

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	<input type="checkbox"/> <b>COURT USE ONLY</b> <input type="checkbox"/>
PLAINTIFFS: <b>Anthony Lobato, et al.</b>  and  PLAINTIFF-INTERVENORS: <b>Armandina Ortega, et al.</b>  vs.  DEFENDANTS: <b>The State of Colorado, et al.</b>	
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<b>DEFENDANTS' PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW</b>	

## INTRODUCTION

This matter was filed in 2005 in Denver County District Court. Plaintiffs, who are parents, students, and public school districts from across the state, allege the Colorado system of public school finance violates Article IX, sections 2 and 15 of the Colorado Constitution.

Specifically, Plaintiffs assert they have been denied a “quality public school education that meets the substantive mandate of the Education Clause, which is at least an education sufficient to prepare them for the workforce and postsecondary education and to take their place in society as informed, active citizens who are ready to both participate and lead in citizenship.” (3d Am. Compl. ¶ 2; Compl. ¶¶ 196–97.) Plaintiffs further assert that due to Defendants’ “failure to fund public education in a rational and sufficient manner, local boards of education are prevented from effectively exercising local control of instruction in their schools, in violation of the Local Control Clause.” (3d Am. Compl. ¶ 4; Compl. ¶ 216.)

Defendants moved for dismissal based on lack of standing and justiciability, which Denver County District Court Judge Michael A. Martinez granted. The Colorado Court of Appeals affirmed. *Lobato v. State*, 216 P.3d 29 (Colo. App. 2008).

The parties filed a joint petition for certiorari, which the Colorado Supreme Court granted. The Supreme Court reversed the district court’s dismissal and remanded the matter for trial. *Lobato v. State*, 218 P.3d 358 (Colo. 2009). Specifically, the Supreme Court directed this Court to afford Plaintiffs an opportunity to prove the General Assembly’s education funding decisions are not rationally related to the constitutional mandate of a thorough and uniform system of free public schools. *Id.* at 374–75.

Upon remand, Plaintiff-Intervenors intervened, asserting similar claims on behalf of low-income and English language learner (“ELL”) students and parents residing in four additional school districts. (Am. Compl. in Intervention ¶ 3.)

Following extensive discovery, the parties presented evidence in a five-week trial to the Court. The parties also designated deposition testimony and submitted numerous volumes of exhibits. The Court has reviewed the evidence, the case file, and applicable statutory and case law. Upon the findings of fact and conclusions of law set forth below, the Court holds Plaintiffs and Plaintiff-Intervenors have not met their burden.

## FINDINGS OF FACT

### 1) History of School Finance System

1. The Colorado Constitution charges the General Assembly with “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.” Colo. Const. art. IX, § 2. The General Assembly acted on this mandate during its

first legislative session in 1877, passing “An Act to Establish and Maintain a System of Free Schools.” (Ex. 7204 at 6.)

2. As discussed in detail below, the General Assembly has since devoted significant attention to public K–12 education. The school finance system has been studied and refined through successive school finance acts. In recent years, the General Assembly has enacted reform laws aimed at moving towards “the next generation of standards-based education.” § 22-7-1002(1)(d), C.R.S. (2011). School districts are now held accountable for their performance, *see generally* §§ 22-11-101 to -605, C.R.S. (2011), and teachers and school administrators are soon to follow, *see generally* Ch. 241 2010 Colo. Sess. Laws 1053, 1053–1075 (amending several noncontinuous sections in title 22). Moreover, the General Assembly now aspires for all high school graduates to be postsecondary and workforce ready. *See* § 22-7-1002(4)(a), C.R.S. (2011).

3. In short, improvement of the public school system is a top priority of state government. As Lieutenant Governor Joe Garcia testified, education is “critical” to the State of Colorado. (Tr. 4511:24–4512:1.)

4. Since statehood, public schools in Colorado have been financed by a combination of locally levied property taxes and state contributions. *Lujan v. Colo. St. Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982); *accord* (Tr. 560:23–561:11). The state’s contribution was initially limited to the revenue generated through the interest, rentals, and leases on the state-owned school lands. *Lujan, Id.* at 1011. It was not until 1935, nearly 60 years after the adoption of Colorado’s constitution that the first direct state support of local school districts was enacted. *Id.*

5. In 1952, following a study of the school finance system by a Governor’s committee, the General Assembly passed the first public school finance act. *Id.* Through this Act, the General Assembly provided each school district with an equalization “support level” in an effort to make the amount of money spent per-pupil more equitable across the state. *Mesa County Bd. of Cty. Comm’rs v. State*, 203 P.3d 519, 523 (Colo. 2009).

6. In response to criticism of the 1952 Act, the General Assembly enacted the Public School Finance Act of 1973. *Lujan*, 649 P.2d at 1011. This Act established an “Authorized Revenue Base,” which was essentially a dollar amount per-pupil that districts were permitted to generate through a combination of local property tax and state equalization aid. *Lujan*, 649 P.2d at 1012; *see also* (Tr. 627:10–628:3). The Authorized Revenue Base amount, first set in 1974, was based in part on the amount each district was then spending. *Id.*; *see also* (Tr. 627:10–18).

7. By the early 1980s, Colorado ranked above the national average in per pupil funding by as much as \$202 per student. (Tr. 2750:16–20.) A downward trend in per pupil funding was precipitated by the voters’ adoption of the Gallagher Amendment in 1982, which reduced the residential property tax assessment rate statewide. (Tr. 2749:11–21.)

8. In 1988, the General Assembly passed a new finance act that grouped school districts into eight categories based on similar geographic and demographic characteristics. (Tr. 631:16–632:8.) According to former Colorado State Treasurer Cary Kennedy, the General Assembly took “a more aggressive role in trying to accomplish equity throughout the state in the distribution of school funding.” (Tr. 2750: 2–6.) Various funding components were established such as instructional supplies, and districts were funded based on the averages for those components within each specific category. (Tr. 632:4–16.) As with the 1973 Act, the component amounts were established by referencing the prior year’s spending in those categories. (Tr. 632:17–20; Ex. 30110 at 11 (noting that funding components were based on “actual audited school district expenditures”).)

9. The 1988 Act drew criticism. (Tr. 633:10–634:1.) For example, many school districts reported they were placed in the wrong category, and there was a concern that averaging funding components within categories discriminated against certain districts. (Tr. 633:10–634:1.)

10. In response to this criticism, several studies, and lobbying by school districts, the General Assembly abandoned the setting category model of the 1988 Act and adopted the 1994 Public School Finance Act. This basic structure still governs school finance today. (Tr. 634:2–636:16; 653:5–7; Exs. 30109–30111.)

11. In the legislative declaration accompanying the 1994 Public School Finance Act, the General Assembly expressly declared that the Act was and is

enacted in furtherance of the general assembly’s duty under section 2 of article IX of the state constitution to provide for a thorough and uniform system of public schools throughout the state; that a through and uniform system requires that all school districts ... operate under the same finance formula; and that equity considerations dictate that all districts ... be subject to the expenditure and maximum levy provisions of this article.

§ 22-54-102(1), C.R.S. (2011).

12. In the meantime, the voters adopted the Taxpayer’s Bill of Rights in 1992, an amendment to the Colorado Constitution that ultimately has reduced the amount of funding available for public education at both the state and local level. (Tr. 2750:7–12.) Per pupil funding fell relative to other states (Tr. 2750:13–15.) By 2008, Colorado’s overall per pupil funding was \$1,809 per student below the national average. (Tr. 2750:21–25.)

13. Nevertheless, state funding of public education has increased. As the Gallagher and TABOR Amendments pushed down local property taxes available to school districts, the state increased its share of funding to backfill lost local tax revenue. (2752:14–2753:10; 2810:5–9.) Over the last thirty years, the local share of public school funding has decreased from over 60 percent to around 35 percent. (Tr. 2752:22–2753:10.) Ultimately, an historic economic

downturn and TABOR’s revenue restrictions have combined to limit the General Assembly’s ability to backfill the eroding local share. (Tr. 2810:1–13; 2827:20–25; *see also* Tr. 361:5–22.)

## 2) Structure of Current School Finance System

14. Plaintiffs challenge three components of the school finance system: the basic funding through the 1994 Public School Finance Act; categorical funding; and capital construction funding. (Ps.’ Trial Brief 16–20.) The Court first discusses the structure of the system, and then turns to a discussion of the amount of funding provided.

### a) 1994 Public School Finance Act

15. The basic funding formula of the 1994 Act provides school districts with a dollar amount per pupil derived from a base funding amount adjusted by certain factors. (Ex. 30012.) Roughly speaking, this per-pupil amount, multiplied by a district’s pupil count, is known as a district’s Total Program Funding. (Ex. 30012 at 2–3.) In budget year 2010–2011, the total per-pupil funding for Colorado school districts ranged from a low of \$6,471 to a high of \$14,748. (Ex. 30012 at 6.) The 2010–2011 per-pupil operating revenue of the school districts involved in this case is as follows:

- i. Jefferson County School District No. 1: \$6,370.17.
- ii. Denver County School District: \$6,941.44.
- iii. Adams-Arapahoe School District No. 28J (“Aurora”): \$6,786.45.
- iv. Colorado Springs School District No. 11: \$6,795.79.
- v. Adams County School District No. 14: \$6,982.60.
- vi. Mapleton School District No. 1: \$6,594.57.
- vii. Sheridan School District No. 2: \$7,581.82.
- viii. Monte Vista School District No. C-8: \$6,851.94.
- ix. North Conejos School District No. RE-1J: \$6,545.81.
- x. Moffat County School District No. RE-1: \$6,202.47.
- xi. Boulder Valley School District No. RE-2: \$6,446.28.
- xii. Sargent School District No. RE-33J: \$6,969.09.
- xiii. Moffat School District 2: \$11,332.50.
- xiv. Creede Consolidated School District No. 1: 12,554.52.
- xv. Woodlin School District No. R-104: \$12,369.79.
- xvi. Alamosa School District No. RE-11J: \$6,365.59.
- xvii. Bethune School District No. R-5: \$11,823.61.
- xviii. Centennial School District No. R-1: \$10,016.76.
- xix. Center Consolidated School District No. 26JT: \$7,351.53.
- xx. Del Norte Consolidated School District No. C-7: \$6,955.29.
- xxi. Weld County School District No. 6 (“Greeley”): \$6,404.37.
- xxii. Montezuma-Cortez School District No. RE-1: \$6,259.01.
- xxiii. Mountain Valley School District No. RE 1: \$11,919.97.
- xxiv. Pueblo School District No. 60 (“Pueblo City”): \$6,463.19.

- xxv. Pueblo County School District No. 70: 70 \$6,202.47.
- xxvi. Rocky Ford School District No. R-2: \$7,115.90.
- xxvii. Sanford School District No. 6: \$8,252.58.
- xxviii. Sangre de Cristo School District No. RE-22J: \$8,560.29.
- xxix. Sierra Grande School District No. R30: \$9,319.18.
- xxx. South Conejos School District No. RE-10: \$9,167.75.

(Ex. 8412).

16. Again, these dollars are generated from a combination of state and local sources, the amounts of which are discussed below. Structurally, however, funds are first generated by local sources of revenue and then state revenues fill the gap. (Ex. 30012 at 7.)

17. The local share is generated from two sources: property taxes and specific ownership taxes. (Ex. 30012 at 7.) School districts raise property taxes by imposing a mill levy on their local citizens. A “mill” of tax is equal to one-tenth of one percent of assessed value. For residential property, the mill is imposed on the property’s assessed value, which, by law, is equal to 7.96 percent of its actual value. Thus, a \$100,000 home would have an assessed value of \$7,960, meaning a mill would generate \$7.96. (Ex. 30012 at 7.) Plaintiffs’ expert witness and former Colorado House of Representatives member Jack Pommer explained that it is a positive thing that there is some reliance on property taxes in Colorado’s school finance scheme. (Tr. 3518:21–3519:10.)

**i) Funding formula**

18. Turning to the formula itself, the base funding amount is the beginning basis for the formula—it identifies what all of the other characteristics of the formula are calculated against. (Tr. 5493:22–5494:3.) Each school district begins with the same base funding amount. (Tr. 5494:2–3.) In 2010–2011, the base amount of funding was \$5,529.71. (Ex. 30012 at 3.) The base funding for 2011–2012 is \$5,634.77. (Tr. 2969:4–9.)

19. This base funding is then adjusted for a variety of factors that provide additional funding in various areas. (Tr. 5494:17–20.) As Plaintiffs’ witness Dr. Ed Steinbrecher testified, these factors were intended to address those items “that caused districts to have variable costs for providing similar services.” (Tr. 636:19–23.) Cary Kennedy described the factors as “a component of per-pupil funding that are specific to try to obtain equity across school districts in purchasing power.” (Tr. 2764: 12–14.) Plaintiffs’ expert and former superintendent John Hefty emphasized the difficulty of “develop[ing] policy that will work well in districts that are so different, so diverse, and have so many differences,” as in Colorado. (Tr. 256:4–15.) Yet, former President of the Colorado Senate John Andrews described the 1994 Act as a “balancing genius” that reflects the “nuances” and “diversity” of “all of the different socio-economic conditions in every corner of Colorado, urban and rural and mountain and plains, low income, more affluent neighborhoods.” (Tr. 6362:20–6363:10; 6366:25–6367:4.) State Board of Education Chairman and former legislator Bob Schaffer testified the democratic process

“result[s] i[n] a School Finance Act that distributes all available funds that are set aside for education among all other budget considerations for the state in the most fair and equitable way possible, and that is by representative agreement of every single citizen of the state of Colorado.” (Tr. 5890:24–5891:15.)

20. The cost of living factor reflects the differences in the costs of housing, goods, and other services among each of the 178 school districts in the state. (Ex. 30012 at 3; Tr. 274:5–7; 2764:15–22.) Initially devised with the assistance of research group Runtime International, this factor is derived from a cost of living study conducted every other year though the Legislative Council of the General Assembly. (Tr. 273:24–25; 274:1–3; 375:14–376:7; 5494:24–5495:9.) Even though cost of living may go down in a particular school district, the General Assembly has protected districts by mandating that the cost of living factor will not be reduced; it will be the prior-year’s factor plus any increases noted by the biennial study. (Tr. 5495:10–20.)

21. The formula also includes a personnel costs factor. (Tr. 274:7–10.) This factor directs funding based on employee salaries and benefits, which are a district’s largest single expense. (Ex. 30012 at 3.) This factor is calculated using historical information and incorporating the cost of living factor. (Ex. 30012 at 3.) The factor gives an indication of how many teachers a district would need to hire and assists with those higher personnel costs. (Tr. 5496:22–5497:1.)

22. The formula also includes a size factor. (Tr. 274:16–17.) The size factor is included to recognize purchasing power differences among school districts. (Ex. 30012 at 3.) It provides additional funding for small districts to help compensate for the economies of scale that larger districts can take advantage of. (Tr. 274:19–23; 5497:9–18.)

23. The formula further includes an at-risk student factor, which is more properly thought of as add-on funding after the per-pupil funding has been identified using the base funding amount plus the factors discussed above. (Tr. 5497:21–5498:3.) This amount, before the at-risk add-on, is considered the district’s total per-pupil funding. (Ex. 30012 at 3, 6.)

24. The additional at-risk funding is intended to provide additional money to assist in the education of those students deemed most at risk of not graduating or having more difficulties in succeeding in education. (Tr. 5498:12–17.)

25. At-risk funding is provided for students eligible for participation in the federal free lunch program. (Ex. 30012 at 4.) Beginning in fiscal year 2005-2006, the definition of at-risk students was expanded to include students who are not eligible for free lunch but whose CSAP scores are not included in a school’s performance calculation because their dominant language is not English. (Ex. 30012 at 4.)

26. For each at-risk pupil, a district receives at least an additional 12 percent of the district’s total per-pupil funding. As a district’s percentage of at-risk students increases above

the statewide average, an increased amount of at-risk funding—up to 30 percent of total per-pupil funding—is provided. (Ex. 30012 at 4.)

27. Plaintiff-Intervenors specifically challenge the reasonableness of using federal free lunch as the proxy for at-risk funding. Plaintiff-Intervenors contend that reduced lunch, as well as free lunch, ought to be considered.

28. However, as Plaintiffs' witness Ed Steinbrecher testified, when studying and designing the 1994 Act, federal free lunch was "the best proxy [the General Assembly] could find." (Tr. 655:7–8.) "[W]e tried it with reduced lunches, with free lunches, et cetera, and the highest correlation was with free lunch, . . . and that's why it became the recommended variable." (Tr. 656:7–10); *accord* (Ex. 30110 at 63 (noting "percentage of students receiving free lunch correlated most highly with the at-risk index").) Senator King also recounted that "several proxies were mentioned at the time," including even graduation rates, but the General Assembly "thought that the free lunch population was the best proxy." (Tr. 6769:4–18.) Noting his belief that "free lunch kids are probably the most at risk," Senator King testified the free lunch proxy was "considered to be the best way of driving a formula to say that we were going to serve the most needy kids." (Tr. 6770:6–10; *see also* Tr. 6831:3–6.) Plaintiffs' witness Scott Murphy confirmed a consensus was reached to use the school lunch program as a proxy for at-risk funding. (Tr. 448:13–16.)

29. The Court also heard evidence that the General Assembly reexamined the at-risk factor's proxy through its 2005 interim committee on school finance. (Tr. 3469:3–7) According to Senator Windels, the committee considered expanding the proxy to include children who scored unsatisfactorily on math and reading standardized tests. (Tr. 3469:8–24). Such a proposal was never forwarded to the General Assembly as a whole because, as Senator King explained, without additional revenue available, expanding the proxy to include students qualifying for both free and reduced priced lunch would have decreased the amount of supplemental funding for each identified at-risk student, thereby creating "winners and losers." (Tr. 6828:11–25; *see also* Tr. 3469:25; 3470:1–3, 7–14.)

## **ii) Budget Stabilization Factor**

30. Beginning in fiscal year 2010-2011, the General Assembly added a budget stabilization factor, now called the negative factor, to the school finance formula. (Ex. 30012 at 4.) This factor acts as a reduction to the other factors in the formula. (Ex. 30012 at 4.) Plaintiffs' witness David Hart explained this factor was adopted by the General Assembly to adjust for the revenue shortfalls that Colorado has recently experienced. (Tr. 2997:18–21.) Similarly, Plaintiffs' witness Cary Kennedy testified the state was in a significant and historic economic downturn. (Tr. 2827:20–25.)

31. Mr. Hart testified that the negative factor negated the General Assembly's intent to provide additional funding for at-risk pupils. (Tr. 2999:21–3000:18.) However, Mr. Hart

acknowledged that he was not a member of the General Assembly, nor was he on the staff of the Colorado Department of Education, when this factor was adopted. (Tr. 3047:2–13.)

32. By contrast, Vody Herrmann, who until recently was the state’s Assistant Commissioner for Public School Finance, testified that she was directly involved in the development of the negative factor. (Tr. 5503:2–4.) She refuted Mr. Hart’s suggestion that the negative factor somehow unwound the at-risk factor. (Tr. 5504:25–5505:3.) Rather, the negative factor reduced all factors proportionately. (Tr. 5505:5–20.) Indeed, once it was determined that there was not sufficient funds to fully fund the school finance formula, school districts themselves lobbied for a proportional, even reduction rather than a reduction that focused on one specific factor, which disproportionately affected certain districts. (Tr. 5503:8–20; 5504:3–21.) In addition, Plaintiffs’ witness Cary Kennedy testified that while she disagreed with the negative factor, she thought the General Assembly and the Governor were really trying to do the right thing. (Tr. 2828:1–5.)

### **iii) Base Funding Figure**

33. The relevant witnesses for the parties generally endorsed the 1994 Act’s basic structure. For example, Defendants’ witness and former Assistant Commissioner for Public School Finance Vody Herrmann called the structure “pretty good.” (Tr. 5532:11–22.) Similarly, Plaintiffs’ expert witness and Colorado Springs District 11 Chief Financial Officer Glenn Gustafson testified that “the basic premise of the formula is—is still a good model to work with,” and considers the act “a fairly sound model.” (Tr. 510:12–16.) While Plaintiffs’ witness Senator Sue Windels characterized the annual school finance act as unconstitutional, she explained this was because of inadequate funding—not the structure of the formula. (Tr. 3472:18–24.)

34. Thus, Plaintiffs’ primary contention, rather, targets the Act’s base funding amount. Plaintiffs’ witnesses repeatedly testified that the base funding figure is the most important component of the school finance scheme, as all factors calculate off of the base. (*See, e.g.*, Tr. 641:19–642:6.) Plaintiffs’ witnesses also testified that the base figure is not and has never been calculated by reference to a “cost study” or other reference to guaranteeing a specific level of educational quality or educational outcomes. (*See, e.g.*, Tr. 643:1–12.)

35. Defendants stipulated that they “have not conducted a study to determine the cost of funding all public education programs set forth in statute and regulation.” (Order Approving Parties’ Stipulations Regarding Data and Factual Admissions ¶31 at 11; Order Approving Parties’ Stipulations Regarding Undisputed Facts ¶8 at 5.)

36. Even so, the Court heard evidence that the General Assembly has taken other steps to set the base funding figure.

37. In prior iterations of the school finance act, the base amount was established by looking at what school districts were spending in prior years. *See Lujan*, 649 P.2d at 1012 (“The [authorized revenue base] amount was first established for each district in 1974, and was based

in part on the amount each district was then spending per pupil. This spending figure was used by the General Assembly as an estimate of what the educational costs were for each district. However, the [Authorized Revenue Base] has been adjusted upwards, especially in the low spending districts, to more accurately reflect the educational needs of the districts.”); *see also* (Tr. 623:1–2).

38. Plaintiffs’ witnesses suggested that a similar method was used to establish the base amount in the 1994 Act. For example, Scott Murphy, who advised the General Assembly’s 2005 interim committee on school finance, recalled the committee examined the base funding amount and determined the 1994 “base was created by backing into it by the dollars available from the prior act and what people believed would be available for the next act.” (Tr. 390:3–25, 391:1.)

39. Plaintiffs suggest that using historical spending to set current funding levels is constitutionally problematic. (Pls.’ 3d Am. Compl. ¶ 110 (“When adopted in 1994, PSFA base funding was determined by historical school funding ....”))

40. However, several of Plaintiffs’ own witnesses testified that they create their school districts’ budgets by similar reference to prior year spending. For example, Creede Superintendent Buck Stroh explained that the prior year’s budget gives a “common ground” in building the budget, and that he could not imagine building the budget without looking at historical spending. (Tr. 2297:5–14.) Similarly, Dr. Brenda Krage, an assistant superintendent at Pueblo City Schools, testified that the district used the prior year’s budget as a benchmark or starting point for the current year’s budget, and agreed that it is a “reasonable place to start.” (Tr. 2479:13–21.) Mountain Valley Superintendent Corey Doss agreed that using the district’s prior year budget as a jumping off point for next year’s budget is a reasonable way to build a budget (Depo. Desig. Corey Doss 73:7–19), as did South Conejos Superintendent Marcella Garcia (Depo. Desig. Marcella Garcia 77:1–4, 13–16.)

41. Plaintiff’s expert witness Dr. Bruce Baker characterized the base as “more or less a political determination of the availability of—of resources to fund the formula.” (Tr. 1393: 7–15.)

42. Yet, Senator Keith King, who was first elected to the General Assembly in 1999, described how the annual school finance act is unique in that it is “the highest priority of the General Assembly.” (Tr. 6736:11–13; 6754:4–11; 6755:2–5.) According to Senator King, the school finance act is “one of two bills that must pass, and we must work together on and we must collaborate on and we must make sure that we fund.” (Tr. 6754:23–25; 6755:1.) In Senator King’s experience, which the Court credits, the General Assembly prioritizes school finance and looks “at what the state can afford, how it plays into the total budget of the state.” (Tr. 6765:21–25; 6766:1–6.) Senator King summarized that the General Assembly is “given the constitutional responsibility to fund schools, and we take it very seriously.” (Tr. 6768:22–24.)

43. In 1993, Legislative Council, the research arm of the General Assembly, released two detailed studies “examin[ing] the factors and characteristics utilized in the 1988 [Public School Finance] Act and recommend[ing] changes if warranted.” (Ex. 30110 at 1; *see also* Ex. 30109.) These studies leaned heavily on an advisory committee of school finance experts, which included witnesses who testified for Plaintiffs in this case. (Ex. 30109 at iii (noting advisory committee included Dr. Ed Steinbrecher and Scott Murphy)).

44. The Legislative Council studies did not recommend any specific methodology for establishing a base per-pupil funding level. (Ex. 30109 at 12.) Mr. Murphy recalled the advisory committee was unable to “zero in on what a base amount of funding should be,” even though “some of the committee members had some fairly strong feelings about [the base].” (Tr. 373:24–374:11; 374:14–18.)

45. Dr. Steinbrecher, who was intimately involved in the development of the 1994 Act explained, however, that there was always a concern in the General Assembly “that if districts had too much money provided in a new act that it wouldn’t be spent wisely, and if they had too little there, there’d be other political considerations.” (Tr. 623:3–8.) According to Dr. Steinbrecher, that is why the General Assembly generally looked at existing funding levels as a starting point for new school finance acts. (Tr. 623:9–11.) Plaintiffs’ expert Dr. Bruce Baker of Rutgers University testified that efficiency can be a reasonable element of education policy design. (Tr. 1428:9–12.)

46. In the 1994 Act itself, the General Assembly notably increased the overall level of public school funding by \$110 million. (Ex. 30123 at 24; *see also* Ex. 30074 at 1.) This increased statewide average per-pupil funding by 3.6 percent. (Ex. 30074 at 1.)

47. After 2000, the base funding amount was set with reference to the calculations identified in Amendment 23 to the Colorado Constitution, which required the base to increase annually by the rate of inflation plus one percent. (Tr. 5494:6–11.) This constitutional formula automatically changed in the 2010-2011 fiscal year to require that future base funding amounts increase by the annual rate of inflation (Tr. 5494:6–11.) According to Cary Kennedy, Amendment 23 was designed to fix the decline in education funding caused by the Gallagher and TABOR Amendments. (Tr. 2754:15–25; 2755:1–15; 2772:12–16)

48. The Court heard testimony that there was not a common understanding within the General Assembly over whether Amendment 23 established a “floor” or a “ceiling” for state funding of public schools. (Tr. 3466:11–15.) Former Representative and Senator Sue Windels found during her tenure that most legislators viewed Amendment 23 as a funding ceiling. (Tr. 3466:16–18.) Cary Kennedy testified her intent as the drafter of Amendment 23 was not to set a maximum level of funding or set a level of thorough and uniform funding. (Tr. 2819:17–25; 2820:1–7.) While the Court generally credits Ms. Kennedy’s testimony, she acknowledged that the Blue Book issued to voters in 2000, which she helped draft, argued in Amendment 23’s favor that it was the best way to infuse the school system with the “necessary” level of funding. (Tr. 2820:4–6; 2823:2–14.)

49. Plaintiffs also contend that the base funding level is simply too low. Plaintiffs' expert witness Justin Silverstein testified about what would be an "adequate" base funding amount. One of the two models employed by Mr. Silverstein, the successful schools model, indicated an appropriate base amount of \$6,051. (Tr. 1492:21–1493:6.) The Court notes that Colorado's fiscal year 2011–2012 base funding amount of \$5,634.77 (Tr. 2969:8–9) is very close to the base amount advocated by Plaintiffs' own expert. Mr. Silverstein's analysis and the alleged inadequacy of state per-pupil funding is addressed in detail below.

### **b) Categorical Funding**

50. On top of a district's total program funding, districts may receive additional state funding to help pay for certain programs, referred to as categorical programs. (Ex. 30012 at 11; Tr. 5506:12–15.) These categorical programs are typically designed to provide additional funding for certain populations that need more assistance than the average student. (Tr. 5507:13–18.) As Plaintiffs' expert John Hefty explained, "[t]he concept is that there—there could be groups of students with similar conditions or similar needs, and programs are set up that have dollars attached to have some reflection of the additional costs driven by those additional needs." (Tr. 280:11–15.)

