, 218 P.2d at 372. The Court concluded that the Colorado Constitution does not "give the legislature unfettered discretion in this area"; and it remains the role and responsibility of the courts "to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system." *Id.*

B. The Education Clause Includes a Substantive Guarantee of Educational Quality and Funding.

Relying on Colorado's first school finance case, *Lujan v. Colorado State Board of Education*, 649 P.2d 1005 (Colo. 1982), the Court reaffirmed that the thorough and uniform provision of the Education Clause includes a qualitative educational mandate that the State must meet:

> Central to *Lujan's* holding was its interpretation that the education clause contains a *substantive mandate* to *the state* subject to review by the courts. The *Lujan* court found that the clause is "satisfied if thorough and uniform educational opportunities are available through state action in each school district" and "each school district must be given the control necessary to implement this mandate at the local level."

Lobato, 218 P.2d at 371, (citing *Lujan*, 649 P.2d at 1025) (emphasis added).

The Education Clause further compels the implementation of a school finance system designed and funded to fulfill this substantive standard. Thus:

> [I]t is the responsibility of the judiciary to determine whether the state's public school financing system is rationally related to the constitutional mandate that the General Assembly provide a "thorough and uniform" system of public education.

Id. at 363.

C. <u>The Court Should Rely on the Education Reform Laws to Interpret the Education Clause.</u>

The Supreme Court identified the sources on which the courts should rely in giving content to the language of the Education Clause:

> [T]he General Assembly's own laws and pronouncements, as well as other courts' interpretations of similar state education clauses, can assist the court in assessing whether the General Assembly has adequately implemented the "thorough and uniform" mandate of the education clause.

Id. at 372. The Court particularly noted its agreement with Plaintiffs' that the State's "education reform statutes with proficiency targets and content standards" may be used to evaluate the constitutionality of the legislature's actions. *Id.* n.17.

D. The Education Clause Constrains the Legislature's Exercise of the Appropriations Power.

After analyzing the risk of judicial intrusion on the General Assembly's authority, the Court held that the legislature's appropriations power did not preclude adjudication of claims under the Education Clause:

> While we acknowledge that the General Assembly "enjoys broad legislative responsibility…to raise and spend funds for government purposes …. [T]his general authority must be exercised in conformity with express or implied restraints imposed thereon by specific constitutional provisions." To this end, we have regularly adjudicated claims that the legislature's appropriations power is being exercised outside of constitutional limits.

Id. at 372-73 (citations and footnote omitted) (quoting *Dempsey v. Romer*, 825 P.2d 44, 51 (Colo. 1992)).

Having held that the Education Clause requires the General Assembly to implement a thorough and uniform system of public education, the Court concluded that this mandate "imposes a judicial constraint, or check, on the legislature's general appropriations power, giving the court the authority to review the merits of the plaintiffs' claims." *Id.* at 373. Therefore, the the General Assembly's general appropriations power cannot foreclose judicial review of the school finance system.

E. The Remedy and Standard of Review Sufficiently Ensure Judicial Deference.

The Supreme Court recognized that the scope of judicial review of constitutionally-based school finance claims must avoid "excessive judicial involvement in education policy." *Id.* Again following *Lujan*, the Court adopted a "rational basis" standard of review as the correct balance between the judicial and legislative roles:

> [W]e hold that the judiciary must . . . evaluate whether the current state's public school financing system is funded and allocated in a manner rationally related to

> the constitutional mandate that the General Assembly provide a "thorough and uniform" public system. *This rational basis review satisfies the judiciary's obligation to evaluate the constitutionality of the public school system without unduly infringing on the legislature's policymaking authority*. . . .
>
> The *Lujan* court engaged in rational basis review of whether the state's system . . . violated the "thorough and uniform" mandate. We see no reason to devise a different standard of review in this case, where the plaintiffs also assert substantive claims under the same constitutional provision.

Id. at 374 (emphasis added) (internal citations omitted).

In further deference to the separation of powers, the Court held that the task of the judiciary is not to determine "whether a better financing system could be devised, but rather to determine whether the system passes constitutional muster." *Id.* (citation omitted). If the court finds that the school finance system does not satisfy rational basis review, "it is the task of the legislature, and not the judiciary, to bring the education funding system into constitutional compliance." *Id.* at 375 n.21 (citations omitted). Therefore the remedy for Plaintiffs' claims should permit the legislature an appropriate period of time within which to enact a constitutional finance system. *Id.* at 375.

In short, the Supreme Court (1) acknowledged the boundaries of the judiciary, and (2) set forth the clear and complete structure of an appropriate standard of review and remedy as the safeguard against any undue intrusion into the General Assembly's powers. The Court's efforts to define fully the safeguard against intrusion into the legislature's powers renders any further deference or limit on this Court unwarranted.

F. Summary of the Ruling and the Scope of Plaintiffs' Burden.

Fully accounting for judicial deference, the Court summarized Plaintiffs' burden on remand as follows:

> To be successful, [Plaintiffs] must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a "thorough and uniform" system of public education. The trial court must give significant deference to the legislature's fiscal and policy judgments. The trial court may appropriately rely on the legislature's own pronouncements to develop the meaning of a "thorough and uniform" system of education. If the court finds that the current system of public finance is irrational, then the court must provide the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution.

Id. at 374-75 (citation omitted).

ARGUMENT

I. THE LEGAL STANDARD FOR A RULE 56(h) MOTION.

The purpose of Rule 56(h) is to allow the court to address issues of law which are *not* dispositive of any claims. *Estate of Hazel*, 240 P.3d 413, 417 (Colo. 2010). The summary judgment standard applies to Rule 56(h) matters, and the burden is on the Defendants as the moving party. In determining whether a genuine issue of material fact exists, the nonmoving party is entitled to all inferences that reasonably may be drawn from the undisputed facts, and the court must resolve any doubt as to the existence of a genuine issue of material fact in the nonmoving party's favor. *Id.* at 417-18.

II. THE STANDARD OF REVIEW FOR PLAINTIFFS' CLAIMS IS THE SUPREME COURT'S RATIONAL BASIS TEST.

Defendants first ask this Court to apply a heightened standard of review—*i.e.*, "beyond a reasonable doubt"—to Plaintiffs' claims. *Lobato*, however, already rejected this argument by articulating a clear and complete standard of review for Plaintiffs' claims: whether the public

school finance scheme "is funded and allocated in a manner rationally related to the constitutional mandate." *Lobato*, 218 P.3d at 374.

