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**CO Denver County District Court 2nd JD  
Filing Date: Jun 27 2011 5:30PM MDT  
Filing ID: 38372017  
Review Clerk: Leanne Youn Galanti**

DISTRICT COURT, DENVER COUNTY, COLORADO  
Denver City and County Building  
1437 Bannock St.  
Denver, Colorado 80202

**Plaintiffs:** ANTHONY LOBATO, et al., and  
**Plaintiff-Intervenors:** ARMANDINA ORTEGA, et al.  
v.  
**Defendants:** THE STATE OF COLORADO, et al.

Alexander Halpern, #7704  
ALEXANDER HALPERN LLC  
1426 Pearl Street, Suite 420  
Boulder, CO 80302  
Telephone: (303) 449-6180  
Facsimile: (303) 449-6181  
ahalpern@halpernllc.com  
Kathleen J. Gebhardt, #12800  
Jennifer Weiser Bezoza, #40662  
KATHLEEN J. GEBHARDT LLC  
1900 Stony Hill Road  
Boulder, CO 80305  
Telephone: (303) 499-8859  
gebhardt@indra.com, jennifer@bezoza.com

*Attorneys for Anthony Lobato, et al.*

Kenzo Kawanabe, #28697  
Terry R. Miller, #39007  
Geoffrey C. Klingsporn, #38997  
Daniel P. Spivey, #41504  
Rebecca J. Dunaway, #41538  
DAVIS GRAHAM & STUBBS LLP  
1550 Seventeenth Street, Suite 500  
Denver, CO 80202  
Telephone: (303) 892-9400  
Facsimile: (303) 893-1379  
kenzo.kawanabe@dgsllaw.com

*Attorneys for Plaintiffs Anthony Lobato, Denise Lobato, Taylor Lobato, Alexa Lobato, and Aurora, Joint School District No. 28, Jefferson County School District No. R-1, Colorado Springs, School District No. 11, Alamosa School District, No. RE-11J, and Monte Vista School District No. C-8*

Kyle C. Velte, #31093  
Ryann B. MacDonald, #41231  
REILLY POZNER LLP  
1900 Sixteenth Street, Suite 1700  
Denver, CO 80202  
Telephone: (303) 893-6100  
Facsimile: (303) 893-6110  
kvelte@rplaw.com, rmacdonald@rplaw.com

*Attorneys for Plaintiffs Creede Consol. School District No. 1, Del Norte Consol. School District No. C-7, Moffat School District No. 2, and Mountain Valley School District No. RE 1*

Jess A. Dance, #35803  
Zane Gilmer, #41602  
PERKINS COIE LLP  
1900 Sixteenth Street, #1400  
Denver, CO 80202  
Telephone: (303) 291-2300  
Facsimile: (303) 291-2400

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Case No. 2005CV4794

Div. 9

JDance@perkinscoie.com

*Attorneys for Plaintiffs Sanford School District 6J, North Conejos School District RE-1J, South Conejos School District RE-10, Centennial School District No. R-1*

David W. Stark, #4899

Joseph C. Daniels, #41321

Sera Chong, #41882

FAEGRE & BENSON LLP

3200 Wells Fargo Center, 1700 Lincoln Street

Denver, Colorado 80203

Telephone: (303) 607-3500

Facsimile: (303) 607-3600

dstark@faegre.com, jdaniels@faegre.com, schong@faegre.com

*Attorneys for Plaintiffs Jessica Spangler, Herbert Conboy, Victoria Conboy, Terry Hart, Kathy Howe-Kerr, Larry Howe-Kerr, John T. Lane, Jennifer Pate, Blanche J. Podio, and Robert L. Podio*

Kimberley D. Neilio, #32049

Jennifer Harvey Weddle, #32068

GREENBERG TRAUIG, LLP

1200 Seventeenth Street, Suite 2400

Denver, Colorado 80202

Telephone: (303) 572-6500

Facsimile: (303) 572-6540

NeilioK@gtlaw.com

*Attorneys for Plaintiff Pueblo, School District No. 60 in the County of Pueblo*

Alyssa K. Yatsko, #37805

HOLLAND & HART LLP

555 Seventeenth Street, Suite 3200

Post Office Box 8749

Denver, Colorado 80201-8749

Telephone: (303) 295-8138

Facsimile: (303) 291-9136

Email: akyatsko@hollandhart.com

*Attorneys for Plaintiff Jefferson County School District No. R-1*

Jessica E. Yates, #38003

SNELL & WILMER L.L.P.

