

## LEGAL PRECEDENT AND THE OPPORTUNITY FOR EDUCATIONAL EQUITY: WHERE TO NOW, COLORADO?

*Molly A. Hunter* \*  
*Kathleen J. Gebhardt* \*\*

### INTRODUCTION

Since the 1600s in New England and at least the late 1700s more broadly, colonies, states, and the U.S. Congress have recognized the importance of educational opportunity to prepare children for the responsibilities of citizenship and the challenges of changing times.<sup>1</sup> While a Massachusetts court decided the first litigation for fair school funding in 1819,<sup>2</sup> the modern era of these cases began with decisions in California, New Jersey, and the U.S. Supreme Court in the early 1970s.<sup>3</sup> An attempt to rely on federal equal protection for funding equity in *San Antonio Independent School District v. Rodriguez* led to the 1973 U.S. Supreme Court decision declaring that education is not a fundamental right under the federal Constitution.<sup>4</sup>

---

\* Director, Education Justice, The National Program at the Education Law Center.

\*\* Executive Director, Children's Voices in Colorado; Plaintiffs' Lead Counsel in *Lo-bato v. State of Colorado* and *Dwyer v. State of Colorado*.

The authors thank Courtney B. Warren, Associate at Bryan Cave LLP, for research essential to this article.

1. See generally INST. FOR EDUC. EQUITY & OPPORTUNITY, EDUCATION IN THE 50 STATES: A DESKBOOK OF THE HISTORY OF STATE CONSTITUTIONS AND LAWS ABOUT EDUCATION (2008).

2. *Commonwealth v. Dedham* was the first education finance case decided by the Supreme Judicial Court of Massachusetts. The court held that schools must "be maintained for the benefit of the whole town, as it is the wise policy of the law to give all the inhabitants equal privileges, for the education of their children in the public schools. Nor is it in the power of the majority to deprive the minority of this privilege." *Commonwealth v. Dedham*, 16 Mass. (16 Tyng) 141, 146 (1819).

3. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973); *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971); *Robinson v. Cahill*, 303 A.2d 273, 276 (N.J. 1973).

4. *Rodriguez*, 411 U.S. at 37.

Heeding the advice of Justice Thurgood Marshall in his dissent, the *Rodriguez* plaintiffs turned to the Texas Constitution and state courts, and won.<sup>5</sup> Since *Rodriguez*, plaintiffs in forty-five states have challenged school funding formulas primarily in state courts, usually suing the state under the state's constitutional education articles.<sup>6</sup>

Each of the fifty state constitutions requires the state to provide education.<sup>7</sup> To interpret these education articles, the courts rely on state constitutional history, which often declares education essential to protect democracy, a republican form of government, and individual rights.<sup>8</sup>

Since 1989, plaintiffs have won about two-thirds of these educational opportunity cases.<sup>9</sup> Though defendant states often prevailed in the 1970s and 1980s in cases based on equal protection clauses and seeking equal per-pupil funding,<sup>10</sup> plaintiffs' success rate improved as they focused more on ensuring that schools had sufficient resources to educate all students, relying on state constitutional education articles.<sup>11</sup> According to the Education Law

---

5. *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

6. Molly A. Hunter, *Requiring States to Offer a Quality Education to All Students*, A.B.A. HUM. RTS., Fall 2005, at 10, 10–12.

7. MOLLY A. HUNTER, EDUC. LAW CTR., STATE CONSTITUTION EDUCATION CLAUSE LANGUAGE (2011), <http://pabarcr.org/pdf/Molly%20Hunter%20Article.pdf> (noting that Washington D.C.'s charter does not include the right to education).

8. *See, e.g., Rose v. Council for Better Educ.*, 790 S.W.2d 186, 205–08 (Ky. 1989); *McDuffy v. Sec'y of Educ.*, 615 N.E.2d 516, 523–37 (Mass. 1993); *Robinson*, 303 A.2d at 291–95; *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 330–32 (N.Y. 2003); *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1257–58 (Wyo. 1995).

9. *Litigation in the States*, EDUC. L. CTR., <http://www.edlawcenter.org/cases/litigation-in-the-states.html> (last visited Feb. 19, 2016).

10. *See, e.g., McDaniel v. Thomas*, 285 S.E.2d 156, 164 (Ga. 1981) (emphasis added) (holding that the constitution requires the General Assembly “to provide funds for an adequate education,” but not “to equalize educational opportunities”); *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 776 (Md. 1983) (noting that the “thorough and efficient” clause commands only that the legislature provide the students of the state with a “basic public school education,” not uniformity in per-pupil funding); *Levittown Union Free Sch. Dist. v. Nyquist* 439 N.E.2d 359, 368–69 (N.Y. 1982) (noting constitutional provisions for “the maintenance and support of a system of free common schools” contemplates the opportunity to obtain a sound basic education, not equal per-pupil funding).

11. *See, e.g., Abbott v. Burke*, 575 A.2d 359, 368–69 (N.J. 1990) (quoting *Robinson*, 303 A.2d at 295) (holding that a constitutionally required “thorough and efficient” system will provide an “equal educational opportunity for children” enabling each to become “a citizen and . . . a competitor in the labor market”); *Campaign for Fiscal Equity*, 801 N.E.2d at 327–28 (distinguishing an earlier equal protection case); *Campbell*, 907 P.2d at 1259 (asserting that the education article was intended as a mandate to the Wyoming legislature to provide students a uniform opportunity to become equipped for their future as participants in the political system and competitors both economically and intellectually).

Center, “[i]n response to these court orders, states have adopted better school funding systems, instituted high quality pre-K programs, mounted major school facilities programs, and enacted other remedies.”<sup>12</sup>

In Colorado, however, recent opinions in school funding and educational opportunity cases raise the question of whether the Colorado Supreme Court has become an exception among state high courts that recognize students’ right to education enshrined in the state constitutions.<sup>13</sup> To address this question, this article examines the many Colorado cases involving education finance and analyzes the state supreme court’s interpretations of both the Education Clause and the Local Control Clause. It also appraises the court’s treatment of cases brought under related, more recent constitutional amendments. Certain opportunities and barriers that this precedent has created emerge in this article, which concludes by suggesting potential avenues future legal advocacy could take toward ensuring fairer educational funding and better opportunities for Colorado’s school children.

## I. THE COLORADO CONSTITUTION

During its formation as a state, Colorado placed a great deal of importance on education, and in 1876 voters overwhelmingly ratified Article IX, a section of the state constitution completely dedicated to education.<sup>14</sup> There are two main provisions within Article IX that have been the focus of education finance litigation in the state: the Education Clause and the Local Control Clause.

---

12. *Litigation in the States*, *supra* note 9; *see, e.g.*, *Abbott v. Burke*, 710 A.2d 450, 462–63 (N.J. 1998) (summarizing the successful high quality preschool program); *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 48 (Wyo. 2008) (examining the state’s movement to a constitutional funding system). *See generally* Molly A. Hunter, *Building on Judicial Intervention: The Redesign of School Facilities Funding in Arizona*, 34 J.L. & EDUC. 173 (2005) (reporting on major facilities funding for construction and renovations in response to the cases *Roosevelt Elementary School District v. Bishop*, 877 P.2d 806 (Ariz. 1994), and *Hull v. Albrecht*, 950 P.2d 1141 (Ariz. 1997)).