The "beyond a reasonable doubt" standard is founded on a presumption of constitutionality accorded to statutes based on "the deference the court affords the legislature in its law making functions." *Mesa Cnty.v. State*, 203 P.3d 519, 527 (Colo. 2009). That presumption is "rooted in the doctrine of separation of powers" and reflects the "foundational premise that . . . co-equal branches observe and effectuate constitutional provisions in exercising their power." *City of Greenwood Village v. In re Centennial*, 3 P.3d 427, 440 (Colo. 2000).

Because declaring a statute unconstitutional is "one of the gravest duties impressed upon the courts," it is "one which the courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *Id.* (citation omitted). For these reasons, a plaintiff "*ordinarily* must prove the statute's unconstitutionality 'beyond a reasonable doubt.'" *Id.* (emphasis added) (citation omitted). Ultimately, however, the "type of constitutional challenge, the nature of the challenged statute, and the standing of the parties determine how we approach judicial review in a particular case . . . ." *Id.*

This distinction is pertinent here because the Supreme Court has already enunciated a standard of review specifically tailored to the constitutional issues posed by this case. The Court adopted the rational basis standard only after close consideration of the judicial responsibility to "'determine what the law is,' without usurping the legislature's authority over education policy." *Lobato*, 218 P.3d at 374 (quoting *Lujan*, 649 P.2d at 1025). The Court concluded, without mention of the "beyond a reasonable doubt standard," that "[t]his rational basis review satisfies

the judiciary's obligation to evaluate the constitutionality of the public school system without unduly infringing on the legislature's policymaking authority." *Id.*

The *Lobato* rational basis test satisfies the concerns underlying the application of the strict standard in other contexts. The cases that generally apply the presumption of constitutionality and the "beyond a reasonable doubt" burden of persuasion uniformly involve claims that specific statutes exceed constitutional authority or infringe upon a party's individual rights. *See, e.g., Mesa Cnty.*, 203 P.3d at 522; *Barber v. Ritter,* 196 P.3d 238, 241 (Colo. 2008); *Hinojosa-Mendoza v. People,* 169 P.3d 662, 668 (Colo. 2007); *Board of Ed. v. Booth,* 984 P.2d 639, 650 (Colo. 1999). The critical distinction here is that, unlike most constitutional claims, this case concerns the General Assembly's *failure* to fulfill its affirmative duty[1] under the Education Clause to provide a thorough and uniform system of free public schools.

Indeed, the situation is quite different where the challenge concerns the General Assembly's failure to properly exercise a mandatory constitutional duty. In *Board of County Commissioners v. Vail Associates, Inc.*, the Colorado Supreme Court considered a challenge to the constitutionality of property tax exemptions enacted by the General Assembly pursuant to its *constitutional mandate* and "*imperative duty*" to enact tax statutes to fund governmental operations. 19 P.3d 1263, 1273-74 (Colo. 2001) (citing*, inter alia, Johnson v. McDonald,* 97 Colo. 324, 347 (1935)).[2] Because *Vail Associates* concerned laws enacted pursuant to a constitutional duty to act, the Court did *not* apply the "beyond a reasonable doubt" standard. Instead, it stated that "[w]e typically accord to legislative enactments a presumption of

[1] The *Lobato* Court variously refers to the Education Clause as imposing a "duty," a "responsibility," and an "obligation" on the General Assembly.

[2] "[Article X,] Section 2 is a mandate to the legislature. It limits its otherwise plenary power to act or not to act by requiring an annual tax to be provided sufficient, when supplemented by other resources of the state, to defray the estimated state expenses for each fiscal year." *Johnson,* 97 Colo. at 347 (1935).

constitutionality. However, the legislature's construction of a statutory or constitutional provision is advisory, not binding." *Vail Assocs.*, 19 P. 2d at 1273 (citations omitted).

Similar to *Vail Assocs.*, the issue here is whether the General Assembly has fulfilled a mandate in accordance with a constitutionally imposed duty. The question is not whether the mechanics of the several components of the school finance system infringe upon constitutional rights, but whether the system "is funded and allocated in a manner rationally related to the constitutional mandate." *Lobato*, 218 P.3d at 374. Thus, the applicable standard of review for the Education Clause claims is the rational basis test specifically crafted by the Court.

Therefore, with reference to Defendants' issues 1 and 2, the court should rule that the "beyond a reasonable doubt" standard is not applicable. To the extent that Defendants' issue 2 merely reiterates the holding of the Supreme Court, it has never been in dispute.

III. THE GENERAL ASSEMBLY HAS ESTABLISHED STUDENT ACHIEVEMENT AS THE MEASURE OF A THOROUGH AND UNIFORM SYSTEM OF PUBLIC EDUCATION.

Next, in its points 3 and 4, Defendants attempt to rewrite *Lobato* and ignore legislative mandates. They argue that the Education Clause guarantees school children the "opportunity" to obtain a free education, but does not guarantee a "thorough and uniform" education or a "qualitative outcome." They ignore completely the Supreme Court's ruling that the Education Clause includes a "*substantive mandate*" of educational quality—not just *any* education so long as it is "gratuitous." The qualifiers "thorough and uniform" establish a standard of educational

quality applicable to the system of schools, the schools themselves, and the education provided each schoolchild by those schools.[3]

In any case, the distinction is false – under the standards-based education system adopted by the General Assembly and implemented by the Defendants, educational "opportunity" is defined in part by statutorily mandated academic content standards and measured by student achievement or, as Defendants prefer, "qualitative outcomes."

A. The Laws and Pronouncements of the General Assembly Provide the Guide for Review of the Public Finance System.

The Supreme Court specified two sources to be drawn upon by this court to determine if the State is meeting the constitutional charge: "the General Assembly's own laws and pronouncements" and "other courts' interpretations of similar state education clauses." *Lobato*, 218 P.3d at 372. Among those "laws and pronouncements," the Court specifically included Colorado's "education reform statutes with proficiency targets and content standards." *Id*. at n.17. Of course, these are the very "qualitative outcomes" the Defendants seek to avoid in the Motion.

This is explicitly shown by the Court's delineation of the allegations in the Complaint that present "appropriate claims and are justiciable," and that constitute claims which "plaintiffs are entitled to the opportunity to prove."

> [P]laintiffs allege that the PSFA base funding amount and statutory increases are based on "historical compromise," as opposed to a rational determination of the amount it would cost to implement the "thorough and uniform" mandate or the cost of providing an education that *meets the standards and goals mandated by education reform efforts*. Citing an independent cost study, plaintiffs allege that

[3] The Court of Appeals recognized that the parents and children have an identifiable, "legally protected interest" to a "'thorough and uniform' free public school education system that guarantees them a constitutionally adequate, quality public education" that supports standing. *Lobato v. State*, 216 P.3d 29, 35 (Colo. App. 2008).

> the current funding levels do not allow students the opportunity to meet the *standards and objectives established in education reform legislation*.