51. There are a number of categorical programs. Those most relevant to this case include: Special Education; Gifted Education; and the English Language Proficiency Act. (Ex. 30012 at 11–14.) The state also provides additional funds for: students in the smallest, most remote schools, known as "small attendance centers"; an expelled and at-risk student services grant program; comprehensive health education; career and technical education programs; and transportation services. (Ex. 30012 at 11–15; Ex. 30147 at 12.)

52. Pursuant to Amendment 23 to the Colorado Constitution, total funding for categorical programs must now increase by the rate of inflation (as with the base funding amount, the required increase was, until recently, inflation plus one percent). Colo. Const. art. IX, § 17(1). How much to increase specific categorical programs is left to the discretion of the General Assembly. (Ex. 30147 at 12.)

53. Vody Herrmann, the former Assistant Commissioner for Public School Finance, explained that increases in specific categorical programs are based in part on an attempt to provide additional funding to those programs that have the largest difference between state revenues provided and total district expenditures. (Tr. 5508:11–24.) The state attempts to "put the largest amount of increase where the largest gap is." (Tr. 5508:23–24.)

54. In certain years when the state had more money, the General Assembly elected to increase funding for categorical programs by more than Amendment 23's constitutionally-required minimum amount. (Ex. 30147 at 12; *see* Tr. 6766:15–18.) In fiscal year 2010-2011, appropriations for categorical programs totaled nearly \$89 million, which is \$34.7 million higher than the minimum amount that would have otherwise been required. (Ex. 30147 at 12.)

55. Plaintiff-Intervenors challenge state funding provided through the English Language Proficiency Act (“ELPA”). (Pl.-Intervenors’ Trial Brief at 5.) Specifically, Plaintiff-Intervenors contend that funding for ELL students is too low and that state aid is arbitrarily capped at two years per ELL student. (Pl.-Intervenors’ Trial Brief at 5, 10.)

56. As a threshold matter, ELPA funding is not intended to cover the entire cost of bringing students to language proficiency. In enacting the ELPA statute, the General Assembly expressly declared state funding was being provided simply to “help defray the costs” of a district’s ELL program. Ch. 243, sec. 1, 1981 Colo. Sess. Laws 1058, 1058 (emphasis added), *codified at* § 22-24-102, C.R.S. (2011). ELPA plainly states its purpose is “to provide assistance to districts.” Ch. 243, 1981 Colo. Sess. Laws at 1059 (emphasis added), *codified at* § 22-24-104(2).

57. This plainly stated statutory intent was confirmed by Dr. Barbara Medina, the state director of ELL programming at the Colorado Department of Education. (Tr. 6081:16–20; 6082:5–13; 6110:11–18.) Dr. Medina explained how ELPA funding is “supplemental” to the “state allocation of the per-pupil operating revenue.” (Tr. 5975:9–20.) Even Plaintiff-Intervenors’ expert Dr. Kathy Escamilla conceded ELPA funding is provided as a supplement to per-pupil funding in order to help defray the costs of district ELL instruction. (Tr. 3795:22–25; 3796:1–11.)

58. Moreover, the Court heard evidence that ELPA is not the only source of supplemental dollars. According to Dr. Medina and Dr. Escamilla, the federal government allocates money to school districts for ELL instruction. (Tr. 3796:12–14, 25; 3797:1–9; 6078:17–20.)

59. Dr. Medina, whom the Court recognized without objection as an expert in language, culture, and equity regarding ELL education programs, opined these federal dollars, combined with ELPA dollars and the per-pupil operating revenue is sufficient funding to move ELL students from one English proficiency category to the next. (Tr. 5965:22–5966:12; 6078:20–23.) Dr. Escamilla’s contrary opinion did not take into account the per-pupil allocation available to school districts. (Tr. 3797:4–20.)

60. Since its enactment in 1981, ELPA has provided supplemental funding for just two calendar years per student. Ch. 243, 1981 Colo. Sess. Laws at 1059, *codified at* § 22-24-104(3). Both Dr. Escamilla and Dr. Medina testified that it generally takes ELL students longer than 2 years to become fully proficient in academic English. (Tr. 3716:7–12; 6019:7–14).

61. In addition to the fact that state categorical funding is not intended to reimburse all districts’ expenses on ELL instruction, Dr. Medina testified she believes the General Assembly attempted to “focus[] on English language production at its very basic level of a student being able to command and understand simple commands,” which was consistent with “the body of knowledge at that time about language development.” (Tr. 5984:25; 5985:1–21; *see*

also Tr. 5967:20–25; 5968:1–8, 19–25; 5969:1–25; 6109:14–23.) First and second-year students, Dr. Medina explained, “would be the students that you would want to increase English proficiency and comprehension with first so that they could access the rest of the school day.” (Tr. 6106:16–22.)

62. Dr. Medina’s testimony is consistent with ELPA. In its legislative declaration, the General Assembly found, determined, and declared “that there are substantial numbers of students in this state whose educational potential is severely restricted because a language other than English is their primary means of communication.” Ch. 243, 1981 Colo. Sess. Laws at 1058 (emphasis added), *codified as amended at* § 22-24-102. Consequently, the General Assembly “recognize[d] the need to provide for transitional programs to improve the English language skills of these students.” *Id.* (emphasis added), *codified at* § 22-24-102.

63. In addition, ELPA defined a “student whose dominant language is not English” as a public school student determined “to be impaired because of his inability to comprehend or speak English adequately.” *Id.* at 1059 (emphasis added), *codified as amended at* § 22-24-103(4) (setting forth same definition for renamed “student with limited English proficiency”). Within this definition, the General Assembly set forth three separate designations—a) students who do not comprehend or speak English, b) students who speak or comprehend some English, but are dominant in another language, and c) students who speak or comprehend English and another language for which dominance is difficult to determine. *Id.*, *codified at* § 22-24-103(4)(a)–(c). Districts are directed to use 75 percent of the annual ELPA funding for a) and b) category students, with the remainder to be used for c) category students. *Id.* at 1060, *codified as amended at* § 22-24-103(4)(c)(I)–(II) (utilizing same 75/25 funding allocation).

64. The Court further finds the state has significantly increased its aid to ELL students by nearly 300 percent over the past decade—far in excess of the increases devoted to any other categorical program. (Ex. 30147 at 12; Tr. 5988:12–17; 6741: 25; 6742:1–12; 6766:19–20.) Indeed, the next largest categorical program increase was nearly 65 percent over that same time period. (Ex. 30147 at 12.) This increase in ELPA funding even exceeds the 250 percent growth in ELL student population over the last 12 years. (Tr. 5986:14–20.) Even last year, despite historic budgetary challenges, the General Assembly granted a 17 percent increase to ELPA funding, which was the only increase to any categorical program. (Tr. 5988:12–17.) Dr. Medina testified how she has repeatedly educated the General Assembly about the dramatic growth of the ELL student population, which has been much more than anyone anticipated. (Tr. 5986:3–20; 5287:2–17, 22–25; 5988:1–2; 5991: 23–25; 5992:1–3.) According to Senator King, “the general assembly has made a huge commitment to English language learners in the state of Colorado to increase their opportunity for a good education”; “[p]eople bring us issues, and we try to respond to those issues and do what we can.” (Tr. 6742:17–20; Tr. 6766:19–24.)

### **c) Capital Construction**

65. Historically, funding for capital construction projects such as new buildings or building repairs has been considered the responsibility of local school districts. (Ex. 30137 at

57; Tr. 2786:16–17.) Many school districts have utilized general revenues and/or voter-approved bonds to meet their capital construction needs. (Ex. 30137 at 57.) A school district’s ability to raise bond money is affected by both the district’s assessed property value and the district’s voters’ willingness to pass a bond election. (Ex. 30137 at 57.)

66. Over the years, concerns have been expressed regarding this historical method of funding school capital construction. The Court finds the General Assembly has responded to such concerns.

67. For example, in the late 1990s, a few school districts, including some involved in this case, brought a class action lawsuit, *Giardino v. State Board of Education*. (Exh 30137 at 59.) In settlement, the General Assembly agreed to provide a total of \$190 million in state funds between 2000 and 2011 to address the most serious capital construction needs. (Ex. 30137 at 59.)

68. In 2005, Plaintiff-Intervenors’ witness Mary Wickersham reported her concerns, along with recommendations to address them, to the legislative Interim Committee on school finance. (Tr. 4272:1–4273:19.) To address her concern over the lack of state oversight of school facilities, Ms. Wickersham had recommended a statewide school facilities needs assessment and minimum statewide school construction standards. (Tr. 4272: 3–9.) To address her concern over the lack of funds available to some schools and school districts, she recommended the General Assembly create a facilities grant program in which schools and school districts would contribute through a “matching” portion based on debt capacity and wealth indicators. (Tr. 4272:10–16.) Ms. Wickersham recommended a policy-making board and a staff implement the program. (Tr. 4272:17–24.)

69. The General Assembly responded to Ms. Wickersham and school districts’ capital construction concerns in 2008 through enactment of the Building Excellent Schools Today (“BEST”) legislation. (Tr. 4320:24–4321:2.) Allowing a portion of revenue from the state school lands to be leveraged, the legislation created a dedicated revenue stream to finance school construction projects across the state, particularly in districts lacking the ability to repair aging infrastructure. (Tr. 2792:3–15.) In addition, the BEST legislation provided for a statewide needs assessment, contemplated a grantee match based on debt capacity and wealth indicators, and created a board and staff to administer the grant program. (Tr. 4321:19–4322:24.)

70. Through the BEST program’s annual grant cycle, the state provides grants for projects ranging from smaller scale, such as fire alarms, to larger scale, such as entire new schools. (Tr. 5598:9–19.) In addition to the BEST program’s annual cycle, BEST grants are also awarded throughout the year on an emergency basis. (Tr. 5599:21–25.) BEST grants take the form of cash grants or lease-purchase financed grants. (Tr. 5599:8–20.) Typically, smaller grants are in the form of cash and larger grants are in the form of lease-purchase financing. (Tr. 5599:12–17.)

71. BEST grants generally require some contribution from the grant recipient. (Tr. 5604:11–16.) This contribution, which is the “match,” is calculated based on statutory criteria that yield a unique match percentage for each potential grant recipient. (Tr. 5604:17–25.) For example, for school district applicants, the criteria used to calculate the match percentage includes per-pupil assessed value, average household income compared to the state average, free and reduced price lunch percentage compared to the state average, bond history over the past 10 years, and bonded mill levy. (Tr. 5605:1–7.) As Public School Capital Construction Assistance Division Director Ted Hughes explained, these factors assess “the capacity of the school district ... to help themselves with their facility needs.... it [assesses] the wealth of ... the school districts.” (Tr. 5605:8–17.) Accordingly, poorer school districts are generally required to provide a lower match percentage than wealthier districts. (Tr. 5605:18–5606:1.)

72. As an additional safeguard for low property wealth school districts, the BEST Act caps the amount of match required at a school district’s limit of bonded indebtedness regardless of the amount it would otherwise be required to provide under the usual match calculation. (Tr. 56113:14–16.) For example, Center was initially required to match 21 percent of the total cost of the facility. (Tr. 172:6–7.) However, because Center was statutorily capped at raising \$4.7 million through bond elections, the state reduced Center’s matching percentage by 6 percent, to a 15 percent match. (Tr. 172:6–12.) The State funded the remaining 85 percent of the costs.

73. Regardless of a school district’s match calculation or potential cap, a BEST applicant may request a waiver of all or part of the match contribution requirement from the state. (Tr. 5606:2–5607:2.) For example, as Mapleton Superintendent Charlotte Ciancio testified, the district was able to get a waiver of the match amount that would have otherwise been required under the statutory calculation. (Tr. 4445:17.)

74. In addition to the BEST program, the Division of Public School Capital Construction Assistance also administers other programs such as a charter school facilities grant program and the Qualified Zone Academy Bond program. (Tr. 5609:13–5610:3.) Under the charter school grant program, the Division makes grants based on the General Assembly’s annual appropriation of money for charter school facility needs. Under the Qualified Zone Academy Bond (“QZAB”) program, the Division oversees the administration of interest-free financing through the federal government for capital needs. (Tr. 5609:10–5610:3.) Currently, the state’s QZAB allocation from the federal government has not been exhausted by school districts. (Tr. 5610:4–7.)

75. The Division also provides a wide range of technical assistance to schools and school districts. (Tr. 5596:4–10.) Division staff includes two architects, two construction project managers, one school finance person, and two people with business backgrounds. (Tr. 5596:11–21.) As such, the Division is well-equipped to assist with such things as “grant applications, ... implementing construction projects, consultant selection, needs identification, planning, [or] facilities operations.” (Tr. 5596:4–10.)

76. As to potential grant applicants, the Division regularly visits schools statewide to assist in needs identification and facilities planning. (Tr. 5600:7–23.) As to grant applicants, the Division assists with application development, including critiquing throughout to ensure that it is as strong as it can be. (Tr. 5602:8–11.) As to grant recipients, the Division assists with helping with development of requests for proposals or qualifications of contractors and helping with evaluation of responses to such requests. The Division might also assist with implementation and monitoring of construction projects. Additionally, the Division is developing a program to assist school districts and schools with warranty management and follow-up training as to maintenance and operation of new facilities. (Tr. 5608:20–24.)

77. At any time, the Division’s planning assistance might also include working with a school district or school to select a master planner who would prepare a master plan that “will be very useful to them and might result in a BEST grant application, but it might be also just a tool that they can use in the future to better manage their facilities and maximize the dollars that they have and to budget better and do a better job with the funding that they have.” (Tr. 5602:2–7.)

78. The Court notes that the amount of capital construction assistance provided by the state is sensitive to, and limited by, local control. (Tr. 5611:11–18.) For example, the Division and the Board have developed construction guidelines that may assist districts in determining site size, classroom size and type, and energy saving implementations. (Tr. 5604:2–10.) However, these “[a]re certainly not mandates or requirements.” (Tr. 5603:24–5604:3.) Additionally, while the Division provides a wide range of technical assistance, the Division can provide only “[a]s much as the district will allow.” (Tr. 5608:11–16.)

79. Notably, many of Plaintiffs and Plaintiff-Intervenors have received facilities assistance from the state. As was recommended to the legislature, every school in the state has had its facilities assessed. (Tr. 5624:10–20.) Furthermore, in testifying as to improvements made since the statewide school facilities assessment, Plaintiff-Intervenors’ witnesses Charlotte Ciancio and Michael Clough testified that facilities grants received by Mapleton and Sheridan, respectively, have since reduced the needs reported in the assessment. (Tr. 4442:24–4443:8; 3631:7–11.) Adams 14, for example, has received BEST grants for three new roofs requiring only an 11 percent district match. (2849:4–8). More significantly, Plaintiff-Intervenors’ witness Mary Wickersham summarized that approximately 38 new school facilities had been built through the state’s BEST program in recent years. (Tr. 4325:12–19.) These new facilities include schools in Plaintiff school districts Alamosa, Centennial, Center, Sangre de Cristo, and Sargent. (Tr. 4325:23–4326:21.) Plaintiff Sanford was recently awarded a BEST grant covering 95 percent of a \$22 million major facility renovation. (Tr. 890:10–13; 891:18–892:2.)

80. These new facilities are meeting the needs of Plaintiffs and Plaintiff-Intervenors. For example, Plaintiff’s expert witness and Center Superintendent George Welsh testified that this new facility would address the district’s current facilities needs. (Tr. 232:5–9.)

81. Plaintiffs’ own witnesses lauded the BEST program. Former Representative Jack Pommer called BEST a “very good bill,” and testified that school districts were satisfied with the

allocation of the grant funds. (Tr. 3514:25–3515:9.) Former House Speaker Andrew Romanoff noted that, while it did not solve all of the capital construction problems, BEST was a good step forward. (Tr. 6859:22–6860:1.) Sanford Superintendent Kevin Edgar testified he was “grateful for the BEST program,” explaining the state realized there were facilities needs, “looked at a way they could assist and they were able to find a way to assist.” (Tr. 855:7–12.)

#### **d) Other Structural Issues**

82. In addition to the three elements of the school finance system raised by Plaintiffs, two other issues related to the structure of school finance in Colorado bear mention.

##### **i) Declining Enrollment**

83. First, several district witnesses testified that they had lost significant revenues because they have seen a decline in students over time. For example, Creede’s student population declined from nearly 200 in the late 1980s to about 120 students about five years ago to somewhere around 70 students today. (Tr. 2295:5–21.)

84. Declining enrollment is not limited to rural districts. As Sheridan Superintendent Michael Clough observed, “Prior to 2008, there was an absolute free fall in terms of the enrollment. One statistic that I read, between 37 and 39 percent of our population has ... decline[d].” (Tr. 3554:4–7.)

85. Indeed, more than 100 of the 178 school districts in Colorado are so-called “declining enrollment” districts. (Tr. 5510:14–20.)

86. It is important to note that the loss of revenues due to declining enrollment is not the result of state decisions or state finance policy. As Creede Superintendent Buck Stroh explained, the loss of funds is a result of choices of students’ families to move out of the district. (Tr. 2296:2–6.) Thus, the roughly \$13,000 per student that Creede loses due to declining enrollment cannot be fairly attributed to any action of the state.

87. Similarly, Ty Ryland, President of the Sierra Grande Board of Education, acknowledged the district lost enrollment when families moved away after a large mine closed. (Tr. 2210:3–12.)

88. Plaintiffs’ expert witness and Colorado Springs District 11 former Chief Academic Officer Michael Poore similarly attributed some of his district’s recent budget reductions to declining enrollment. (Tr. 1034:19–1035:2.)

89. Even so, the 1994 Public School Finance Act’s formula softens the impact of declining enrollment by allowing districts to average their enrollment over time. (Tr. 5510:24–5511:6; *see also* Tr. 271:11–14.) Districts are permitted to take their highest average enrollment

for up to five years and use that high count—rather than their actual funded pupil count—to determine their funding. (Tr. 5511:7–16.)

90. As former Assistant Commissioner for Public School Finance Vody Herrmann explained, declining enrollment averaging permits districts time to make changes in their expenses—for example, to downsize staff—to adjust for the fact that they now have fewer students to educate. (Tr. 5511:17–5512:6.)

91. Plaintiffs’ expert witness and Colorado Springs District 11 Chief Financial Officer Glenn Gustafson noted that his district has had the largest percentage decline in the state, losing 15 percent of its students over the last decade. (Tr. 482:21–483:3.) Mr. Gustafson testified that the averaging mechanism allows the district to “smooth” the decline in students over time and is “very effective” and has been “very helpful for” the district. (Tr. 485:6–9.) Likewise, Sheridan Superintendent Michael Clough testified that the averaging mechanism helps the district avoid “financial ruin” as enrollment declines. (Tr. 3628:1–5.) South Conejos Superintendent Marcella Garcia similarly explained that, even though the district’s actual student head count is 235, through declining enrollment averaging, the district is funded for 265 students—30 more than the actual head count. (Depo. Desig. Marcella Garcia 37:1–9.) At per-pupil funding of more than \$9,000 (Ex. 8412), this results in nearly \$300,000 of additional revenue to the district.

92. Over time, the General Assembly has extended the time period for declining enrollment averaging. During the last ten years, the limit was increased from a three year average to a five year average, giving districts a longer period of time to receive additional funding. (Tr. 5512:7–21.)

## **ii) Mill Levy Overrides/Bonded Indebtedness**

93. In addition to the state funds that flow through the 1994 Public School Finance Act, categorical program funding, and capital construction funding, the Court finds the General Assembly has allowed school districts to raise money from their local voters in a variety of ways.

94. First, school districts are permitted to seek a general Mill Levy Override (“MLO.”) (Ex. 30012 at 8.) MLO funds may be spent on a wide variety of activities, including general operating expenditures. (Tr. 5515:11–17.) According to Cary Kennedy, “[t]he override was built into the School Finance Act to allow school districts whose local voters wanted to put more money into their schools to be able to do so with their own local dollars . . . .” (Tr. 2772:1–5.)

95. As a threshold matter, witnesses testified that MLOs should be considered outside of the school finance act. The Court finds this is incorrect. The authority for raising MLO funds is found within article 54 of the education statutes—which is the Public School Finance Act. C.R.S. § 22-54-108.

96. Roughly speaking, an MLO cannot exceed 25 percent of a district's Total Program Funding or \$200,000, whichever is a greater amount. (Tr. 5515:18–19; Ex. 30012 at 8.) The reason for this cap in funding is to keep the funding gap between districts that have an easier time obtaining voter approval for MLOs and those who have a harder time from growing too large. (Tr. 5521:8-16.) Originally, the MLO cap was 10 percent, but the General Assembly accommodated school districts' requests to raise more funds locally. (Tr. 2789:7–18.)

97. Despite the fact that all districts are authorized by law to seek MLOs from their voters, as of last year only 108 of the 178 school districts have MLOs in place. (Tr. 3017:8–10.) Under the 25 percent statutory limit, discussed above, those 108 districts have the capacity to generate more than \$1.4 billion. (Tr. 5519:2-6; Ex. 30192.) However, those districts are currently generating only \$652 million. (Tr. 5519:9–11.) This means that, of the 108 districts with MLOs, there is approximately \$800 million in additional dollars that could be raised. (Tr. 5519:2–13.) This figure does not include the 70 school districts that have no MLO at all.

98. Of the school districts involved in this case:

- i. Jefferson County has raised \$74.3 million against its \$158.4 million cap, leaving it with \$84.1 million in capacity.
- ii. Denver Public Schools has raised \$76.9 million against its \$154.9 million cap, leaving it with \$78 million in capacity.
- iii. Aurora has raised \$22.3 million against its \$69.9 million cap, leaving it with \$47.5 million in capacity.
- iv. Colorado Springs District 11 has raised \$30.4 million against its \$67.5 million cap, leaving it with \$37.1 million in capacity.
- v. Adams 14 has raised \$4.9 million against its \$15.2 million cap, leaving it with \$10.3 million in capacity.
- vi. Mapleton has raised \$4.9 million against its \$14.3 million cap, leaving it with \$9.4 million in capacity.
- vii. Sheridan has raised \$1.0 million against its \$3.5 million cap, leaving it with \$2.5 million in capacity.
- viii. Monte Vista has raised \$195,000 against its \$2.1 million cap, leaving it with \$1.9 million in capacity.
- ix. North Conejos has raised \$189,856 against its \$2.0 million cap, leaving it with \$1.8 million in capacity.
- x. Moffat 1 has raised \$2.2 million against its \$3.9 million cap, leaving it with \$1.7 million in capacity.
- xi. Boulder Valley has raised \$55.2 million against its \$56 million cap, leaving it with \$929,384 in capacity.
- xii. Sargent has raised \$75,000 against its \$927,543 cap, leaving it with \$852,543 in capacity.
- xiii. Moffat 2 has raised \$151, 821 against its \$637,513 cap, leaving it with \$485,692 in capacity.

- xiv. Creede has raised \$70,000 against its \$370,462 cap, leaving it with \$300,462 in capacity.
- xv. Woodlin has raised \$231,953 against its \$347,416 cap, leaving it with \$115,463 in capacity.
- xvi. Alamosa has no current MLO.
- xvii. Bethune has no current MLO.
- xxviii. Centennial has no current MLO.
- xix. Center has no current MLO.
- xx. Del Norte has no current MLO.
- xxi. Greeley has no current MLO.
- xxii. Montezuma-Cortez has no current MLO.
- xxiii. Mountain Valley has no current MLO.
- xxiv. Pueblo City has no current MLO.
- xxv. Pueblo District 70 has no current MLO.
- xxvi. Rocky Ford has no current MLO.
- xxvii. Sanford has no current MLO.
- xxviii. Sangre de Cristo has no current MLO.
- xxix. Sierra Grande has no current MLO.
- xxx. South Conejos has no current MLO.

(Ex. 30192.)

99. The second form of local revenue districts are legally permitted to seek from their voters is for excess transportation costs. More specifically, school districts are permitted to ask their local voters to fund all transportation costs that are not currently reimbursed by the state. (Tr. 5523:14–25.) Only one of the districts involved in this case has sought and received these additional transportation dollars. (Tr. 5524:9–13.) This is reflective of the state as a whole; of the 178 school districts in Colorado, only three or four have received these additional funds. (Tr. 5524:14–17.)

100. The third form of local revenue districts are legally permitted to request is for special building and technology funds. This permits districts to seek up to ten mills for up to three years to pay for building projects or technology needs. (Tr. 5524:18–5525:2.) None of the districts involved in this case have received these additional building and technology dollars. (Tr. 5525:7–11.) Of the 178 school districts in Colorado, only a few have received these additional funds. (Tr. 5525:12–15.)

101. The fourth form of local revenue districts may request from their voters is for full-day kindergarten funding. Like excess transportation costs, this allows districts to seek funding for any excess cost for a district’s full-day kindergarten program (the state currently funds kindergarten students at 58 percent of the level of a first through twelfth grade student). (Tr. 5525:16–5526:1.) None of the districts involved in this case have received these additional full-day kindergarten dollars. (Tr. 5526:7–10.) Of the 178 school districts in Colorado, only two have sought and received these additional funds. (Tr. 5526:11–14.)

102. Finally, a school district may hold an election to authorize it to issue bonds to build or repair buildings and other capital facilities. (Tr. 5526:17–25.) The permissible use of bond dollars is fairly broad, as long as it’s capital-related. (Tr. 5526:24–25.) Districts may seek bonds up to 20 percent of their assessed property value (25 percent for rapidly growing districts) or 6 percent of their actual property value, whichever is greater. (Ex. 30012 at 9.) Several of the districts involved in this case have no outstanding bonded debt at all, indicated by the fact that they have no bond redemption mills. (Ex. 30191.) Indeed, 48 school districts across the state currently have no bonded debt. (Ex. 30191.)

103. Many of those districts that do have outstanding bonded debt have significant remaining capacity for building projects. For example, Greeley has more than \$327 million in outstanding bond capacity. (Tr. 4045:19–22.) Pueblo District 70 has current bonds of about \$50 million against a cap of more than \$100 million. (Depo. Desig. Ryan Elarton 45:13-22.) And, as Denver’s Chief Financial Officer David Hart testified, that district has “[h]undreds of millions” in capacity. (Tr. 3041:1–4.)

104. Finally, there is no district in the state that has maxed out its ability to go to its voters for all five revenue options. (Tr. 5530:8–10.)

### **3) Funding**

105. The Court now turns from the structure of the school finance system to the amount of funding provided to schools in the state of Colorado.

#### **a) Local and State Shares**

106. As noted above, it was decades after the adoption of Colorado’s constitution that the first direct state support of local school districts was enacted, *Lujan*, 649 P.2d at 1011, and, until recently, local school districts paid the majority of the cost for their local public schools.

107. Plaintiffs’ witness Dr. Ed Steinbrecher, whose respected career in school finance in Colorado began in the late 1960s, explained the long history of local funding for public schools. He noted that Colorado relied heavily on local property taxes to fund its public schools from the early days of statehood through the 1970s. (Tr. 651:21–25) Early in Dr. Steinbrecher’s career, the local districts paid between 70 and 80 percent of the total costs of public education. (Tr. 652:1–5.)

108. As recently as the late 1980s, local districts covered approximately 60 percent of the costs of their schools, leaving the state to cover the remaining 40 percent. (Tr. 2752:22–2753:1; 3043:1–12; 5535:8–13.) This majority local support is no longer the case.

109. As Dr. Steinbrecher explained, state funding expanded over time as the costs of education rose and local property taxpayers increasingly protested rising school property tax levels. (Tr. 652:10–21.)

110. In about 1990, the state and local shares crossed paths, and since that time state share has been rising while local share has been falling. (Tr. 5535:8–17.)