13. *See generally* *Dwyer v. State*, 357 P.3d 185 (Colo. 2015) (determining that a school funding plan that reduced total education funding did not violate a voter-adopted constitutional mandate to increase base state funding); *Lobato v. State*, 304 P.3d 1132 (Colo. 2013) (holding that the state school funding system did not violate the state constitution’s education article and yet ignoring, according to Justice Hobbs and Chief Justice Bender in dissent, the extensive trial record, which demonstrated that the finance scheme systematically maintains educational deficiencies and disparities).

14. *See* Tom I. Romero, II, “Of Greater Value Than the Gold of Our Mountains”: *The Right to Education in Colorado’s Nineteenth-Century Constitution*, 83 U. COLO. L. REV. 781, 831–36 (2012) [hereinafter Romero, *Greater Value Than the Gold*].

The Education Clause, section 2, states:

The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year.<sup>15</sup>

Delegates to the Constitutional Convention, drafting a constitution in order to be accepted as a new state in the United States, discussed and adopted this clause—the “thorough and uniform” language in particular—to establish “a qualitative element in the state’s education clause that continued a course of action that had animated the region from almost the inception of its territorial days.”<sup>16</sup>

The delegates to the Constitutional Convention also established the commitment to local control. After expressing concerns about the trustworthiness of state-level decision making, “the delegates chose to confer responsibility for instruction and curriculum (including textbooks) on the local school districts” and to delegate to the state board of education the “general supervision’ of the public schools.”<sup>17</sup> With its adoption of the local control provision, “Colorado became only the second state . . . with an express constitutional local control requirement,” and is one of only six today.<sup>18</sup>

The Local Control Clause, section 15, states:

The general assembly shall, by law, provide for organization of school districts of convenient size, in each of which shall be established a board of education, to consist of three or more directors to be elected by the qualified electors of the district. Said directors shall have control of instruction in the public schools of their respective districts.<sup>19</sup>

---

15. COLO. CONST. art. IX, § 2.

16. See Romero, *Greater Value Than the Gold*, *supra* note 14, at 833–34.

17. See *id.* at 835.

18. *Id.* at 834–36 (stating that Colorado followed Kansas in adopting a constitutional local control provision). The other four states with a constitutionally mandated local control provision include Florida, Georgia, Maine, and Montana. See FLA. CONST. art. IX, § 4 (a)–(b); GA. CONST. art. VIII, § V, ¶ 1; ME. CONST. art. 8, pt. 1, § 1; MONT. CONST. art. X, § 8.

19. COLO. CONST. art. IX, § 15.

In 1982, the voters in Colorado placed the first of several tax policies in their constitution.<sup>20</sup> Known as the “Gallagher Amendment” (named after its author), this amendment set a ratio of residential property taxes to nonresidential property at 45% residential to 55% nonresidential.<sup>21</sup> At the time, no one could foresee the rapid growth Colorado was to experience in residential property values. To maintain the Gallagher ratio after this boom, residential property assessment rates dropped from 21 mills in 1983 to 7.96 mills in 2003.<sup>22</sup> For several years, school districts were able to “float” their mill levies to maintain a relatively even source of revenue.<sup>23</sup> In 1992, all of that changed.

In 1992, Colorado voters added another tax policy to their constitution: Article X, section 20, known as the Taxpayer Bill of Rights (“TABOR”).<sup>24</sup> This provision is the most restrictive of its kind in the country and limits the amount of funding that a taxing authority may collect and retain or expend, including local governments, school districts, and the state itself.<sup>25</sup> In addition, TABOR requires a vote of the people to add a new tax or change an existing tax at all levels of government.<sup>26</sup> The TABOR amendment has spawned dozens of cases seeking to interpret its mechanics, intent, and impact.<sup>27</sup>

---

20. See *Constitutional Provisions*, COLO. DEPT’ T TREASURY, <https://www.colorado.gov/pacific/treasury/constitutional-provisions-0> (last visited Feb. 19, 2016). The process for amending the Colorado Constitution is one of the easiest across the country and has led to more amendments than in all but two other states. COLO. CONSTITUTIONAL PANEL, FOUNDATION OF A GREAT STATE: THE FUTURE OF COLORADO’S CONSTITUTION 9–12 (2007), [http://www.du.edu/issues/media/documents/Constitution\\_Report.pdf](http://www.du.edu/issues/media/documents/Constitution_Report.pdf); *Building a Better Colorado’s Process*, BUILDING A BETTER COLO., <https://betterco.org/process/index> (last visited Feb. 19, 2016).

21. Memorandum from Todd Herreid, Chief Fiscal Officer, Colo. Legis. Council Staff, to the Long-Term Fiscal Stability Comm’n, Colo. Legis. Council Staff 1 (July 7, 2009), <https://www.colorado.gov/pacific/sites/default/files/State%20Constitution%20and%20School%20Finance.pdf>.

22. *Id.* at 2.

23. *Shrinking Funding for Colorado’s Schools: A Timeline of School Finance Legislation and Consequences*, COLO. FISCAL INST., <http://www.coloradofiscal.org/wp-content/uploads/2015/05/school-finance-timeline-CFI.pdf> (last visited Feb. 19, 2016).

24. COLO. CONST. art. X, § 20; see *TABOR*, COLO. LEGIS. COUNCIL, <https://www.colorado.gov/pacific/cga-legislativecouncil/tabor> (last visited Feb. 19, 2016).

25. Cf. *Policy Basics: Taxpayer Bill of Rights (TABOR)*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 13, 2015), <http://www.cbpp.org/research/state-budget-and-tax/policy-basics-taxpayer-bill-of-rights-tabor>. No other state has adopted TABOR, presumably because “TABOR forces large, annual cuts to services that families and businesses rely on and that support state economic prosperity, as Colorado’s experience shows.” *Id.*

26. COLO. CONST. art. X, § 20(4)(a).

27. As of 2013, there had been more than forty appellate decisions addressing various

To meet the revenue limits of TABOR, the state started requiring school districts to lower their local mills.<sup>28</sup> School districts were faced with the dilemma that, under TABOR, they potentially could not keep any revenue above the limit, including revenue from concession contracts and non-federal grants.<sup>29</sup> In response to this requirement, many school districts held “waiver elections” that would allow them to keep the revenue they collected.<sup>30</sup> Between 1995 and 2006, 175 of the 178 districts voted to waive the revenue limits.<sup>31</sup> However, despite these local votes, the state continued to require local districts to lower their local mills.<sup>32</sup> That decision by the state was challenged, in *Mesa County Board of County Commissioners v. State of Colorado*.<sup>33</sup> The Colorado Supreme Court, in *Mesa*, after a detailed analysis of the state and local funding system for schools in Colorado, found that the state did not have the authority to lower the local mills and that the repeal of the part of the statute that lowered local mills after a vote did not violate TABOR.<sup>34</sup>

In November 2000, Colorado voters amended their constitution a third time to address the negative impacts that both Gallagher and TABOR had on school funding, and in doing so they clearly indicated their intent to prioritize K–12 education funding over competing budgetary demands.<sup>35</sup> This amendment (“Amendment 23”) became Article IX, section 17, of the Colorado Constitution and was intended to ensure that education funding first return to 1988 funding levels and then keep up with enrollment increases and inflation.<sup>36</sup>

---

aspects of TABOR. See Peter J. Whitmore, *The Taxpayers Bill of Rights—Twenty Years of Litigation*, COLO. L., Sept. 2013, at 35 (describing the leading Colorado appellate court cases interpreting TABOR since the amendment went into effect).