Id. at 374 (emphasis added).[4]

Moreover, Defendants' argument that school children are entitled to only an opportunity for a free education—as opposed to a "thorough and uniform" education—contradicts the statutory declarations enacted by the General Assembly itself. In order to fulfill its constitutional obligation, the General Assembly has adopted and the Defendants have implemented a system of "standards-based education" that defines the content of a "thorough and uniform" system of public education and creates measures to test the accomplishment of that system. The criterion of success is *student academic performance*.

The standards-based education system is founded on the concept that student performance can and must be objectively quantified, and utilizes defined outcomes along with a universal process of standardized testing to measure the quality of the standards-based education system. It cannot be disputed that a critical measure of the finance system is whether the system is rationally related to the provision of funding to school districts sufficient to provide an education that results in student achievement consistent with legislatively defined performance outcomes.

B. The General Assembly Has Identified Student Achievement as the Measure of a Thorough and Uniform System of Public Education.

The Defendants administer a comprehensive educational accountability system anchored by a standards-based education system that (1) sets student academic performance standards; (2) provides objective student achievement results with respect to those standards; (3) compares

[4] The Court goes into greater detail in its summary of the Complaint, 218 P. 3d at 364-66.

student performance levels against state and federal achievement goals; and (4) holds the State, the school districts, and the schools accountable for the accomplishment of those goals.

In the legislative declaration to the Education Accountability Act of 2009, the General Assembly finds that "an effective system of statewide education accountability" is one that "*objectively evaluates the performance of the thorough and uniform statewide system of public education for all groups of students* at the state, school district . . . and individual public school levels …." C.R.S. § 22-11-102(1)(d)[5] (emphasis added).

School accountability standards provide the measure to determine if every individual student receives an education that meets the constitutional standard:

> The General Assembly hereby finds that [the Education Clause] requires the General Assembly to provide for the establishment and maintenance of a thorough and uniform system of free public schools. The state therefore has an obligation to ensure that every student has a chance to attend a school that will provide an opportunity for a quality education. If a school is not providing a thorough and adequate education, *as determined by the annual performance review* conducted by the [Colorado Department of Education] … the state has an obligation to the students enrolled in that school to make changes to ensure that they have an opportunity to receive a quality education comparable to students in other public schools in the state.

§ 22-30.5-301(1) (emphasis added).

These are the pronouncements of the General Assembly enacted in the exercise of its authority and discretion to define today's thorough and uniform system of public education. They form a nexus between (1) the mandate of the Education Clause, and (2) the successful implementation of the statutory education accountability system, and thereby link student achievement to the substantive contours of the Education Clause. Whether the system of public schools satisfies the mandate of the Education Clause must therefore be determined, in part, by

[5] Statutory citations, unless otherwise stated, are to C.R.S. (2010).

the results of annual school district and school performance reviews conducted pursuant to the accreditation procedures in the Education Accountability Act. The methodology of education accountability and education reform, briefly described below, underscores the role of outcomes in what the legislature has defined as a thorough and uniform system of public schools.

C. Education Accountability, Education Reform, and Standards-based Education.

The essence of standards-based education is student learning – the very "outcome" that Defendants do not wish to defend. In 1993, the General Assembly adopted a "system of standards-based education" as the "anchor for education reform with the focus of education including not just what teachers teach, but *what students learn*." § 22-7-401 (prior to 1997 codified at § 22-53-401) (emphasis added). This standards-based system is intended to "promote assessment of student learning," and "reinforce accountability," with "the ultimate goal … to ensure that Colorado's schools have standards which will enable today's students of all cultural backgrounds to compete in a world economy in the twenty-first century." *Id.*

The standards-based system is part of the "educational accountability" system designed to create an objective means to measure the performance of the thorough and uniform system of education. *See, e.g.*, §§ 22-11-102(1)(d) & -102(2)(e). The methods employed are aligned to create a universal set of academic requirements, programs, and testing applicable across the state to all students. Thus, standards-based education mandates *content standards* (what students should learn), *programs of instruction* (how they will learn it), and *assessments* (how to measure the extent to which they have learned it). §§ 22-7-402(4) ("content standards" defined"); -

402(10) ("programs of instruction" defined) & -402(1) ("assessments" defined).[6] A student's assessment results provide the measure of his or her *performance level*, defined as the "level of achievement by a student on an assessment relative to a content standard." § 22-7-402(9).

The definition of student performance level is the qualitative level of student achievement that speaks to the General Assembly's substantive constitutional standard:

> For graduating students, [an] acceptable performance level shall mean the student has the *subject matter knowledge and analytical skills that all high school graduates should have for democratic citizenship, responsible adulthood, postsecondary education, and productive careers.*

Id. (emphasis added).

To accomplish these purposes, the State Board of Education has adopted "state model content standards" and "state assessments" aligned with those content standards that "specify an acceptable performance level on each such state assessment." § 22-7-406(1)(a) & (3). School districts are required to adopt district content standards that meet or exceed the state standards; to align curriculum and programs of instruction with those content standards; "*and to ensure that each student will have the educational experiences needed to achieve the adopted content standards*." §§ 22-7-407(1) & (2) (emphasis added).

In Part 4 of the 1997 Educational Accountability provisions, the General Assembly committed to the proposition that every school child has the "fundamental right" to an opportunity to *achieve the content standards* at a performance level that defines a constitutionally sufficient public education, § 22-7-403(2):

> Every resident of the state six years of age or older but under twenty-two years of age has a *fundamental right to a free public education that assures that such*

[6] The 2008 Preschool to Postsecondary Education Alignment Act or "CAP4K" expands on this definition by adding "and to measure a student's academic progress toward attaining a standard." § 22-7-1003(1).

> *resident shall have the opportunity to achieve the content standards* adopted pursuant to this part 4 *at a performance level which is sufficient to allow such resident to become an effective citizen of Colorado and the United States, a productive member of the labor force, and a successful lifelong learner.*[7]

D. Today's Substantive Standards: CAP4K and the Education Accountability Act of 2009.

The General Assembly enacted CAP4K in 2008 as the "next generation of standards-based education." § 22-7-1002(1)(a) & (d). CAP4K mandated a revision of the standards-based system to accomplish a "seamless system of public education standards, expectations, and assessments" that aligns the public education system from "preschool through postsecondary and workforce readiness" in order to assure qualitative student outcomes:

> This alignment will ensure that a student who enters school ready to succeed and achieves the required level of proficiency on standards as he or she progresses through elementary and secondary education will have achieved postsecondary and workforce readiness when the student graduates from high school, if not earlier.

§ 22-7-1002(4)(a).

