

# **McKenna Long & Aldridge LLP**

1400 Wewatta Street, Suite 700  
Denver, Colorado 80202

## **TESTIMONY OF HERBERT LAWRENCE FENSTER BEFORE THE COLORADO LONG-TERM FISCAL STABILITY COMMISSION**

July 29, 2009

### **I.**

Mr. Chairman, Members of the Commission, I am Herb Fenster, for fifteen years a citizen of the State of Colorado. I am a lawyer and Senior Partner in the law firm of McKenna Long & Aldridge where I have been in practice for almost fifty years. I practice in our firm's offices in Denver and Washington. Part of my adult life has been spent in education. I hold degrees in Civil Engineering and Architecture from the University of Pennsylvania and a Masters Degree in Economics from that Institution. I am a graduate of the University of Virginia Law School.

Over several decades, in my practice in Washington and now Denver, my firm and I have represented many colleges and universities. These have included the Regents of the University of California and the Trustees of Leland Stanford Junior University. I was for seven years a Trustee of the University of Pennsylvania and have been very active in the planning, management and financial affairs of universities around the country as an advisor.

I am a life-long Republican and, among other activities, served as the legal counsel to the Reagan-Bush campaign. While I have conservative views about many subjects, I am an unrelenting advocate for public education, from early childhood learning through higher education.

My wife Jane and I are residents of Boulder and moved there, in part, so that we could be involved with and serve the University. Even before moving here from Washington D.C., our younger son had decided to come out here to the University and I agreed to serve on the Board of the Parent Association; I served on that board for the succeeding six years. Early on, after we moved here, I chaired the University's Student Affairs Advisory Board, a board organized to review all of the campus non-academic functions and to advise on changes that the board believed were needed. The board, over a two-year period, looked into every corner of non-academic functions on the campus, including staffing, physical plant, planning and vision. This work was completed twelve years ago but, unfortunately, not a single recommendation made at that time has yet been acted upon.

## II.

Eight years ago, I helped found and currently sit on the Board of an Institute on the Boulder Campus, the Alliance for Technology Learning and Society ("ATLAS") whose charter, vision and programs are directed to enhancing education from primary through higher ed. Five years ago, we helped found the National Center For Women and

Information Technology ("NCWIT"), a national organization devoted to enlarging the roles of girls and women in the information technology industries, businesses and education fields. My firm and I provide pro bono legal services to NCWIT and are very active in assuring the success of its programs, studies and outreach. I also sit on the Board of the University's Center of the American West, a remarkable organization that combines Western History with outreach to many of the industry, business, intellectual and government communities in the West.

I serve on the Board of Qualistar, an organization headquartered here in Denver whose purposes and roles include a focus on early childhood care and education, resource and referral services, and the management of preschool, learning readiness programs. I also serve on the Board of Great Education Colorado, whose chair, Carol Boigon is a member of this Commission. GreatEd's purpose is to support and advocate for public education in Colorado.

### **III.**

This is indeed a very difficult task. To suggest just how difficult, I have borrowed some statistics compiled by my long-time friend Dave Skaggs, in his capacity as Executive Director of the Colorado Department of Higher Education:

## Demographics

- Colorado is **8<sup>th</sup> fastest-growing state** in the nation, with the Hispanic demographic growing most rapidly.<sup>1</sup>
- **Colorado's workforce is highly educated, ranking 5<sup>th</sup> nationally**, with about 45% ages 25 to 64 having at least an associate degree. This high level of educational attainment is due in large part to in-migration of degree-holders to Colorado.<sup>2</sup>
- **But we do a relatively poor job of educating Colorado natives:** only a third of Coloradans with AA degrees were born here (national average, 52% born in-state) and only 23% of those with a bachelor's degree were born here (national average, 42%).<sup>3</sup>
- **Colorado has the largest majority-minority ethnic gap in college attainment in the nation<sup>4</sup>** (in our case, white-Hispanic). The Hispanic population is the fastest growing demographic in Colorado. 38% of Hispanics have not graduated from high school, 6% have an associate degree, and 8% have a bachelor's degree. This should not distract from the comparable gap that demands comparable attention with respect to the state's African-American population.
- **Colorado has the largest gap in the nation in regional income** between its wealthiest and best educated counties and its least.<sup>5</sup> These regional differences drive different educational needs and solutions.
- **The high remediation rate for the college-bound population is a factor in the low number attaining post-secondary degrees.** 56% of entering students at two-year public institutions and 20% at four-year public institutions require remedial