28. See *Mesa Cty. Bd. of Cty. Comm’rs v. State*, 203 P.3d 519, 524 (Colo. 2009).

29. *Id.*

30. *Id.*

31. *Id.*

32. See *id.* at 525.

33. See generally *id.* at 526 (“The plaintiff sought declaratory and injunctive relief and a refund of the \$117.8 million allegedly collected in violation of Article X, section 20.”).

34. *Id.* at 536.

35. See LEGISLATIVE COUNCIL TO THE COLO. GEN. ASSEMBLY, AN ANALYSIS OF THE 2000 STATEWIDE BALLOT PROPOSALS 9, 46–47 (2000); *Shrinking Funding for Colorado’s Schools*, *supra* note 23.

36. *Colorado Supreme Court Rejects Funding Increase Claim*, NAT’L EDUC. ACCESS NETWORK, <http://schoolfunding.info/2015/09/colorado-supreme-court-rejects-funding-increase-claim/> (last visited Feb. 19, 2016); see also Complaint, *Dwyer v. State*, No. 14 Civ. 32543 at 2 (Denv. Dist. Ct. 2014), <http://co.chalkbeat.org/sites/default/files/sites/2/2014/06/Dwyer>

## II. HISTORICAL DEVELOPMENT OF SCHOOL FUNDING LITIGATION

### A. *Early Education Clause Cases*

The Colorado Supreme Court first addressed the Education Clause in 1893, in *In re Kindergarten Schools*, and affirmatively answered the question of whether the General Assembly could establish and maintain kindergarten for children under six years of age.<sup>37</sup> The court also identified the rule of construction to be applied to the Colorado Constitution, a rule which remains good law today.<sup>38</sup>

The court stated that “[u]nless . . . the constitution, in express terms or by necessary implication, limits it, the legislature may exercise its sovereign power in any way that, in its judgment, will best subserve the general welfare.”<sup>39</sup> The court applied the following construction to Article IX, section 2, stating that

the section is clearly mandatory, and requires affirmative action on the part of the legislature to the extent and in the manner specified, and is in no measure prohibitory or a limitation of its power to provide free schools for children under six years of age, whenever it deems it wise and beneficial to do so.<sup>40</sup>

Holding this section mandatory was a key first step in creating a right to education in Colorado. However, the court did not address the minimum standards actually required by the clause until almost a century later.

The court next considered the Education Clause in *Chicago, B. & Q.R. Co. v. School District No. 1 in Yuma County*, interpreting an Act, the stated purpose of which was “the establishment and maintenance of a thorough and uniform system of free public schools throughout the state,” as required by the Education Clause.<sup>41</sup> The plaintiff railroad company sued for the return of a “special school tax” paid by the company pursuant to this Act.<sup>42</sup> The company alleged that the Act was one for “raising revenue” within the meaning of Article V, section 31, and that, because the

---

er-FINAL-Complaint-6.26.pdf.

37. 32 P. 422, 422–23 (Colo. 1893).

38. *Id.* at 422.

39. *Id.*

40. *Id.* at 423.

41. 165 P. 260, 261 (Colo. 1917).

42. *Id.* at 261.

Act originated in the Senate and not the House as required by that provision, the tax was unconstitutional.<sup>43</sup> The Colorado Supreme Court disagreed that the tax pursuant to this act was for “raising revenue,” and instead held that it was a general Act; taxes were incidental to the main purpose, which was the support and benefit of a school system, and, therefore, the Act was constitutional.<sup>44</sup>

### B. *Early Local Control Precedent—Belier Line of Cases*

Starting in 1915 and continuing to this day, the Colorado Supreme Court has held that “local control of instruction” is inextricably tied to control over locally raised funds. In *Belier v. Wilson*, the court addressed a statute that authorized the county commissioner to levy a tax on property in one district for the support of a school in another district.<sup>45</sup> The court held that this taxation, “without giving the electors of the former district any voice in the selection of those who manage and control the school . . . violates, both in letter and in spirit, article 9, § 15.”<sup>46</sup>

The Colorado Supreme Court considered local control and funding again in *School District No. 16 in Adams County v. Union High School*, in which the challenged statute provided that a student could attend a high school in a neighboring district if the sending district had no high school.<sup>47</sup> The court held that this legislation violated the Local Control Clause because “[t]he Legislature [had] . . . clearly interfered with the control of instruction in such district.”<sup>48</sup> The court’s decision emphasized that “[n]o discretion is left in the board of directors of the district wherein there is no high school as to the character of high school instruction the pupils thereof shall receive at the cost of the district.”<sup>49</sup> The rationale behind this rule is that in order for local control to be fully realized, a district must have some discretion over (1) the education of students residing in their district and (2) the education provided by the funding supplied from within the district.

---

43. *Id.*

44. *Id.* at 262–63.

45. 147 P. 355, 355 (Colo. 1915).

46. *Id.* at 356.

47. 152 P. 1149, 1149 (Colo. 1915).

48. *Id.*

49. *Id.*



The Colorado Supreme Court continued this principle of local control in *Hotchkiss v. Montrose County High School District*, a case it held to be indistinguishable from *Union High School*.<sup>50</sup> The court held that “the construction therein given to statutes which purport to confer upon one school district the power to control or utilize the funds of the other” is unconstitutional under the Local Control Clause, especially where the school providing the funding has no discretion over the pupils’ education.<sup>51</sup> In *Hotchkiss* the court stated that it was not concerned with the wisdom of the statute, only its constitutionality.<sup>52</sup>

The court first limited the *Belier* line of cases in *Craig v. People*, in which it held that the General Assembly may accomplish inter-district funding by appropriating state funds from the public school fund.<sup>53</sup> The court held that the state apportionment of the public school fund, a constitutionally established special fund based on school population, was constitutional “to supplement local taxation for school purposes, thereby decreasing the school tax burden of the residents thereof.”<sup>54</sup> The court went on to say that, so long as the manner of distribution for the public fund is “not unreasonable, not discriminatory, and not in contravention of constitutional mandates, it cannot be assailed.”<sup>55</sup> Thus began the current system of mixed state and local funding for education in Colorado, the same system that now exists in forty-nine states.<sup>56</sup>

### C. *The Next Phase*

In the 1931 case of *Duncan v. People*, the Colorado Supreme Court again addressed the mandates of the state’s Education Clause.<sup>57</sup> The court held that a local school board’s arrangement for school accommodations in another district, including transportation as well as the curriculum required, did not satisfy Article IX, section 2, of the constitution, which states that “one or more

---

50. 273 P. 652, 652–53 (Colo. 1928).

51. *Id.*

52. *Id.*

53. 299 P. 1064, 1066–68 (Colo. 1931).

54. *Id.* at 1067.