CAP4K embedded two expansive new concepts into the education reform system: "school readiness" and "postsecondary and workforce readiness." These concepts pushed the boundaries of elementary and secondary education at the front end to include preschool and kindergarten and at the culmination to include post-graduation preparedness. CAP4K ties its goals and purposes to a qualitative standard of student achievement of academic standards that culminate in postsecondary and workforce readiness and are "sufficiently relevant and rigorous to ensure that *each student who receives a public education in Colorado is prepared to compete*

[7] This provision was originally codified in 1993 as §22-53-403(2).

academically and economically within the state or anywhere in the nation or the world." § 22-7-1002(4)(e) (emphasis added).

Postsecondary and workforce readiness is the General Assembly's interpretation of the outcome required by the Education Clause in the 21st century. It is "the knowledge and skills that a student should have attained prior to or upon attaining a high school diploma." § 22-7-1003(15).

> *[P]ostsecondary and workforce readiness requires a student to demonstrate* creativity and innovation skills; critical-thinking and problem-solving skills; communication and collaboration skills; social and cultural awareness; civic engagement; initiative and self-direction; flexibility; productivity and accountability; character and leadership; information technology application skills; and other *skills critical to preparing students for the twenty-first-century workforce and for active citizenship.*

§ 22-7-1008(1)(a)(V) (emphasis added); *see also* § 22-7-1005(3)(a).

In order to measure accomplishment of its goals, CAP4K mandates a new assessment system designed to measure students' "academic progress toward attaining the standards and toward attaining postsecondary and workforce readiness." § 22-7-1006(1)(a). The purposes of the new assessment system include setting a "high level of accountability across the state for students, schools, and school districts" and to:

> Provide assessment scores that are useful in *measuring student academic performance, the academic performance of a school, and the academic performance of a school district* for purposes of state and federal accountability systems.

§ 22-7-1006(1)(a)(V) & (VII) (emphasis added).

Toward this end, the General Assembly requires that the new assessment system incorporate "scoring criteria for measuring a student's level of attainment and progress toward attaining postsecondary and workforce readiness." § 22-7-1006(1)(c). There could be no more

definitive statement that the legislature has included student achievement, measured by the criteria of CAP4K, as a substantive guarantee of the Education Clause.

In order to assure accomplishment of the goals of CAP4K, the General Assembly enacted the Education Accountability Act in 2009.[8] The Education Accountability Act is premised upon the legislative findings that an "effective system of statewide education accountability" focuses on "maximizing every student's progress toward postsecondary and workforce readiness and postgraduation success." It does so by holding the State, school districts, and individual public schools accountable for performance on performance indicators and measures that are aligned through a single accountability system that "*objectively evaluates the performance of the thorough and uniform statewide system of public education for all groups of students*" at the state, school district, and individual public school levels. § 22-11-102(1)(d) (emphasis added).

A state-administered system of school district accountability was originally introduced in 2000 with the adoption of what was then Part 7 of the "Educational Accountability Act." At that time, the General Assembly declared that the accountability program "should be designed to measure objectively the quality and efficiency of the educational programs offered by the public schools." § 22-7-102(2) (repealed in 2009 with the enactment of the Education Accountability Act).

Like its predecessor, the Education Accountability Act reports information concerning student performance at the State, school district, and individual school level, § 22-11-102(1)(b), and holds the State, school districts, and schools "accountable on statewide performance indicators supported by consistent, objective measures," § 22-11-102(3)(a). Defendants

[8] The Education Accountability Act of 2009 is codified as article 11 of title 22, C.R.S.

determine annually the "level of attainment" of each public school, school district, and the State on three performance indicators: student academic growth, student achievement levels on statewide assessments, and progress made in closing student achievement and growth gaps. § 22-11-204(1)(a). Defendants also determine the level of attainment on postsecondary and workforce readiness indicators, including graduation and dropout rates and student performance on a standardized college entrance examination. §§ 22-11-204(1)(b) & (4).

The State Board annually "accredits" each school district pursuant to an "accreditation contract." §§ 22-11-206(1) & (2). Each accreditation contract includes the school district's level of attainment on the performance indicators, its implementation of a required "performance plan," and other factors. §§ 22-11-206(3) & (4). The State Board is directed to develop "objective, measurable criteria" to be applied in determining a district's "accreditation category," with the greatest emphasis on attainment of the performance indicators." § 22-11-207(2).[9]

The Defendants are charged with the duty to administer and enforce this intensive system of accountability, founded on the precept that student achievement is the standard of a quality education and, therefore, can and must be measured objectively. Nevertheless, they ask this court to ignore the entire statutory framework, openly contradicting the clear directions of the Supreme Court.

E. Decisions in Other State Courts Support the Use of Student Performance Data to Measure Constitutional Compliance.

Other state courts have held not only that accountability standards *could* be considered in reviewing the finance system, but that they are a *mandatory element* of the State's compliance

[9] Each school district is categorized as "accredited with distinction," "accredited," "accredited with improvement plan," "accredited with priority improvement plan," or "accredited with turnaround plan." §22-11-207(1).

with its education clause. In *Claremont School District v. Governor*, 795 A.2d 744, 751-52 (N.H. 2002), the New Hampshire Supreme Court found that:

> Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligations to provide a constitutionally adequate education, the State has fulfilled its duty. . . . If the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty.

Stating that "[i]t is thus widely accepted that establishing standards of accountability is part of the State's duty to provide a constitutionally adequate education," the New Hampshire Court cited numerous other jurisdictions that include standards and accountability in determining a constitutionally adequate education: *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *DeRolph v. State*, 728 N.E. 993, 1019 (Ohio 2000); *Abbott v. Burke*, 693 A.2d 417, 428 (N.J. 1997); *Tenn. Small Sch. Sys. v. McWhereter*, 894 S.W.2d 734 (Tenn. 1995); *Bd. of Educ. v. Bushee*, 889 S.W.2d 809, 816 (Ky. 1994).

To exactly the same effect, the Kansas Supreme Court has held that a rational school finance formula must be funded to assure student "outputs":

> Without consideration of outputs, any study conducted by post audit is doomed to be incomplete. *Such outputs are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the legislature*. [*Montoy v. State*, 120 P.3d 306, 309 (KS 2003)] (quoting K.S.A. 72-6439) (constitutionally suitable education is one in which "schools meet the accreditation requirements and [students are] achieving an 'improvement in performance that reflects high academic standards and is measurable.'")

Montoy v. State, 112 P.3d 923, 939 (Kan. 2005). *See also Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1262 (Wyo. 1995) (where the Wyoming Supreme Court cited to school district,

school, and student performance standards and assessments in evaluating the "thorough and efficient" public education required by the Wyoming Constitution).