111. According to former State Treasurer Cary Kennedy, “the capacity of local school districts across the state to raise local funding for their schools has been diminished,” and “the state . . . has needed to come up with state resources in essence to backfill the loss of capacity to generate local tax dollars to support schools.” (Tr. 2752:14–21.)

112. Currently, the state is funding nearly two-thirds of the cost of public education, with the local share being closer to one-third. (Tr. 2753:1–10; 5535:18–20.) As former Assistant Commissioner for Public School Finance Vody Herrmann described, this has been a “significant shift.” (Tr. 5535:21–22.)

113. Since the passage of the 1994 Public School Finance Act, the state’s financial support for public schools has grown from approximately \$1.5 billion general fund dollars and \$1.7 billion total dollars to more than \$3 billion general fund dollars and \$4.4 billion total dollars in fiscal year 2010-2011. (Ex. 30120 at 19; Ex. 30135 at 14; *see also* Tr. 6757:25–6758:8.) Colorado now devotes nearly half of the state’s general fund revenues to elementary and secondary education. (Tr. 2955:6–9.) As Senator Keith King explained, 45 cents of every dollar in state revenue is appropriated in the Public School Finance Act. (Tr. 6759:12–15.) “The trend,” according to Senator King, has been to fund public education “as much as we possibly can.” (Tr. 6759:7–12.)

114. The Court recognizes this significant overall increase in state support is manifest in Plaintiff school districts, as well as those in which Plaintiffs and Plaintiff-Intervenors reside.

115. For example, Greeley has seen state funding grow by \$37 million, from \$59.1 million in 2002 to \$96.1 million in 2010, while local sources of revenue (property taxes and specific ownership taxes) have increased only \$4.3 million, from \$35.9 million in 2002 to \$40.2 million in 2010. (Ex. 4413 at 71.)

116. David Hart, Chief Financial Officer of the Denver Public Schools, testified that in the 2011-2012 fiscal year, local general fund revenue has decreased by about \$43.3 million while state equalization support has increased by \$25 million to help offset that loss of local support. (Tr. 3040:2–20.)

117. Center Superintendent George Welsh testified that, in this year’s budget, the district received more than \$3.8 million from the state and only \$845,000 from local taxpayers. (Tr. 6728:13–16.)

118. Mountain Valley Superintendent Corey Doss explained that 95 percent of the district’s budget comes from the state, with only 5 percent provided by the local district community. (Depo. Desig. Corey Doss 11:17–12:1.)

119. Similarly, Aurora Public Schools Superintendent John Barry testified that the district currently receives 86 percent of its funding from the state and only 10 percent from local taxpayers. (Tr. 1836:2–11.)

120. There was repeated testimony from Plaintiffs’ and Plaintiff-Intervenors’ witnesses that certain programs were paid for out of school districts’ “general fund.” For example, Wayne Eads, Chief Operating Officer at Greeley, noted that additional funding for programs for special education students and recent immigrants was taken from the general fund. (Tr. 3393: 23–3394:1; 3394:20–23.) However, as Mr. Eads conceded, the general fund includes state funds; in Greeley’s case, roughly 75 percent of the district’s general fund is made up of state dollars. (Tr. 4037:12–24.) Likewise, in describing the sources of Jefferson County’s general fund, Superintendent Cynthia Stevenson noted that “obviously, the greatest source is the state.” (Tr. 1066:13–18.)

121. In summary, the Court finds that, in the face of a dramatically decreasing share of local funding for the traditionally local obligation of public schools, the state has stepped in to provide increasing financial support. The local school districts’ failure to fulfill their historic responsibility to fund their schools underscores the significant and growing effort the state makes to support public education. If it is more aggregate state funding Plaintiffs and Plaintiff-Intervenors seek, the Court finds they have received it.

#### **4) Legislative Actions Regarding School Finance.**

122. A significant theme of Plaintiffs’ and Plaintiff-Intervenors’ case is that the state, and specifically the General Assembly, has taken little if any action to address the purported problems with public school finance. The Court finds this is not the case. The funding increases just described are a palpable legislative response.

123. And, as already stated, Lieutenant Governor Joe Garcia testified that education is “critical” to the State of Colorado. (Tr. 4511:24–4512:1.) He explained how the Governor’s office is “very focused on K through 12 education.” (Tr. 4485:1–2; *see also* 4483:20–23.)

124. The General Assembly also recognizes the significance of education and, consequently, the Public School Finance Act. The Court has already recounted Senator Keith King’s testimony that the annual school finance act is “the highest priority of the General Assembly.” (Tr. 6736:11–13; 6754:4–11; 6755:2–5.) This was echoed by Defendants’ other legislative witnesses. Senator John Andrews explained, “[E]ducation is possibly the most important thing we do in the state of Colorado [because] ... [w]e need an educated population.” (Tr. 6333:2–5.) Recalling his service in the legislature, State Board of Education Chairman Bob Schaffer concurred that education is “essential to maintain the republic.” (Tr. 5889:11–

12.) Senator Ben Alexander similarly acknowledged the importance of education both “for the individual’s sake as well as for society’s sake.” (Tr. 6335:9–11.)

125. Because of the significance of education, it occupies “the dominant share of Colorado’s budget,” drawing as Senator King testified, 45 cents of every dollar. (Tr. 6361:19–20; 6759:12–15.) Accordingly, Senator Andrews explained, “[A]ny member of the state house or senate could not avoid finding that education had to be amongst his or her top three priorities.” (Tr. 6368:16–6369:2.)

126. As explained by Dr. Ed Steinbrecher, development of the school finance scheme is a thoughtful process.

[W]hen the legislature wants to adopt new legislation, they want to know the implications. So if a proposal comes before them related to changes in the finance act, they want to know its impact on every district both in terms of the dollars allocated, the mill rates in those districts, and the appropriation level that will require the State to approve.

(Tr. 618:25–619:7.)

127. Former Senator Sue Windels testified in detail about her efforts to keep abreast of the education constituency’s concerns. (Tr. 3433:8–3434:6; 3456:3–3457:11.) When drafting the annual school finance act, Senator Windels explained her “first step always . . . was to put together a meeting of the stakeholders. I would call all of the—invite the school districts to send their representatives to talk about how they would like to see the School Finance Act drafted, what they would like to see added, what they would like to see taken away . . . .” (Tr. 3433:11–19.)

128. Similarly, Senator Keith King, who has also served in the Colorado House of Representatives, testified that he has “listened literally to thousands of hours and to thousands of people coming to the education committee, to the finance committee, to various committees to have an opportunity to speak.” (Tr. 6751:25–6752:3.) According to Senator King, the legislative process “is very open”; “[w]e have an opportunity for everybody to come and give us their opinion and their voice about what they want in the School Finance Act . . . .” (Tr. 6752:19–25.)

129. The Court finds the 1994 Public School Finance Act, at issue in this case, was the result of significant review and study by the General Assembly. As briefly recounted above, Legislative Council released two detailed studies in 1993 “examin[ing] the factors and characteristics utilized in the 1988 [Public School Finance] Act and recommend[ing] changes if warranted.” (Ex. 30110 at 1; *see also* Ex. 30109.) These studies leaned heavily on an advisory committee of school finance experts, including Plaintiffs’ witnesses Dr. Ed Steinbrecher and Scott Murphy. (Ex. 30109 at iii, noting that advisory committee included.)

130. Building on these studies, the General Assembly convened an Interim Committee on School Finance in 1993. This Committee was charged with “conducting a complete and thorough examination of the current school finance act and suggesting changes and improvements to the state’s public school financing system.” (Ex. 30105 at 1.) The Committee “held public meetings and had discussions which drew upon staff research, expert testimony, and comments from school districts and the general public to address the specific provisions in its charge.” (Ex. 30105 at 1.) Further, the Committee “travel[ed] to eight different locations in the state (Greeley, Loveland, Durango, Grand Junction, Colorado Springs, Pueblo, Las Animas, and Denver),” a process that “provided insight as to the components of the 1988 act which are problematic for school districts.” (Ex. 30105 at 4.)

131. These studies were all aimed at improving the school finance structure. As Dr. Steinbrecher, who was intimately involved in the development of the 1994 Act explained,

Well, the way the ‘94 act worked, there was (sic) studies of factors that caused districts to have variable costs for providing similar services, and that was the whole basis for the economic study, for the at-risk pupil study, et cetera. So all of that study went toward finding ways of determining those differences between districts in the economy factors, their size factors, and the at-risk student factors.

(Tr. 636:19–637:2.)

132. The result of these studies and activities was the 1994 Public School Finance Act. (See Ex. 30105 at 7–14.) Many of the Legislative Council recommendations were incorporated into the new 1994 Act. For example, the setting categories used in the 1988 Act were abandoned and each school district was assigned its own cost-of-living index. (Ex. 30109 at 7; Tr. 654:11–22.) Students receiving free lunch became the proxy for determining at-risk students. (Ex. 30109 at 8; Tr. 654:23–655:5.) And, specific ownership taxes were equalized. (Ex. 30109 at 9; Tr. 656:11–25.)

133. Importantly, the studies of the school finance system did not end with the adoption of the 1994 Act. Since that time,

- the General Assembly has conducted a cost of living study every two years in order to update the cost-of-living factors in the public school funding formula. (Exs. 30100, 30150, 30153, 30156, 30159, 30162, 30165.)
- In 1996, the General Assembly’s Committee on K–12 Capital Construction Finance conducted a study of “issues related to public school capital construction, including strategies and revenue sources for financing such construction.” (Ex. 30102 at xi.)
- In 2000, the General Assembly studied the definition of “at risk” pupils as used in the Public School Finance Act of 1994. (Ex. 30101.)
- In 2005, the General Assembly formed an Interim Committee on School Finance, charged with “studying the funding for students in public schools statewide, analyzing the needs of public school facilities throughout the state, and determining funding factors

and formulas that should be adopted to ensure that all students in public schools in the state are receiving a thorough and uniform education in a safe and effective learning environment.” (Ex. 30106 at xi.) Committee Chair Senator Sue Windels “felt it was very important to have the guidance of stakeholders, of people who were actually working within the system so that we could have their guidance and their feedback.” (Tr. 3426:1–8.) Littleton Superintendent Scott Murphy, who served on the task force that advised the 2005 Interim Committee, explained, “We began to bring people that had information about funding that would come and testify before us. We’d have long conversations about—because there was (sic) experts from different areas and different perspectives. We’d have long conversations about where we are with school finance today, what people’s attitudes were to that. How rational, if you will, they thought it was.” (Tr. 385:22–386:6.)

- In 2009, the General Assembly, through another Interim Committee to Study School Finance, again studied “appropriate funding factors, formulas, and the allocation of resources to ensure that all students in public schools are receiving a thorough and uniform education.” (Ex. 30108 at 1.)

134. Not only has the finance system been studied, the Court finds that significant changes have been made in response to issues identified, often by school districts themselves.

135. Plaintiffs’ expert witness and Littleton School District Superintendent Scott Murphy described how the so-called “j-curve” unjustly enriched a couple of the largest districts with additional funding. (Tr. 406:11–407:8.) Concerns were raised, and the General Assembly corrected the formula. (Tr. 407:8–10; 452:4–9.)

136. The Colorado Preschool Program, discussed in detail below, was dramatically expanded. The program grew from serving fewer than 10,000 students in 2003-2004 to more than 20,000 students today. (Tr. 3513:3–10; Ex. 4 at 3.) Indeed, several former legislators—including two of Plaintiffs’ expert witnesses—described the program as a good one. Former state House member Jack Pommer agreed that, through the program, the General Assembly helped school districts help students who couldn’t afford to attend preschool. (Tr. 3513:11–14.) And former House Speaker Andrew Romanoff agreed that the program, though not perfect, was a step in the right direction. (Tr. 6860:8–15.)

137. In response to concern from school districts that not enough federal money allocated through the Secure Rural Schools program was being allocated by county officials to school districts, the General Assembly required at least 25 percent of the funds be given to districts, up from the original requirement of 5 percent set by the federal government. (Tr. 181:21–182:6; 2256:15–2257:14.) The General Assembly also required that 50 percent of the SRS dollars be allocated based on the determination of a panel made up of county and school district members, meaning that districts often receive significantly more than the 25 percent minimum share. (Tr. 2257:14–16; *see also* Tr. 182:3–4 (Center received 49 percent of SRS dollars); Tr. 2257:16–19 (Creede receives 50 percent of SRS dollars).)

138. Historically, the amount that a district could receive through a mill levy override election was fixed—it did not increase with inflation—meaning that a \$10,000 annual MLO in 1995 was still a \$10,000 MLO in 2011, regardless of the fact that educational costs had increased during that time. (Tr. 3042:10–17.) The General Assembly stepped in to address this issue and now permits MLO elections to be indexed to inflation or population growth. (Tr. 3042:14–19.)

139. Many legislative actions were prompted by recommendations of study commissions or task forces. For example, former Governor Bill Ritter created a P-20 education council, which passed along recommendations to the governor and the General Assembly. (Tr. 4491:7–11; 6402:3–6.) While not acting on all of the council’s recommendations, the General Assembly did make several changes. (Tr. 4491:7–12.) For example, the General Assembly established the Colorado Counselor Corps program, which expanded high school counselors to low income schools. (Tr. 6403:3–6.) The General Assembly also increased the funding for kindergarten programs. (Tr. 6402:11–19.) Though not fully funded, kindergarten students are now funded at 58 percent of the level of a student in grades 1-12. (Tr. 6653:6–10.)

140. On recommendation of the P-20 council, the General Assembly also improved the state’s concurrent enrollment options. (Tr. 6429:1–3; see 4491:11–13.) Concurrent enrollment, essentially, allows high school students to take college-level courses for credit. (Tr. 6428:9–11.) Historically in Colorado, concurrent enrollment was only available for the truly exceptional student who had exhausted her high school curriculum. (Tr. 6428:14–23.) In recent years, however, the General Assembly has expanded concurrent enrollment so that, at a policy level, there are no restrictions on a public school’s ability to offer its students concurrent enrollment. (Tr. 6429:1–6432:15; 6490:21–23.) Lobbied in part by Colorado Springs District 11, the General Assembly also adopted the ASCENT program, which allows qualified high school students to remain in high school for a fifth year during which they get to enroll, tuition-free, as a college student. (Tr. 6433:23–6436:15; *see* 956:24–957:20.)

141. In 2005, a task force advising the General Assembly’s Interim Committee on School Finance made a number of recommendations. As Senator King explained, there was “very little fundamental change to the School Finance Act after we heard from all the constituencies and gave everybody a chance to come and talk to us about what was important to them and what they liked and what they did not like.” (Tr. 6767:4–8.) Even so, the Court finds the General Assembly did specifically address several of the Interim Committee’s recommendations.

142. For example, the General Assembly enacted the Interim Committee’s recommendation to authorize local districts to request mill levy overrides to fund full-day kindergarten programs. (Tr. 3440:18–24; 3461:19–3462:4.) This was requested specifically by school districts. (Tr. 3462:20–23; 3463:5–9.)

143. The General Assembly also acted to stabilize the decline in local share by implementing what was known as the “mill levy freeze,” and it increased the local mill levy override limit. (Tr. 516:21–517:5; *see also* Tr. 6403:18–6404:3(describing the mill levy

stabilization); Tr. 5520:21–5521:6 (describing increase to mill levy override limit).) *See generally Mesa County Bd. of County Comm’rs v. State*, 203 P.3d 519 (Colo. 2009) (upholding mill levy freeze legislation).

144. The 2005 task force and the Interim Committee both recognized issues with special education funding in Colorado. (Ex. 30106 at 11; Tr. 3436:12–18; 3438:20–23; 3439:6–12; 3499:6–7; *see* Tr. 376:17–22.) The committee heard testimony from school districts about excess costs incurred from high needs special education students. (Tr. 3436:12–24; 3438:20–3439:12; 3439:20–3440:12; 3460:4–7.) As a result, in 2006, the General Assembly revised the formula for special education funding to a three-tiered reimbursement and made it, in the words of former state House member Jack Pommer, “fairer” and more equitable among the districts. (Tr. 3439:23–3440:1; 3460:11–16; 3513:22–3514:6.)

145. The General Assembly also created a Special Education Fiscal Advisory Committee to provide reports and recommendations regarding special education funding. The committee’s 2008 report made ten recommendations, seven of which were adopted by the General Assembly. These recommendations included increasing the percentage of funding for so-called “Tier B,” or higher cost, special education students and creating and allocating a \$2 million pool to help cover costs of very high cost students educated in the school districts. (Ex. 91 at pages 10 & 11 of 41; Tr. 2011:24–2012:23.) The committee’s 2010 report made both “short term” and “long term” recommendations. (Ex. 92 at 14.) The General Assembly followed all of the short term recommendations, which were by definition intended for immediate consideration. (Tr. 2015:15–2016:10.) Indeed, in both the 2008 and 2010 reports, the committee “commend[ed] the General Assembly for its leadership” in addressing certain special education funding needs. (Ex. 91 at page 24 of 41; Ex. 92 at 15.)

146. Another important legislative action was the BEST program, discussed above. In short, the General Assembly created a program that makes available around \$1 billion for capital construction needs—needs that have traditionally and historically been funded at the local school district level.

147. Finally, Senator King testified in detail that the General Assembly’s review of the school finance system continues to the present time through the Education Success Task Force. (Tr. 6745:21–6751:13.)

148. The Court, therefore, finds the General Assembly has repeatedly studied and continues to study the public school finance system; it has made numerous improvements to the system, often in response to concerns raised by school districts themselves.

## **5) Mandates**

149. Another major theme of Plaintiffs’ and Plaintiff-Intervenors’ case is that the General Assembly has increasingly imposed burdensome mandates on the state’s school districts. The Court now turns to this issue.

**a) Federal requirements**

150. As a threshold matter, many of the requirements noted by Plaintiffs and Plaintiff-Intervenors are federal, not state, requirements.

151. For example, several witnesses testified about the challenges of being required to meet annual Adequate Yearly Progress (“AYP”) student achievement benchmarks, particularly having all students proficient by the year 2014. (*E.g.*, Tr. 690:18–691:18.) However, this requirement is part of the federal No Child Left Behind (“NCLB”) law; it is not a state mandate. (Tr. 6132:7–19.)

152. Defendants’ witness Richard Wenning, the former Assistant Commissioner at CDE over Performance and Policy, explained AYP is a federal accountability system that is distinct from the state’s accountability system, discussed below. (Tr. 4634:8–4635:3; 4667:5–7; 4669:11–14; *see also* Tr. 4671:8–11.)

153. Even so, Plaintiffs suggest that, because the state submitted a plan aligning itself with the federal NCLB statute, the full proficiency requirement is now part of state law. However, as Dr. Patricia Boland, who works on federal programming at CDE, explained, adoption of the plan remains a federal, not a state, target. (Tr. 6133:3–8.) According to Dr. Boland, Colorado’s system for accrediting schools simply does not require full proficiency by 2014. (Tr. 6133:13–19.) Moreover, any penalties for failing to meet the 2014 target would flow from the federal government, not the state. (Tr. 6133:20–6134:1.)

154. This was confirmed by Mr. Wenning, who oversaw the current state accountability system. (Tr. 4635:8–22.) Mr. Wenning explained the federal government measures student AYP in all districts. (Tr. 4667:5–7, 21–25.) According to Mr. Wenning, districts can forgo federal funding and thereby avoid the federally mandated obligations for failing to meet AYP. (Tr. 4668:1–7.) Only districts that accept federal funding and have chosen to participate in NCLB are subject to such federal “micro-managing.” (Tr. 4668:14–4669:10.) The Court, therefore, finds school districts labor to meet the federal AYP mandate upon their own choice—independent of any state action—to accept federal funds.

155. School district witnesses also testified about the requirement that all teachers be designated “highly qualified.” Again, this is a federal requirement that arose from NCLB. (Tr. 6134:2–15.)

156. Dr. Boland explained the “very, very many” requirements that flow from federal statutes, Title I in particular. (Tr. 6136:20–24.) For example,

- If a district does not make adequate yearly progress for two consecutive years in the same content area, the district has to set aside 10 percent of Title I funds for the purpose of professional development in the area where the district was not making AYP.

- Districts or schools that fail to meet certain performance thresholds must offer supplemental educational services to their students. When a so-called Title I school has missed its AYP targets in the same content area for four or more years, the district has to set aside 20 percent of its Title I allocation for the supplemental educational services.
- Once districts have reached a certain spending threshold, they are required to set aside 1 percent of their Title I allocation for parent involvement.

(Tr. 6136:25–6137:17.)

157. NCLB and Title I are not the only source of federal mandates on local school districts. A large portion of Plaintiffs’ case focused on special education and the cost of serving students with disabilities. However, as Dr. Ed Steinberg, CDE’s assistant commissioner overseeing special education issues, explained, the mandating body in the field of special education is the federal government. (Tr. 6207:25–6208:4.)

158. Dr. Steinberg testified that he would prefer to focus efforts on improving the performance of students with disabilities, e.g., graduation and dropout rates, but that the federal government has placed its focus on compliance issues such as timely filing of certain forms. (Tr. 6208:5–6210:19.) Indeed, Dr. Steinberg has raised this issue with the federal government, but officials have indicated their intent to remain focused on compliance mandates. (Tr. 6211:8–23.)

159. Several of Plaintiffs’ witnesses noted that Colorado also has a law addressing special education. But as Lucinda Hundley, one of Plaintiffs’ witnesses on special education, conceded, Colorado has, with limited exceptions, aligned itself with federal law. (Tr. 1925:16–24; 1926:17–1927:16.) As Ms. Hundley further conceded, even if all of Colorado’s special education requirements disappeared, the nearly identical federal requirements would still prevail. (Tr. 2018:12–19.)

160. Thus, even if the Court accepted Plaintiffs’ argument, articulated through Ms. Hundley, that in the area of special education, the “mandating body” ought to provide funds to comply with the mandates, (Tr. 2016 13–15), Plaintiffs’ issue is with the federal government, not the State of Colorado.

#### **b) State requirements**

161. Three specific state requirements are particularly relevant to this case: the Colorado Achievement Plan for Kids, or CAP4K, which includes new standards and assessments and requirements for post-secondary and workforce readiness; school district accreditation; and the new teacher evaluation standards encompassed in Senate Bill 10-191.

##### **i) CAP4K**

162. Colorado has long had standards and assessments to advance and measure student achievement. (Tr. 680:9–12; 4726:15–18.)

163. The Colorado Achievement Plan for Kids, or CAP4K, was initiated by legislation in 2008. (Tr. 6408:2–7.) It grew out of the work of Governor Ritter’s P-20 council (Tr. 6407:20–6408:1) and, consistent with the theme of that council, endeavored to create alignment among all aspects of the educational spectrum—early childhood, primary/secondary education, and higher education. (Tr. 6408:9–6409:20.)

164. CAP4K achieves this alignment at the early end of the spectrum – the transition from early childhood to compulsory primary education—by creating a uniform definition of school readiness, or what a student needs to be ready to enter compulsory education. (Tr. 6408:18–23.) Similarly, at the later end of the spectrum—leaving secondary education and entering higher education or the workforce—CAP4K creates a common definition of postsecondary or workforce readiness, meaning what a student needs to be ready to move out of high school. (Tr. 6408:25–6409:20.)

165. Such alignment is important to ensure that, for example, what a high school might decide qualifies its students for higher education is consistent with what those higher education institutions want to see from their entering students. (Tr. 6409:4–14.)

166. This alignment will help address issues raised by Plaintiffs and Plaintiff-Intervenors in this case, particularly the need for remediation by Colorado’s students as they enter college. As explained by Dr. Matthew Gianneschi, Governor Ritter’s senior education policy advisor and the current Deputy Executive Director of the Department of Higher Education:

[O]ne of the issues with remediation that has historically come up—and the K-12 sector has been absolutely right to argue with higher education in this area—is that the K-12 system has a series of standards.... [T]he standards were based upon what K-12 educators thought were the right skills students should master in high school. So they are good standards, but they didn't necessarily directly align with readiness for college.

...

The Commission on Higher Education has an admission policy that says students should prepare for college in the following manner. And the way that that's outlined is it's based upon seat time in courses. And it says you should take three years of college preparation math. You should take three years of lab-based science. You should take four years of English language arts. That is the policy.

So the question is—we have a series of incentives or a series of policies that are course and seat base time from higher ed. And then we have performance standards in the K-12 side that say, Here are the standards that we specifically think you need to master. And we've never tried to join them.

So what we had are two different sets of policies. You had the K-12 standards, which were based upon adequate yearly progress and accountability and what needed to be offered in the K-12 environment. And then you had no standards in eleventh and twelfth grade, and then the students apply to college. And it changes completely.

And now it goes to seat time requirements. So you may have been a student in tenth grade that had been exceptional in math. You had gone beyond any requirements that the state might have for remediation, but you only took two years of high school math.

So the question then becomes does that student meet the admission policy. The current status would be, no, we would actually call that student deficient in spite of the fact that they have actually demonstrated mastery at the high school level.

CAP4K allows us to get beyond the idea of telling students that you can prepare for college based upon how long you sit in a class. And we can now say that the standards that you need to demonstrate mastery in high school are the very same standards that you're going to need for entry into college.... [F]or the first time, we're actually going to show and be willing to say, We will align our admission policy and our remedial policy with what is actually being taught in the high schools.

(Tr. 6424:6–6427:25.)

167. An important component of CAP4K is the creation of new standards and assessments. §§ 22-7-1005, -1006, C.R.S. (2011). At the outset, the Court reiterates that Colorado school districts and schools have long been subject to standards and assessments. (Tr. 680:9–12; 4726:15–18.) Colorado, as one of the nation's leaders in implementing standards-based education, began adopting standards in 1993. (Tr. 680:9–12; 4726:15–18.) As Assistant Commissioner Jo O'Brien explained, Colorado's "standards-based education system is predicated on the idea that there is strength in identifying what a student should know at grade level and then assessing that in an exceptionally clear way and then aligning accreditation and accountability to that." (Tr. 4725:9–14.)

168. To ensure that the new standards reflected Colorado's values, the state initiated development of the new standards and assessments by convening a stakeholder group and subcommittees. (Tr. 4728:5–4729:5.)

169. Approximately 20 people, 80 percent of whom were from school districts, comprised the stakeholder group charged with outlining the theory upon which the new standards would be built. (Tr. 4729:6–14.) The theory developed by the stakeholder group was

“the end in mind,” which addressed the need to align primary school with higher education. (Tr. 4733:7–12.)

170. The subcommittees included 254 Coloradoans who were selected by the stakeholders to write the standards. (Tr. 4731:1–7.) Subcommittee members were selected for their expertise in the standards’ subject matters. (Tr. 22–4730:7.) For example, a farmer might have input into a standard pertaining to agricultural aspects of science. (Tr. 4730:6–13.) As with the shareholder group, though, 80 percent of the subcommittee members were from school districts. (Tr. 4730:14–22.) Most were “practitioners who were curriculum developers, who were award-winning teachers.” (Tr. 4730:14–22.)

171. As developed by the stakeholders and subcommittees, the new standards intentionally focused on less material. Specifically, the new standards were informed by the theory that “fewer, clearer, higher” standards yield better student achievement. (Tr. 4739:8–4742:5; *see also* Tr. 4696:1–5.) This theory was based on examination of states and countries with the highest student achievement. (Tr. 4739:15–24.)

172. Having fewer standards may reduce, for example, 46 to 48 things that a student would need to know under the old standards to approximately 2 to 10 things under the new standards. (Tr. 4740:4–9.) The stakeholders recognized that “fewer concepts versus the extensive excessive content was powerful.” (Tr. 4740:1–3.) Indeed, as Superintendent Stevenson explained, “as the expectations have increased, you don’t have time—you don’t—you can’t waste children’s time. You can’t go over and over and over things they already can do.” (Tr. 1096:25–1097:5.)

173. Having higher standards increases the complexity of what a student would need to know. (Tr. 4740:23–4741:12.) Although perhaps initially counterintuitive, “if you ask a student for more rigorous output, the student will rise to that output.” (Tr. 4741:16–18.)