55. *Id.*

56. U.S. DEP’T OF EDUC., 10 FACTS ABOUT K-12 FUNDING 2 (2005); see Educ. Fin. Statistics Ctr., *State Finance Programs*, NAT’L CTR. FOR EDUC. STATS. [http://nces.ed.gov/edfin/state\\_financing.asp](http://nces.ed.gov/edfin/state_financing.asp) (last visited Feb. 19, 2016).

57. See *Duncan v. People*, 299 P. 1060, 1060 (Colo. 1931).

public schools shall be maintained in each school district within the state.”<sup>58</sup> The court interpreted this Clause literally and did not accept the board’s argument that its substantial compliance with the provision by providing alternative accommodations was sufficient.<sup>59</sup>

In *Wilmore v. Annear*, the Colorado Supreme Court dealt with a challenge to the first direct state support of local schools.<sup>60</sup> The court held that “the establishment and financial maintenance of the public schools of the state is the carrying out of a state and not a local or municipal purpose.”<sup>61</sup> The court further stated that “there are certain restrictions . . . that the general assembly may not impose on districts or their boards,” but that this Act, which in relevant part apportioned \$500 from the general funds of the state to school districts in proportion to their pupils in average daily attendance, did not violate any of these restrictions.<sup>62</sup>

Decades later, in *Marshall v. School District Re #3 Morgan County*, a school district brought an action against parents to recover rental fees for books used by their children in their public school studies.<sup>63</sup> The court determined that “it was not the intent of the framers of our constitution that school districts furnish books free to all students.”<sup>64</sup> In holding this, the court cited three statutes: one passed in 1883 requiring school boards to provide books to indigent children, one passed in 1887 granting boards of education the power to provide free textbooks, and one passed in 1964 providing that the boards could charge “reasonable” fees for textbooks, if necessary.<sup>65</sup> In an unusual turn of reasoning, the *Marshall* court held that these statutes showed that the constitutional requirement to maintain and establish free schools did not require schools to provide books for all children.<sup>66</sup> Despite the state constitution’s promise of “free public schools,” in which all children are to be “educated gratuitously,” here the court held

---

58. COLO. CONST. art. IX, § 2; *Duncan*, 299 P. at 1060–61.

59. *Duncan*, 299 P. at 1061.

60. See *Wilmore v. Annear*, 65 P.2d 1433, 1434–35 (Colo. 1937).

61. *Id.* at 1437.

62. *Id.* at 1433–34, 1437.

63. 553 P.2d 784, 784 (Colo. 1976).

64. *Id.* at 785.

65. *Id.* at 785–86 (referring to COLO. REV. STAT. § 3046(9) (1883); Act of Apr. 4, 1887, Colo. Sess. Laws 391–93; Act of Mar. 26, 1964, ch. 73, Colo. Sess. Laws 587).

66. *Id.* at 784, 786.

that students could be charged for an essential part of an education: textbooks.<sup>67</sup>

#### D. *Lujan Challenge to Colorado School Finance*

In the 1977 case *Lujan v. Colorado State Board of Education*, school children from sixteen districts across the state challenged the Public School Finance Act of 1973 (“PSFA 1973”)<sup>68</sup> on the grounds that it violated the equal protection provisions of the U.S. and Colorado Constitutions, as well as the Colorado Education Clause.<sup>69</sup> Although the *Lujan* trial court ruled in favor of the plaintiffs,<sup>70</sup> the Colorado Supreme Court reversed, citing the U.S. Supreme Court’s *Rodriguez* decision to hold that PSFA 1973 did not violate the federal Equal Protection Clause.<sup>71</sup> Also, as did most state courts ruling in these types of cases, the Colorado Supreme Court concluded that the state’s equal protection and education clauses did not require “absolute equality in educational services or expenditures.”<sup>72</sup>

The court recognized *Lujan* as the first time it had “been called upon to interpret Article IX, section 2 in any context which would prove helpful to this case”—namely, whether it requires equal educational funding.<sup>73</sup> Interpreting section 2, the court found that the requirements are satisfied if “thorough and uniform educational opportunities are available through state action in each school district,” and that the section “does not require that educational expenditures per pupil in every school district be identical.”<sup>74</sup>

### III. MORE CHALLENGES BASED ON LOCAL CONTROL

#### A. Booth—*Lessening Local Control?*

In the 1999 case, *Board of Education of School District No. 1 v. Booth*, the Colorado Supreme Court ruled on a challenge under

---

67. *Id.* at 784–85.

68. Public School Finance Act of 1973, ch. 252, 2006 Colo. Sess. Laws 1075.

69. 649 P.2d 1005 (Colo. 1982).

70. *See id.* at 1010.

71. *Id.* at 1016 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–35 (1973)).

72. *Id.* at 1018–19.

73. *Id.* at 1024.

74. *Id.* at 1025.

the Colorado Constitution's Local Control provision when it determined the constitutionality of the Charter Schools Act ("CSA").<sup>75</sup> The CSA "establishes a process by which individuals or groups may apply to a local school board for a charter and a process for any interested party to appeal . . . an adverse decision."<sup>76</sup> The issue in *Booth* was "whether the General Assembly constitutionally may authorize the State Board of Education to order a local school board to approve a charter school application that the local board has rejected when the State Board finds approval to be in the best interests of the pupils, school district, or community."<sup>77</sup>

The court began its analysis by noting that "[t]he framers' inclusion of article IX, section 15 makes Colorado one of only six states with an express constitutional provision for local governance, underscoring the importance of the concept to our state."<sup>78</sup> The court then stated that although the local board of a school district has "undeniable constitutional authority," that authority is subject to limits, which in this case "require[s] balancing the local board's interest in exercising control over instruction with the State Board's interest in asserting its general supervisory authority," something guaranteed in Article IX, section 1(1).<sup>79</sup>

The *Booth* court defined the contours of both "general supervision" and "control of instruction," using plain language definitions from Webster's Dictionary as a guide.<sup>80</sup> In balancing the authority of the General Assembly, the State Board, and local school boards, the court held that it "will presume the allocation of authority is valid unless it clearly impedes the capacity of either the State Board or a local board to exercise its independent constitutional authority."<sup>81</sup>

The court concluded that the provision allowing the State Board to order a local board to approve an application for a charter school does not impede the locality's capacity for local control because the order will just serve as the basis for the contract for

---

75. Bd. of Educ. v. Booth, 984 P.2d 639, 642 (Colo. 1999); see COLO. REV. STAT. § 22-30.5-101 (2013).

76. *Booth*, 984 P.2d at 642 (citation omitted).

77. *Id.*

78. *Id.* at 646.

79. *Id.*; see COLO. CONST. art. IX, § 1(1).

80. *Booth*, 984 P.2d at 646-48.