Summary and Conclusion. The General Assembly has chosen to fulfill the mandate of the Education Clause through a system anchored in academic content standards and assessments that measure student achievement outcomes. Many state courts have held that this sort of system is itself part of a constitutional education system. The Defendants attempt to circumvent the entire standards-based system that has defined and reshaped public education in Colorado, with the express purpose of meeting the mandate of the Education Clause, with the facile conclusion that the constitution requires no more than that whatever system is created in its name be "gratuitous."

This argument squarely contradicts the Supreme Court's direction to consider the "proficiency targets and content standards" of the education reform statutes as a source by which to evaluate the actions of the legislature. The General Assembly has quite properly made student achievement the ultimate measure of a thorough system of public education and has created a method to measure that achievement. The cost to provide an educational program capable of meeting these objectives is a necessary factor in determining whether a public school finance scheme is rationally related to satisfying the mandate of the Education Clause.

The court should deny Defendants' requests 3 and 4 as contrary to the Colorado Supreme Court's opinion, the education statutes enacted by the General Assembly, and the mandate of the Education Clause.

IV. THE TABOR REQUESTS SHOULD BE DENIED.

In their issues 5 and 6, Defendants argue that the Education Clause and the Local Control Clause must be harmonized with the Taxpayers' Bill of Rights (TABOR), Colo. Const. article X, section 20, and that TABOR "constrains" appropriations required by the Education Clause. The thrust of their argument is that the State's obligation to allocate funding to fulfill the mandate of the Education Clause is restricted by TABOR. Defendants appear to argue that TABOR bars the General Assembly from performing its constitutional duty to establish and maintain a thorough and uniform system of public schools, *i.e.* "The General Assembly cannot be constitutionally required to expend revenue the Constitution does not allow it to obtain." This argument is irrelevant, however, unless and until Defendants (1) concede that the legislature is not currently funding the education system at constitutional levels, *and* (2) show that there is no constitutional manner to make additional revenue available to the education system without raising overall revenue levels. Defendants have done neither.

The issue before this court is "whether the public school finance system is funded and allocated in a manner rationally related to the constitutional mandate that the General Assembly provide a 'thorough and uniform' public school system." *Lobato*, 218 P.3d at 374. The desired remedy is a declaration that the public school finance system is unconstitutional and an order providing "the legislature with an appropriate period of time to change the funding system so as to bring the system in compliance with the Colorado Constitution." *Id.* at 375. None of this requires resolution of Defendants' TABOR requests. Defendants' questions address a hypothetical ultimate remedy in this action and then assume that the General Assembly will fail to respond.

The failure of Defendants' argument is that they articulate no tension between TABOR and the Education Clause that requires harmonization of the two provisions. The Education Clause is a mandate to the General Assembly to establish and maintain a thorough and uniform system of public education and, necessarily, to implement a funding system that is rationally related to accomplishing its substantive purpose. It creates a correlative and substantive right in parents and school children to obtain a constitutionally adequate education.

TABOR, by contrast, is a *procedural* provision:

> [TABOR] circumscribes the revenue, spending, and debt powers of state and local governments. *It creates a series of procedural requirements and nothing more; it does not create any fundamental rights.*

City of Wheat Ridge v. Cerveny, 913 P.2d 1110, 1115 (Colo. 1996) (citing *Bickel v. City of Boulder*, 885 P.2d 215, 226 (Colo. 1994) (TABOR's "requirement of electoral approval is not a grant of new powers or rights to the people"); *Havens v. Bd. of Cnty. Comm'rs*, 924 P.2d 517, 519-20 (Colo. 1996).

While the Education Clause requires some level of spending and TABOR limits overall levels of state revenue and spending, the two provisions bear no relationship that would necessarily require "harmonization," much less create an irreconcilable "conflict." The spending (or revenue) limitations of article X, sections 20(4)(a) and (7), place no absolute limit on the state and local revenues, which may be raised and expended for education; they merely define the voting procedures that must be followed to raise revenue above a specified level. *See Mesa Cnty.*, 203 P.2d at 524-25.

Accordingly, the Education Clause and TABOR do not conflict on their face. "A conflict exists when one provision authorizes what the other forbids or forbids what the other

authorizes." *Bickel*, 885 P.2d at 228-229 (citing *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 6 (Colo. 1993)). The Education Clause mandates a quality education; TABOR conditions certain increases in government taxing and spending. Nothing in TABOR forbids any level of increased education spending.

Nor can Defendants show that TABOR and the Education Clause conflict "as applied" in this case, if only for a complete absence of supporting facts. To show a conflict on an "as applied basis" here, Defendants must show as a factual matter that the legislature could not increase education funding without violating TABOR due to actual levels of revenue and spending. Because any conflict between the Education Clause and TABOR necessarily involves a question of fact, Defendants' TABOR requests are inappropriate for review under Rule 56(h). *Estate of Hazel*, 240 P.3d at 417.

In any event, even if there were an actual conflict, the Colorado Supreme Court has "consistently rejected readings of [TABOR] that would hinder basic government functions or cripple the government's ability to provide services." *Barber*, 196 P.3d at 248 (citations omitted); *Mesa Cnty.*, 203 P.3d at 529 (TABOR not to be interpreted to "unreasonably curtail the everyday functions of government"). TABOR creates procedures, not substantive rights. If there ever were a true conflict, TABOR must yield to the more specific mandate of the Education Clause. And, as a procedure, TABOR must yield to substantive rights. *Cf. Guinn v. Nev. State Legis.*, 71 P.3d 1269, 1275 (Nev. 2006) (*specific* substantive rights prevail over *general* procedure where provisions conflict), *overruled in part by Nevadans for Nev. v. Beers*, 142 P.3d 339, 348 (Nev. 2006) (overruling *Guinn*'s holding that substantive rights necessarily prevail over procedure). Finally, adoption of the Education Clause was a precondition of admission to the

Union. *See Lobato*, 218 P.3d at 368. If, as Defendants suggest, one of these provisions must be violated, it must be the general procedural provision and not the specific substantive right provision necessary for statehood.[10] Because no actual conflict exists, however, none of this analysis is necessary here.

This case is simply not a TABOR case. TABOR does not impose an absolute revenue limit that would facially bar enactment of a rational school finance system; and Defendants cannot show a conflict between the two provisions on an "as applied" basis. If there were a conflict, the substantive rights created by the Education Clause must prevail over the TABOR procedures. Defendants' requests 5 and 6 should be denied, and Defendants' invitation to turn this action into a TABOR case is unwarranted and should be rejected.