One Tabor Center, Suite 1900

Denver, Colorado 80202

Telephone: (303) 634-2000

Facsimile: (303) 634-2020

Email: jyates@swlaw.com

*Attorneys for Plaintiffs Alexandria, Amber, Ari, Ashley, and Lillian Leroux*

Elizabeth J.M. Howard, #41439

THE HARRIS LAW FIRM, P.C.

1125 Seventeenth Street, Suite 1820

Denver, Colorado 80202

Telephone: (303) 299-0484

Facsimile: (303) 299-9484

Email: Elizabeth@HarrisFamilyLaw.com

*Attorneys for Plaintiffs Teresa Wrangham, Debbie Gould, and Stephen Topping*

**PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF NON-EDUCATION  
APPROPRIATIONS AND TABOR PROVISIONS**

Plaintiffs, Anthony Lobato, et al., (“Plaintiffs”), submit this motion *in limine* to exclude evidence and argument concerning non-education appropriations made by the General Assembly and TABOR restrictions.

### **C.R.C.P. 121 § 1-12(5) CERTIFICATION**

Counsel for Plaintiffs conferred with Counsel for Defendants regarding this Motion on June 16, 2011. Defendants object to the relief sought by this Motion.

### **INTRODUCTION**

This case begins and ends with students. The law requires the General Assembly to provide an education system of a certain quality to students. Plaintiffs claim the General Assembly has failed to do so. To assess Plaintiffs’ claim, the Supreme Court has considered and provided a precise standard: whether the school funding system is “rationally related to the constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.” *Lobato v. State*, 218 P.3d 358, 374 (Colo. 2009).

Through arguments contained in their Rule 56(h) motion and the expert witness disclosure concerning Henry Sobanet, Defendants have indicated their intent to offer evidence of the General Assembly’s appropriations on human services, prison systems, and higher education, as well as evidence of the procedures contained in TABOR. Defendants claim that these non-education appropriations and TABOR show that the funding dedicated to public schools is rational in light of competing policy interests of the General Assembly. As a political matter, this non-education evidence may normalize or excuse deviance from the law. However, as a legal matter, the evidence is irrelevant here; it has nothing to do with students, and has nothing to do with the relationship between school funding and the school system.

As explained below, this evidence should be excluded from trial for at least two reasons: (1) introduction of such evidence would change the issue from whether the current education funding system is rationally related to the provision of a “thorough and uniform” education system, to whether the current education funding system is rational in light of other state purposes unrelated to the Education Clause, such as prisons or budget shortfalls; and (2) introduction of such evidence would turn a lawsuit on the constitutional adequacy of an education lawsuit into a lawsuit on the adequacy of all state programs.

## **ARGUMENT**

### **I. LEGAL STANDARD.**

To be admissible, evidence must be relevant; and, unless otherwise provided for by law, all relevant evidence is admissible. *People v. Rath*, 44 P.3d 1033, 1038 (Colo. 2002) (citing CRE 402). Evidence is logically relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *Id.* (quoting CRE 401). Evidence is immaterial “when a party produces evidence for a proposition that is not within the legal framework of the case.” 23 Colo. Prac. § 401:2. Even if logically relevant, evidence can be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or misleading the jury, or by considerations of undue delay, *waste of time*, or needless presentation of cumulative evidence.” CRE 403 (emphasis added).

### **II. NON-EDUCATION APPROPRIATIONS ARE NOT RELEVANT.**

#### **A. Evidence Concerning Non-Education Appropriations Falls Outside The Supreme Court’s Analysis**

Any evidence concerning non-education appropriations falls outside the analysis set forth

by the Supreme Court because it has no bearing on the limited question of whether the public school funding system is rationally related to the Education Clause's mandate to provide a "thorough and uniform" system of public schools. Colo. Const. art. IX, § 2.

Defendants wish to re-litigate the issue decided by the Supreme Court in *Lobato*, by seeking to introduce evidence and argument that non-education appropriations and revenue limits prevent the General Assembly from satisfying its constitutional mandate under the Education Clause. When remanding this case, the Supreme Court instructed this Court to consider only whether the school funding system is "rationally related to the constitutional mandate that the General Assembly provide a 'thorough and uniform' public school system." *Lobato*, 218 P.3d at 374. This Court is directed to give "significant deference to the legislature's fiscal and policy judgments," but this does not "give the legislature unfettered discretion in this area and [the court] has responsibility to review whether the actions of the legislature are consistent with its obligation to provide a thorough and uniform public school system." *Id.* at 372, 374 (citing *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1025 (Colo. 1982)). The Supreme Court crafted this standard with careful attention to judicial deference and the appropriate balance of power among the three branches.