81. *Id.* at 650.

the charter school, and the local board still has the authority to negotiate and resolve issues with charter applicants on its own.<sup>82</sup> Therefore, the *Booth* court held that the CSA provision allowing appeals to the State Board is constitutional.<sup>83</sup>

B. Owens, *Local Control Violated by a Voucher Statute*

Five years later, in *Owens v. Colorado Congress of Parents, Teachers, and Students*, the court considered whether a voucher statute violated the constitution's local control provision.<sup>84</sup> Known as the Colorado Opportunity Contract Pilot Program, the statute was "designed to meet the 'educational needs of high-poverty, low-achieving children in [Colorado's] highest-poverty public schools.'"<sup>85</sup> The parents of a child who qualified would receive four "assistance payments" each year from the school district where the child was enrolled for a private school education.<sup>86</sup> Opponents of the statute challenged it by saying that it violated the Colorado constitution's local control provision.<sup>87</sup>

The court found that "article IX, section 15 creates and requires a structure of school governance that has remained unchanged since statehood despite . . . changes in school funding, and the Pilot Program does not comport with this constitutional structure."<sup>88</sup> The court stressed the importance of this section to the framers of the constitution, arising from their distrust of the political character of the State Board, and indicated that the purpose of local control is to place control as near to the people as possible.<sup>89</sup>

The court then analyzed the case law regarding local control, particularly the *Belier* line of cases, *Lujan* and *Booth*, and concluded that the *Belier* line consistently held that "control over locally raised funds is essential to effectuating the constitutional requirement of local control over instruction."<sup>90</sup> Further, the court

---

82. *Id.* at 654.

83. *Id.* at 654–55.

84. 92 P.3d 933, 934 (Colo. 2004).

85. *Id.* at 936 (alteration in original) (quoting COLO. REV. STAT § 22-56-102(1)(a) (2003)).

86. *Id.*

87. *Id.* at 934.

88. *Id.* at 935.

89. *Id.* at 935–36.

90. *See id.* at 939–42.

recognized that “[in] the *Belier* era, [it] scrupulously honored the framers’ preference, as expressed in article IX, section 15, for local over state control of instruction, even in the face of legislative efforts to address serious shortcomings on the part of local school districts.”<sup>91</sup>

The court rejected voucher proponents’ arguments that this line of cases no longer applied because state involvement in management and funding of public schools had become much greater and school finance and choice had evolved so much.<sup>92</sup> “Implicit in this argument,” the court wrote, “is that with greater state funding comes greater state control over educational policy. This court has long recognized, however, that the constitutional division of power between state and local boards is not measured by [state] funding.”<sup>93</sup> Over the years, the court adhered to the principle that “[c]ontrol over instruction is inextricably linked to control over locally-raised funds.”<sup>94</sup>

The court distinguished the case at bar from *Booth* because it was not trying to balance state and local constitutional authority in this case.<sup>95</sup> Here, unlike in *Booth*, the local boards did not retain any authority to determine which students were eligible to participate, the amount of funds to be devoted, or the character of instruction paid for by those funds.<sup>96</sup> Because of this, the court found that “[t]he Pilot Program deprives the school districts of all local control of instruction” and accordingly declared it unconstitutional under the local control provision.<sup>97</sup>

#### IV. RECENT CASES BASED ON THE EDUCATION AND LOCAL CONTROL CLAUSES AND ON AMENDMENT 23

##### A. *Giardino v. State of Colorado State Board of Education*

In 1998, a class action case was filed against the State of Colorado over its method of funding capital construction for K–12

---

91. *Id.* at 940.

92. *Id.* at 940, 943.

93. *Id.* at 943.

94. *Id.* at 941.

95. *Id.* at 942.

96. *Id.*

97. *Id.*

schools.<sup>98</sup> At that time (and still today), the ability of a local school district to maintain, renovate, or build a new school was almost completely dependent on local property wealth.<sup>99</sup> Colorado simply has never believed that ensuring safe and secure buildings for its students was a state responsibility. Thus, until 2008, Colorado had no idea of the number of school buildings in the state or, more importantly, the conditions of any of the buildings.<sup>100</sup> Plaintiffs in *Giardino* alleged that the state's finance system for facilities violated the thorough and uniform clause and denied the equal protection and due process protections contained in the Colorado Constitution.<sup>101</sup> *Giardino* proceeded to trial in May 2000.<sup>102</sup> After several days of trial, the parties settled for \$190 million, which was to be distributed via state financial assistance programs established as part of the settlement.<sup>103</sup> In 2008, to replace the financing programs created after *Giardino*, for the first time the state passed a bill that provided some state support through a matching grant program.<sup>104</sup> Known as the BEST (Building Excellent Schools Today) program, it has been successful in helping to build new schools in some of the poorest regions of the state; however, it has not come close to meeting the over \$13 billion in need that was identified as part of the BEST program.<sup>105</sup>

---

98. *Giardino v. Colorado State Bd. of Educ.*, No. 98-CV-0246 (Denv. Dist. Ct. 1998); see generally Kathleen J. Gebhardt, *Challenges to Funding School Facilities in Colorado*, 83 NEB. L. REV. 856 (2004–05) (providing “an account of the *Giardino* litigation . . . and the aftermath of the settlement reached”).

99. Gebhardt, *supra* note 98, at 861.

100. See KORI DONALDSON, COLO. LEGISLATIVE COUNCIL, BUILDING EXCELLENT SCHOOLS TODAY (BEST) ACT (Sept. 2011), <https://www.colorado.gov/pacific/sites/default/files/11-11Update%20to%202010%20BEST%20Issue%20Brief.pdf>. The BEST program was the first time the state had a real obligation to interest itself in school capital construction and maintenance. *Id.*; see also *infra* notes 104–05.

101. See Gebhardt, *supra* note 98, at 862.

102. See *id.* at 865–66.

103. DONALDSON, *supra* note 100; Gebhardt, *supra* note 98, at 865–66.

104. COLO. DEP'T OF EDUC., DIV. OF CAPITAL CONSTR., BUILDING EXCELLENT SCHOOLS TODAY (BEST) 6, 11, <http://www.cde.state.co.us/cdefinance/bestgrantprogramoverview>; DONALDSON, *supra* note 100.

105. See Editorial, *Audit Shows Colorado Falling Short on School Repairs*, DENV. POST (Oct. 9, 2013), [http://www.denverpost.com/editorials/ci\\_24276151/audit-shows-colorado-falling-short-school-repairs](http://www.denverpost.com/editorials/ci_24276151/audit-shows-colorado-falling-short-school-repairs); Matt Samelson, *Voices: Uncertain Future for Building Funds*, CHALKBEAT COLO. (July 26, 2012, 7:05 AM), <http://co.chalkbeat.org/2012/07/26/commentary-saving-283-million-for-schools-capital-needs/#.Vqq7gMclfwc>.