174. Having clearer standards increases the specificity of what a student would need to know. (Tr. 4740:17–22.) Clearer standards create more “definitive, concrete, measurable” outcomes. (Tr. 4740:21–22.) For example, instead of “being appreciative of literature,” a literature student might instead be asked to distinguish a main idea from a supporting idea. (Tr. 4740:17–20.)

175. Ultimately, as noted by Assistant Commissioner Jo O’Brien, the new standards have been “very well received. They were seen as modern, relevant, fresh, and they were cowritten by Coloradoans.” (Tr. 4744:3–5.) Creede Principal John Goss agreed, stating that “a lot of really smart people took a really long time to develop these, and they have a lot of value.” (Goss Depo. 31:2–9.)

176. As Colorado was finishing and adopting the new standards, it was asked to participate in the nation’s common core standards. (Tr. 4745:11–15.) The Court observes that, at that time, Colorado’s own new standards were already 90–95 percent in alignment with the

common core standards. (Tr. 4745:24–4746:1; *see* 943:14–25.) Thus, when the State Board of Education decided to participate in the nation’s common core standards, few changes were needed. (Tr. 4746:22–24.)

177. In conjunction with the state’s adoption of new standards, new state assessments are being developed. (Tr. 4751:2–9.) To determine when to implement the new assessments, the state sought the input of the districts. (Tr. 4752:16–4753:5.) The districts suggested that the state implement the new assessment in 2014. (Tr. 4752:16–4753:5.) Meanwhile, between now and 2014, the state will implement a transitional assessment to ease the shift from the old standards to the new standards. (Tr. 4753:6–23.)

178. In addition to the new standards and assessments, several other points regarding CAP4K deserve mention. First, CAP4K is not yet completely in place. In fact, the graduating class of 2016 will be the first class fully subject to CAP4K. (Tr. 6413:2–14.) Plaintiffs and Plaintiff-Intervenors focus specifically on CAP4K’s requirement that students graduate high school post-secondary or workforce ready. Yet, like CAP4K as a whole, this requirement is not currently in place. (Tr. 6409:22–6410:3.) Although the state has an expectation of postsecondary and workforce readiness by graduation (*see* Tr. 4671:7–8), and as discussed below, universal postsecondary and workforce readiness is not required for school district accreditation (Tr. 6413:15–25).

179. Second, because CAP4K is not yet implemented, it is not possible to know what it will cost and which districts will need additional resources to comply with CAP4K’s requirements. As explained by Dr. Gianneschi,

CAP4K has never been attempted. We’ve never had a system in which we’ve tried to align specifically the outcome expectations for students coming out of high schools with the entry requirements into our post-secondary system . . . .

. . .

So I think the question is going to be, Will it drive new costs? Maybe. But we won’t know what those new costs are until we first identified what those standards are. And then we’ve looked at district implementation of how much it’s going to take to implement those standards. And then once we get there, we have to first identify what are the abilities of the districts under the current resources, their ability to meet those standards, and then where are the deficiencies.

So I don’t think we can—and this is what CAP4K attempted to try to address. We don’t yet know how much it might cost. For some districts, it may not cost anything.... Some districts may be able to do it right now. Others, may not. We won’t know until it’s actually implemented.

So at this point, it's purely speculative . . . . [W]e can't get to a cost until we've first identified what the structure is.

(Tr. 6414:5-6415:16.)

180. Third, representatives from schools and school districts, including many of Plaintiffs' witnesses, were involved in developing the requirements of CAP4K, including the new standards and assessments.

181. For example, as to the new technology standards, Assistant Commissioner O'Brien explained, "[T]here was lots of campaigning from districts to embed technology-based skills into the standards . . . and, yes, we did sprinkle them in, but I would say that one could be a very masterful eighth grader and . . . could do it without having to have lots of technological tools." (Tr. 4761:23-4762:17.) Plaintiffs' witness Daniel Maas of Littleton acknowledged his opinions "are reflected in the Colorado state standards." (Tr. 1294:15-16.)

182. As noted above, CAP4K stemmed from the work of the P-20 council. That council included superintendents of school districts, both urban and rural, classroom teachers, high school counselors, and college presidents. As Dr. Gianneschi, who staffed the council, testified, "we attempted to cover every possible group." (Tr. 6401:10-17.) Plaintiffs' witnesses Gerald Keefe, Lucinda Hundley, and Monte Moses were on the council. (Ex. 2415.)

183. As Colorado Springs District 11 former Chief Academic Officer Michael Poore testified about his district's involvement, "We had one person that was a committee member. We had several of our folks that were advisors that were called in, and then we also went so far as to say that within each of the five committees that the P-20 council actually broke up into, that we had representation; every time there was a meeting, that we had a representative at the P-20 council to make sure that we were monitoring things that were going on as well as maybe even have the possibility to testify during different times of these meetings." (Tr. 921:1-11.) In fact, Mr. Poore did testify "several times" regarding certain aspects of the legislation. (Tr. 921:12-18.)

184. Fourth, not only were Plaintiff districts involved in shaping the requirements of CAP4K, they and the districts in which Plaintiffs and Plaintiff-Intervenors reside generally testified that, while concerned about lack of resources, they support the requirements. Dr. Brenda Krage, an Assistant Superintendent at Pueblo City, noted that her district "philosophically believe[s] in CAP4K, that there are many components to that that are the right things to do for kids. (Tr. 6888:20-22.) In describing the new standards and assessments, Dr. Dana Selzer, the former Chief Academic Officer at Greeley, explained that "[i]t's good for Colorado. It's good for our community if we can get it done." (Tr. 4087:2-3.) Jefferson County Superintendent Cynthia Stevenson testified that the district's student achievement goal "completely aligns with CAP4K," and any challenges experienced by the district due to standards and assessments "have been worthy ones." (Tr. 1103:24-1104:3, 1112:4-10.) Aurora Superintendent John Barry testified that he was "proud" that the district has led the state in

“deliberately [taking] that legislation from an idea to an implementation.” (Tr. 1831:21–1832:4.) In fact, the district’s strategic plan, VISTA 2015, “align[s] a P-20 concept.” (Tr. 1762: 16–19.) Boulder Valley Chief Academic Officer Ellen Miller-Brown similarly recognized that the district’s mission echoes CAP4K. (Tr. 2688:7–18.) Mapleton Superintendent Charlotte Ciancio similarly agrees that “it’s good that as a state we have a standard that we’re asking school districts to meet.” (4454:22–4455:1 .) In addition, Plaintiffs’ expert witness and former Speaker of the Colorado House of Representatives Andrew Romanoff noted that he voted for CAP4K in the legislature, and he believed it was a good step forward. (Tr. 6860:2–7.)

185. This support was consistent with the testimony of Defendants’ witnesses including Dr. Gianneschi, who called CAP4K a “remarkable success.” (Tr. 6437:11.) As Dr. Gianneschi described it,

we now have a state that is heading in a direction that is unique among the states in the country. We’ve made a commitment to attempting to try to create an environment in every community in the state where every student, regardless of their socio-economic status, their academic background, or their parents’ educational attainment, the conditions in which they go to school, will be assumed to be a college-ready student.

...

I think it’s a really remarkable statement for the state.

(Tr. 6437:12–6438:4.)

186. Finally, despite the various components of CAP4K described above, the Court is particularly mindful that, at the end of the day, CAP4K, as with all of the reform legislation at issue in this case, is about improving student achievement. *See, e.g.*, § 22-7-1002; Pls.’ Trial Brief at 26-30.

## **ii) Accreditation**

187. Former Assistant Commissioner Wenning explained Colorado’s accreditation system is “an articulation of the State role in oversight in ensuring that schools are doing well and get, if not, focus and support on helping them improve.” (Tr. 4636:7–10; *see also* Tr. 4674:8–14.)

188. The Court finds that the state evaluates schools and school districts on four performance indicators: academic achievement, academic growth, achievement gaps, and post-secondary workforce readiness. (Tr. 4636:18–22; Ex. 1003.) These performance indicators are assigned weighted numerical values, developed with “extensive stakeholder input,” which are added together for a maximum of 100 points. (Tr. 4659:2–10.) Numerical cut-offs determine whether a school district or school is Accredited with Distinction, Accredited, Accredited with

Improvement Plan, Accredited with Priority Improvement Plan, and Accredited with Turnaround Plan. (Tr. 4659:11–16; Ex. 1003.) Mr. Wenning also correlated these five levels of accreditation to traditional “A,” “B,” “C,” “D,” and “F” letter grades, which he explained were created to “signal the kinds of support or intervention needed in that district” while providing the reward of “greater autonomy for those districts that were doing well.” (Tr. 4659:13–16; 4660:24–4661:2.)

189. Schools and school districts are assessed based on their performance over the past year and the past three years. (Tr. 4637:14–25.) Mr. Wenning explained these two timeframes are evaluated to “provide useful and engaging information for districts” while discouraging “an overanxious look at one year’s fluctuations and scores.” (Tr. 4637:18–23.)

190. Notably, the state’s accreditation framework does not require 100 percent proficiency on the CSAP exam to attain the maximum score on the academic achievement performance indicator. (Tr. 4661:15–20; 4662:9–15.) Nor does the state require 100 percent proficiency by 2014 like the federal NCLB program. (Tr. 4671:8–11.) The assessed level of proficiency receives the least weighting in CDE’s accreditation framework because as Mr. Wenning explained, it is “the least relevant to understanding the performance of the effectiveness and quality of the district.” (Tr. 4658:14–20.) According to Mr. Wenning, proficiency rates do not give a measure of school or district effectiveness. (Tr. 4642:8–4643:2; 4642:1–4.)

191. Indeed, lack of proficiency at the point in time of assessment may just be a function of how far behind and below grade level a student entered school, particularly for the less affluent. (*See* Tr. 301:16–24; 4639:24–4640:2, 6–21; 4641:21–4642:1; 4650:20–23.) Such a student, after completing twelfth grade, would be below grade and likely not proficient as measured by the CSAP exam, even if he or she made typical progress each year. (*See id.*) To learn all that needs to be learned, this hypothetical student would need either more time or accelerated learning or even a combination of both. (Tr. 301:16–24; *see* Tr. 4688:25–4689:8.) This is why, as Mr. Wenning explained, “Mathematically, it’s impossible for all kids to be proficient in any given year.” (Tr. 4671:11–21.)

192. To address this shortcoming, Mr. Wenning developed the Colorado Growth Model. (Tr. 4642:4–7.) Growth reveals how fast students are moving toward proficiency, “and it looks at where a child began and then within a specific amount of time, how much distance they moved, how much academic growth did they show between two points in time.” (Tr. 4644:13–18; *see also* 4645:1–14.) Thus, growth and proficiency rates when examined together yield “a more complete picture of” district performance. (Tr. 4651:1–7.)

193. The Court finds the state’s focus—through heavier weighting of the academic growth performance indicator—is on “the velocity of learning” and how much value the adults in the system added to students’ individual education. (Tr. 4639:12–15; 4644:24–4645:4.) Thus, state accountability is based on what Mr. Wenning called “the most important thing, which is maximizing progress regardless of where a child begins” and whether districts “are effective at moving kids based on where they start.” (Tr. 4641:12–14; 4645:1–4.) *See also* § 22-11-102(1), C.R.S. (2011) (“The general assembly hereby finds that an effective system of statewide

education accountability is one that: (a) Focuses the attention of educators, parents, students, and other members of the community on maximizing every student’s progress toward postsecondary and workforce readiness and postgraduation success ....”) (emphasis added).

194. The Court credits Mr. Wenning’s testimony, based on his extensive experience developing the growth model and overseeing accreditation at CDE. (Tr. 4634:23–4635:1.) Consequently, the Court finds the district accreditation framework reports, and all of the information within them, are the measure of district performance. The Court rejects Plaintiff-Intervenors’ numerous demonstrative exhibits of CSAP proficiency rates as a measure of school district performance. (*See, e.g.*, Ex. 20122.) As Mr. Wenning explained, these exhibits reflect the typically behind starting points of low income and ELL students; they do not reflect how effective the represented districts are at catching these students up towards proficiency. (Tr. 4650:16–4651:9.)

195. As with other aspects of Colorado’s education reform legislation, school districts have generally responded positively. For example, former Colorado Springs School District 11 Chief Academic Officer Michael Poore testified that he “really endorse[s] what the State has moved towards in terms of us being able to understand student performance and the standards we expect students to meet.” (Tr. 965:10–19.) In fact, Mr. Poore commended the individual student growth tracking feature of the state’s accountability system as something his district had “felt was best practice” before it was implemented by the state. (Tr. 965:20–966:1.) More generally, Aurora Public Schools Superintendent John Barry concluded that, in his opinion, SB09-163, which established Colorado’s accreditation framework, is good legislation that is “very helpful to the state.” (Tr. 1831:10–16.)

196. Curiously, Plaintiffs and Plaintiff-Intervenors urge this Court to look to state requirements to define the constitutional mandate, but their witnesses were inconsistent on the value of the state’s accreditation report cards. In general, witnesses from accredited school districts spoke dismissingly about the laxness of the state’s accreditation requirements, which are not now 100 percent of anything, while those from struggling districts pointed to the accreditation report as proof of inadequate funding. The Court declines Plaintiffs and Plaintiff-Intervenors’ invitation, if any, to weigh the individual accreditation reports any differently than the state’s requirements on school districts.

### **iii) Senate Bill 10-191**

197. Colorado’s educator effectiveness legislation, SB10-191, was passed in May 2010. (Tr. 5205:10–11.) This legislation creates a common statewide definition of educator effectiveness, and, to that end, it requires that at least half of educator performance be evaluated based on student achievement growth. (Tr. 5205:7–21; *see also* Tr. 5279:18–20.) The legislation also contemplates, but does not require, policy changes regarding educator preparation, induction, licensure, strategic compensation, and professional development. (Tr. 5205:21–5206:3; 5208:20–5210:4.) State Board of Education member Angelika Schroeder summarized that SB10-191 “is intended to professionalize the profession.” (Tr. 5178:11–12.)

198. The Court heard concerns from school districts that SB10-191 will be costly to implement, particularly in light of no additional state financial assistance. Yet, this was refuted by some of Plaintiffs and Plaintiff-Intervenors' own witnesses. Mapleton Superintendent Charlotte Ciancio explained, "We're already investing in our teacher evaluations. It would be a shift in those funds." (Tr. 4394:21–23.) Similarly, in appearing before the legislature in support of SB10-191, Aurora Public Schools Superintendent John Barry testified "to the fact that I would not ask for additional resources for the school district's implementation." (Tr. 1832:19–21.)

199. This is consistent with the testimony of Defendants' witnesses. Harrison School District No. 2 Superintendent Mike Miles explained his belief that SB10-191 would have "minimal effect on the district" because the district's current educator evaluation system is, for the most part, already aligned with SB10-191. (Tr. 5835:13–20.) State Board of Education members Angelika Schroeder and Marcia Neal, as well as Educator Effectiveness Council member Nina Lopez, all concurred that costs of implementing SB10-191 may be defrayed by redirecting funds currently being spent. (Tr. 5193:25–5194:2; 5279:20–5280:14; 5480:11–18.)

200. Nina Lopez also testified CDE is developing a model evaluation system of best practice that will be available for districts to use if they choose. (Tr. 5212:15–22; 5213:8–18.) "Pilot" districts, including Plaintiff districts Center and Moffat RE-1 as well as Adams 14, are benefiting as first users of the state model evaluation system. (Tr. 2896:19–2897:3; 5212:5–7, 15–5213:1; 5214:11–23.) It is expected that CDE will provide additional assistance to districts. (Tr. 5217:24–5218:5.)

201. Moreover, the Court finds that actual implementation costs are speculative. Like CAP4K, the requirements of SB10-191 are not yet in place. (Tr. 990:8–10; 5676:1–8.) The new teacher evaluation system called for by the legislation is not scheduled to come on line until the 2014-2015 school year. (Tr. 2406:5–10; 5210:5–11; 5211:22–25.)

202. As with CAP4K and the new accreditation system, the Court finds the General Assembly's ultimate goal in SB10-191 is to improve student achievement. *See, e.g.*, § 22-9-102(1) ("The general assembly hereby declares that: (a) A system to evaluate the effectiveness of licensed personnel is crucial to improving the quality of education in this state ....").

203. Plaintiffs and Plaintiff-Intervenors' own witnesses agreed with this legislative declaration. Former Colorado Springs District 11 Chief Academic Officer Michael Poore explained SB10-191 is a necessary reform because—echoing the near consensus of the trial testimony—the quality of an educator has a "huge impact" on student achievement. (Tr. 1039:14–14.) In testifying before the legislature, Plaintiff-Intervenors' witness Mapleton Superintendent Ciancio supported the legislation because she believed that "many of the elements that are in the bill are very consistent with the work we're trying to accomplish in Mapleton" in improving student achievement. (Tr. 4392:24–4393:15.) Carol Eaton of Jefferson County School District testified a statewide, consistent definition of what constitutes an "effective" teacher was a fair approach (Tr. 6847:25–6848:9), and Jefferson County

Superintendent Cynthia Stevenson agreed the education profession needs to “look at alternative ways of paying teachers” and that, to that end, the district is already sponsoring a strategic compensation pilot (Tr. 1081:5–1082:7). Ultimately, as Sheridan Superintendent Michael Clough acknowledged, Senate Bill 191 will help the district “meet [its] goal of putting the best teachers [it] can possibly get in front of [its] students.” (Tr. 3584:1–4.)

**c) Waivers**

204. Plaintiffs and Plaintiff-Intervenors’ witnesses testified on the burden of meeting mandates. Yet, the Court finds districts may effectively waive out of many such requirements.

205. As already discussed, school districts can choose not to participate in the federal NCLB program, thereby avoiding federal accountability penalties and consequences. (Tr. 4668:1–7, 14–4669:10; 6139:11–14.)

206. The General Assembly also has provided several opportunities for districts to seek waivers of state requirements. Districts may request the State Board of Education to exercise its general waiver authority under § 22-2-117(1)(a), C.R.S. (2011). (Tr. 4673:10–21; 5890:4–6.) State Board of Education Chairman Bob Schaffer testified the “board grants waivers at virtually every meeting” and has “been very liberal with granting waivers.” (Tr. 5890:7–13.) According to Chairman Schaffer, the State Board and CDE often suggest waivers to school districts as a remedy for local problems. (Tr. 5890:14–17.)

207. Moreover, districts may request innovation status pursuant to the Innovation Schools Act, §§ 22-32.5-101 et seq., C.R.S. (2011), which can afford what former Associate Commissioner Wenning characterized as “a great deal of autonomy” on par with charter schools. (Tr. 4672:6–23.) Denver Public Schools Principal Kristin Waters, who testified before the legislature in favor of the Innovation Schools Act and whose school attained innovation status, observed “[I]t’s nice to be able to have some flexibility or some autonomy, and it can really have an impact on what happens in an individual school.” (Tr.4874:16–19.)

208. Specific waiver provisions are additionally contained within education reform statutes, such as Senate Bill 191. (Tr.5219:21–5220:8.)

209. The Court heard testimony that at least one Colorado school district has opted out of NCLB. (Tr. 1730:3–20; 4668:9–13.) Kit Carson School District No. R-1 Superintendent Gerald Keefe explained the district asked its voters, “[D]o you want to sever ties with the federal government and are you willing to pay for it”? (Tr. 1730:2–8.) When voters in Kit Carson agreed to opt out of NCLB, they also agreed to offset forfeited federal funds with local dollars. (Tr. 1730:9–1731:2.) In exchange, the district was released from any potential sanctions flowing from NCLB noncompliance. (Tr. 1730:16–20.)

210. In addition, the Court heard how the same district, Kit Carson, has received innovation status to effect a waiver of many Senate Bill 191 provisions. (Tr. 1737:11–18;

5220:20–24.) As Superintendent Gerald Keefe explained, the district “wanted to set up [its] own system that ... better met the needs of rural Colorado.” (Tr. 1735:4–14.)

211. In contrast, many of the school districts involved in this case have not sought waivers at all. (*E.g.*, Tr. 2297:19–23 (Creede).) Former Rocky Ford Superintendent Nancy Aschermann testified the district has never considered how waivers could enhance educational opportunity or quality within the district and, in fact, has never even determined which state laws and regulations may be waived. (Depo. Desig. Nancy Aschermann 180:18–181:1.) North Conejos Superintendent Rick Ivers did not even know of a district policy directing him to explore and recommend possible waivers to the board of education. (Depo. Desig. Rick Ivers 21:5–9; 24:1–22; 27:4–10; Ex. 251.)

212. Several of the Plaintiffs and Plaintiff-Intervenors’ witnesses noted that their districts could not opt-out of certain specific requirements, such as CAP4K. Importantly, however, the decision to include or not include an opt-out provision in CAP4K was not made unilaterally by the state; rather, it was made in consultation with school districts. As Dr. Gianneschi credibly explained,

[W]hen we created CAP4K, this was not done in a back room. This was done with dozens and dozens of people. And we sent out copies of the draft legislation. And that was sent out to thousands of educators throughout the state. So we were trying to solicit feedback.

And one of the things that came back was we heard from some districts that said, Hey, we don’t disagree with the intent. But we would like to see a way in which we might, as a district, opt out. So we can say as a district, locally elected school board, we decide that we do not want our students to be uniformly post-secondary ready. That’s a decision they can make. That’s what they wanted.

What we said was, Well, we’re sort of open to that conversation. Where I think the—the turning point for us in that deliberation was we—in particular, we heard from the special education community in the state. And the special education community said—they were strongly supportive of the idea of having one definition for what it meant to be post-secondary ready. Even if some students couldn’t meet it, they felt that it was a moral obligation to ensure that we held everybody to a common expectation.

(Tr. 6416:6–6417:4.)

#### **d) Penalties**

213. School district witnesses generally testified about state intervention for failing to meet the state’s requirements. Yet, the Court heard few specific examples. What the Court did hear was former Commissioner of Education Dr. William Moloney describe the reality of state

oversight he observed during his tenure: “Like all superintendents, I became highly skilled at evading these, and the further I was away from the capitol, the better job, and that’s exactly what goes on right here in Colorado. The—the general deal is, and this is understood, that we at the state pretend to monitor, and they in the districts pretend to comply, and it’s a devil’s bargain . . . .” (Tr. 5449:16–23.)

214. School district witnesses did specifically suggest a loss of accreditation, but former Assistant Commissioner Wenning testified the state board has never withdrawn accreditation from a school district. (Tr. 4665:13–17.) The state board also has not penalized school districts or schools under the current accreditation framework. (Tr. 4666:10–12.) If a school district or school is evaluated as priority improvement or turnaround, it receives additional support from the state, but to date, no district or school has received a “D” or “F” grade for the five consecutive years required to trigger state board intervention. (Tr. 4663:9–19.)

215. Indeed, while Dr. Brenda Krage of Pueblo City expressed concern that there could be “high-stakes consequences” if her district did not improve its accreditation status, she conceded that the earliest these consequences could happen is in the year 2016. (Tr. 6891:24–6892:6.)

## **6) Other Specific Educational Programs**

216. In addition to the general concerns about requirements and student achievement goals raised by Plaintiffs and Plaintiff-Intervenors, they also note issues with several discrete programs, specifically special education, gifted education, English Language Learner instruction, and early childhood education. The Court addresses those issues below.

### **a) Special Education**

217. As noted above, pursuant to the federal Individuals with Disabilities Education Act (“IDEA”), students with disabilities are entitled to a free appropriate public education (“FAPE”). (Tr. 6206:14–6207:1.)

218. In Colorado, special education services are provided through administrative units, which are either a single school district or a consortium of smaller districts that come together to create economies of scale in serving students with disabilities. (Tr. 1928:13–18.) There are currently 58 administrative units in Colorado. (Tr. 1928:19–20.)

219. Colorado provides funding to help administrative units with the cost of providing FAPE to their students. As explained above, the system of special education funding in Colorado was improved in 2006, and the legislature has acted on recommendations of the Special Education Fiscal Advisory Committee in years since. Even so, Plaintiffs’ witnesses testified that the total amount of funding allocated by the state for students with disabilities is insufficient.

220. In Colorado, special education is a shared fiscal responsibility between the federal government, state government, and local school districts. Interestingly, the federal government indicated a commitment to pay 40 percent of the average excess expenditures for special education, a goal they have never come close to meeting. (Tr. 2126:24–2127:15.)

221. Dr. Margaret McLaughlin, Plaintiffs’ retained expert witness and a professor at the University of Maryland, confirmed that there is no requirement in federal law that states pay any particular portion of special education costs. (Tr. 2074:1–4.) Even so, she opined that current state dollars were not enough to provide those students with the services they are entitled to under federal (and the related state) law. (Tr. 2042:15–2043:5; 2065:7–15.) Dr. McLaughlin did not, however, have an opinion on how much money should be allocated for special education in Colorado, nor did she have an opinion about what specific proportion of special education costs Colorado should pay. (Tr. 2067:13–19; 2125:20–24.)

222. Further, Dr. McLaughlin’s opinions in this case were often based on assumptions or speculation from non-Colorado data. For example, she testified that she has seen instances where a special education team refuses to suggest a particular, expensive service for a student with a disability without approval of the district’s central office, but acknowledged that she had not made that observation in Colorado. (Tr. 2075:20–2076:3.) She also wrote in her report that “[i]n my extensive experience conducting interviews in schools and districts, I’ve been told by school administrators and special educators that they’re explicitly told not to suggest or agree to call for services on an IEP without prior permission,” but acknowledged that these instances were not reported by administrators in Colorado. (Tr. 2129:21–2130:4.) Similarly, Dr. McLaughlin wrote in her report that “[w]hat an IEP determines to be an appropriate education for a given student is not, surprisingly, most often based on what is available in the school or district,” but admitted that was not from research performed in this case. (Tr. 2130:5–10.) Finally, the Court notes the only Colorado officials Dr. McLaughlin consulted in forming her opinions were somehow associated with Plaintiffs. (Tr. 2135:3–6.)

223. By contrast, Dr. Ed Steinberg, CDE’s Assistant Commissioner for Special Education Issues, testified that, in his expert opinion, funding is sufficient to provide for the needs of students with disabilities. (Tr. 6227:22–25.) Specifically, he noted that just because the state does not pay all of the costs of special education does not mean students with disabilities are not having their needs met. (Tr. 6227:12–16.)

224. Dr. Steinberg based this opinion, in part, on the fact that there are relatively few complaints filed at the state level asserting that a student with special education is not receiving FAPE. (Tr. 6218:23–6219:10.) Dr. Steinberg noted that, with 84,000 special education students in the state, there may be a dozen state-level complaints filed annually. (Tr. 6219:11–15.) Dr. Steinberg also noted that school districts must provide assurances to the state that they provide a free appropriate public education, and that in his years with the state, he has never seen a district unable to make that assurance. (Tr. 6217:7–22.)

225. In addition to the amount of funding, Dr. McLaughlin also takes issue with the structure of the special education funding system in Colorado, although she acknowledges that there is not one absolute, perfect model. (Tr. 2042:15–2043:5; 2124:5–7.) And, while Ms. Hundley expressed concern that the current model had not been fully funded and noted that, with the benefit of hindsight, there might be other models worth examining, she did acknowledge the model was “set up with good intentions” and was better than what was in place previously. (Tr. 1941:12–15; 1951:3–20.)

226. In short, Colorado’s funding model provides school districts \$1,250 for every special education student (Tier A), additional funds for students with particular disabilities (Tier B), and then two “high cost” pools to help defray the costs of educating very expensive students both in-district and out-of-district. § 22-20-114, C.R.S. (2011).

227. Dr. McLaughlin took particular issue with the reasonableness of using certain disability categories as a proxy for cost. (Tr. 2049:7–16.) The Court finds that this opinion is contradicted by Dr. McLaughlin’s own report in this case. On page three of her expert report, she writes that special education costs are related to, among other things, specific disability categories. (Ex. 5700; Tr. 2124:21–25.)