Given the Court's focus on deference to policy judgments of the legislature, the Court would certainly have included consideration of non-education appropriations in the analysis if the Court so intended. Because the Supreme Court crafted a detailed standard that includes several counterbalancing components, the Court here should be reluctant to add or remove any component not suggested by the Supreme Court. For example, the Supreme Court's test includes a consideration of the public school funding scheme and its relationship to a specific mandate.

This scope is narrow, but the Court intentionally selected a rational basis test to examine the relationship. Dangerous speculation is required to guess whether the Supreme Court would have used a rational basis test if the scope of the analysis expanded to include every appropriation decision made by the General Assembly.

By providing the specific means and specific end to be analyzed for a rational relationship, the Supreme Court intentionally avoided the type of rational basis test conducted to resolve equal protection claims under which the court (1) first identifies a legitimate state purpose, and then (2) considers whether a rational relationship exists between the challenged law and the identified purpose. *See Lujan*, 649 P.2d 1005, 1022-23 (Colo. 1982). Here, the Supreme Court’s test completes the first step: the mandate of the Education Clause is the one—and only—state purpose to analyze. The remaining issue is whether the challenged laws, here the laws creating the public education system, are rationally related to the purpose already identified by the Supreme Court. No room is left for additional state purposes.

Further, the Supreme Court’s reference to “fiscal and policy judgments” pertains only to the legislature’s judgment about what constitutes a thorough and uniform school system. Nowhere in the surrounding language, or in the opinion itself, does the Supreme Court state or imply that the trial court should consider any other portion of the budget. In fact, the *Lobato* court specifically rejected this implication by stating that the judiciary should not give the legislature “unfettered discretion in this area.” *Id.* at 372. If the Defendants could defeat any challenge to the level of education funding simply by introducing evidence of budget shortages, the legislature would effectively receive “unfettered discretion” and the rights recognized in the *Lobato* opinion would be rendered meaningless.

Other courts agree that budget constraints—legal or political in nature—are not relevant to the issue of whether a constitutional education mandate has been satisfied. *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 754-55 (N.H. 2002) (“excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional command” of an adequate education); *Randolph Cnty. Bd. of Educ. v. Adams*, 196 W. Va. 9, 23 (1995) (“we are compelled to underscore that financial hardship is an insufficient basis for ignoring the West Virginia Constitution. The imposition of these difficult choices is an inevitable and unavoidable attribute that emanates from our Constitution.”).

Recently, The New Jersey Supreme Court rejected the argument that financial distress can excuse or normalize deviance from the law. In *Abbott v. Burke*, 2011 WL 1990554, at \*13-14 (N.J. 2011), the court made a clear distinction between *constitutional* mandates and expectations set up by prior *statutory* non-education appropriations. The court held that the legislature was not bound by appropriations to non-education programs made in years past, and that financial distress was no excuse for the failure to fund a *constitutional* mandate. *Id.*

As in *Claremont Sch. Dist.*, *Randolph Cnty. Bd.*, and *Abbott*, the legislature’s non-education appropriations have nothing do here with the issue whether the constitutional rights of students have been violated. At most, the reliance on this evidence suggests that Defendants agree that the students’ rights have indeed been violated, but that Defendants seek to normalize or excuse such violations. This argument has no legal significance at trial in this case.

According to the Supreme Court, the sole issue for this court to decide is whether Colorado’s current public education funding system is “rationally related to the constitutional mandate that the General Assembly provide a ‘thorough and uniform’ public school system.”

*Lobato*, 218 P.3d at 375. As such, Defendants cannot escape an adverse ruling by arguing that current educational spending is rational in light of budget shortfalls, TABOR restrictions, or the General Assembly’s spending on prisons, higher education, or human services. Quite simply, the amount the General Assembly appropriates to prisons has no bearing on whether its education spending is constitutionally adequate under the Education Clause. Because evidence of the General Assembly’s non-educational appropriations can have no bearing on whether the education spending satisfies the minimum constitutional requirements of the Education Clause, such evidence is immaterial and irrelevant. It should therefore be excluded.

**B. Evidence of non-education appropriations does not tend to show that education funding is rationally calculated to satisfy the Education Clause.**

In addition to falling outside the analysis provided in *Lobato*, evidence of non-education appropriations is not logically relevant to the claims and defenses in this case. Introduction of other appropriations would actually require the Court to make policy judgments regarding the entire budgetary scheme, something that is prohibited by the constitution’s doctrine of separation of powers. Colo. Const. art. III; *Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963). The Constitution guarantees qualitative results for only two programs—education and the judiciary. Colo. Const. art. IX, § 2; *Pena v. Dist. Court of 2nd Judicial Dist. in and for City and Cnty. of Denver*, 681 P.2d 953, 956 (Colo. 1984).