V. THE GENERAL ASSEMBLY'S BUDGET ALLOCATIONS ARE NOT RELEVANT.

Defendants' next five requests (7 through 11) taken on their face are self-evident, if not banal. However, they are assembled to support an argument that is completely contrary to the Supreme Court's clear statement of the issue to be decided: Is the finance system rationally related *to the Education Clause* mandate? Defendants would expand the scope of this action to something like "is the public school finance system rationally related to *any* legislative purpose whatsoever?" That, obviously, would render meaningless the rights and duties created by the Education Clause, as recognized in *Lobato* and *Lujan*. *Lobato* itself definitively resolves these five issues and, more importantly, the argument Defendants intend them to support.

[10] The fact that statehood depends on a valid Education Clause renders TABOR's language concerning all other constitutional provisions inapplicable to the Education Clause, because a contrary interpretation would render TABOR a nullity.

A. Constitutional Mandates Requiring Non-Education Appropriations Play No Role In The Supreme Court's Standard.

"To be successful, [Plaintiffs] must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a 'thorough and uniform' system of public education." *Lobato*, 218 P.3d at 374. This standard focuses on the connection between two items only: (1) the school finance system, and (2) the mandate of the Education Clause.

By contrast, Defendants argue that all appropriations must be considered. But the Court did *not* say: To be successful, [Plaintiffs] must demonstrate that the school finance scheme is not rationally related *to any constitutional mandate, including, but not limited* to the constitutional mandate of a "thorough and uniform" system of public education.

Defendants' argument would leave funding for public education to the unfettered discretion of the legislature–exactly the proposition that the Supreme Court rejected. *See Lobato*, 218 P. 2d at 372 ("[a] ruling that the plaintiffs' claims are nonjusticiable would give the legislative branch unchecked power, potentially allowing it to ignore its constitutional responsibility to fashion and to fund a 'thorough and uniform' system of public education."). The legislature does have other funding concerns, including constitutional mandates. But these other concerns are simply irrelevant to the resolution of this case in the framework provided by the Supreme Court.

In addition to falling outside the clear scope of the test provided by *Lobato*, the other "mandates" cited by Defendants differ from the Education Clause mandate in a critical way. The "thorough and uniform" requirement of the Education Clause creates a substantive standard against which the General Assembly's actions must be measured and which imposes a "judicial

constraint or check on the legislature's general appropriations power." *Lobato*, 218 P.3d 373. This is the foundation for the Court's standard of review quoted above.

By contrast, article VIII, section 1 (State Institutions), provides no standard of legislative performance, stating only that the specified state institutions, including prisons and institutions required by the "public good," "shall be established and supported by the state, *in such manner as may be prescribed by law*." (emphasis added). Similarly, article VIII, section 5, provides that the "establishment, management, and abolition of the state [higher education] institutions shall be subject to the control of the state under the provisions of the constitution and *such laws and regulations as the General Assembly may provide*." (emphasis added).

Unlike the Education Clause, these provisions contain no qualitative standard that would impose a "judicial constraint or check on the legislature's general appropriations power." *Lobato*, 218 P.3d 373. Thus, unlike public education, the services contemplated by these constitutional mandates could literally be funded at one dollar per year. The actual level of funding required by any non-education mandate is not important, however, because Defendants have failed to show that any level of constitutionally required funding for non-education services conflicts with the level of funding required for education. Plaintiffs certainly believe that higher education, public welfare, and prisons are valuable government services. But, by the literal wording of the constitution, these services are not of a level of constitutional dignity equivalent to public education.

The judiciary is a helpful counterexample to the non-education mandates cited by Defendants. Funding and maintenance for the judiciary holds a unique place in the constitution

due to balance of powers concerns. Although the constitution does not provide express qualitative standards for funding the judiciary:

> [T]he judicial branch of government possesses the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities.

Pena v. Second Judicial Dist., 681 P.2d 953, 956 (Colo. 1984) (citation omitted); *Bd. of Cnty. Comm'rs v. Nineteenth Judicial Dist.*, 895 P.2d 545, 547-48 (Colo. 1995). *Pena* also provides very pertinent guidance concerning the power of the judiciary to compel appropriations or expenditures of funds necessary to assure the "efficient operation of the court or the performance of judicial functions":

> [A] court may exercise its inherent powers only when established methods for procuring necessary funds have failed and the court has determined that the assistance necessary for the effective performance of judicial functions cannot be obtained by any other means.

681 P.2d at 957 (citations omitted) (footnote omitted). The judiciary and K-12 education are politically vulnerable services that the constitution affords heightened protection, and they are unlike the bulk of remaining services that draw on the General Fund with respect to constitutional stature.

At the heart of Defendants' argument is their confusion of the claims at issue in *Lujan*, which they cite in an effort to completely rewrite the Supreme Court's standard. (Motion at 8.) *Lujan* was principally an equal protection case, and its application of the "rational basis test" must be understood in that light. *Lobato*, 218 P.3d at 373-74; *Lujan*, 649 P.2d at 1023-24. Under an *equal protection* rational basis test, the State may identify any legitimate purpose in support of its actions. It was only in that context that *Lujan* upheld the school finance act as rationally related to local control of instruction and controlling the public debt. *Id.* Identifying

other legitimate state purposes is germane to equal protection claims, but not to a claim that the substantive mandate of the Education Clause has been violated.[11]

In fact, when the Court in *Lujan* reviewed a claim based on the Education Clause, the Court considered no State interests in controlling debt or other non-education appropriations. Instead, the Court held that "the requirement of a 'thorough and uniform system of free public schools' does not require that educational expenditures per pupil in every school district be identical." *Lujan*, 649 P.2d at 1025. The absence of "other state interests" in the Education Clause analysis cannot seriously be viewed as inadvertent—the Court had just finished considering the "other state interests" in its equal protection analysis.

In sum, Plaintiffs do not dispute that political and economic considerations are generally committed to the discretion of the legislature. However, the fundamental holding in *Lobato* is that the budgetary discretion of the General Assembly is constrained by the mandate of the Education Clause. *See Lobato*, 218 P.3d 373. Given the Supreme Court's holding in *Lobato*, the issue is not whether education spending is rational in light of other things the legislature wants to spend money on. Instead, the sole question is whether the current school finance scheme is rationally related to the Education Clause's mandate of a "thorough and uniform" system of free public education. All other considerations, or constitutional or statutory provisions, are irrelevant.

[11] Legislation that violates a specific constitutional provision may also further a legitimate state purpose, but that does not cure the constitutional violation. For example, in *Owens v. Colorado Congress of Parents, Teachers, and Students*, 92 P.3d 933, 936 (Colo. 2004), the Court found that legislation violated the Local Control Clause "[i]rrespective of the fact that the goals of the [statutory] program and the policy considerations underlying it are laudable".