## B. Lobato v. State of Colorado (“Lobato I”)

In 2005, plaintiffs challenged the overall adequacy of funding under the Public School Finance Act of 1994 (“PSFA”) in *Lobato v. State of Colorado* and alleged that the overall funding system violated both the education clause and the local control of instruction clause.<sup>106</sup> The trial court initially dismissed the case, finding it non-justiciable.<sup>107</sup> The Colorado Court of Appeals affirmed, but in 2009, the Colorado Supreme Court reversed both lower courts’ decisions and remanded the case for trial.<sup>108</sup> Significantly, the Supreme Court found:

[T]he plaintiffs must be provided the opportunity to prove their allegations. To be successful, they must prove that the state’s current public school financing system is not rationally related to the . . . constitutional mandate to provide a “thorough and uniform” system of public education. . . . [The trial court] may appropriately rely on the legislature’s own pronouncements [to develop] the meaning of a “thorough and uniform” system of education.<sup>109</sup>

In August and September 2011, a five-week trial was conducted pursuant to the remand.<sup>110</sup> The trial court heard testimony from plaintiff and defendant witnesses from the Colorado Department of Education (“CDE”), superintendents of Colorado school districts, nationally respected researchers, and others, who all presented numerous relevant exhibits.<sup>111</sup> The trial covered, *inter alia*, testimony on “special student populations,” including gifted and talented students, Colorado’s early childhood population, students with disabilities, and English language learner (“ELL”) students.<sup>112</sup> In examining the school funding system and further developing the meaning of the Education Clause, the court relied on the legislature’s own statements and laws setting

---

106. *Lobato v. State*, 216 P.3d 29, 32–33 (Colo. App. 2008); *see* Public School Finance Act of 1994 (PSFA), COLO. REV. STAT. § 22-54-101 (1994).

107. *Lobato*, 216 P.3d at 33.

108. *Id.* at 42, *rev’d and remanded by Lobato v. State (Lobato I)*, 218 P.3d 358, 363–64, 376 (Colo. 2009) (*en banc*).

109. *Lobato I*, 218 P.3d at 363.

110. *See* Todd Engdahl, *High Court Reverses Lobato Ruling*, CHALKBEAT COLO. (May 28, 2013, 12:22 PM), <http://co.chalkbeat.org/2013/05/28/high-court-reverses-lobato-ruling/#.Vqq5bsclfwc> (discussing the 2011 trial that followed the 2009 remand).

111. *Lobato v. State*, No. 2005CV4794, 2011 WL 10960207, at \*39–54 (Denv. Dist. Ct. Dec. 9, 2011) (Trial Order).

112. *Id.* at \*26, 57, 72, 79.



out the state's standards-based education requirements and accountability measures.<sup>113</sup> One brief summary is illustrative.

### 1. Court Findings: ELL Students

The data available at the 2011 trial, usually from the 2008–09 school year, showed that Colorado had over 100,000 ELL students in grades K–12, representing 12% of the student population, who were being served in most school districts.<sup>114</sup> Colorado law requires districts to identify, track, and annually assess ELL students and to implement a research-based program to serve them.<sup>115</sup> Bringing all ELL students in Colorado up to legislatively mandated proficiency levels “requires comprehensive programs across many grade levels; in-school and out-of-school experiences, trained teachers, a good curriculum, instructional materials, and good parent involvement,” in the words of the court.<sup>116</sup>

Achievement test scores of Colorado Limited English Proficient students in reading, writing, and mathematics are significantly lower than average scores statewide.<sup>117</sup> The graduation rate of ELL students in Colorado for the year 2009 was 53%, as compared to the state average graduation rate of 75%.<sup>118</sup> The court found that the Colorado English Language Proficiency Act provides

insufficient funding in Colorado to provide the types of effective instructional and support programs for ELLs mandated by [federal law], supported by research, and recommended by [the Colorado Department of Education] in its own guidebook . . . . State funds barely cover the costs of administering the [annual] Colorado English Language Assessment (CELA) test.<sup>119</sup>

According to the court, the evidence showed that the funding level provided for ELLs bears “no relationship” to the cost of meeting the state's own standards and requirements, as delineated in the legislature's own pronouncements.<sup>120</sup>

---

113. *Id.* at \*9–11.

114. *Id.* at \*79.

115. *Id.*

116. *Id.* at \*83.

117. *Id.* at \*82–83.

118. *Id.* at \*83.

119. *Id.* at \*81.

120. *Id.*

## 2. Undisputed: No Rational Relationship

After hearing all the evidence on these and many other educational matters, the trial court issued a hefty 156-page opinion, stating its findings and conclusions. The court summarized the standards-based education system and the funding system that the legislature put in place in 1994, and from that starting point made clear that these two systems—education and education finance—“which were not aligned to begin with, have radically diverged.”<sup>121</sup>

The court also described the “deplorable conditions of numerous rural schools” and weak funding of categorical programs, and it concluded that “the entire system of public school finance . . . is not rationally related to the mandate of the Education Clause” of the Colorado Constitution.<sup>122</sup> The court further explained that the state had identified the “standard and measure of the education to be provided,” but its funding system nevertheless failed to “determine the resources needed to accomplish that [level of education],” and subsequently did not “fund . . . the necessary resources.”<sup>123</sup>

In ruling that the Colorado school finance system violated both the rights of the individual plaintiffs and the Colorado Constitution, the court wrote: “The Plaintiffs have proved, indeed, it is essentially undisputed, that the PSFA bears no rational relationship to providing funding sufficient to successfully implement the standards-based education system developed by the General Assembly.”<sup>124</sup> The court concluded that, “[i]n short, the PSFA has never been adjusted to address the costs associated with the progressive implementation of the standards-based education and education accountability systems,” and further that “Colorado public school children are not receiving the thorough and uniform educational opportunities mandate[d] by the Education Clause.”<sup>125</sup>

As a remedy, the court called for a rational and sufficient funding system, ordering the state defendants “to design, enact, fund,

---

121. *Id.* at \*149.

122. *Id.* at \*150.

123. *Id.* at \*149.

124. *Id.* at \*150.

125. *Id.* at \*149, 153.

and implement a system of public school finance that provides and assures that adequate, necessary, and sufficient funds are available in a manner rationally related to accomplish the purposes of the Education Clause and the Local Control Clause.”<sup>126</sup> Nonetheless, the court stayed this order while the case was on appeal.<sup>127</sup>

C. *Return to the Supreme Court: Lobato v. State of Colorado*  
 (“Lobato II”)

After the *Lobato I* ruling, it is important to note that the composition of the Colorado Supreme Court changed.<sup>128</sup> Two of the justices in the majority left the court.<sup>129</sup> One of the new appointees to the court recused herself from the *Lobato II* decision because she had previously worked on the case.<sup>130</sup>

On appeal from the trial court’s ruling, the supreme court reversed without citing to a single finding in the extensive trial court record.<sup>131</sup> Ignoring the *Lobato I* court’s guidance that the legislature’s own pronouncements on public education could be relied upon at trial,<sup>132</sup> the supreme court instead turned to Webster’s Dictionary to define the Education Clause.<sup>133</sup> The court defined “thorough and uniform” as complete, comprehensive, and consistent across the state.<sup>134</sup> The court, dismissing the entire trial record and trial court opinion in one short paragraph, held that the state school financing system was “rationally related to the ‘thorough and uniform’ mandate,” claiming that the system of

---

126. *Id.* at \*156.

127. *Id.*

128. See Felisa Cardona, *Ritter Picks Monica Marquez for Colorado Supreme Court*, DENV. POST (Sept. 9, 2010, 11:34 AM), [http://www.denverpost.com/ci\\_16027263](http://www.denverpost.com/ci_16027263); Zachary Willis, *District Court Judge Brian Boatright Appointed to the Colorado Supreme Court*, CBA CLE LEGAL CONNECTION (Oct. 27, 2011), <http://cbaclelegalconnection.com/2011/10/rado-district-court-judge-brian-boatright-appointed-to-the-colosupreme-court/>.