By contrast, not one of the programs the Defendants would wish to discuss—prisons, higher education, or human services—requires a specific level of funding, and none of the programs, therefore, come with a legally minimum level of quality.<sup>1</sup> The General Assembly may

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<sup>1</sup> As described in the plaintiff’s opposition to the Defendants’ Rule 56(h) motion, the constitution instead only requires that these programs be “established” and “supported . . . as prescribed by

want to fund these unrelated programs adequately, and doing so would almost certainly benefit the population of Colorado. But this Court is not permitted to review evidence about what the legislature wants to do, or what would be good for the state’s population—those are pure policy decisions that only the General Assembly can make. This evidence has nothing to do with whether the current funding system is rationally related to the education clause’s mandate of a “thorough and uniform” school system as required by *Lobato*. Accordingly, this Court should prohibit the discussion of other budgetary appropriations under CRE 401, because it is immaterial to the central question of the case as defined by the Supreme Court in *Lobato*.

Even if this discussion were minimally relevant, it would waste time and confuse the issues in the case, and therefore should be held inadmissible under CRE 403. The Defendants would not be permitted to make uncontroverted assertions that the General Assembly “needs” to fund these other services, and therefore the school funding system is rational in light of these other “needs.” Instead, this Court would be forced to review the constitutional adequacy of each and every appropriation under the General Assembly’s budget. This scrutiny would expand the scope of this trial far beyond the issue framed by the Supreme Court in *Lobato*, and would needlessly waste time in an already time-consuming trial.

### **III. EVIDENCE REGARDING TABOR IS IRRELEVANT**

TABOR’s procedural restrictions on raising revenue may cause difficulties in funding education at a constitutional level. But these difficulties are not legal – they are political and have nothing to do with this case. As the Defendants urge, the Court should “take the Constitution as it is . . . and construe the instrument as a whole, causing it, including the

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law.” *See* Colo. Const. art. VIII, section 1; Colo. Const. art. VIII, section 5.

amendments thereto, to harmonize, giving to every word as far as possible its appropriate meaning and effect.” Defendants’ 56(h) Motion, at 6 (*citing Town of Frisco v. Baum*, 90 P.3d 845, 847 (Colo. 2004)). However, TABOR itself states only that it “supersede[s] *conflicting* state constitutional . . . provisions.” Colo. Const. art. X, § 20(1) (emphasis added).

The Defendants suggest that the General Assembly cannot meet its constitutional obligations under the Education Clause because of TABOR, because it “cannot be constitutionally required to expend revenue the Constitution does not allow it to obtain.” Defendants’ Rule 56(h) Motion, at 6. This assertion misses the point, and confuses the issues. A declaration that the current system of public school funding is unconstitutional would not “constitutionally” require expansion of revenue. The option of expanding revenue to satisfy the constitution is left up to the legislature and the voters. TABOR’s procedural limitations certainly make it much more difficult to fund schools, but the Education Clause’s mandate is not voided because of difficulty created by TABOR. *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”). This argument could become material only once the Defendants admit that all of the money in the General Fund is insufficient to meet the constitutional mandate to adequately fund schools.

Finally, any doubt that TABOR plays no role in this Court’s analysis of Plaintiffs’ claims is eliminated by the Supreme Court’s rejection of the Court of Appeals’ conclusion that TABOR would render resolution of this action impossible “without disregarding [the] General Assembly’s authority.” *Lobato v. State*, 216 P.3d 29, 40 (Colo. App. 2008), *rev’d* 218 P.3d 358 (Colo. 2010). Given the Court of Appeals holding on TABOR, which was reversed, the

Supreme Court certainly considered the role, if any, that TABOR would play at trial. Through omission of TABOR in the precise standard provided by the Court, the Supreme Court rejected the argument that TABOR can somehow render a failed school funding system rationally related to the requirement that the legislature provide a thorough and uniform education system.

Since TABOR and the Education Clause do not conflict as a matter of law or in this case, this Court should hold that any evidence or argument related to TABOR's limitations is irrelevant, and therefore inadmissible under CRE 401. Additionally, any minimal probative value of such evidence is substantially outweighed by considerations of undue delay and waste of time and, therefore, also should be excluded under CRE 403.

### **CONCLUSION**

WHEREFORE, Plaintiffs request an order precluding from trial evidence and argument of non-education appropriations and budget constraints imposed by TABOR.