228. In contrast to Dr. McLaughlin’s criticism of the structure, Dr. Steinberg testified that, in his expert opinion, the funding model was “a well-thought-out attempt to deal with some of the changing needs of kids with disabilities in Colorado, particularly, I think, the increase of kids with autism, the more significant areas of disability.” (Tr. 6226:24–6227:2.)

229. Indeed, Plaintiffs’ expert witness Lucinda Hundley, who was directly involved in the development of the funding model (Tr. 1940:1–6), testified that the idea behind the Tier B designation was that “some disability areas are typically more expensive to serve.” (Tr. 1944:24–1945:2, *see also* Tr. 2009:22–2010:7.) Another of Plaintiffs’ experts, Randy Boyer, who also had a role in developing the model, testified that the Tier B categories are “typically the significant disabilities” that are “intensive service-driven.” (Depo. Desig. Randy Boyer 9:12–18; 83:13–84:4.)

230. The parties agree that students with disabilities are not reaching satisfactory achievement levels. While performance of students with disabilities is a concern to both sides in this case, the Court notes that Colorado’s special education students perform, generally, on par with their national peers when measured on the National Assessment of Educational Progress (“NAEP”), which is discussed in more detail below. (Ex. 10045; Tr. 2122:6–21.)

231. What the parties disagree about is whether students with disabilities would perform better with increased funding. Ms. Hundley testified that special education students in her school district were not performing well and suggested that more resources would improve achievement. (Tr. 1988:23–1989:12.)

232. By contrast, Dr. Steinberg explained that, in his opinion, the primary reason that students with disabilities are not performing well is a lack of focused reading instruction. (Tr. 6235:18–6236:13.) Dr. Steinberg also testified that he did not believe the issue was a lack of resources, but rather a need to reallocate existing resources to focus on training teachers to properly teach reading. (Tr. 6238:3–23.) In Dr. Steinberg’s opinion, the key to improving student achievement is “looking at the existing resources, reallocating existing resources, looking at efficiencies, inefficiencies within school districts to maximize the dollars that are available.” (Tr. 6278:21–24.) Dr. Steinberg also noted that the state could not require a certain reading program be used—which he would like to do—because in a local control state like Colorado, the state cannot mandate a particular program or set of programs even if it has research to show that the programs would improve student outcomes. (Tr. 6238:24–6239:12.)

233. Even Plaintiffs’ expert Dr. McLaughlin testified she was not aware of studies showing that an increase in spending on special education students led to an increase in student achievement. (Tr. 2128:2–7.) As she explained,

It is extremely difficult to make that link for the reasons being, ... children who are going to require the greatest expenditures are most likely the children who have the more significant disabilities and their achievement will be impacted. So we can’t assume that higher cost or higher expenditures are going to result in much higher performance.

(Tr. 2128:9–17.)

234. The Court further finds many of the plaintiff districts are seeing improvements in their services for students with disabilities. For example, in 2006–2007, none of the twelve administrative units involved in this case met the requirements of IDEA as determined by the state; in 2009–2010, eight of the twelve met requirements. (Ex. 10492; Tr. 6283:7–23.)

235. As Ms. Hundley noted in recent testimony to the United States Congress, her former employer, Littleton, has made “significant gains” with respect to students with disabilities, including steady gains in academic achievement. (Tr. 2021:8–23.) Ms. Hundley testified the district offers “comprehensive programming” in a “caring and involved, small-town atmosphere,” emphasizing a high school graduation rate of 90 percent—79 percent for students with disabilities. (Tr. 2020:1–2021:2.) Littleton also collects data on its special education students who have graduated, and of the students who reported back, 52 percent are involved in higher education and 44 percent are employed in the workforce. (Tr. 2022:6–20.) According to Littleton’s annual parent survey, the majority of parents report that the district is doing well or very well in meeting their children’s needs. (Tr. 2024:16–2025:1.)

236. A final point bears mention with respect to students with disabilities. Colorado is at or above average in a number of measures of quality special education programs. For example, Dr. McLaughlin testified that Colorado is at or above the median in students served in the general education classroom, rather than in a segregated setting, which is a goal of federal

special education policy. (Tr. 2118:9–2119:10.) Colorado is also relatively low in the number of “non-public placements” —which, again, is a goal of federal policy. (Tr. 2120:1–11.) Colorado is about at the national average in the number of state-level complaints filed by parents dissatisfied with their special education student’s education. (Tr. 2120:25–2121:19.)

237. Furthermore, Colorado is a national leader in implementing Response to Intervention, or RtI, a strategy that Dr. McLaughlin and other witnesses personally support. (Tr. 2120:15–24; *e.g.*, 982:19–23.) Dr. Steinberg explained that Colorado implemented RtI in order to steer intervention to students as early as possible rather following the older model of waiting for students to have such a significant discrepancy between their IQ and their achievement. (Tr. 6230:6–6233:21.) Under that old model, districts would spend 70-80 percent of their special education staff’s time testing and reporting, rather than actually working with students. (Tr. 6233:22–11.) Under the RtI model, these professionals will be freed up to work with classroom teachers to devise good intervention strategies and to monitor student progress. (Tr. 6233:12–6235:10.) Dr. Steinberg, a leading proponent of RtI in Colorado, testified that he did not expect this RtI model to carry additional costs but rather be cost-neutral or, perhaps, even save districts money. (Tr. 6235:11–17; 6280:21–6281:24.)

#### **b) Gifted Education**

238. Plaintiffs and Plaintiff-Intervenors also raise issues with Colorado’s funding for gifted education.

239. Colorado provides specific funds for gifted students, something that not all states do. (Tr. 6229:7–12.) Roughly 30 to 35 states provide some gifted education funding; approximately 15 states provide no funding at all. (Tr. 6229:13–17.)

240. Funding for gifted education in Colorado has been increasing. A decade ago, the General Assembly appropriated approximately \$5.5 million for gifted education. (Tr. 6302:16–19.) This year, the General Assembly appropriated \$9.2 million specifically for gifted education. (Tr. 6302:8–13.) Districts are also permitted to spend their general fund monies, which also come, in part, from the state, on gifted education. (Tr. 6303:3–6304:3.)

241. Colorado law mandates that districts identify and create programs for gifted students. (Tr. 6289:21–6290:13.) Prior to this mandate, not all school districts provided programs for gifted students. (Tr. 6293:12–19.)

242. Further, historically, certain sub-groups of gifted students were underrepresented in gifted education, including Hispanics and students of low socio-economic status. (Tr. 6295:16–6296:15.) In recent years, however, Colorado has been moving in the right direction in working to identify and retain more of these students. (Tr. 6296:11–17.)

243. Colorado law specifically provides that district program plans be developed with resources in mind, that is, districts should tailor their programs to the amount of funding available. (Tr. 6229:18–6330:5.)

244. To that end, local districts—not the state—are responsible for writing program plans and setting various goals and targets. (Tr. 6290:4–13; 6291:7–10.) As explained by Jacquelin Medina, the state director for gifted education, there are no penalties or sanctions if districts do not meet their goals. (Tr. 6291:11–25.) Districts do receive on-site monitoring visits from the state, but these visits are to look at strengths and identify areas for improvement; they are not punitive visits. (Tr. 6298:8–6299:8.)

245. Districts could be penalized for failing to submit any sort of plan or report at all. (Tr. 6291:22–25.) However, CDE has granted extensions to districts in the past if a district is unable to submit a report on time. (Tr. 6299:16–25.) In those instances, if districts need extra help, CDE provides that help. (Tr. 6299:25–6300:1.)

### **c) English Language Learners**

246. The English Language Proficiency Act (“ELPA”), discussed above, requires districts to provide programs for students with limited English proficiency. §§ 22-24-104(5), -105(1)(d), C.R.S. (2011). “Design and implementation” of programs is “the function of the districts.” § 22-24-103(3). Under ELPA, subsections 22-24-105(1)(a) and (c), districts also are responsible for identifying ELLs and classifying them as (a), (b), or (c) students. (*See* Tr. 5974:21–5975:4.)

247. ELPA does not require any particular type of English acquisition program. (Tr. 3795:11–14; 5993:24–5994:2); *see* § 22-24-104(6) (declaring districts may use ELPA funds for bilingual programs, English-as-a-second-language programs, “or any other method of achieving the purposes of this article”). As Plaintiff-intervenors’ expert witness Dr. Kathy Escamilla conceded, ELPA is a “funding source”—not a “program statute.” (Tr. 3795:6–10; *see also* 3794:20–25.) According to Dr. Escamilla, districts have “complete discretion” to determine what type of program, for example English medium or bilingual education, meets its unique needs. (Tr. 3795:15–21; 3793:16–19; 3814:15–21; *see* Tr. 3736:3–7.)

248. The Colorado Department of Education (“CDE”) does not have the authority to tell districts to make programmatic changes, and it does not dictate what programs a district should offer. (Tr. 3799:14–17; 5994:3–10; 6031:24–6032:1.)

249. Nevertheless, CDE offers collaboration and support to districts, particularly regarding its knowledge around best practices. (Tr. 5995:7–16.) To this end, the Department has developed an extensive guidebook, is available for technical assistance, and maintains numerous online resources. (Tr. 5995:17–22.) In Dr. Escamilla’s opinion, the Department’s guidebook “provides solid and up-to-date information to the field without being overly

prescriptive or dogmatic.” (Tr. 3798:19–3799:4.) In addition, Dr. Escamilla feels the Department is to be “commended” for its guidebook. (Tr. 3799:5–13.)

#### **d) Early Childhood Education**

250. Colorado’s constitution expressly states that a gratuitous education be provided to students starting at age six. Colo. Const. art. IX, § 2. Even so, all parties agree that preschool is beneficial to students, and particularly at-risk students. (Tr. 3071:5–12; 3088:9–3089:9; 3146:18–3146:5.) Indeed, Plaintiffs and Plaintiff-Intervenors’ expert Dr. Steven Barnett conceded that there is a debate as to whether publicly-funded preschool programs should be offered to all children, or only targeted to at-risk children. (Tr. 3201:14–19.)

251. In 1988, recognizing that certain children were arriving to school unprepared, the state established the Colorado Preschool Program to provide a high quality early childhood education program to at-risk preschool-aged children. (Tr. 6623:14–20; Ex. 4.) The program has grown substantially since its inception. The General Assembly initially provided funding for 2,000 students. The program currently funds 20,160 students all across Colorado. (Tr. 6623:21–6624:2.) Although it is voluntary, 170 of the 178 school districts in Colorado participate in the Colorado Preschool Program; many of the others choose not to participate for various reasons. (Tr. 6611:8–15.) In determining to set the cap at 20,160 students, the General Assembly looked at the percentage of students eligible for free and reduced lunch statewide, then looked at the estimated number of four-year olds and calculated the number of additional slots that would be needed considering resources that were already being provided by the federal Head Start early childhood program. (Tr. 6661:20–6662:9.) The General Assembly has also made the program more flexible, permitting districts to serve high-needs three-year-olds as well as four-year-olds. (Tr. 6624:3–12.)

252. Even Plaintiffs and Plaintiff-Intervenors’ expert Steven Barnett acknowledged that Colorado’s program has positive features. (Tr. 3135:5–10; 3147:16–22.) For example, Colorado ranks 10<sup>th</sup> out of all states in providing access to programs for three-year-olds. (Ex. 5505 at 6.) In terms of total resources spent on preschool, Colorado ranks about in the middle nationally. (Ex. 5505 at 6.) Of the 13 states identified by the U.S. Census as being in the western region, which includes Colorado, only five offer a state-level preschool program, and Colorado is the only state that serves three-year-olds. (Tr. 3221:9–23.) Colorado meets six of Dr. Barnett’s ten benchmarks for quality, including having comprehensive early learning standards, requiring specialized training for preschool teachers, having a maximum class size of lower than 20 (Colorado’s is 16), and having a staff-to-student ratio of better than 1:10 (Colorado’s is 1:8). (Ex. 5505 at 39.) Importantly, Dr. Barnett identified group size and ratio as some of the most important factors in driving student achievement. (Tr. 3093:11–20.) Dr. Barnett called a class size of 16 “great.” (Tr. 3136:20–21.)

253. One of the quality benchmarks identified by Dr. Barnett was whether preschool teachers had a bachelor’s degree. Both Dr. Barnett and the state’s early childhood expert, Lori Bowers, testified that some in the field do not believe this is an appropriate requirement. (Tr.

3201:23–3202:5; 6641:17–6642:7.) It was Ms. Bowers’ opinion that a bachelor’s degree is not a requirement of an effective early childhood program. (Tr. 6645:2–8.) As Ms. Bowers explained, there are many strong preschool programs that do not require a bachelor’s degree. (Tr. 6645:10–6646:4.)

254. Another benchmark that Colorado is not reported as meeting is whether the program provides screening and support services. (Ex. 5505 at 39.) However, Ms. Bowers explained that many of these standards are in place in practice, they are just not formally required at the state level. (Tr. 6643:8–6644:8.) Ms. Bowers also testified that she did not believe the quality benchmark of requiring at least one meal be served necessarily made sense because the Colorado Preschool Program only requires 2 ½ hours of preschool be required each day. (Tr. 6642:8–18.)

255. Dr. Barnett identified ways in which he believed that Colorado’s program could become even more effective. (Tr. 3136:10–3138:9.) He conceded, however, that he did not know how many programs were providing more than the 2 ½ hours of preschool four days a week that is the minimum required by Colorado statute. (Tr. 3110:13–18.) He also acknowledged that it’s hard to conclude from the research how many years of preschool ought to be provided, although his personal opinion was that more years was better. (Tr. 3111:9–3112:2.)

256. The Colorado Preschool Program is not the only source of state or federal funding for early childhood education. For example, the General Assembly funds preschool for certain students with disabilities; Colorado has approximately 8,000 preschool students who are being served as students with special needs. (Tr. 6612:18–6613:2.) Colorado also provides a child care assistance program through the Department of Human Services. (Tr. 6612:3–9.) Many children in Colorado are also served through the federal Head Start program. (Ex. 4 at 2.)

257. Dr. Barnett offered some criticism of Head Start, but acknowledged that Head Start, while it may be inferior to some preschool programs, is superior to others. (Tr. 3212:6–16.) The Court finds that given that Dr. Barnett acknowledged that he has been credited for saving the federal Head Start program, his criticisms of Head Start not persuasive. (Tr. 3207:2–8.)

258. Colorado also recognizes the importance of full-day kindergarten and has made efforts to increase funding for those students. (Tr. 6402:15–19.) Indeed, as of 2007, 104 school districts reported that they offered full-day kindergarten to all of their students, and an additional 42 districts offered full-day kindergarten to at least some students. (Ex. 7 at 4.) In 2007, 41 percent of kindergarten students were in full-day programs, the most recent data indicates that number has grown to 64 percent. (Tr. 6678:1–4; 6686:6–9.)

## **7) Local School District Choices**

259. Former Assistant Commissioner for Public School Finance Vody Herrmann explained local school districts determine how their budgets are set and how they use the state

money that comes to them. (Tr. 5535:23–5536:4.) Lieutenant Governor Joe Garcia and Senator Keith King similarly explained the state’s authority over districts was limited because local school districts decide how state allocated resources will be spent. (Tr. 4514:1–11; 6799:8–16.) Indeed, State Board of Education Chairman Bob Schaffer testified “the greatest and most important” decisions in Colorado’s education system are made at the local level. (Tr. 5886:8–12.) According to Chairman Schaffer, these local decisions manifest as the ways in which “dollars are distributed on a local basis to the priorities that the local district establishes for itself.” (Tr. 5886:20–22.)

260. This local responsibility is generally true for federal funds as well. School districts choose how to manage the Title I funds they receive from the federal government. (Tr. 6131:19–22.) Indeed, although CDE officials often discuss best practices and best use of these federal funds with school districts, and try to help districts understand why the practices CDE suggests would result in better student outcomes, use of the funds is ultimately a local district decision. (Tr. 6144:9–19.)

261. As Plaintiffs’ expert Justin Silverstein conceded, regardless of the amount of funding the state provides, it is not the state’s role to guarantee student performance. (Tr. 1552:2–19.) Lieutenant Governor Garcia testified it is the actual delivery providers—from classroom teachers to local school boards—who have the responsibility for the delivery of quality education opportunities and outcomes. (Tr. 4622:2–14, 18–22.)

262. The Court is mindful that districts face significant, unique challenges. For example, John Hefty noted there are both advantages and disadvantages to size: developing capacity to implement a standards-based education can be difficult in small districts, but individualizing education is beneficial, and small enrollment may necessitate such individualization. (Tr. 262:18–25.)

263. A critical take-away from the testimony at trial is that despite their diversity in size, property wealth, and student populations, school districts exercise their constitutional right to local control by making choices regarding their educational practices. The Court recognizes Plaintiffs and Plaintiff-Intervenors’ witnesses often testified they lacked the funding to do everything they desire. However, as illustrated by the following examples, the Court finds many districts are offering a wide variety of educational opportunities and seeing successes based on choices they have made.

264. Center, which has about 550 students (Tr. 222:13–15), has seen strong academic growth for four straight years. (Tr. 106:9–21.) The district has received a CDE Center of Excellence award two of the last three years (Tr. 807:20–23), and one of its teachers was recently named teacher of the year for the entire San Luis Valley (Tr. 807:2–14.)

265. The district has a strong intervention program in its elementary school, including interventions provided after school and during the summer. (Tr. 128:14–18; 132:21–25.) In these early grades, the district generally keeps class size below 15. (Tr. 228:22–229:4.) The

district offers its middle-school students access to Compass Learning, which is a very expensive math intervention program. (Tr. 133:17–25.) There is a senior mentoring program, and staff and community members often provide additional mentoring or tutoring support. (Tr. 205:15–24.)

266. Center offers its students music, physical education, basic art, a vocational technology track that includes graphic art design and video production, a building trades class, and Spanish foreign language. (Tr. 124:24–125:20; 157:25–158:2.) The district has opted to offer certain courses even though few students want to take them. In fact, in one instance, the district offered a calculus course for only one student. (Tr. 230:6–10.) The district participates in a concurrent enrollment program through which students can take classes from Adams State College and earn college credit while in high school. (Tr. 125:1–8.) In some years, half of the senior class has taken some college courses. (Tr. 125:9–15.)

267. Center has a strong technology program. The district provides classroom laptops to every fourth and fifth grader and take-home netbooks to sixth through eighth graders. High school students are given take-home laptop computers. (Tr. 167:23–168:4.) Center also has an alternative high school so that students who have “fallen through the cracks” and cannot attend a traditional school will have a place to go. (Tr. 175:14–21.) The district employs a school nurse. (Tr. 134:6–9.) Students in Center can participate in football, volleyball, cross-country running, soccer, basketball, wrestling, track, baseball, and, on occasion, cheerleading. (Tr. 127:3–8.)

268. Sanford serves 346 students in one of the poorest counties in Colorado. (Tr. 820:20–821:1; 903:4–6.) 92 percent of the district’s approximately \$2.7 million in funding this year was provided by the state. (Tr. 904:5–17.) Even so, Sanford is accredited and has received national recognition for its high school (Tr. 826:4–5; 833:17–23; 887:12–14; Ex. 10124 at 1.) Each high school student has a laptop computer, and computer labs are available for younger students. (Tr. 843:9–19.) The district offers three “thriving” vocational programs—agriculture, business, and family consumer science, as well as chorus and journalism. (Tr. 846:15–847:2; 888:7–11.) On-site AP classes and concurrent enrollment at Adams State College are also available for students. (Tr. 848:2–14.) Sanford also offers numerous sports and extracurricular opportunities. (Tr. 848:19–849:6.)

269. Woodlin, a district of around 100 students on the eastern plains of Colorado (Tr. 1174:5–9), meets Colorado’s accreditation standards and is accredited by the state (Ex. 3203.) Traci Weisensee, an individual plaintiff and employee of the Woodlin, described the district as having a “very strong educational environment in the sense that we don’t have a lot of discipline issues.” (Tr. 1194:19–20.)

270. For its 100 students, Woodlin employs thirteen teachers and approximately 30 staff. (Tr. 1214:24–1215:3.) About half of Woodlin’s approximately 100 students “choice-in” to the district. (Tr. 1213:19–22.) This means students and families living outside of the school district chose to attend school there. (Tr. 1213:23–25.) While certain classes combine grade levels, class size still remains around 20 students. (Tr. 1219:12–16.) Woodlin also structures its

schedule to provide an “academic stampede” period where students can focus on areas in which they are struggling. (Tr. 1200:2–7.)

271. Woodlin provides on-site housing for its teachers. (Tr. 1174:9–10.) Woodlin has had significant improvements to its facilities over the last five years, many of those improvements paid for, at least in part, with state dollars. (Tr. 1219:24–1220:6.)

272. Woodlin offers a preschool program. (Depo Desig. Rose Cronk 257:13–258:9.) Students there have access to physical education, music, art, and vocational business, although those programs are now provided only part-time. (Tr. 1200:21–25.) Woodlin provides a variety of extracurricular activities, including basketball, football, volleyball, and track. (Depo. Desig. Rose Cronk 134:8–9.) Students can also participate in the Future Farmers of America, Future Business Leaders of America, National Honor Society, science fairs, and the Knowledge Bowl. (Depo. Desig. Rose Cronk 134:10–25.) Woodlin also offers a one- to two-week summer ecology program. Students tour parts of Colorado or the broader United States and get hands-on outdoor science experience. (Tr. 1218:15–25.) About nine to twelve students participate in the program each year. (Tr. 1219:1–3.)

273. Woodlin offers students classes through the VNET system, which is a distance learning system in which students receive instruction through televisions in their classrooms. (Tr. 1199:1–6.) Through VNET, students can take both high school and college-level courses (Tr. 1215:8–11.) Students have access to foreign language courses, including Spanish and, at times, French and German. (Tr. 1201:1–13.) At least one Woodlin student has taken an on-line advanced placement (“AP”) course. (Tr. 1216:12–13.) Woodlin’s students can also take courses through Morgan Community College. Students either take classes at Woodlin if the local teacher is qualified or take the courses through the VNET program. (Tr. 1202:8–13.) Woodlin also offers a Sophomore Scholars program that allows students who meet certain criteria, including earning 30 college credits by the end of high school, to attend Morgan Community College tuition free the next year. (Tr. 1215:16–1216:2.) This means students earn an associate’s degree in only one year of college— and do so tuition-free. (Tr. 1215:25–1216:7.)

274. Creede, with approximately 70 to 75 students, is located in the western edge of the San Luis Valley. (Tr. 2224:12–16; 2286:13–18.) Like Woodlin, many of Creede’s students—about 30 percent—live outside the district and choose to attend school there. (Tr. 2293:13–25.)

275. Creede’s population is not a wealthy population. (Tr. 2287:5–6.) The median income in the district is around \$35,000. (Tr. 2287:1–4.) Fifty-two percent of the district’s students are on the free or reduced lunch program. (Tr. 2286:19–22.) Despite these economic challenges, Creede, like Woodlin, meets Colorado’s accreditation requirements and is “accredited” by the state. (Ex. 2605; Tr. 2287:11–14.) The district meets the state’s academic achievement goals, its academic growth goals, its academic growth gap goals, and its postsecondary and work force readiness requirements. (Ex. 2605; Tr. 2287:15–23.)

276. While not necessarily offered every year, Creede provides advanced classes including AP calculus, physics, chemistry, and other high-level sciences, like forensics. (Tr. 2265:7–25.) There is also a vocational business program, which includes accounting, keyboarding, and other technology classes. (Tr. 2290:1–8.) Students can also take a video basics or Java course, computer applications, business law, and marketing. (Tr. 2290:9–25.) For its 70–75 students, the district also has a part-time art program and a music lab program in which students can learn to play instruments like the piano, trumpet, harmonica, the drums, or guitar. (Tr. 2288:3–19.) Creede utilizes Colorado Online Learning to offer students access to additional classes. Colorado Online Learning offers classes in, for example, foreign languages, astronomy, anthropology, psychology, and poetry. There are also AP classes offered. (Depo. Desig. John Goss 77:6–14.) Creede has a preschool program and a quality full-day kindergarten program. (Tr. 2292:5–20.) Also, students can participate in extracurricular programs including track, basketball, cross-country running, volleyball, and Knowledge Bowl competitions. (Tr. 2238:5–6; 2291:20–22.) Creede has, in the past, partnered with Adams State College to offer a program called College at High School, which allowed Creede’s students to take college-level classes. The program was not offered last year, as there was no demand for the class. (Depo. Desig. John Goss 79:4–80:12.) Creede also has a cooperative internship program that allows students to work with local businesses, providing those businesses are not closed for the winter. (Tr. 2269:11–15.)

277. Creede is creative with its budget, purchasing textbooks from sites like eBay for 90 percent less than buying those books new. (Depo. Desig. John Goss 10:19–23; 12:3–13.) Creede Principal John Goss testified that he is “really happy” with the current state of technology in the district, particularly hardware. (Depo. Desig. John Goss 14:22–24.) The district has a business room with computers, a computer lab full of computers, and two rolling “labs” of laptop computers. (Depo. Desig. John Goss 15:2–5.) Each teacher has a laptop or PC, and in the elementary school, there are enough computers for every student to be on one. (Depo. Desig. John Goss 15:16–23.)

278. Pueblo City has received a number of prestigious awards. For example:

- Five of the district’s schools have been nationally recognized as blue ribbon schools, a distinction that recognizes academic superiority or dramatic gains in student achievement. (Exs. 706, 709.)
- Three schools have received the Title I distinguished school award, which recognizes exceptional student performance or closing the achievement gap. (Exs. 706, 708.)
- One school was recognized as a Colorado Center of Excellence. (Ex. 710.)
- Two schools received the John Irwin School of Excellence award, which recognizes schools whose performance is in the top 8 percent nationally. (Exs. 706, 707.)

279. Pueblo City offers preschool in each of its elementary schools and has a full-day kindergarten option in every elementary school except one. (Tr. 2444:14–23; 2447:10–17.) The district’s own witness described its early childhood programs as “better than adequate.” (Tr. 2478:3–4.)

280. The district has a three-tiered diploma system, including a track for students who want to focus on career and technical education. (Tr. 2440:21–2441:1.) For students on that track, some engage in concurrent enrollment, taking courses at Pueblo Community College or having PCC instructors teach on the high school campus. (Tr. 2441:5–12.) Pueblo City offers numerous elective options. While not available in all schools, the district offers strong band programs in two of the district’s four high schools, vocational music, and career and technical education programs, including business education, marketing, and computer-aided drafting. (Tr. 2427:7–15.) The district also offers construction technology in three high schools. (Tr. 2476:16–17.) There is a health academy program that students from all four high schools can access that trains students who are interested in the health care field. (Tr. 2476:19–2477:1.) The district offers a Pro Start program and a catering program, which are both restaurant-industry based programs. (Tr. 2477:2–5.) Pueblo City has well over 1,000 students in its career and technical education program. (Tr. 2476:1–8.)

281. All students in the district have the option of taking Spanish, and several schools offer Italian. (Tr. 2428:13–15.) Three of the four high schools offer French, and one offers German. (Tr. 2428:15–19.) Students have the option to participate in sports and co-curricular activities, including DECA (a marketing club), FBLA (a business club), service learning clubs, leadership clubs, a Math Counts club, a Knowledge Bowl team, a math, science, and engineering competition, speech and debate, and a consumer family study program available at one high school. (Tr. 2428:20–2429:6; 2429:18–2430:2.)