129. See Cardona, *supra* note 128; Willis, *supra* note 128.

130. Tim Hoover & Kevin Simpson, *Colorado Supreme Court Justices Offer Strong Reactions in Lobato Case*, DENV. POST (Mar. 7, 2013, 10:45 AM), [http://www.denverpost.com/ci\\_22738785/colorados-high-court-hears-school-funding-lawsuit-arguments](http://www.denverpost.com/ci_22738785/colorados-high-court-hears-school-funding-lawsuit-arguments).

131. *Lobato v. State (Lobato I)*, 304 P.3d 1132, 1136–37 (Colo. 2013).

132. *Lobato v. State (Lobato I)*, 218 P.3d 358, 375 (Colo. 2009) (en banc); see also *infra* note 144 (discussing the Washington Supreme Court defining education in the context of legislation).

133. *Lobato II*, 304 P.3d at 1139.

134. *Id.*

public schools was complete, comprehensive, and consistent across the state.<sup>135</sup>

Then, setting the bar at the lowest constitutional standard in the country, the court cited the 19th century relic in the Education Clause that requires “[o]ne or more public schools’ be open ‘at least three months in each year’ in each school district . . . .”<sup>136</sup> This anachronistic requirement, the court wrote, “also supports our interpretation of the phrase ‘thorough and uniform.’”<sup>137</sup> Shockingly, the court stated that this outmoded phrase, “together with the ‘thorough and uniform’ mandate, simply establishes the constitutional floor upon which the General Assembly must build its education policy.”<sup>138</sup>

In a strongly worded dissent, the Chief Justice wrote, “today, the majority abdicates this court’s responsibility to give meaningful effect to the Education Clause’s guarantee that all Colorado students receive a thorough and uniform education.”<sup>139</sup> His dissent reviewed the evidence presented at trial, the trial court’s findings of fact, and its conclusions of law to support his opinion.<sup>140</sup>

In an additional dissenting opinion, Justice Hobbs wrote that

based on the extensive trial record in this case, the current finance scheme for public school education through the twelfth grade does not promote a “thorough and uniform” system, contrary to the Education Clause. Instead, the currently unbalanced system of school finance systematically maintains and exacerbates educational deficiencies—leaving our public school system “so crippled by underfunding and so marked by gross disparities among districts that access to educational opportunities is determined not by a student’s interests or abilities but by where he or she happens to live.”<sup>141</sup>

The court majority also held that the finance system did not violate the Local Control Clause of the Colorado Constitution based on the requirement that the local board retain discretion, commenting that “local ‘control over instruction is inextricably linked

---

135. *Id.* at 1140.

136. *Id.* at 1139.

137. *Id.*

138. *Id.*

139. *Id.* at 1144 (Bender, C.J., dissenting).

140. *Id.* at 1144–48.

141. *Id.* at 1152 (Hobbs, J., dissenting).

to control over locally-raised funds.”<sup>142</sup> The court held that the finance system complies with the Local Control Clause because local districts retain “responsibility for imposing, collecting, and expending local property taxes collected for education purposes.”<sup>143</sup> Overall, the Supreme Court failed to uphold the educational rights of Colorado’s children and left them without the power of the constitution to guide the state in providing what other state courts have found to be substantive rights to an adequate education.<sup>144</sup>

#### D. Dwyer v. State of Colorado

In 2015, the Colorado Supreme Court addressed a narrower challenge to school finance in *Dwyer v. State of Colorado*.<sup>145</sup> This challenge arose out of Amendment 23.<sup>146</sup> During the Great Recession, Colorado cut close to \$1 billion from education funding per year.<sup>147</sup> To keep track of the cuts, the legislature implemented the so-called “negative factor.”<sup>148</sup> The *Dwyer* plaintiffs challenged the constitutionality of the “negative factor,” particularly whether it violated Amendment 23.<sup>149</sup>

---

142. *Id.* at 1143 (majority opinion).

143. *Id.*

144. Particularly striking in the same time frame as the *Lobato* cases are decisions from the Washington Supreme Court and the Kansas Supreme Court. The Washington Supreme Court defined education in the context of legislative enactments, and after reviewing the extensive trial court record, held that “the ‘education’ required under [the constitution] consists of the *opportunity* to obtain the knowledge and skills described” in prior case law and legislative statutes. *McCleary v. State*, 269 P.3d 227, 251 (Wash. 2012). The court then analyzed whether the legislature was providing the necessary funding and held that the “basic education funding formulas . . . did not correlate to the level of resources needed to provide all students with an opportunity to meet the State’s education standards.” *Id.* at 253. Similarly, in Kansas, after an extensive trial with similar findings to *Lobato*, the Kansas Supreme Court found the state finance system unconstitutional. *Gannon v. State*, 319 P.3d 1196, 1203–04 (Kan. 2014) (per curiam). The facts of these three cases (*McCleary*, *Gannon*, and *Lobato*) were remarkably similar. It is a challenge to understand the disparate Colorado court decision.

145. 357 P.3d 185, 187 (Colo. 2015).

146. See COLO. CONST. art. IX, §17; see also *supra* notes 35–36 and associated discussion of Amendment 23.

147. Yesenia Robles & John Frank, *Colorado’s Education Formula That Cuts Funding Ruled Constitutional*, DENV. POST (Sept. 21, 2015, 9:48 AM), [http://www.denverpost.com/news/ci\\_28851256/colorados-education-formula-that-cuts-funding-ruled-constitutional](http://www.denverpost.com/news/ci_28851256/colorados-education-formula-that-cuts-funding-ruled-constitutional).

148. Nicholas Garcia, *Denver Court Rejects State’s Request to Toss Negative Factor Lawsuit*, CHALKBEAT COLO. (Nov. 12, 2014, 5:18 PM), <http://co.chalkbeat.org/2014/11/12/denver-court-rejects-states-request-to-toss-negative-factor-lawsuit/#.VqfvKcrNQqd>.

149. *Dwyer*, 357 P.3d at 188.

The trial court denied the state's Motion to Dismiss, ruling that Amendment 23 required increases in education funding.<sup>150</sup> However, the Colorado Supreme Court, in an unusual procedural approach, heard the case and without any factual record, dismissed the case in its entirety.<sup>151</sup> It should be noted that the *Lobato I* court, when writing about Amendment 23, found that "[w]hen construing a constitutional amendment, the duty of the court is to 'give effect to the electorate's intent in enacting the amendment.'"<sup>152</sup> The *Lobato I* court went on to hold that "Amendment 23 prescribes minimum increases for state funding of education."<sup>153</sup>

The *Dwyer* court, however, held that the negative factor does not violate Amendment 23, which "only requires increases to statewide *base* per pupil funding, not *total* per pupil funding."<sup>154</sup> By contrast, the negative factor affects total per-pupil funding by operating as a factor in the formula for the total.<sup>155</sup> The court rejected the argument that because the negative factor reduces every district's funding by the same percentage and is not based on individual district characteristics, it cuts the base funding.<sup>156</sup> The court wrote that this contention is incompatible with the plain language of Amendment 23 and the statute.<sup>157</sup>

Since the *Lobato* and *Dwyer* rulings, Colorado's school funding has continued to fall with no end in sight.<sup>158</sup> The negative factor has continued to increase.<sup>159</sup> All of the facts identified as educational inadequacies in the *Lobato* trial court opinion have worsened, and many students are denied their right to a constitutionally adequate education.<sup>160</sup> *Dwyer* is an example of the court backing away from a constitutional provision intended to require

---

150. *Id.* at 187.