Dated: June 27, 2011

DAVIS GRAHAM & STUBBS LLP

/s/ Terry R. Miller

Kenzo Kawanabe, #28697

Terry R. Miller, #39007

Geoffrey C. Klingsporn, #38997

Daniel P. Spivey, #41504

Rebecca J. Dunaway, #41538

*Attorneys for Plaintiffs Anthony Lobato, Denise Lobato, Taylor Lobato, Alexa Lobato, and Aurora, Joint School District No. 28, Jefferson County School District No. R-1, Colorado Springs, School District No. 11, Alamosa School District, No. RE-11J, and Monte Vista School District No. C-8*

Kathleen J. Gebhardt, #1280

Jennifer Weiser Bezoza, #40662

KATHLEEN J. GEBHARDT LLC

Alexander Halpern, #7704

ALEXANDER HALPERN LLC

*Attorneys for Plaintiffs Anthony Lobato, et al*

Alyssa K. Yatsko, #37805

HOLLAND & HART LLP

*Attorneys for Plaintiff Jefferson County School District No. R-1*

Jessica E. Yates, #38003

Lisa A. Decker, #

SNELL & WILMER L.L.P.

*Attorneys for Adams County Plaintiffs – Lillian Leroux and David Maes*

Elizabeth J.M. Howard, #41439

THE HARRIS LAW FIRM, P.C.

*Attorneys for Teresa Wrangham, Debbie Gould, and Stephen Topping*

Kyle C. Velte, #31093

Ryann B. MacDonald, #41231

REILLY POZNER LLP

*Attorneys for Plaintiffs Creede Consol. School District No. 1, Del Norte Consol. School District No. C-7, Moffat School District No. 2, and Mountain Valley School District No. RE 1*

Jess A. Dance, #35803

Zane Gilmer, #41602

PERKINS COIE LLP

*Attorneys for Plaintiffs Sanford School District 6J, North Conejos School District RE-1J, South Conejos School District RE-10, and Centennial School District No. R-1*

David W. Stark, #4899

Joseph C. Daniels, #41321

Sera Chong, #41882

FAEGRE & BENSON LLP

*Attorneys for Plaintiffs Jessica Spangler, Herbert Conboy, Victoria Conboy, Terry Hart, Kathy Howe-Kerr, Larry Howe-Kerr, John T. Lane, Jennifer Pate, Blanche J. Podio, and Robert L. Podio*

Kimberley D. Neilio, #32049

Jennifer Harvey Weddle, #32068

GREENBERG TRAURIG, LLP

*Attorneys for Plaintiff Pueblo, School District No. 60 in the County of Pueblo*

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

**CERTIFICATE OF SERVICE**

The undersigned certifies that on the 27th day of June, 2011, a true and correct copy of the foregoing **PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE OF NON-EDUCATION APPROPRIATIONS AND TABOR PROVISIONS** was filed and served, via LexisNexis® File & Serve, addressed to the following:

OFFICE OF THE ATTORNEY  
GENERAL  
John W. Suthers, Attorney General  
Antony B. Dyl  
Carey Taylor Markel  
Erica Weston  
Nicholas P. Heinke  
Jonathan P. Fero  
Nancy Wahl  
1525 Sherman Street, 7th Floor  
Denver, CO 80203

Henry Solano  
DEWEY & LE BOEUF  
4121 Bryant Street  
Denver, CO 80211

Jess A. Dance  
Zane Gilmer  
PERKINS COIE LLP  
1900 16<sup>th</sup> Street, #1400  
Denver, CO 80202

Kimberley D. Neilio  
Jennifer Harvey Weddle  
GREENBERG TRAURIG, LLP  
1200 Seventeenth Street, Suite 2400  
Denver, CO 80202

Elizabeth J.M. Howard,  
THE HARRIS LAW FIRM, P.C.  
1125 Seventeenth Street, Suite 1820  
Denver, CO 80202

David G. Hinojosa (by email)  
Nina Perales  
Carmen Leija  
Marisa Bono  
MALDEF  
110 Broadway, Suite 300  
San Antonio, TX 78205

Kyle C. Velte  
Ryann B. MacDonald  
REILLY POZNER LLP  
1900 16<sup>th</sup> Street, #1700  
Denver, CO 80202

David W. Stark  
Joseph C. Daniels  
Sera Chong  
FAEGRE & BENSON LLP  
3200 Wells Fargo Center  
1700 Lincoln Street  
Denver, CO 80203

Jessica E. Yates  
Lisa A. Decker  
SNELL & WILMER LLP  
One Tabor Center  
1200 Seventeenth St., Ste 1900  
Denver, CO 80202

Alyssa K. Yatsko  
HOLLAND & HART LLP  
555 17<sup>th</sup> Street, Suite 3200  
Denver, CO 80203

*/s/ Fern O. Spangler*

Fern O. Spangler

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