B. Non-Education Appropriations Play No Role In The Supreme Court's Standard.

No items in the State General Fund are equal in constitutional stature to public education. The General Fund is divided into five main categories: (1) K-12 education; (2) health and human services; (3) corrections, public safety, and judicial; (4) higher education; and (5) other department spending. (*See* Letter from Governor Bill Ritter to Rep. Mark Ferrandino, Chairman, J. Budget Comm., Colo. Gen. Assemb., on the Budget for FY 2011-12, at pp. 2 & 6 (Nov. 1, 2010) (on file with the Colorado Office of State Planning and Budgeting), attached hereto as **Exhibit A**). As described below, no constitutional mandate similar to the Education Clause limits or curtails legislative discretion over the non-education appropriations in the State General Fund.

Health and Human Services. Health and human services includes the Departments of Health Care Policy and Financing, Human Services, and Public Health and Environment. Programs funded by health and human services include Medicaid, indigent care program financing, food assistance programs, developmental disability programs, and home and community based services. (*See* Presentation, Governor Bill Ritter, Governor Bill Ritter's FY 2011-12 Budget Request , at pp. 7, 19-20 (Nov. 2, 2010) (on file with the Office of State Planning and Budgeting), attached hereto as **Exhibit B**).

The only constitutional provision that arguably imposes a mandate for health and human services is article VIII, section 1, discussed above. Far from mandating a specific qualitative level of services for each institution listed, and in contrast to the Education Clause, this provision simply requires that the state establish and support these institutions. Article VIII, section 1, merely directs that state support be as "prescribed by law." The text expressly rejects

Defendants' suggestion that this section was intended to mandate *specific* levels of support. Further, there is no federal requirement to maintain the health and human services programs. Even participation in Medicaid is voluntary. *See Frew v. Hawkins*, 540 U.S. 431, 433 (2004). Accordingly, the legislature would violate no constitutional mandate by significantly reducing appropriations to health and human services.

Corrections, Public Safety, and Judicial. Corrections provides services such as prisons, parole and reentry programs, which assist offenders in transitioning from a prison facility to the community. *See* Colorado Dept. of Corrections, http://www.doc.state.co.us/ (last visited May 16, 2011). The constitution only requires that the State "establish" and "support" penal institutions. *See* Colo. Const. art. VIII, section 1. How the State decides to "establish" and "support" penal institutions is left to the discretion of the General Assembly. The constitution has no mandate for public safety services and the quantity or quality of those services the State must provide. The legislature would violate no Constitutional provision by implementing significant sentencing reform to reduce expenses for Corrections, or otherwise significantly reducing appropriations to corrections and public safety services.

By contrast, the legislature's discretion over funding levels for the judiciary is constrained in the same fashion as its discretion over education funding. *Pena*, 681 P.2d at 956. Because funding levels for the judiciary and education are both critical and politically vulnerable, the constitution logically offers heightened protections over these funding levels in relation to the protection of funding for services like corrections and human services that are less politically vulnerable.

Higher Education. Article VIII, section 1, mandates that the State "establish" and "support" institutions of higher education. The Constitution declares certain institutions of higher education to be "state institutions;" however, it lacks any specificity regarding the type of support the General Assembly must provide. Colo. Const. article VIII, section 5.

Other Department Spending. All "other departments" includes, but is not limited to, the Department of Transportation, the Department of Natural Resources, and the Department of Agriculture. Among these departments, only the establishment and support of the Department of Transportation is constitutionally mandated. *Johnson v. McDonald,* 49 P.2d 1017, 1020 (Colo. 1935) (state highway department is a state institution within the meaning of article VIII, section 1). This is the same broad provision that directs that higher education, penal institutions, and institutions for the benefit of the insane, blind, deaf and mute, must be "established" and "supported", but does not mandate the quality of support the State must provide.

In other words, the legislature would violate no constitutional mandate by significantly reducing appropriations to health and human services, corrections and public safety, and "other department" services. It is not for Plaintiffs or the Court to determine which services to target and for how much, but the point is that such reductions are permissible under the Constitution. And, it is this possibility of reductions that makes Defendants' requests for determination of law irrelevant to this action.

Other jurisdictions agree that budget constraints—legal or political in nature—are not relevant to the issue of whether a constitutional education mandate has been satisfied. For example, the New Hampshire Supreme Court stated that "excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional

command" of an adequate education. *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754-55 (N.H. 2002). The West Virginia Supreme Court, construing its "thorough and efficient systems of free schools" mandate, held that "we are compelled to underscore that financial hardship is an insufficient basis for ignoring the West Virginia Constitution. The imposition of these difficult choices is an inevitable and unavoidable attribute that emanates from our Constitution." *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 23 (1995).

In sum, the constitution does mandate funding some, but not all, items within the State General Fund. Where the Constitution mandates expenditures for services other than the judiciary and education, it leaves the type, quality, quantity and nature of that support to the unrestricted discretion of the General Assembly. Because Defendants cannot show that each dollar of the General Fund is necessarily dedicated to a constitutionally mandated expenditure, non-education appropriations and TABOR are wholly irrelevant to Plaintiffs' claims and reallocation of the General Fund is constitutionally permissible.

C. The General Assembly Can Increase the Funds Available in the General Fund without Violating TABOR.

Even if the legislature could not satisfy the Education Clause after reallocating appropriations that the Constitution does not protect, the legislature and Governor has even more room to work with tax credits and exemptions. About $2 billion per year is allocated to a variety of tax credits and exemptions. The legislature and Governor have the present ability to reallocate over $1 billion in tax credits and exemptions to satisfy the mandate of the Education Clause. Reallocation is constrained only when the state's revenue exceeds the TABOR limit. Presently, revenue is about $1.26 billion per year *under* the TABOR limit and is expected to remain so for

the foreseeable future.[12] The political entities may thus reallocate over $1 billion in tax credits and exemptions to meet the Education Clause mandate. *See Mesa Cnty.*, 203 P.3d at 529 ("a 'tax policy change directly causing a net tax revenue gain' only requires voter approval when the revenue gain exceeds the limits dictated by subsection (7) [of TABOR].").

D. Summary Conclusion.

Although each of Defendants' requests 7 through 11 is in itself unobjectionable, when considered together they reveal the actual request being presented to the court. The precise question here is whether the public school funding scheme is rationally related to the qualitative mandates of the Education Clause. Defendants' invitation to expand the scope of that standard to include literally every line item in the state budget should be denied.