151. *Id.* at 193.

152. *Lobato v. State (Lobato I)*, 218 P.3d 358, 375 (Colo. 2009).

153. *Id.* at 376.

154. *Dwyer*, 357 P.3d at 191, 193.

155. *Id.* at 190.

156. *Id.* at 192.

157. *Id.* at 192–93.

158. John Frank, *Colorado Budget 2017: \$373 Million in Reduced Spending, Refunds*, DENV. POST (Nov. 2, 2015, 5:13 PM), [http://www.denverpost.com/news/ci\\_29061187/hicken-looper-outlines-proposed-state-budget-cuts-27-billion](http://www.denverpost.com/news/ci_29061187/hicken-looper-outlines-proposed-state-budget-cuts-27-billion); Robles & Frank, *supra* note 147.

159. See *Amendment 23 FAQs*, GREAT EDUCATION COLO., <http://www.greateducation.org/statistics-faqs/funding-faqs/amendment-23/> (last visited Feb. 19, 2016).

160. See Yesenia Robles, *Colorado School Funding Disparities on Rise, Educators Call for Change*, DENV. POST (Aug. 23, 2015, 12:01 AM), [http://www.denverpost.com/news/local/ci\\_28686665/colorado-school-funding-disparities-on-rise-educators-call-for-change](http://www.denverpost.com/news/local/ci_28686665/colorado-school-funding-disparities-on-rise-educators-call-for-change).

better funding, when Colorado's education funding was already some of the most dismal in the country.<sup>161</sup> If the court continues to follow these recent precedents, it will be very difficult to achieve meaningful education finance reform through the courts.

### CONCLUSION

Colorado courts have heard claims under the state constitution's education article for over a century. With its recent *Lobato II* decision, however, the Colorado Supreme Court has erected new challenges that must be overcome to vindicate children's constitutional rights in the courts. While the *Lobato II* court did not overturn *Lobato I* or *Lujan* and did not declare the claims non-justiciable, as a handful of state high courts have done,<sup>162</sup> a more thorough court would need to articulate a modern, standards-based constitutional standard to recognize and defend the right to an educational opportunity that is meaningful in the 21st century for Colorado's children.

In *Lujan*, the court held that the requirement of a "thorough and uniform system of free public schools" is satisfied when "thorough and uniform educational opportunities are available through state action in each school district."<sup>163</sup> Also, in *Lobato I*, the court held, unsurprisingly, that "plaintiffs are entitled to the opportunity to prove their allegations."<sup>164</sup> These precedents are still good law. Moreover, the court's remand in *Lobato I* framed plaintiffs' burden as: "To be successful, they must demonstrate that the school finance scheme is not rationally related to the constitutional mandate of a 'thorough and uniform' system of public education."<sup>165</sup> And the instructions to the trial court were grounded and clear: "The trial court may appropriately rely on

---

161. These decisions are even more discouraging when considered in the context of the strong research that shows that there is a significant causal relationship between increased school funding in response to court rulings and improvements in long-term educational outcomes, especially for economically disadvantaged students. See C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes* 3–5 (Nat'l Bureau of Econ. Research, Working Paper No. 20118, 2014).

162. See, e.g., *Bonner v. Daniels*, 907 N.E.2d 516, 518 (Ind. 2009); *City of Pawtucket v. Sundlun*, 662 A.2d 40, 58 (R.I. 1995).

163. *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1017, 1025 (Colo. 1982).

164. *Lobato v. State (Lobato I)*, 218 P.3d 358, 374 (Colo. 2009).

165. *Id.*

the legislature's own pronouncements to develop the meaning of a 'thorough and uniform' system of education."<sup>166</sup>

Although the *Lobato II* court held that "the phrase 'thorough and uniform' . . . describes a free public school system that is of a quality marked by completeness, is comprehensive, and is consistent across the state,"<sup>167</sup> the court ignored the extensive trial court record, which documented in detail an educational system that was incomplete, not comprehensive, and caused inconsistencies across the state.<sup>168</sup> The evidence at trial also revealed violations of state and federal education laws and day-after-day harm to Colorado's school children, facts the court failed to confront.<sup>169</sup>

Instead, the *Lobato II* majority held that the finance system satisfied the complete, comprehensive, and consistent requirements because of the "multi-faceted statutory approach that applies uniformly to all of the school districts."<sup>170</sup> The court held, without analysis, that the statutory scheme was "rationally related" to the "thorough and uniform" constitutional mandate.<sup>171</sup> In this manner, the majority rested its opinion on the bones of the state's educational statutes without acknowledging or examining the missing meat on the bones, the missing educational resources due to the state's underfunding, and the gross disparities across districts that the state has fostered.

Going forward, Coloradans pushing for fair funding and better opportunities can use the constitutional standards articulated by the *Lujan* and *Lobato* courts in their advocacy. They will likely compare and contrast the constitutional requirements for "thorough and uniform" and "complete, comprehensive and consistent" education with the ongoing shortfalls and inequities that are rampant across the state. In fact, the inadequacies and disparities continue to grow; Colorado's funding and outcomes are among the worst in the nation and sinking further.<sup>172</sup>

---

166. *Id.* at 375.

167. *Lobato v. State (Lobato II)*, 304 P.3d 1132, 1138 (Colo. 2013).

168. *See supra* Part IV.B–C.

169. *See id.*

170. *Lobato II*, 304 P.3d at 1141.

171. *Id.*

172. *See* Press Release, Educ. Week, Quality Counts Introduces New State Report Card: U.S. Earns C, and Massachusetts Ranks First in Nation (Jan. 8, 2015), [http://www.edweek.org/media/qualitycounts2015\\_release.pdf](http://www.edweek.org/media/qualitycounts2015_release.pdf); Press Release, Educ. Week, State and National Grades Issued for Education Performance, Policy; U.S. Earns a C-Plus, Maryland



At the same time, it will be important for advocates to consider the barrier that the continuation of TABOR creates, a virtual stranglehold on securing improvements through the elected branches of state government. While advocates will build coalitions and use grassroots pressure to improve opportunity and adequate programs and services, they may eventually find that they need to bring another lawsuit under the Education Clause. Tragically, new plaintiffs could readily show that the Colorado education system is not complete or comprehensive and far from “uniform” because the state funding system fails to deliver the resources across districts that all kids need, which has caused gross disparities in educational outcomes. Advocates can also hope for the makeup of the court to change.

Children in Colorado should be afforded an adequate education, even if the current court has failed to vindicate their rights under the constitution. Public interest attorneys in Colorado, following precedent in a few other states, can work in a different type of advocacy role: working with families and others who are negatively impacted by the court’s decision to seek both legislative and constitutional changes that will protect Colorado’s children.

Coloradan children’s right to a quality education is still their best hope for being able to lead meaningful and productive lives. With so much at stake, advocates will pursue every possible avenue to help ensure that future.