282. Pueblo District 70 offers concurrent enrollment to all students that meet the relevant criteria. (Depo. Desig. G. Andenucio 36:2-15.) Students can take classes such as welding, machinery, culinary arts, philosophy, economics, etc. (Depo. Desig. G. Andenucio 37:18–25.) There is no wait list for concurrent enrollment classes. (Depo. Desig. G. Andenucio 36:2–15.) The district also offers a technology academy that, at least at this point, accepts all students who sign up for it. (Depo. Desig. G. Andenucio 90:5-14.) The district also has an International Baccalaureate program; at this point in time, there is not a cap on the number of students who can take IB classes. (Depo. Desig. G. Andenucio 94:12-20.) Pueblo 70 also offers additional programs for at-risk students. Students in Title I programs have an extended school year. (Depo. Desig. G. Andenucio 68:25–69:1.) The district offers a summer school program for migrant and English Language Learner students. (Depo. Desig. G. Andenucio 69:10–19.) Some schools offer Friday tutoring programs. (Depo. Desig. G. Andenucio 71:12–19.)

283. Pueblo 70 tells visitors to its website that it “has adopted a technology initiative that provides the opportunity to put technology into the hands of every child in every classroom.” (Ex. 1312.) All high school students have laptop computers, and all high school teachers get table computers. (Depo. Desig. G. Andenucio 14:25–15:9.) Almost every elementary and middle school classroom has an interactive Promethean board for use by teachers and students. (Depo. Desig. G. Andenucio 12:7–20.)

284. Perhaps most compelling was Senator Keith King’s account of the charter high school he administers in Colorado Springs. To meet the needs of its at-risk student body, the school offers many interventions, such as free breakfast and lunch, transportation, and summer school. (Tr. 6778:2–3; 6783:9–6784:5.) Colorado Springs Early Colleges also has implemented a guarantee—the first of its kind in Colorado—that every student will graduate post-secondary or workforce ready without the need for college remediation. (Tr. 6780:23–6781:2, 11–12.) Last year—just the school’s fifth in operation, every graduate of the school already had college credit, with an average of 42 credits per student earned. (Tr. 6779:16–19; 6780:6–11.) Many students had already earned an associate’s degree, and one former remedial math student graduated with a four-year degree in electrical engineering. (Tr. 6780:11–17.)

285. As Plaintiffs’ expert Cary Kennedy acknowledged, districts, in their exercise of local control, decide how they will absorb budget cuts. (Tr. 2807:7–17.) Some, for example, choose to cut programs, while others elect to increase class sizes. (Tr. 2807:11–14.) Jefferson County recently delegated such decisions to an employee summit guided by a federal arbiter and comprised of representatives from the board of education, the Superintendent’s cabinet, and the teachers’ union. (Depo. Desig. Lorie Gillis 55:16–56:2, 23–57:20.) More specifically, the Court heard how Colorado Springs District 11 recently decided to increase class size by one student, generating a savings of \$3 million. (Tr. 511:20–512:2.) Greeley also increased elementary class size by one—from 23 to 24—and saved about \$1 million. (Tr. 4040:18–4041:6.) Similarly, Pueblo City estimated that increasing class size by one student would save approximately \$2 million by eliminating just 33 of the district’s 950 teaching positions. (Tr. 2475:4–14.)

286. Plaintiffs’ witnesses conceded increasing class size by one would likely not impact student achievement. Plaintiffs’ expert witness Dr. Linda Darling-Hammond testified that “a difference of one student in a reasonable range doesn’t make a huge difference.” (Tr. 3968:25–3969:1.) Similarly, Dr. Brenda Krage, Pueblo City’s Assistant Superintendent for Learning Services, acknowledged the research on the effect of class size is not clear and testified one “could probably find a multitude of numbers to support an argument in terms of the ideal class size.” (Tr. 2474:22–2475:3.) Accordingly, the Court finds many districts could free up significant dollars by minimal increases in class sizes, which would likely not have any negative effect on student performance.

287. A common theme among districts showing successes was a resistance to allowing resource concerns to hinder efforts to increase student growth and achievement. Former Commissioner of Education Dwight Jones explained, lack of educational resources is “never absolute . . . . [T]he creativity and innovation of teachers is they find a variety of ways to make sure that their kids learn.” (Depo. Desig. 50:18–20.) Indeed, the Court heard how the successes of Bruce Randolph Middle School of Denver Public Schools, as recognized by President Obama in his State of the Union address, were achieved by being “creative in [its] thinking on how [it] used what [it] had.” (Tr. 4893:17–18.) In fact, when asked whether Bruce Randolph Middle School might have been able to do even more if it had more resources, Principal Kristin Waters did not believe so. (Tr. 4893:14–17.) Rather, she explained, “I think that’s one of the things that happens oftentimes in education and people just throw up their hands, ‘Oh, we can’t do it

because we don't have the money.' They don't have the creative thinking to navigate through systems or try to think about doing things in a different way." (Tr. 4893:14–4894:1.)

288. According to Mapleton Superintendent Charlotte Ciancio, local control is “the ability to do whatever we need to do locally to meet the needs of our children to achieve the state standards.” (Tr. 4455: 6–9.) To that end, and in response to concerns that the district “needed to change [its] practice, that [it] needed to do a better job of meeting the community’s needs” (Tr. 4364:21–24), the district has implemented a unique “small schools model.” (Tr. 4633:10–16.) Since implementing the small schools model, the district has had better achievement as assessed under the state standards. (Tr. 4366:21–4367:16.) The district has been able to implement and sustain the small school model without increasing its budget by “shift[ing] ... priorities.” (Tr. 4371:4–8.) Superintendent Ciancio does not believe that further budget cuts would affect the district’s ability to sustain the small schools model. (Tr. 4373:19–20.)

289. Similarly, former Colorado Springs District 11 Chief Academic Officer Michael Poore testified that the district improved its academic performance, despite an increase in its at-risk population, through reallocation of resources. (Tr. 1028:19–1029:16.)

290. Despite having “cut the budget every single year [he’s] been there,” Aurora Superintendent John Barry has “turned around the school. The growth rates have been significant, in the sense that we have beat the state [average] in reading, writing, math, and science for four years. We have beat [the state] on the achievement levels, and we have beat the state on the growth rate.” (Tr. 1758:20–1759:3; 1794:4–5.)

291. Harrison also has experienced budget cuts in recent years. (Tr. 5796:11–20.) Nevertheless, during this time, the district has experienced “tremendous” growth in student achievement. (Tr. 5799:6.) As Superintendent Mike Miles explained, the district accomplished this increased achievement despite tight budgets by instilling a core belief that, no matter the circumstances, “there’s no excuse for poor-quality instruction.” (Tr. 5800:21–23.) In furtherance of that core belief, the district strategically reallocated its resources to support a pay-for-performance plan in which student achievement correlates to educator pay. (Tr. 5816:10–20.) The Court observes that the strategy has paid off. For example, the district’s Wildflower Elementary School recently scored 100 percent on the state assessment in third grade reading, along with scores above the state average in all other subjects. (Tr. 5821:14–19.)

292. The Court also heard how some cost saving measures can have a beneficial effect on educational opportunities. Former Commissioner Dwight Jones, who also has managed school districts, explained that budget cuts can “allow[] you to tighten your belt to make just better decisions to stop doing some things that you need to stop doing.” (Depo. Desig. 163:19–21.) Pueblo City, for example, recently made the decision to combine several schools, freeing up more than \$1 million. (Tr. 2481:24–2482:6.) Dr. Brenda Krage explained that, in addition to saving money, this combination could increase student achievement by increasing the programs available at the combined schools. (Tr. 2481:15–19.) Former Rocky Ford Superintendent Nancy Aschermann explained a reorganization prompted by budget cuts eliminated duplication of

administrative effort and increased students' elective opportunities. (Depo. Desig. 201:25–202:6; 202:24–203:2.)

293. In addition, Greeley recently consolidated several schools, all of which were under capacity, and saved \$2 million in operating funds. (Tr. 4020:2–9; 4043:25–4044:2.) Although Greeley Chief Operating Officer Wayne Eads described the consolidation as “strictly driven by dollars,” (Tr. 4020:19–24), he acknowledged that there were benefits to consolidating, including increasing course offerings and after-school activities, community support, improving facilities, and increasing space in the district’s alternative high school. (Tr. 4044:3–17; Ex. 4417.) In an October 2010 letter to the local community (Ex. 4413 at 1), Greeley School District Chief Operating Officer Wayne Eads described the schools as “excellent.” (Ex. 4413 at 2.) Between 2006 and 2010, Greeley saw the percentage of its students considered proficient or advanced on the CSAP increase in reading, math, writing, and science. (Ex. 4401.) Student attendance was also up. (Ex. 4401.) And, the percentage of English Language Learner students demonstrating proficiency increased from 36 percent to 50 percent. (Ex. 4401.) In a parent satisfaction survey, 95 percent of Greeley’s responding parents were satisfied with their school. (Ex. 4401; Tr. 4107:23–4108:1.)

294. Of course, the Court heard school district witnesses describe in extended detail the inadequacy of opportunities available to their students. Just as the district choices can positively impact student opportunities and performance, the Court finds district choices can have negative effects. Indeed, State Board of Education member Elaine Gantz-Berman testified, “in some ways, local control prevents all school districts from setting the bar high and having student outcomes that can be as rigorous as they can be.” (Tr. 5712:10–14.)

295. For example, Bethune, which currently serves just 133 students, has received a “C” grade from the state and is accredited with an improvement plan. (Tr. 1590:20–22; Ex. 10093 at 1.) Although gaps are closing, and the district is approaching state achievement, growth, and growth gaps requirements, Bethune is “in the middle of the road achievement-wise.” (Tr. 1594:1–3; 1675:11–12; Ex. 10093 at 1.) Superintendent Shila Adolf described several innovative initiatives, such as an in-house letter writing program, parental education efforts, and an extended school day with a period for additional academic support. (Tr. 1601:20–25; 1606:2–18; 1619:9–24.) However, Adolf testified Bethune does not employ a curriculum aligned to state standards. (Tr. 1612:24–1613:14.)

296. North Conejos is accredited, though Superintendent Rick Ivers emphasized the district is only “temporarily” meeting state academic achievement requirements. (Depo. Desig. Rick Ivers 182:24–183:1; 183:8–10.) According to Superintendent Ivers, the lack of writing and reading interventionists at the district’s two elementary schools, which Ivers claimed the district could no longer afford, was affecting student achievement. (Tr. Depo. Desig. Rick Ivers 225:22–226:25; 239:18–240:5, 14–23.) When asked why the district does not continue to employ such interventionists if it believed they were important, Superintendent Ivers said “[p]riorities, choices have to be made.” (Depo. Desig. Rick Ivers 240:14–22.) Apparently, one of the district’s

priorities is its wrestling program, as Ivers testified the district recently used its SRS funds to build a \$300,000 wrestling facility. (Depo. Desig. Rick Ivers 48:5–11.)

297. Until 2005, Greeley’s choice of program for English Language Learner students was not working; it was not unusual for a student to be in the program for six years and still be unable to speak English. (Tr. 4100:21–4101:7.) This was especially true for students in the bilingual programs. (Tr. 4101:8–10.) In response to advice from CDE, Greeley revised its English Language Learner program, and that program began to see results. (Tr. 4100:21–4101:1, 4102:20–24.) Yet, in response to a complaint filed with the federal government, and subsequent federal action, Greeley has had to abandon this program. (Tr. 4069:4–4070:18; 4103:16–18.)

298. Additionally, even though Colorado Springs District 11 has lost approximately 4,000 students over the last several years, the district chose to add an additional ten full time equivalent (“FTE”) teacher positions. (Tr. 513:19–514:1.) It did this even though the district does not have data on the correlation, if any, between adding teachers to a classroom and student achievement. (Tr. 514:2–6.) Colorado Springs District 11 also chose to buy out the contract of a superintendent at a cost to the district of \$400,000. (Tr. 514:7–12.)

299. Pueblo City also previously used an administrative organizational structure Dr. Krage described as not “work[ing] well for serving kids and families.” (Tr. 2479:3–5.) Dr. Krage made clear that it was the district, not the state, that adopted this organizational structure. (Tr. 2479:6–12.)

300. As a further example of the impact of district choice, for many years Pueblo City chose minimum graduation requirements that did not qualify students for a four-year college in Colorado and barely qualified them to enter community college. (Tr. 2432:1–2433:10.) At the time, nearly three-quarters of the district’s students took only these minimum requirements. (Tr. 2432:16–19.) This was not a state choice, as Colorado does not have statewide graduation requirements. (Tr. 2432:9–15; 2486:1–21.)

301. And, in 2010, Monte Vista underwent a Comprehensive Assessment of District Improvement (“CADI”), audit, performed by CDE. (Ex. 2209.) This audit found a number of problems in the district, including:

- The district’s schools operated as “independent silos” without regard for what was occurring in other schools;
- Staff members were not aware of the programs or expectations in other schools;
- There was limited accountability among district staff;
- Some secondary school class sizes were too small to make efficient or effective use of instructional time;
- There was no long-term professional development plan aligned with the goal of closing the achievement gap;
- Some teachers held to practices that were not data-informed;

- A culture existed in which administrators and staff members did not have to follow district curricula, textbooks, or school discipline guidelines;
- In some buildings, teachers did not arrive to school on time;
- Staff did not cultivate a culture in which they recognized that all students are capable of achieving high expectations;
- Instruction did not always challenge students to achieve their full potential, and a district-wide sense of urgency did not exist in areas of identified needs.

(Depo. Desig. Dwayne Newman 21:1-24:13, 27:6-39:3, 43:9-45:15; Ex. 2209.)

302. Monte Vista has changed current practice as a result of CADI findings and expects student performance to improve. (Depo. Desig. Dwayne Newman 62:24–63:3.) Superintendent Newman acknowledged the district is currently preparing its students with the skills, knowledge, and ability to be productive in society. (Depo. Desig. Dwayne Newman 9:10–13.)

303. Numerous witnesses testified about the importance of professional development and collaboration for teachers. Some, like Harrison, expect teachers to engage in professional development activities as part of their job. (Tr. 5823:19–21.) As Superintendent Mike Miles explained,

[I]f the professional development is geared to help them improve the quality of their instruction, we think that’s just part of being a professional.

...

And we shouldn’t have to incentivize that. If you’re a professional, you do that on your own. So while we provide a lot of professional development, we provide some professional development even on weekends, we’re not going to pay people for that.”

(Tr. 5823:13–25.) Harrison’s professional development includes collaboration with mentors and department chairs who do not receive additional compensation for taking on those leadership roles. Rather, Superintendent Miles explained, serving in leadership roles is “an expectation” for those whose high-performance qualifies them to serve. (Tr. 5824:16–18.) Similarly, Creede conducts 36 hours of teacher collaboration time, called a professional learning community, each year. Creede provides only a minimal amount of compensation—\$100 per year—but has full participation and has not received pushback for the lack of compensation because, in the words of Principal John Goss, “we’re a good team here.” (Depo Desig. John Goss 23:22–25:16.)

304. In contrast, Pueblo City chose to negotiate the amount of time teachers will be required to do professional development and engage in other outside-of-the-classroom activities as part of their union contract. (Tr. 2408:5–8; 2487:2–2488:2; 6887:3–11.) Although the district acknowledges research shows professional learning communities—time for teachers to

collaborate—would help increase student achievement, it notes the language in the union contract hinders formation of such communities. (Tr. 2487:16–2488:2.) Thus, even though Pueblo City claims it needs more professional development and teacher collaboration (Tr. 2415:22–2416:6), it is the district’s own choices that have limited the amount of available time. Indeed, Dr. Krage acknowledged the union contract—which was a district choice—is “very adult-oriented rather than student-learning-oriented.” (Tr. 2488:3–6.)

305. South Conejos Superintendent Marcella Garcia expressed a similar concern with the teacher’s union’s resistance to additional professional development days. She noted the district used to provide seven professional development days, but as a result of negotiations and “union preference,” the district now offers only four. (Depo. Desig. Marcella Garcia 119:1–120:17.) Superintendent Garcia noted that there are “too many restrictions in the master agreement to move forward with decisions” such as increasing professional development time or teacher evaluation. (Depo. Desig. Marcella Garcia 128:14–129:11.)

306. Adams 14 Superintendent Sue Chandler also acknowledged the importance of professional development, particularly because the district believes highly effective teachers are the driver of student achievement, and it has found teachers do not come out of college with enough preparation. (Tr. 2892:5–17.) Yet, Adams 14 agreed with the union that teachers only would be required to attend two professional development days per year. (Tr. 2892:18–2893:3.) Superintendent Chandler testified two days is not enough time, but she suggested the district would have to increase teacher compensation to secure more professional development time. (Tr. 2895:1–4; *see* Tr. 2893:4–21.)

307. Nearly all witnesses, including Plaintiffs’ and Plaintiff-Intervenors’ expert Dr. Linda Darling-Hammond, testified an effective teacher is one of the most important factors in improving student achievement (*E.g.*, Tr. 3891:19–3892:4). Adams 14 Superintendent Sue Chandler succinctly agreed students do not grow with ineffective teachers. (Tr. 2896:4–6.) And, Sanford Superintendent Kevin Edgar spoke as did many witnesses when he agreed a more experienced teacher is not necessarily a better teacher. (Tr. 902:22–903:3.) Rocky Ford’s former Superintendent Nancy Aschermann testified that if the district paid its teachers based on effectiveness, she would expect increased student achievement because such a pay structure “would encourage all teachers to be more effective and to strive for the higher salaries by being more effective.” (Depo. Desig. Nancy Aschermann 178:21–179:4.)

308. Even so, nearly all of the districts involved in this case choose to pay their teachers not based on supply and demand or how their students perform, but rather based on how many years they have been in the classroom and how much education they have. (*E.g.*, Tr. 902:10–17 (Sanford); Tr. 2474:7–19 (Pueblo City).) For example, Dr. Ed Steinberg, CDE’s Assistant Commissioner in Charge of Special Education Issues, noted that even though there is a chronic shortage of speech language pathologists, many districts refuse to offer a higher salary or provide a bonus to recruit these in-demand professionals, choosing instead to stick to their single salary schedule. (Tr. 6223:17–6224:11.) While acknowledging they are “easy to implement” and do not divide the bargaining unit, Former Commissioner of Education Dr. William Moloney

criticized unitary salary schedules as “simply insane.” (Tr. 5334:20–5335:20.) According to Dr. Moloney, paying teachers without regard to supply and demand or student achievement “hurts children.” (Tr. 5336:1–5.)

309. In Dr. Moloney’s opinion, the unitary salary schedule should be replaced with a system that rewards teaching excellence because it “would militate towards the well-being of children.” (Tr. 5335:21–25.) State Board of Education member Marcia Neal, who taught in public schools for 12 years, explained she supports Senate Bill 10-191 because the ubiquitous unitary salary schedule does not “attempt to identify really, really effective teachers or ineffective teachers, and I happen to think that that’s a real key thing if we really want to improve education, is to change that system.” (Tr. 5462:14–21; 5464:1–2; 5467:18–5468:4.) In explaining Harrison’s decision to adopt a pay-for-performance salary structure, Superintendent Miles explained the district “wanted student achievement to be rigorously looked at. We believe that the more effective teachers have higher student achievement results . . . . And so to make it more rigorous in that fashion, . . . we were rewarding our teachers who were doing the best job.” (Tr. 5812:4–14.) Since implementing pay-for-performance, Harrison has experienced “tremendous [student achievement] growth in almost every area.” (Tr. 5820:11–12.)

310. In addition to choosing how to manage, allocate, and spend state funds, districts choose whether to seek additional funds from their local voters. As already described, districts can ask their voters to approve mill levy overrides or bonded indebtedness, which generate additional local funds for public education and capital needs. The Court finds many districts have taken advantage of this opportunity.

311. For example, Littleton, which has received an “A” grade of accredited with distinction, has been successful in obtaining MLO funds from its local community. (Tr. 420:21–421:2; 453:20–24; Ex. 7805 at 1.) While Superintendent Scott Murphy criticized the amount of state funding received by the district, he testified “the support of our community” means Littleton has sufficient dollars to meet its students’ needs. (Tr. 417:13–418:5.)

312. Plaintiffs’ expert witness and Colorado Springs District 11 Chief Financial Officer Glenn Gustafson explained the district has kept its facilities in above-average condition—B- to C+ shape—by seeking and passing two bonds since 1996. (Tr. 491:16–22.)

313. Former Cherry Creek School District No. 5 Superintendent Monte Moses recalled that passage of four budget override elections enabled the district to provide “the quality of program that we wanted in the basics and student achievement as well as the whole core program that in our community’s mind, included the fine arts, the foreign languages, activities, athletics, the whole gamut of things that go into developing a well-rounded individual.” (Tr. 669:10–670:2.)

314. Jefferson County Superintendent Cindy Stevenson testified the district’s voters approved a \$35 million mill levy override in 2004, which funds reserves and teacher salaries to

maintain class sizes. (*See* Tr. 1068:18–1069:5.) District voters also authorized a \$317 million bond issue for capital needs. (Tr. 1068:18–24.)

315. Kit Carson Superintendent Gerald Keefe described how local voters have supported the district’s override requests to the tune of an additional \$2,400 per-pupil. (Tr. 1731:5–18.) Kit Carson uses these funds to maintain class sizes, a music program, an agriculture program, and keep staff. (*See* Tr. 1731:19–22.)

316. Aurora Superintendent John Barry testified the district has been “aggressive . . . on trying to reach out to the community as best we could to be able to get . . . resources.” (Tr. 1801:6–8.) In 2008, despite a nationwide recession, Aurora’s community “saw enough progress and potential . . . to give [the district] a chance,” approving a \$215 million bond and a \$14.7 million mill levy override. (Tr. 1800:20–1801:6.)

317. In contrast, the Court heard witnesses describe their hesitance to even ask their local voters—those who most directly benefit from the local public schools—for additional MLO funds. Plaintiffs’ expert witness and Center Superintendent George Welsh testified that he has not asked his voters for a mill levy override at any time during the 15 years he has worked in the school district. (Tr. 230:21–231:1.) He testified he did not “have the guts” to ask for a mill levy override since the district’s voters recently approved a bond to help pay for a new school facility. (Tr. 183:24–184:3.) The Court notes that district voters paid 15 percent of the cost of this new facility, while the state picked up the remaining 85 percent.

318. Sanford Superintendent Kevin Edgar detailed extensive resource needs. He testified the district “use[s] everything we can find to help us fund education,” but he dismissed available mill levy override funds, doubting an override would ever pass. (Tr. 905:25–906:6.)

319. Adams 14 Superintendent Sue Chandler also described resource needs. She acknowledged the local community has supported the district through a \$4.89 million MLO in 1996 for art, music, physical education, technology, literacy, and dropout programs, as well as a bond for a new high school in 2006. (Tr. 2846:15–19; 2847:3–7; 2901:17–2902:6.) Nearly \$8 million dollars per year are available—funds that Superintendent Chandler agreed could meet the district’s desire for full-day preschool, a longer school day or year, anti-truancy measures, expanded health services, reduced class sizes, additional professional development, more gifted and talented programming, higher teacher salaries. (Tr. 2902:14–2904:2.) Even though it has not tried another election, Superintendent Chandler explained the district believes additional local revenue is not a possibility based on community surveys. (Tr. 2846:20–25; 2902:10–12; 2904:5–15.)

320. Denver Chief Financial Officer David Hart also testified about the financial needs of the district. He acknowledged, however, that Denver has the authority to raise \$78 million in additional MLO dollars, and that doing so would come at a cost of \$125 per year for the average single-family residence. (Tr. 3041:8–3042:5.)

321. Wayne Eads, Greeley’s Chief Operating Officer, also testified that the state had identified more than \$200 million in current facilities needs in the district. (Tr. 4008:18–4009:13.) However, Greeley currently has the legal authority to seek more than \$327 million—well in excess of its needs—from its local voters. (Tr. 4045:19–22.)

322. Sierra Grande has made a different choice. Board of Education President Ty Ryland testified the district narrowly lost a MLO election last fall. (Tr. 2212:12–15.) President Ryland said the district learned a lot from the effort and believes voters did not understand the ballot language. (Tr. 2213:1–16.) Sierra Grande plans to ask the community for the same MLO in the upcoming election. (Tr. 2213:17–19.)

323. And, Sierra Grande is not the only district in which voters have chosen not to approve requests for additional funds. Colorado Springs District 11 asked its voters to support an MLO that would have provided funds for teacher performance pay and increasing student achievement. (Tr. 504:10–17.) This MLO request was “soundly defeated.” (Tr. 504:17.) Former Chief Academic Officer Michael Poore characterized the district’s community as “anti-tax” and said “any kind of tax increase is—just churns their stomach.” (Tr. 1035:3–8; 1044:24–1045:17.)

324. Similarly, Pueblo City asked its voters to support an MLO to provide additional funds for teacher salaries and classroom resources. (Tr. 2451:14–2542:3.) Local voters chose not to support this MLO. (Tr. 2452:10–20.) Pueblo City Schools also sought a \$17 million bond initiative to put air conditioning in all of its schools. (Tr. 2421:15–19.) Again, voters rejected this initiative. (Tr. 2421:19–21.)

325. The neighboring Pueblo District 70 considered a combination of an \$18 million bond issue and an MLO, which would generate \$3.4 million annually while costing the average homeowner about \$2.50 per month. (Depo. Desig. Ryan Elarton 21:21–22:13.) Yet, the district did not submit this bond and override to its voters because polling data indicated it would not pass. (Depo. Desig. Ryan Elarton 23:3–10.) Indeed, the district has not gone to its voters for an MLO in the last decade. (Depo. Desig. Ryan Elarton 12–15.)

326. Greeley recently sought a \$16 million MLO. (Ex. 4414.) Based on the district’s own estimates, this MLO would have cost the average district homeowner approximately \$16 per month—less than \$200 per year. (Ex. 4414 at 3; Tr. 4040:4–10.) It would have generated funds to pay for, among other things,

- Individual textbooks for all students in core academic courses within seven years;
- Updated computers and technology tools within five years;
- All-day kindergarten for all students within two years;
- Advanced Placement, International Baccalaureate, and magnet programs;
- Art, music, and PE;
- Career/college readiness programs for all middle-school and high-school students.

(Ex. 4414 at 2.) Voters overwhelmingly rejected this MLO. (Tr. 4040:11–13.)

327. Many witnesses testified that local voters rejected these measures because of the challenging economic times. The Court notes, however, consistent with its earlier ruling that fiscal pressures and difficult decisions cannot be raised as a defense by the state (*see* Order Granting Plaintiffs’ Motion *in limine* to Exclude Evidence of Non-Education Appropriations and TABOR Provisions), economic pressures cannot be raised as a “defense” by the Plaintiffs or Plaintiff-Intervenors. The Court considers the dollars available within the school finance system; whether additional available dollars are difficult to obtain is irrelevant to the question before the Court.

328. The Court also heard how negative attitudes to cooperation affect student opportunities. For example, Center could offer its students more opportunities by partnering and coordinating with nearby school districts, some of which are only a few miles away, but does not do so because the district is worried that other districts would try to “pluck” Center’s students away and because “[i]t gives the public appearance that we can’t provide for our own kids, we need help from this other district.” (Tr. 188:7–189:12.)

329. Like Superintendent Welsh, Mountain Valley Superintendent Corey Doss acknowledged that permitting students in his district to take courses Mountain Valley does not offer at neighboring districts would be good for the individual student, but that such an option would never be considered by the district. (Depo. Desig. Corey Doss 173:5–10.)

I can tell you that would probably not ever come up with my board of education ... due to the fact that we compete over students. And students are dollar signs. That’s the bottom line when you look at it from a business perspective, not just educational perspective. And as we talked about before, ... we lose students to Moffat, we lose money. If Moffat is providing better classes, more classes than we’re providing, those students may then decide to go to Moffat. I think that that is an option that would scare the board of education. I don’t think that they would touch that with a 10-foot pole.

(Depo. Desig. Corey Doss 172:16–173:4 (emphasis added).)

330. The Court heard how smaller, rural districts may pool resources through Boards of Cooperative Educational Services (“BOCES”), particularly for special education services. (Tr. 266:6–267:3.) Sanford Superintendent Kevin Edgar, for example, testified the district transports two students with severe needs to the nearby town of Alamosa. (Tr. 906:25–907:16.) Even though this arrangement is cheaper, Edgar said the district wants additional state funding so that Sanford could inefficiently serve the two students on-site at its own facility. (Tr. 907:17–908:13.)