VI. THE TABOR UNFUNDED MANDATES PROVISION IS NOT RELEVANT.

Defendants' request 12 advances another irrelevant TABOR issue: that TABOR authorizes unfunded educational mandates on local school districts. TABOR, article XX, section (9), does not literally affirm a power to impose unfunded mandates; it permits local districts other than school districts to reject state mandates. This unique exception is understood to permit the General Assembly to "impose" unfunded mandates *in furtherance of its obligation under the Education Clause*. The justification for not permitting school districts to reject unfunded education mandates is the General Assembly's overriding constitutional duty to provide a thorough and uniform system of education:

[12] Plaintiffs contend that current funding for public education is short by over $1 billion, but Defendants have not come close to showing that the additional amount required to satisfy the Education Clause exceeds the combined amount of revenue that can be reallocated or increased through adjustments to tax credits and exemptions. Unless and until Defendants can make such a showing, TABOR and state budget considerations are not relevant and are no obstacle to Plaintiffs' claims.

> [TABOR] expressly contemplates the state's separate constitutional obligation to provide a uniform system of free public schools throughout the state and acknowledges the state's ability to impose unfunded mandates on local districts to accomplish this goal in subsection (9).

Mesa Cnty., 203 P.3d at 528.

The entire education accountability and standards-based education system is a mandate from the General Assembly to the school districts based on the Education Clause. It would be absurd to conclude that TABOR section (9) advances fulfillment of the Education Clause mandate by authorizing the State to *underfund* its education system in violation of the Education Clause. Section (9) does not mean that unfunded mandates cannot be taken into account in determining if the school finance system is rationally related to the Education Clause mandate, much less that an otherwise irrational school finance system somehow becomes immune from constitutional review by including unfunded mandates.

In the name of the Education Clause, the General Assembly has established a comprehensive system of educational goals, methods, and measures, all of which it requires school districts to implement successfully. The General Assembly has failed even to estimate the actual costs necessary to satisfy those requirements and to provide a rational method to pay for them. A system intended to finance a constitutional mandate cannot be rationally related to that purpose if it is created and funded without reference to the costs of providing the mandated services. That an unfunded mandate would not violate TABOR is beside the point.

Accordingly, that TABOR permits unfunded mandates does not demonstrate that the system of finance is rationally related to the Education Clause and has no bearing on that question. Because Defendants' request 12 has no relevance to this action, the request should be denied.

VII. PLAINTIFFS SEEK INJUNCTIVE RELIEF AGAINST THE DEFENDANTS, NOT THE GENERAL ASSEMBLY.

In their final request, Defendants ask the Court to rule that it "may neither coerce nor restrain the General Assembly through injunctive relief." Plaintiffs seek injunctive relief only against the named Defendants, not the General Assembly.

The General Assembly is not a party defendant because it has immunity under article V, section 16, of the Colorado Constitution, the speech or debate clause:

> When the General Assembly is engaged in legitimate legislative activity, the speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation.

Romer v. Colo. Gen. Assemb., 810 P.2d 215, 225 (Colo. 1991). That does not mean that legislation may not be challenged; but "[s]uch a challenge would normally be brought by one affected by the legislation bringing an action against the executive agency responsible for the statute's enforcement." *Id.* at 222. That is precisely what the Plaintiffs have done here.

If the public school finance system is found to be unconstitutional, the General Assembly will effectively be required to respond because it does not have the constitutional option not to fund public education. The Supreme Court held that if the court finds the school finance system unconstitutional, it will be the task of the legislature to bring it into compliance. Therefore, the remedy should permit the legislature an "appropriate period of time" to enact a constitutional system. In other words, the legislature would be coerced or restrained by the constitution, not by an injunctive order. This is exactly what *Lobato* held. *Lobato*, 218 P.3d at 372.

Pending legislative action, injunctive relief against the executive boards and officers charged with the duty and power to implement the unconstitutional system is plainly necessary

or the violation will simply continue. In their Third Amended Complaint, Plaintiffs request injunctive relief against the named Defendants, specifically seeking injunctions enjoining Defendants from implementing unconstitutional statutes and requiring Defendants to execute their powers and duties in a constitutional manner.

Defendants read beyond Plaintiffs request for injunctive relief and insist that Plaintiffs must be seeking an injunction "compelling corrective legislative action." By doing so, Defendants ignore the sweeping duties and powers that Defendants exercise in the provision of education services in Colorado. The Defendant State Board's duties include to:

- supervise "the public schools of Colorado and the educational programs maintained and operated by all state governmental agencies";
- adopt "a comprehensive set of guidelines for the establishment of high school graduation requirements";
- "appraise and accredit the public schools and school districts" in Colorado; and,
- "order the distribution or apportionment of federal and state moneys granted or appropriated to the department for the use of the public schools of the state" . . . .

C.R.S. §§ 22-2-106(1(a), (a.5), (c), & (e).

In order to execute its duties, the State Board has the powers necessary to:

- "perform all duties delegated by law";
- "promulgate and adopt policies, rules, and regulations concerning the general supervision of the public schools"; and,
- "accept gifts, grants, and donations of any nature for the use of the department or the public schools" . . . .

C.R.S. §§ 22-2-107(1)(a), (c), & (h).

This non-exhaustive list of duties and powers demonstrates the considerable power and discretion exercised by Defendants over the public school system. By explicitly referencing Defendants in their prayer for relief, Plaintiffs' requested injunctive relief targets these duties and

powers. The requested relief would compel Defendants to exercise the discretion delegated to them by the General Assembly to supervise, accredit, and manage public school funds in a manner consistent with the Education and Local Control Clauses. Defendants would also be enjoined from implementing unconstitutional legislation.

All of this is not to say that the courts are ultimately powerless with respect to the General Assembly. If the General Assembly were to fail to act in the face of a court order, the court could direct that action be taken to carry out its responsibility. *Montoy v. State*, 120 P.3d 306, 310 (Kan. 2005). If necessary, the court could direct the General Assembly to implement a substantial funding increase. *Montoy v. State*, 112 P.3d 923, 940-41 (Kan. 2005). To the same effect, the Colorado Supreme Court held that where normal processes do not result in necessary results, the courts have inherent power even to force the appropriation and expenditure of funds. *Pena*, 681 P.2d at 957. But such an issue is not ripe for review because the legislature has not failed (and presumably would not fail) to respond to a judicial declaration that the system of public schools is unconstitutional.

Because there is no dispute that Plaintiffs may obtain declaratory relief in the absence of the General Assembly, and because Plaintiffs may obtain significant and complete injunctive relief compelling Defendants to exercise their discretion in a constitutionally compliant manner, the Defendants' request 13 should be denied.

CONCLUSION

For the foregoing reasons, the Defendants' Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) should be denied.

Dated: May 16, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2011, a true and correct copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 56(h) MOTION** was filed and served via LexisNexis, as follows:

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