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<sup>1</sup> Census Bureau, 12/27/2007.

<sup>2</sup> NCHEMS; "The Emerging Policy Triangle; Economic Development, Workforce Development, and Education," May 2007.

<sup>3</sup> 2005 American Community Survey as compiled by NCHEMS, "Setting the Stage: A Look at Colorado's Demographic and Educational Context," 2007.

<sup>4</sup> NCHEMS.

<sup>5</sup> NCHEMS, "Setting the Stage: A Look at Colorado's Demographic and Educational Context," presented at the Colorado Higher Education Summit, June 2007.

courses, for an overall remediation rate of 30% for all first-time college-bound students in 2006.<sup>6</sup>

### Economics

- **Colorado ranks 3<sup>rd</sup> nationally in expected growth in jobs that will require post-secondary training.** To meet workforce needs and remain internationally competitive, degree attainment in the workforce will need to increase from 47% to at least [55]% by 2025 – that means we have to produce nearly a quarter million *more* degrees than projected under current practice, requiring a 10% gain in degree completion rates for traditional students *and* major gains for adult learners.<sup>7</sup>
- **Higher education should better serve high demand workforce areas;** for example, too few students are enrolling in science, technology, engineering, and mathematics; we also face particular needs in the health field and teaching.<sup>8</sup>
- **Colorado’s economy is tied to strong support for cutting-edge scholarship and research** needed to create new industries, products and solve pressing problems in areas of such as energy, health, climate change and technology. Our superior national ranking and stature of our research institutions must be sustained.<sup>9</sup>

### Funding

- Though Colorado is a wealthy state, ranking 10th in the nation in personal income per capita, it ranks 49<sup>th</sup> out of the 50 states in state and local support for public higher education as a percent of personal income.<sup>10</sup>
- Out of necessity, Colorado institutions already are very efficient, ranking near the top nationally. Funding constraints are likely to persist and suggest the need to direct limited resources to serve more students more affordably, making efficiency and productivity critical considerations.<sup>11</sup>

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<sup>6</sup> First time recent high school graduates assigned to remediation by sector, 2006. Source: SURDS, DHE.

<sup>7</sup> SHEEO, The College Degree Gap, Higher Education Policy Conference Agenda, August 12-15, 2008.

<sup>8</sup> Metro Denver Economic Development Corporation, “Toward a More Competitive Colorado,” 2008.

<sup>9</sup> National Science Foundation, “Federal R&D Obligations to Universities and Colleges,” 2009.

<sup>10</sup> State Higher Education Executive Officers, Compiled by NCHEMS: <http://higheredinfo.org/> for 2006.

<sup>11</sup> NCHEMS, Colorado Higher Education Financing Study, 2006.

- While tuition is relatively low for Colorado residents compared to national averages (community colleges charge 80% of their peers' average tuition; four-year institutions, 64%, and research universities 86%), Colorado offers relatively less financial aid to needy students than other states, so net cost remains a barrier to access for many students.<sup>12</sup>
- Current levels of state funding and tuition revenues are inadequate to sustain, let alone enhance, institutional quality. Yet, state resources are constrained by numerous constitutional and statutory limitations and by near-term economic conditions.<sup>13</sup>