331. Other district officials also revealed their preference for state rather than local dollars. Creede superintendent Buck Stroh testified at length about the fact that it wishes it had funds to offer its 70–75 students additional programs that the local community wants, such as industrial arts (Tr. 2246:11–16), but the Court notes Creede has the legal authority to go to its local community to seek more than \$300,000 in additional funds. (Ex. 30192.) Like Creede, Pueblo City wishes it could offer additional electives (Tr. 2428:3–11), but again the Court notes that the district’s voters have not approved additional funds through a mill levy override. (Ex. 30192.)

332. In summary, the Court finds that despite the fact that all districts operate under the same uniform public school finance system, the unique choices districts make have a significant effect on what educational opportunities are offered and how students perform and achieve.

## **8) Student Performance in Colorado**

333. Either explicitly or implicitly, all of the testimony and evidence at trial looked to a singular topic, which the Court finds to be a critical issue in this case—the performance of Colorado’s school children. Plaintiffs and Plaintiff-Intervenors advocate more money to improve this performance so that, their argument goes, the school finance system can be considered constitutionally rational. But while the Court heard and credits testimony indicating that there are challenges with student achievement, and certainly there are students who do not achieve to the level that the state deems acceptable, the Court notes that student achievement in Colorado is, relatively, good.

334. Student performance nationwide is measured by NAEP, also officially referred to as the Nation’s Report Card. Unofficially, Dr. Moloney, a former member of NAEP’s governing board of directors, referred to NAEP as the “gold standard” and agreed NAEP was America’s best test. (Tr. 5414:24–5415:1.)

335. On the Nation’s Report Card, Colorado scores:

- Higher than 28 jurisdictions and lower than only 4 on the fourth grade reading assessment (Ex. 9403);
- Higher than 20 jurisdictions and lower than only 12 on the eighth grade reading assessment (Ex. 9404);
- Higher than 25 jurisdictions and lower than only 5 on the fourth grade math assessment (Ex. 9405);
- Higher than 23 jurisdictions and lower than only 8 on the eighth grade math assessment (Ex. 9406);
- Higher than 23 jurisdictions and lower than only 9 on the fourth grade science assessment (Ex. 9407);
- Higher than 23 jurisdictions and lower than only 8 on the eighth grade science assessment (Ex. 9408); and

- Higher than 31 jurisdictions and lower than only 4 on the eighth grade reading assessment (Ex. 9409)

336. Accordingly, the Court finds that Colorado students perform well above the national average on this national assessment.

337. Colorado also performs above average in terms of its preschool students. Dr. Stephen Barnett, Plaintiffs' expert witness on preschool issues, testified that the data shows Colorado "to be somewhat above average with respect to the readiness and early school success of children." (Tr. 3102:13–15.)

338. Similarly, Colorado performs above the national average in the number of high school graduates needing remediation. Colorado's typical remediation rate of around 30 percent is lower than the national average of 44 percent. (Tr. 6420:16–6422:5.)

339. Colorado also scores slightly better than the national average in terms of the probability that a ninth grade student will enter college by age 19. (Ex. 7735 at 23 of 39.) In terms of the number of students receiving a high score on Advanced Placement tests (considered a score of 3 or above), Colorado ranks in the top ten. (Tr. 5001:16–5002:4; Ex. 7735 at 23 of 39.) And when looking at the proportion of students with a high ACT or SAT score, Colorado is first in the nation. (Ex. 7735 at 23 of 39.)

340. In sum, the Court finds that this case is and ought to be about the success of Colorado's students, and on many measures, while there is, and likely always will be, room for improvement, Colorado's students perform well above the average.

341. While Colorado has had issues with its achievement gap between certain student populations, the gap is narrowing at both the K-12 and higher education level. At the higher education level, Colorado's colleges are making some substantive improvements in closing the degree attainment gaps between different ethnic groups. (Tr. 6485:8–18.) At the K–12 level, former Assistant Commissioner Wenning testified "the equity of growth has improved" statewide, in that the growth rate gap between low-income and non-low-income as well as minority and non-minority students have "narrowed significantly" over the past five years. (Tr. 4646:1–10.) According to Mr. Wenning, "more students are making a year's growth in a year's time," and "the inequities among different student groups has decreased." (Tr. 4646:11–13.)

## **9) Relationship Between Spending and Achievement**

342. The Court now turns to the crux of Plaintiffs' and Plaintiff-Intervenors' case – whether increasing the funding to Colorado's schools will increase student achievement and educational quality. Plaintiffs' articulate this theory at the very outset of their complaint:

Plaintiffs' children and the children of the State of Colorado have been and are being denied their right to a quality public school education .... The violation of

Plaintiffs' constitutional rights is caused by the Colorado system of public school finance . . . . The State has persistently failed to fund education in a rational manner and at the levels required to meet constitutional and statutory standards of quality.

Pls.' 3d Am. Compl. ¶¶ 2-3. In other words, this case turns on the argument, succinctly articulated by Plaintiffs' expert witness Justin Silverstein, that school districts cannot meet state and federal requirements to improve student performance without additional funds.

343. Mr. Silverstein and his firm, Augenblick Palaich and Associates ("APA"), performed a "cost study" to attempt to demonstrate how much additional money would be needed to meet these requirements. (Ex. 8303.) As summarized in that study,

[t]he costs associated with compliance reflect input requirements -- that is the state may require that certain services be provided, or that certain procedures be implemented, and the costs of compliance express the burden of meeting those requirements. But such compliance does not assure that the basic objectives of state policy are fulfilled -- that student performance increases at a particular rate -- or that districts would avoid the sanctions created by the state as part of standards-based reform which are designed to impact districts that fail to meet those objectives. Rather, if districts are to fulfill the underlying objectives of state law, student performance must increase sufficiently so that districts do not need to be sanctioned. While the state cannot guarantee student performance results . . . , it can provide sufficient resources so that districts have the resources and capacity to meet state objectives.

(Ex. 8303 at 2 (emphasis added); *see also* Tr. 1560:21–1561:4.)

344. Mr. Silverstein's analysis employed two approaches—the "professional judgment" model and the "successful school district" model. As described by Mr. Silverstein, the professional judgment model uses professional educators to specify the resources needed for schools and school districts to meet a certain set of performance objectives. (Ex. 8303 at 3.) The successful school district model examines the basic spending of school districts that successfully meet current state standards and requirements in order to determine a "reasonable estimate" of necessary base spending. (Ex. 8303 at 3.)

345. According to Mr. Silverstein, a monumental increase in spending is needed to increase student outcomes. Under the successful school district model, a total of \$8.1 billion is needed to increase student performance and provide an "adequate" education. (Ex. 8303 at 32.) This is \$1.35 billion more than Colorado currently provides for its public schools. (Tr. 1535:18–1536:12.) Under the professional judgment model, a total of \$10.3 billion is needed to increase student performance and provide an "adequate" education. (Ex. 8303 at 33.) This is 3.6 billion more than current funding. (Tr. 1536:13–15.) If districts' mill levy override funding is excluded from the calculations, as some of Plaintiffs' witnesses urged it should be, the needed additional amounts grow to \$1.94 billion and \$4.15 billion, respectively. (Ex. 8303 at 32–33.)

346. The Court credits the work done by APA in estimating the above costs. However, for the reasons stated below, the Court is not persuaded that Colorado’s school finance system requires the sizeable spending increases called for by Silverstein’s cost study.

347. Mr. Silverstein acknowledges that each methodology has its strengths and weaknesses. (Ex. 8303 at 3.) The state’s expert witness Dr. Eric Hanushek of Stanford University testified that, in his opinion, no cost study methodology meets the conventional standards of scientific evidence. (Tr. 4956:5–11.) In Dr. Hanushek’s opinion, these studies are “basically political documents, in that they are not to be taken as scientific expressions of what resources are needed.” (Tr. 5022:14–16.) As to the professional judgment model, in particular, Dr. Hanushek notes a problem with asking educators what they would do to increase achievement is that their natural tendency is to continue what they are already doing, and therefore builds in and amplifies current inefficiencies. (Tr. 5025:10–22.)

348. The Court finds Dr. Hanushek’s concern is particularly applicable to this case. Even though the 30 school districts directly or indirectly represented in this case make up only 17 percent of the 178 districts in Colorado, 20 of the 81 professional judgment panel members — 25 percent of the panel—came from these 30 districts. When including the four additional members of the panel who served as expert witnesses for Plaintiffs and Plaintiff-intervenors, that percentage jumps to 30 percent of the panel being affiliated with Plaintiffs or Plaintiff-intervenors. (Tr. Ex. 8303 App. B.) This percentage is additionally noteworthy in light of Dr. Baker’s admonishment to “vet[]” cost studies presented by plaintiff groups in school finance litigation: “if a plaintiff group comes in with a cost study, they bear a greater burden of explaining that it is legitimately a—an estimate, that it provides an estimate of the legislature’s own constitutional obligation . . . .” (Tr. 1458:10–14 (emphasis added).)

349. While the Court heard testimony that the General Assembly has utilized APA cost studies, legislative witnesses hardly gave the Court an endorsement of APA’s cost study in this case. Senator Keith King testified cost “is not a good way of establishing how we have a governmental system” because “costs vary dramatically across the state.” (Tr. 6763:15–25.) According to Senator King, “a better system is to say how do we look at the 178 school districts in the state of Colorado, how do we come up with a School Finance Act system that takes into consideration cost of living, at-risk kids, size of school district, all the factors that are important to that particular school district, and try and work into a system of that way as opposed to driving it by a cost system.” (Tr. 6764:3–11.) And, while she did not go as far as Senator King, Plaintiffs’ witness former Senator Sue Windels agreed some things like the cost of a new prison can be easily quantified, but school finance is a huge, complex system with many components. (Tr. 3467:7–15.)

350. Mr. Silverstein acknowledged his analysis assumes that increased funding will result in increased student outcomes. (Tr. 1560:21–1561:4.) However, he also acknowledged that looking at the relationship between spending and achievement was outside of his expertise. (Tr. 1544:14–21.) Another of Plaintiffs’ experts, Dr. Bruce Baker, wrote in an academic

textbook that “[t]he connection between resources and outcomes proposed in professional judgment analyses is, at best, speculative.” (Ex. 30190 at 184; Tr. 1454:19–1455:14; 1455:19–1456:3.) Dr. Baker acknowledged the professional judgment approach utilizes a “methodology [] designed around setting up hypothetical scenarios.” (Tr. 1453:13–17.) Even in the opinion of Plaintiffs’ expert and former Superintendent John Hefty, a cost study does not provide a final answer because all things necessary to achieve universal proficiency are not known. (Tr. 338:16–25.)

351. The Court further finds that although Mr. Silverstein’s firm has conducted similar cost studies in many states over many years (Tr. 1474:9–1475:3), the firm has never examined whether, when states implemented the recommended increased funding, they saw a corresponding increased achievement. (Tr. 1542:8–1543:3.) Indeed, as noted by Dr. Hanushek,

there was an Augenblick study of schools in North Dakota that said in one year what schools had to be adequate according to a professional judgment model and according to a successful schools model. So they gave the spending per district to be adequate. Well, it turned out that a number of districts were already spending more than what was needed to be adequate while some other districts were spending less than what was required by adequacy. If you looked at the performance of students in those districts, what you found is the ones that were spending more than was needed were doing worse in terms of achievement than the ones that were spending less than what was needed even though the studies were supposed to take into account all of the other demands for poverty or special education or what-have-you in them.

(Tr. 5027:9–25.)

352. Mr. Silverstein was not the only witness for the Plaintiffs or Plaintiff-Intervenors to contend that increased spending was necessary for increased student achievement. Plaintiffs’ and Plaintiff-Intervenors’ expert witness Linda Darling-Hammond argued that there is a relationship between school spending and student achievement. According to Dr. Darling-Hammond,

I think we have a lot of evidence about how resources can and do make a difference, and there have been studies around the country of the relationship, for example, between school spending and student achievement, studies that have been done in states, you know, that I've seen or conducted in states ranging from Massachusetts to South Carolina to here in Colorado to California which demonstrate a strong relationship between resources and achievement. There's also research that shows that resources spent well and strategically have an even greater influence on achievement than resources spent poorly.

(Tr. 3928:12–23.) Dr. Darling-Hammond also advocated for increasing funding to lower class size, which she contended would produce higher student achievement. (Tr. 3965:20–3968:6.)

Dr. Darling-Hammond specifically referenced the Tennessee STAR study, which she testified showed positive effects of significant reductions in class size. (Tr. 3966:4–19.)

353. In contrast to Mr. Silverstein and Dr. Darling-Hammond, the state presented testimony from Dr. Eric Hanushek that centered on his research that there is no consistent relationship between school resources and student achievement. (Tr. 4969:14–19.)

354. As Dr. Hanushek explained at trial, at the national level, spending per-pupil has nearly quadrupled over the last half-century, but student performance has remained relatively flat. (Tr. 4971:9–20; Ex. 7735 at 3–5 of 39.) More specifically, the primary factors that drive education costs—lower class sizes, teachers having masters degrees, and overall length of average teacher experience—have been getting “better” (i.e., class sizes are lower, more teachers have masters’ degrees, and the average teacher has more experience), but these “improvements” have not led to gains in student achievement. (Tr. 4973:1–4976:11; Ex. 7735 at 3–5 of 39.) This is consistent with Dr. Hanushek’s finding that most studies show these major resources have no statistically significant effect on student achievement. (Tr. 4981:14–19; Ex. 7735 at 6 of 39.)

355. Dr. Hanushek specifically looked at the correlation between spending and achievement in Colorado. He found that, consistent with his national and international research, there is no consistent relationship between spending and achievement in this state. (Tr. 5006:6–5011:13; Ex. 7735 at 29–36 of 39.) Indeed, Dr. Hanushek suggested Colorado, if anything, is a good example of rational educational spending. As he explained,

the fact that Colorado spends less than the national average per pupil on its students and becomes a top ten state according to the NAEP is a good thing, not a bad thing, because they’re spending a small amount of money to get a very good outcome.

(Tr. 5024:18–22.)

356. Dr. Hanushek also looked at the results of court-ordered spending as a result of “adequacy” lawsuits similar to this case and concluded that judicial intervention in education spending is ineffective. (Ex. 7735 at 8 of 39.) For example, Dr. Hanushek researched New Jersey, which has had some form of court control over education spending for approximately 40 years. (Tr. 4987:13–4988:5.) These court cases have pushed dramatic increases in spending, but student performance, while historically and currently above the national average, has increased on par with national achievement rather than accelerating—as one would expect it should if more money drives higher achievement. (Tr. 4988:8–4992:21; Ex. 7735 at 8–15 of 39.)

357. Dr. Hanushek also looked at Wyoming, which has relatively similar demographic characteristics to Colorado. (Tr. 4994:7–4995:15; Ex. 7735 at 17 of 39.) Wyoming’s education funding lawsuit resulted in a court order that its state’s schools be funded to a level where they are the best in the nation—visionary and unsurpassed. (Tr. 4993:6–17.) As a result, Wyoming’s spending increased substantially—the state went from spending about \$1,500 per pupil more

than Colorado in 1989-1990 to spending about \$6,000 more in 2008-2009. (Ex. 7735 at 18 of 39.) However, comparing Wyoming's student achievement to Colorado's, Dr. Hanushek demonstrated that Wyoming's achievement, relative to the nation, declined over time while Colorado's actually increased. (4996:13-5000:4; Ex. 7735 at 16, 19-22 of 39.)

358. Importantly, Dr. Hanushek did not testify that money does not matter. Rather, he explained how money is spent is far more important than how much is spent. Put another way, "in general, you can't expect any positive achievement gains from just putting more money in and not changing the way the funding is directed." (Tr. 4969:23-4970:7.)

359. Dr. Hanushek also challenged Dr. Darling-Hammond's testimony on the effect of decreasing class size in general and on the Tennessee STAR study in particular. Dr. Hanushek noted that pupil-teacher ratio has declined from roughly 26:1 in 1960 to 15.5:1 in 2007 with no overall increase in student achievement. (Tr. 4973:8-12; Ex. 7735 at 3-5 of 39.) Indeed, Dr. Hanushek explained that, if one looks at the very best studies of the correlation between pupil-teacher ratio and student achievement, less than 10 percent of those studies show a positive, statistically significant impact of class size on achievement. (Tr. 4977:9-4979:24; Ex. 7735 at 6 of 39.) Dr. Hanushek further testified that, while the STAR study perhaps showed an increase in performance for kindergarteners when their class size was reduced, there is no evidence of any increase in performance beyond kindergarten from class size reduction. (Tr. 4972:2-22; 4982:1-4985:24.)

360. Plaintiffs and Plaintiff-Intervenors attempted to discredit Dr. Hanushek by pointing to other court decisions that have taken issue with his research. (Tr. 5106:3-5114:14.) However, the Court gives more weight to the very recent statement of the United States Supreme Court, which noted, by citation to Dr. Hanushek's work, "a growing consensus in education research that increased funding alone does not improve student achievement." *Horne v. Flores*, 129 S.Ct. 2579, 2603 (2009).

361. On rebuttal, Dr. Darling-Hammond argued CSAP proficiency rates are better suited than the student growth Dr. Hanushek used to evaluate any relationship between expenditures and achievement. (Tr. 5767:2-5; see Tr. 5768:7-16.) However, as the Court has already found, the state weighs growth more heavily than student achievement status, and growth is a more accurate measure of a district's added value to a student's education, regardless of starting point. Dr. Darling-Hammond's preference also was contradicted by Plaintiffs' opening witness former superintendent John Hefty for these very reasons. (Tr. 320:22-321:5; 336:21-337:16.)

362. Echoing Dr. Hanushek, Dr. William Moloney recalled his extensive experience in education and testified the connection between resources and achievement is "exceedingly tenuous." (Tr. 5338:23-5339:4.) Spanning several decades and different positions in both teaching and school administration, Dr. Moloney credibly recounted his experiences reforming education with leadership, accountability, and expectations, while sometimes also reducing expenditures. (See generally 5291:4-5323:5.) As Dr. Moloney summarized:

I was the principal in the wealthiest school on the planet, you know, and I definitely saw that there was more to this than money. I know what makes a good school. I know what makes a good teacher, and money is incidental to that, and I believe you need money, and I believe money should be intelligently spent, but we have a terrible track record. We indiscriminately shovel money in this direction without any quality control worthy of that term.

(Tr. 5340:10–20.)

363. Dr. Hanushek and Dr. Moloney’s expert testimony on the tenuous connection between spending and achievement is consistent with testimony presented by witnesses on both sides. As already discussed, former Assistant Commissioner of Education Richard Wenning explained the statewide gap in growth rates among students groups have narrowed significantly over the past five years. (Tr. 4646:1–10.) Notably, this gap closure has occurred over a period when state funding for K–12 education has decreased. (Tr. 4649:8–13.)

364. And, while many school district witnesses summarily testified their districts required more money to increase student achievement, others suggested there was no such correlation. Perhaps the best example was the testimony of David Hart, Denver’s Chief Financial Officer, who acknowledged that

despite challenging financial times, Denver Public Schools believes it can make significant progress in improving the instructional core, growing and retaining great people, engaging families and the community, and creating a culture within DPS of high expectations, service, and excellence.

(Tr. 3047:14–23.) As another example, Mountain Valley Superintendent Corey Doss conceded that students should be doing better, and the district’s CSAP scores should be higher, with the district’s current financial resources. (Depo. Desig. Corey Doss 115:3–116:9.)

365. In addition, the Court has already recounted various school district choices and attendant consequences, as well as the facts of great variation in achievement and outcomes across the state. Lieutenant Governor Joe Garcia, whom the Court recognized as an expert in Colorado educational policy (4501:24–4502:4; 4510:13–19), stated the point succinctly:

I believe that money is one factor that can assist districts, but it’s not—it may be—but it’s not necessary. It’s not the only component.

...

Because we’ve seen some districts address that issue well without additional funding. They’ve chosen to use their funding in particular ways and to create a focus among the instructors to make that a priority.

(Tr. 4519:8–10, 14–18.) Richard Wenning testified similarly:

I don't believe there's a relationship between the amount of funding. I believe there is a relationship between the allocation of that funding and student achievement, yes.

...

The reason I say that is there's dramatically different levels of performance. We have schools and districts in the state that, you know, regularly get a year to two years' growth from their students, and we have school districts that maybe regularly get half a year of growth from their students and it's sustained over time. I don't believe that is a question of the overall pot of money available to those districts. I believe it has to do with how those dollars are used. I think the evidence is clear that, just from their performance, that there is much greater variability in performance than there is in funding.

(Tr. 4678:19–22; 4679:11–23.)

366. By way of example, Mr. Wenning compellingly compared Aurora and Pueblo City School District's performance as measured by the state accreditation framework report. Although the districts each received almost the same total points percentage, Mr. Wenning explained the Commissioner of Education awarded Aurora a higher accreditation grade because of its above average student growth rates. (Tr. 4638:9–4639:6; *compare* Ex. 10057, *with* Ex. 10373.) Aurora's students tend to enter school farther behind than their counterparts in Pueblo, but in Aurora, students are generally growing much faster than those in Pueblo, particularly ELLs and low-income students. (Tr. 4640:23–4641:5, 21–4652:14; 4653:5–19; 4655:4–14, 25–4656:17, 22–4657:3; *compare* Ex. 10057 at 2–4, *with* Ex. 10373 at 2–4.) Mr. Wenning also highlighted Mapleton as another district like Aurora that has shown continuous improvement with increasing student growth rates over the last three years. (Tr. 4713:12–18.)

367. In further support of Dr. Hanushek's conclusions, the Court heard more general evidence about non-financial factors influence on student achievement. Plaintiffs own witness John Hefty believes leadership is key to the improvement of public education. (Tr. 335:2–7.) Sanford Superintendent Kevin Edgar agreed leadership can impact student achievement (Tr. 888:22–24), while Sierra Grande School Board President Ty Ryland believes a good superintendent is an absolute necessity (Tr. 2210:21–24). Ryland recounted how Sierra Grande recently struggled with the wrong superintendent and emphasized the right superintendent, which he believes the district now has, can greatly affect student achievement. (Tr. 2211:4–23.) Superintendent Edgar himself may illustrate Mr. Ryland's belief, testifying he has gone so far as to clean up school grounds and drive school buses when necessary. (Tr. 889:6–13.)

368. Mountain Valley Superintendent Doss noted a number of challenges beyond simple funding issues that have impacted student achievement in his district:

[T]here's numerous, numerous things we can work on, but what's not working would be, first and foremost, communication with each other, with administration, with school board, with parents . . . . How we utilize our time. How we utilize our schedules. How we work together rather than work against each other.

(Depo. Desig. Corey Doss 118:8–119:1.) Mr. Doss further elaborated on attitude problems he has seen in the district:

In tight-knit groups, you have attitudes at times that sometimes do not match each other, compatible due to past experiences, due to many things. And teachers tend to kind of crawl back into their own classrooms and work at their own pace. This is what I do, you can't tell me what to do type of deal that works for me. And then there's some jealousy and self-pity there as well. This teacher leaves at 4:15, I'm here till 5 o'clock at night. I don't like this teacher. That teacher isn't working. Lack of understanding, lack of communication drives into that, as well as being a very small community and lots of people being related to each other and so on and so forth.

(Depo. Desig. Corey Doss 121:20–122:9.)

369. The Court also heard other witnesses tie student achievement to attitude issues of another kind. Despite its excellent overall achievement, Boulder Valley has one of the largest achievement gaps in the state—a gap that has persisted over time. (Tr. 2691:24–2692:4; *see also* Exs. 10357–58.) The district formed a task force to study why its schools were racially and socioeconomically segregated. (Tr. 2692:5–14.) Chief Academic Officer Dr. Ellen Miller-Brown acknowledged the district's continuing efforts to redress inequitable delivery of education to children of poverty and color. (Tr. 2696:21–2697:3, 16–2698:1, 4–15.) She acknowledged community concern about low expectations for minority students, and agreed such has been identified as a root cause in the district's Unified Improvement Plan. (Tr. 2698:22–2699:7.) Although Dr. Miller-Brown testified Boulder Valley needs additional resources, she made clear it does not take more money for teachers to stop having low expectations for children of color. (Tr. 2703:3–6.) Rather, Dr. Miller-Brown testified Boulder needs to be courageous in its will to change systems and practices. (Tr. 2693:15–19.)

370. The issue of low expectations also has been found in other districts involved in this case, such as Adams 14. (Tr. 2891:15–25.) Plaintiff-Intervenors' expert Dr. Kathy Escamilla found ELLs in Greely, Rocky Ford, Sheridan, and Mapleton, generally are not valued people. (Tr. 3807:17–21; 3808:19–22.) According to Dr. Escamilla, meeting the needs of ELLs was not the highest priority in any of these four districts. (Tr. 2809:2–5.) Thus, while Dr. Escamilla argued for additional resources targeted to ELLs, she would want to see an

accountability system set up and would not write Greeley, Rocky Ford, Sheridan, or Mapleton a blank check. (Tr. 3809:6–25.)

371. These districts stand in stark contrast to Senator King’s successful charter high school. Senator King testified “the mission statement of our school, is that every kid, regardless of his background, regardless of where he’s from, regardless of what his home situation has been, will succeed at our school, will have an opportunity for a quality education, will have an opportunity to go on to college, and will be successful. No exceptions. No excuses.” (Tr. 6782:20–6783:2.) Colorado Springs Early Colleges is able to offer the college-level educational opportunities described above with modest revenue of just \$6,139 per pupil. (Tr. 6778:19–20.)

372. Other witnesses testified similar to Dr. Hanushek, about their belief that increased funding will not necessarily lead to increased student achievement or better student outcomes. Plaintiffs’ witness Superintendent Sue Chandler conceded that even if she had resources to meet all the needs of her district, she could not guarantee 100 percent proficiency. (Tr. 2904:16–20.) Defendants’ expert on language, culture, and equity Dr. Barbara Medina testified she did not believe increased funding would guarantee increased student outcomes for ELLs (Tr. 6022:4–7.) According to Dr. Medina, a price cannot be put on a commitment to principles and values, particularly that all students can learn. (Tr. 6022:21–24.)

373. Upon all of the above recited evidence, the Court finds neither Plaintiffs nor Plaintiff-Intervenors have proven that increased funding at the levels called for in the APA cost study will actually increase student achievement in the school districts involved in this case.

## STANDARD OF REVIEW

374. Plaintiffs and Plaintiff-Intervenors must establish the General Assembly’s education funding decisions are not rationally related to the constitutional mandate of a thorough and uniform system of free public schools and protection of local control over instruction. (Order re: Defendants’ Motion for Determination of Questions of Law at 3); *Lobato*, 218 P.3d at 363, 374–75.

375. Rational basis, as the Supreme Court explained in this case, is a “minimally-intrusive” standard of review. *Id.* at 373. This Court must give “substantial deference to the legislature’s fiscal and policy judgments.” *Id.* at 363. This includes legislative declarations, *see, e.g., Torres v. Portillos*, 638 P.2d 274, 277–78 (Colo. 1981), which courts generally “accept ‘at face value,’” *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 240 (8th Cir. 1994).

376. Indeed, “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data,” *Fed. Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). “If any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must

assume those facts exist.” *HealthONE v. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002) (quoting *Christie v. Coors Transp. Co.*, 933 P.2d 1330, 1333 (Colo. 1997)), accord *Lujan*, 649 P.2d at 1022.

377. “A State . . . has no obligation to produce evidence to sustain the rationality . . .” *Heller v. Doe*, 509 U.S. 312, 320 (1993). The challenging party, in contrast, bears the burden of “negat[ing] every conceivable basis,” *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

378. Rational basis review is not a license for “[t]he judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.” *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Under well-established rational basis review, a party challenging the State’s actions “cannot prevail so long as ‘it is evident from all the considerations presented to [the legislature], and those of which [the court] may take judicial notice, that the question is at least debatable.’” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 153-154 (1938)); see also *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (“If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”). “The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

379. The Colorado Supreme Court instructs that judicial deference is particularly warranted for education statutes. In *Bd. of Educ. of Sch. Dist. No. 1 v. Booth*, 984 P.2d 639, the Court stated, “We have traditionally treated education policy choices with special deference and are particularly averse to the judicially intrusive effect of invalidating a statute in this context.” *Id.* at 653 n.6. And, in *Lujan*, the Court declared,

“Judicial intrusion to weigh such considerations and achieve such goals must be avoided . . . , especially so in this case where the controversy, as we perceive it, is essentially directed toward what is the best public policy which can be adopted to attain quality schooling and equal educational opportunity for all children who attend our public schools.”

*Id.* at 1018.

380. Justice Erickson in his decisive *Lujan* concurrence, additionally argued that “[i]n enacting laws such as the school finance system, the legislature must be free to remedy parts of a problem, or to recognize degrees of a problem and to formulate solutions in the areas it determines to be more in need or more readily corrected than others.” *Id.* at 1026 (citing *Thompson v. Engelking*, 537 P.2d 635 (Id. 1975)). This is consistent with the United States Supreme Court’s instruction in *Beach Communications* that “the precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed

leeway to approach a perceived problem incrementally.” 508 U.S. at 316 (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)).

381. In short, as the Supreme Court admonished in this case, the “task is not to determine ‘whether a better system could be devised,’ but rather to determine whether the system passes constitutional muster.” *Lobato*, 218 P.3d at 374 (quoting *Lujan*, 649 P.2d at 1025).

## CONCLUSIONS OF LAW

### A. Rules of Constitutional Construction

382. Core legal issues in this case are the requirements of the Education Clause, Article IX, section 2, and the Local Control Clause, Article IX, section 15, in the Colorado Constitution.

383. Courts interpret constitutional language according to its common and ordinary meaning. *E.g.*, *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005). “Words must ‘be given the natural and popular meaning usually understood by the people who adopted them.’” *Lobato*, 218 P.3d at 375 (quoting *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988)).

384. Also, it is well established “the Constitution, including all amendments thereto, must be construed as one instrument, and as a single enactment.” *People v. Field*, 66 Colo. 367, 181 P. 526, 527 (1919), *accord, e.g.*, *Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004) (quoting *Dixon v. People*, 53 Colo. 527, 530) (“[I]t is essential that we take the Constitution as it is, including every part thereof relating to the subject-matter under consideration, and construe the instrument as a whole, causing it, including the amendments thereto, to harmonize, giving to every word as far as possible its appropriate meaning and effect.”); *Colo. State Civil Serv. Employees Ass’n v. Love*, 448 P.2d 624, 630 (Colo. 1968) (“Each clause and sentence of either a constitution or statute must be presumed to have purpose and use, which neither the courts nor the legislature may ignore.”).

385. “It is well known that many of Colorado’s constitutional provisions were based on the Illinois, Pennsylvania, and Missouri Constitutions.” *People v. Rodriguez*, 112 P.3d 693, 699–700 (Colo. 2005) (citing Dale A. Oesterle & Richard B. Collins, *The Colorado State Constitution: A Reference Guide* 1 (2002); *McIntyre v. Bd. of County Comm’rs*, 86 P.3d 402, 414 n.7 (Colo. 2004)). Accordingly, the Supreme Court has found other state courts’ constitutional interpretations to be persuasive. *See, e.g., id.*; *see also Lobato*, 218 P.3d at 372 (noting both *Lujan* majority and Justice Erickson’s dispositive concurrence examined other state courts’ interpretation of similar constitutional education clauses).

386. In accordance with the Supreme Court’s direction, this Court also “may appropriately rely on the legislature’s own pronouncements to develop the meaning of a ‘thorough and uniform’ system of education.” *Lobato*, 218 P.3d at 375.

## B. The Education Clause

387. The Court now addresses what is commonly referred to as the Education Clause. Again, the Colorado Constitution charges the General Assembly with “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.” Colo. Const. art. IX, § 2.

388. Throughout their pleadings, Plaintiffs and Plaintiff-Intervenors consistently maintain the Education Clause provides that “Colorado’s children are entitled to [receive] a thorough and uniform education” or a variation therefore. As this Court noted in its Order regarding Defendants’ Motion for Determination of Questions of Law, this is a misstatement of the mandate set forth in the Education Clause. In its *Lobato* decision, the Supreme Court repeatedly states the mandate requires “the general assembly provide a thorough and uniform system of [free] public education [or schools]” or another variation therefore. See 218 P.3d 358 (emphasis added). The Education Clause itself states, “[t]he general assembly shall . . . provide . . . a thorough and uniform system of free public schools . . . .” Colo. Const. art. IX, § 2. Again, as stated in the previous Order, the Court finds the distinction significant.

389. Individual students are referenced in the succeeding portion of the Education Clause, which provides that “all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously.” Colo. Const. art. IX, § 2. The Supreme Court has determined the state constitution does not establish education as a fundamental right. *Lujan*, 649 P.2d at 1017–19, cited in *Owens v. Colorado Congress of Parents, Teachers and Students*, 92 P.3d 933, 941 (Colo. 2004). Moreover, when the constitutional drafters intended to guarantee individual rights, they did so in clear terms. Colo. Const. art. II, § 3 (“All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.”). Accordingly, the Court concludes individuals aged six to 21 years are guaranteed a gratuitous education in a thorough and uniform system.

390. As for the meaning of a “thorough and uniform” system, the constitutional drafters left no definition, either in the Constitution itself or in the official recording of their deliberations. (Tr. 571:8–13; 582:20–583:2.) Moreover, the Supreme Court has never defined the terms. The Supreme Court has said the drafters did not intend that school districts furnish books free to all students. *Marshall v. School Dist. RE No. 3 Morgan County*, 191 Colo. 451, 553 P.2d 784, 785 (1976). The Supreme Court also has declared the Education Clause is “satisfied if thorough and uniform educational opportunities are available through state action in each school district.” *Lujan*, 649 P.2d at 1025, quoted in *Lobato*, 218 P.3d at 371 (emphasis added).

391. Consequently, dictionary definitions of “thorough” and “uniform” from the time of drafting provide an appropriate starting point. See, e.g., *Lobato*, 218 P.3d at 375; *Washington*

*County*, 109 P.3d at 149. Webster’s 1859 dictionary, the edition in circulation when the Constitution was drafted in 1875 and 1876, defined “thorough” as, in part, “[l]iterally, passing through or to the end” and “complete.” *An American Dictionary of the English Language* (Merriam 1859). “Uniform” was defined in the same dictionary as, in part, “[o]f the same form with others” and “conforming to one rule or mode.” *Id.*

392. While deliberations of the Colorado Constitutional Convention are largely unrecorded, some intent can be gleaned from the available procedural record. Early in the Convention before even a draft of Article IX had been presented, a delegate offered a resolution directing the legislature to “provide for the establishment and maintenance of a thorough and efficient system of free schools, whereby all children of the State between the ages of six and twenty-one years irrespective of color, birthplace or religion, shall be afforded a good common school education.” *Proceedings of the Constitutional Convention for the State of Colorado 1875–1876* at 43 (Smith Brooks Press 1907); *see* (Ex. 7208:5–6). Although this resolution was referred to the Committee of Education, the first draft of what became Article IX, Section 2, replaced the word “efficient” with “uniform” and omitted the modifiers “good” and “common.” *Proceedings* at 185.

393. In addition, although Colorado’s historic record is limited, other states offer more replete accounts of their constitutional conventions. *See generally* John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence From the Constitutional Convention Debates*, 70 ALB. L. REV. 927 (2007) (admitted as Ex. 7205). Colorado was the first state to utilize both of the words “thorough” and “uniform” in its Education Clause. (Tr. 557:19–24.) Yet, one or the other appears in numerous state constitutions adopted before 1876. (Ex. 7204 at 4 n.22.) A scholarly examination of the available recorded constitutional debates concludes that in the late 1800s, a “thorough” system of schools was commonly understood to refer to both primary and secondary levels of education. (Ex. 7205 at 951) (contrasting term “common,” which was “understood to be limited to basic elementary instruction”) The same examination concludes “uniform,” under its most expansive usage in the late 1800s, required the same levels of schooling throughout a state, while a narrower view contemplated a comparable schedule of operation statewide. (*See* Ex. 7204 at 961–64.) The Court notes these historical interpretations are consistent with Webster’s 1859 definitions and the drafters’ decision to drop the words “good” and “common” from their final draft of the Education Clause.

394. Accordingly, the Court concludes the drafters of the Education Clause mandated the General Assembly to establish and maintain a system of free primary and secondary education encompassing all grades and operating under a standardized schedule throughout the state. More specific parameters of a “thorough and uniform system of free public schools” were entrusted to the General Assembly.

395. Of course, the General Assembly has acted in furtherance of its constitutional duty, enacting legislation regarding public education, including the Public School Finance Act and various reforms already discussed. Plaintiffs and Plaintiff-Intervenors argue the Court should look to this legislation to, as the Supreme Court suggested, develop the meaning of a

thorough and uniform system of education. *See Lobato*, 218 P.3d at 375. The Court concludes the General Assembly’s legislative pronouncements reflect a legislative judgment of what constitutes a thorough and uniform system of free public schools today. *See, e.g.*, § 22-7-1002(1)–(4). In short, the General Assembly envisions a system from which all graduates will be postsecondary and workforce ready. § 22-7-1003(4)(a).

396. Witnesses for both sides offered personal definitions of “thorough” and “uniform,” many of them describing a particular quality of education. The Court heard a wide range, from Dr. Moloney’s characterization of the constitutional language as a “very low bar” (Tr. 5338:10–22), to Superintendent Ciancio’s opinion that a thorough and uniform system is one that provides whatever students need to be successful and achieve their dreams (Tr. 4456:23–4457:1; 4458:11–18). Senator Windels said it is “a system that fulfills all the laws and regulations that are placed upon . . . school districts.” (Tr. 3425:13–15.) Superintendent Barry simply said, “the only thing I can tell you is I know it when I see it.” (Tr. 1809:23–24.) The Court concludes these lay constructions provide no guidance as to the meaning of a “thorough and uniform system of free public schools.” The witnesses’ differing definitions demonstrate the inherent difficulty of settling on any qualitative meaning of the Education Clause’s mandate. What constitutes an “adequate” education ultimately depends upon one’s policy or value judgments.

397. Plaintiffs and Plaintiff-Intervenors attempt to escape this difficulty by contending the General Assembly unconstitutionally fails to provide sufficient funding for districts to educate all students to postsecondary and workforce readiness. While Plaintiffs and Plaintiff-Intervenors primarily challenge the adequacy of state funding, the Court heard testimony questioning the equity of funding as well. (*E.g.*, Tr. 2208:4–15.)

398. Returning then to the Constitution, the Court concludes the Education Clause plainly requires the General Assembly to “maintain” the thorough and uniform system of free public schools it establishes. Colo. Const. art. IX, § 2. Some amount of state funding would seem to be required. Yet, neither the word “maintain” nor anything else in the Constitution requires the General Assembly to appropriate a specific sum on education.

399. In accordance with Congress’s Enabling Act, (*see* Ex. 7204:2 n.7), the drafters identified a “public school fund of the state” to provide interest income to be “expended in the maintenance of the schools of the state,” which “shall be distributed amongst the several counties and school districts of the state, in such manner as prescribed by law,” Colo. Const. art. IX, § 3. The Court concludes this fund, based on federal land grants, was never intended to be the sole means of funding the state public school system. Since statehood, public schools in Colorado have been financed primarily by a combination of locally levied property taxes and state contributions. *See Lujan*, 649 P.2d at 1011; *accord* (Tr. 560:23–561:11, 651:21–25).

400. Constitutional drafters in other states included minimum funding provisions, such as in the Missouri Constitution of 1875, article IX, section 3(b), which requires that no “less than twenty-five percent of the state revenue” must “be applied annually to the support of the free

public schools,” and the Pennsylvania Constitution of 1874, article X, section 1, which requires an annual appropriation of “at least one million dollars.” Colorado’s drafters were aware of these provisions, *Rodriguez*, 112 P.2d at 699–700, but chose not to include an analogous mandate for minimum state education funding.

401. As for the equity of funding, Dr. Romero explained how disparities date back to the time of statehood, particularly in the San Luis Valley. (Tr. 561:12–562:14; 578:21–579:18.) The Court recognizes the Supreme Court has resolved a nearly identical inequity argument in favor of the state. In *Lujan*, the Supreme Court concluded “[t]he constitutional mandate which requires the General Assembly to establish ‘a thorough and uniform system of free public schools,’ is not a mandate for absolute equity in educational services or expenditures.” 649 P.2d at 1018. The Court has heard no evidence that the disparities in per-pupil funding are any less equitable than in 1982. On the contrary, testimony established the General Assembly has worked since that time to make the public school finance system more equitable with a complex and accommodating funding formula. (E.g., Tr. 634:2–636:16; 653:5–7; 2750: 2–6; 2764:12–14; 6362:20–6363:10; 6366:25–6367:4.)

402. The Court, therefore, concludes that as with establishing a thorough and uniform system, the Constitution vests determination of how specifically to “maintain” the system with the General Assembly. To the extent the Court credits the General Assembly’s pronouncements in developing the modern meaning of a thorough and uniform system of free public schools, equivalent deference should be afforded to the General Assembly’s determination of the appropriate means, level, and distribution of education funding. *See Lobato*, 218 P.3d at 375. While a better system might be devised, that is not this Court’s concern, and the General Assembly’s fiscal and policy judgments must be given substantial deference. *Id.* at 363, 374.

### **C. The Local Control Clause**

403. The Court now examines what is commonly referred to as the Local Control Clause. “The general supervision of the public schools of the state” is vested in a state “board of education,” Colo. Const. art. IX, § 1, but local “school districts of convenient size” as provided by the general assembly “shall have control of instruction,” Colo. Const. art. IX, § 15. Colorado is one of only six states with an express constitutional provision for local control over instruction. *Booth*, 984 P.2d at 646.

404. Plaintiffs and Plaintiff-Intervenors contend that, as a result of the State’s failure to sufficiently fund public education, local school districts are deprived of their constitutional right to local control. (Pls.’ 3d Am. Compl. ¶ 4; *see also* Pl.-Intervenors’ 1st Am. Compl. ¶¶ 103–04.) Plaintiff-Intervenors argue one step further that inadequate funding precludes meaningful local control over instruction because districts must allocate all of their local funds to meeting state requirements, leaving no local funds for local priorities. (Pl.-Intervenors’ Trial Brief at 8–10.)

405. The Court concludes local control is a guarantee over instruction—not an entitlement to state funding. As already discussed, the Colorado Constitution imposes no specific education funding requirement on the General Assembly. And, as the Supreme Court has repeatedly instructed, local control over instruction is not about local use of state funds. *Owens*, 92 P.3d at 935 (“[T]his Court has consistently construed [article IX, section 15] to mean that local school districts must retain control over any instruction paid for with locally-raised funds.”) (emphasis added); *see also id.* at 939 (“[C]ontrol over locally-raised funds is essential to effectuating the constitutional requirement of local control over instruction.”) (emphasis added); *Booth*, 984 P.2d at 648 (“[C]ontrol of instruction requires substantial discretion regarding the character of instruction that students will receive at the district’s expense.”) (emphasis added).

406. Even if the Court could conclude otherwise, it heard no testimony from any district being unable to pursue any local priorities, let alone one that has maxed out their local funds, including those available through mill levy overrides. (Tr. 5530:8–10; *see, e.g.*, Tr. 2207:19–25; 2209:11–17.)

## **B. Rationality**

407. Having examined the Education and Local Control Clauses, the Court turns finally to the ultimate question in this case—whether Plaintiffs and Plaintiff-Intervenors have established that the General Assembly’s education funding decisions are not rationally related to the constitutional mandate of a thorough and uniform system of free public schools and protection of local control over instruction.

408. As an initial matter, the Court concludes Plaintiffs have not met their burden as to the structure of the school finance system. Plaintiffs’ own witnesses endorsed the formula structure of the 1994 Act. (Tr. 510:12–16; 3472:18–24.) In furtherance of the constitutional mandate to establish and maintain a thorough and uniform system of free public schools, the General Assembly has engaged in extensive study and deliberation to devise the current system. (Tr. 636:19–637:2; Exs. 30100–02; 30105–06; 30108–10; 30150; 30153; 30156; 30159; 30162; 30165; *see* Tr. 618:25–619:7.) And, it continues to do so. (Tr. 6745:21–6751:13.)

409. As already discussed, the Constitution does not require equity of funding or opportunities. That there are disparities in property wealth, local taxing rates, per-pupil spending, and even educational opportunities does not render the public school finance system unconstitutional. *See Lujan*, 649 P.2d at 1018. While the judiciary has refrained from ordering a merely better system, *see Lobato*, 218 P.3d at 374, the General Assembly, over many decades, has evolved the school finance system into a complex formula that attempts to accommodate the differing financial situations of the state’s 178 school districts, as well as the disparate needs of those districts’ unique student populations. Indeed, the 1994 Act structurally addresses concerns raised by Plaintiffs and Plaintiff-Intervenors—economies of scale, declining enrollment, and the

higher costs of affording educational opportunities to students at-risk of academic failure. (Tr. 256:4–15; 274:5–10, 16–17; 636:19–23; 2764:15–22; 5494:17–20; 5497:21–5498:3.)

410. Plaintiff-Intervenors discretely attack the breadth of the system—namely, its provision of supplemental funding for English Language Learners (“ELL”) for just two years and its extension of at-risk supplemental funding to only students qualifying for free lunch. The Court concludes Plaintiff-Intervenors have not proven these legislative choices are not rationally related to the constitutional mandate of a thorough and uniform system of free public schools and protection of local control over instruction. *See Lobato*, 218 P.3d at 363, 374–75; *see also Heller*, 509 U.S. at 320; *Lehnhausen*, 410 U.S. at 364.

411. Although the evidence establishes that it typically takes longer than two years to acquire full English proficiency, it is not irrational to allocate state dollars to students at the earliest stages of English acquisition to assist districts in making their curriculum accessible. (*See* Tr. 5984:25; 5985:1–21; 5967:20–8, 19–25; 5969:1–25; 6109:14–23). The General Assembly’s targeted allocation for students dominant in a language other than English can enable them to access an educational opportunity (*see* Tr. 6106:16–22), and the requirement of local programming and implementation furthers local control over instruction (*see* Tr. 5993:24–5994:10). While Plaintiff-Intervenors may disagree with the General Assembly, these policy judgments are entitled to substantial deference. *See Lobato*, 218 P.3d at 363; *Torres*, 638 P.2d at 277–78; *see also HealthONE*, 50 P.3d at 893.

412. Similarly, while the evidence demonstrates the General Assembly’s chosen free lunch proxy does not encompass all students possibly at-risk of academic failure, it is not irrational to allocate state dollars to the students determined to be neediest after careful and repeated study. (Tr. 448:13–16; 655:7–8; 6769:4–18; 6770:6–10.) Again, Plaintiff-Intervenors may disagree, but this policy judgment is entitled to substantial deference. *See Lobato*, 218 P.3d at 363; *Torres*, 638 P.2d at 277–78; *see also HealthONE*, 50 P.3d at 893.

413. What is left and really at the heart of Plaintiffs and Plaintiff-Intervenors’ contentions is the amount of state funding for public education—both in total and for specific student populations, such as ELLs and at-risk students.

414. Although the General Assembly has not undertaken the specific cost-study envisioned by Plaintiffs, which Defendants concede (Order Approving Parties’ Stipulations Regarding Data and Factual Admissions ¶31 at 11; Order Approving Parties’ Stipulations Regarding Undisputed Facts ¶8 at 5), the Court concludes Plaintiffs and Plaintiff-Intervenors have not proven the base per-pupil and total funding amount bears no rational relationship to the constitutional mandate of the Education and Local Control Clauses. *See Lobato*, 218 P.3d at 363, 374–75. As already discussed, the General Assembly has exhaustively studied its funding of public schools. Legislative reports and numerous witnesses established the General Assembly seeks to enhance educational opportunities throughout the state while leaving local boards in control over instruction. It is not irrational to have concern about inefficient expenditures in this local control state of 178 locally administered school districts. (Tr. 623:3–8; *see* Tr. 1428:9–12.)

It is not irrational to look to historic district expenditures or prior year appropriations as many Plaintiff school districts do to set funding levels. (Tr. 623:9–11; 2297:5–14; 2479:13–21; Depo. Desig. Corey Doss 73:7–19; Depo. Desig. Marcella Garcia 77:1–4, 13–16.) It is not irrational to annually invite districts and other stakeholders to share their concerns about the public school finance system. (Tr. 3433:11–19; 6751:25–6752:3, 19–25.) And, it is not irrational to incrementally increase funding over time as the General Assembly has for K–12 public education. (Tr. 652:10–21; 2752:22–2753:1–10; 3043:1–12; 5535: 8–13, 18–22; 6757:25–6758:8.) Such policy judgments are entitled to substantial deference, *see Lobato*, 218 P.3d at 363, and have not been negated, *see Lehnhausen*, 410 U.S. at 364. Plaintiffs’ cost-study method might be a better way of arriving at a funding level, but to conclude it is the only way would ignore the General Assembly’s decisions and transform rational basis review into something far more stringent and intrusive. *See Lobato*, 218 P.3d at 373–74; *Dukes*, 427 U.S. at 303; *see also Lujan*, 649 P.2d at 1026 (Erickson, J. specially concurring).

415. Plaintiffs and Plaintiff-Intervenors nonetheless maintain state funding is insufficient to meet state requirements, particularly the expectation that all students graduate postsecondary and workforce ready.

416. Yet, Plaintiffs and Plaintiff-Intervenors fail to credit the General Assembly’s permission to raise additional local dollars for public education. School districts in Colorado have access to hundreds of millions of untapped dollars by way of local mill levy overrides. (Tr. 5519:2–13.) Indeed, just limiting the analysis to the school districts involved in this case, there is nearly \$300 million in available mill levy override dollars. (Ex. 30192.) Local districts also have access to specific mill levy overrides for full-day kindergarten, transportation, and special building and technology needs. (Tr. 5523:14–25; 5524:18–5525:2; 5525:16–5526:1.) Finally, there are vast dollars available to school districts, through local bond elections, for capital construction needs. (Tr. 5526:17–25; Ex. 30012 at 9; *e.g.*, Tr. 3041:1–4; 4045:19–22; Depo. Desig. Ryan Elarton 45:13–22.)

417. The Court concludes it has not been proven that expecting districts to use local funds in furtherance of a thorough and uniform system of free public schools is irrational. *See Lobato*, 218 P.3d at 363, 374–75. Nothing in the Constitution requires the General Assembly to fully fund the system with state dollars. There is no constitutional provision constraining or even addressing the means by which the General Assembly can establish and maintain the system. And, as already explained, public schools in Colorado historically have been funded primarily with local tax dollars. *See* (Tr. 560:23–561:11; 651:21–25); *Lujan*, 649 P.2d at 1011. Only relatively recently has the state share overtaken the local share. (Tr. 5535:8–17.) In practice, local control over instruction has meant not just local responsibility over the actual provision of educational opportunities, but also some responsibility for funding. *See also Owens*, 92 P.3d at 935, 939; *Booth*, 984 P.2d at 648.

418. The Court also concludes allowing districts to seek mill levy overrides is not irrational because it furthers local control over instruction. *See Owens*, 92 P.3d at 935

(“Control over locally-raised funds allows local electors to tailor educational policy to suit the needs of the individual district, free from state intrusion.”) (emphasis added); *id.* at 941 (“Allowing a district to raise and disburse its own funds enables the district to determine its own educational policy, free from restrictions imposed by the state or any other entity.”) (emphasis added). As the Supreme Court explained in *Lujan*,

The use of local taxes affords a school district the freedom to devote more money toward educating its children than is otherwise available in the state-guaranteed minimum amount. It also enables the local citizenry greater influence and participation in the decision making process as to how these local tax dollars are spent. Some communities might place a heavy emphasis on schools, while others may desire greater police or fire protection, or improved streets or public transportation.

649 P.2d at 1023. The General Assembly has made a policy judgment in favor of MLOs, and the Court affords due deference. *See Lobato*, 218 P.3d at 363.

419. Plaintiffs and Plaintiff-Intervenors’ insufficient funding argument additionally confuses what the General Assembly aspires to with what it requires. Universal postsecondary and workforce readiness at graduation is currently a goal not yet measured or required of districts. (Tr. 6409:22–6410:3; 6413:15–25; *see* Tr. 4671:7–8.) The General Assembly expressly recognized alignment of the system from preschool through postsecondary and workforce readiness “is a multi-faceted and complex project that will require multiple stages of planning, design, and implementation and that will likely continue over years.” §22-7-1003(4)(c). Moreover, 100 percent proficiency on the CSAP is a federal accountability requirement. (Tr. 4635:8–22; 4661:15–20; 4662:9–15; 4671:8–11; 6133:13–19.) The Court concludes the state’s current requirements on school districts regarding student performance are clearly spelled out in CDE’s accreditation framework reports. (*See* Tr. 4636:18–22; Ex. 1003.)

420. The evidence demonstrates some districts are meeting all state accreditation requirements, while others are not. (*Cf., e.g.,* Ex. 2605, *with* Ex. 10093.) Similarly, some districts are receiving additional funds from mill levy overrides, and many are not. (Tr. 3017:8–10; Ex. 30192.) The Court heard no evidence of any district having maxed out all the local funds available to it. (Tr. 5530:8–10.) Therefore, Plaintiffs and Plaintiff-Intervenors’ claim of insufficient funding is refuted by the untapped availability of substantial additional dollars, and it is refuted by the fact that districts are able to meet state requirements with current funding. Even if the Court gave absolute deference to the General Assembly’s pronouncements and concluded the student performance required for accreditation defined a thorough and uniform system of free public schools, then it necessarily would have to conclude the General Assembly is maintaining the system with funding sufficient to meet its requirements.

421. The Court further concludes Plaintiffs and Plaintiff-Intervenors have not proven it is irrational for the General Assembly to fund the public school finance system at a level that

sees many districts achieve state requirements. As the Court has already found, Plaintiffs and Plaintiff-Intervenors have not proven the differences in student performance across the state are due to funding disparities. The Court has found that district choices, some better than others, are a more plausible explanation. Consequently, it is not irrational to decline additional state funding when districts enjoy the constitutional guarantee to decide how to spend allocated dollars. (Tr. 623:3–8; *see* Tr. 1428:9–12.). Colo. Const. art IX, § 15. And, it is not irrational to decline additional funding in light of the debate in the education field about the relationship, if any, between funding and achievement, *see Clover Leaf*, 449 U.S. at 464, which Plaintiffs and Plaintiff-Intervenors have not negated, *see Lehnhausen*, 410 U.S. at 364. *Compare, e.g.*, (Tr. 3928:12–23), *with* (Tr. 4969:14–19; 4981:14–19; 5006:6–5011:13); *see Horne*, 129 S.Ct. at 2603; *see also HealthONE*, 50 P.3d at 893; *Beach Communications*, 508 U.S. at 315.

422. Upon the above conclusions of law and findings of fact, the Court ultimately concludes Plaintiffs and Plaintiff-Intervenors have not met the burden set forth by the Supreme Court of proving the General Assembly’s public school finance system is not rationally related to the constitutional mandate of a thorough and uniform system of free public schools and protection of local control over instruction. Consequently, the Court concludes the General Assembly’s public school finance scheme passes constitutional muster.

### C. Judgment

423. Accordingly, the Court enters judgment on all claims in favor of Defendants.

DATED: October 28, 2011

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **DEFENDANTS' PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW** upon all parties herein by electronically filing through LexisNexis courtlink or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 28th day of October, 2011 addressed as follows:

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