### Structural/Design Factors

- While postsecondary education is mainly structured to serve traditional college age students, **college [completion] for non-traditional students also has to be a priority.** Some 20,000 students who attended Colorado colleges (since 2002) completed 75% of the credits for a degree but dropped out before graduation.<sup>14</sup>
- Under the **College Opportunity Fund (COF)** resident students receive stipends to pay part of tuition, institutions receive additional support from fee-for-service contracts, and performance contracts supply some accountability. According to a recent study, the COF program **has not met its goals of improving access and educational outcomes and advancing other state goals.**<sup>15</sup>
- **Current funding** is based largely on prior institutional funding levels; it **does not reflect enrollment changes or reward educational outcomes such as degree completion.** Although all institutions have performance contracts with the state that include persistence and graduation benchmarks, the contracts simply prescribe reporting requirements, implementation of the contracts provided no rewards for doing well.<sup>16</sup>

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<sup>12</sup> Colorado Department of Higher Education, "Fiscal Year 2008-2009 Tuition and Fee Report," 2009.

<sup>13</sup> NCHEMS, 2006.

<sup>14</sup> SURDS database research for WICHE NTNM grant proposals.

<sup>15</sup> WICHE, "An Evaluation of Colorado's College Opportunity Fund and Related Policies," 2009.

<sup>16</sup> WICHE, 2009.

These statistics are not benign. They demonstrate very clearly that Colorado has a major crisis in its education systems and organizations. From every imaginable aspect, the state is, increasingly, not adequately able to educate its children: the state is being approached from two separate and disparate directions. First, it is the beneficiary of vast numbers of highly educated families from both coasts. Second, like every other state in the Southwest, it is being asked to educate the very large numbers of numbers of hispanic arrivals, many of whom must master English and many of whom lack complete secondary education. Then, just to make matters even more difficult, our primary population center, Denver, is managing to graduate from high school fewer than fifty per cent of its students; this could well make Denver a ghetto. I well recognize that all of these problems are daunting, to say the least. But there is no solution in ignoring them: it is my view that, during the fifteen years we have been citizens of this state, these problems, every one of them, have grown significantly worse and the state, particularly its legislature has indeed ignored them.

You cannot get away with continuing to do that. These emigrees from East, West and South have children and if our state does not adequately educate our children, many of those who emigrated here will leave. Once a rural, ranching and farming state, Colorado will become that again: education across the entire spectrum, starting with early childhood and ending IF AT ALL, with graduate education is the single most important purpose our state government can have.

Here, today, I can only address higher education. State supported higher education in Colorado is in very bad shape, much worse than most of you probably suspect.

#### IV.

When we first moved to Boulder in June of 1994, the Boulder campus was then receiving about 17 per cent of its operating expenses from state appropriated funds. This, together with support of other state higher education institutions, gave the State a rank of 48th in the nation on the basis of per cent of personal income. We have come a very long way in those fifteen years because we now rank 49th, only slightly ahead of Mississippi. The support for the Boulder Campus is now about 7 per cent of its operating expenses and, given the shortfalls facing the state in other areas, this level of support could sink close to zero.

Compounding the shrinking levels of support from the state, the design of the campus private support is no better and probably worse. The University of Colorado Foundation, created to marshal private and principally alumni support, is confounded by the need to divide its inadequate resources among all of the "system" campuses. At that, its relationship with the Boulder campus is, at best, only luke warm. It has seen its function in managing alumni affairs and parent affairs taken away and returned to the Chancellor's office because its attendance to these critical components of private support has been so poor over a number of years. Now, like every other such university endowment and fund-raising operation, it is further impacted by the shrinkage in funding which is a



byproduct of the nation's current financial crisis. Most recently, I have noted that the Foundation appears to have turned its portfolio over to a private investment banking organization for management; this is not exactly a favorable sign for the future.

The campus, as you all know, is the premier, flagship University for the state. Yet, its recently completed vision and planning document, "Flagship 2030" reveals, however subtly, that it is in danger of, progressively and increasingly, failing to meet both the needs of the State and the needs of the institution itself in competing with universities of like kind and the much higher objectives for which it should be striving and for which it has such remarkable promise.

In my view, as someone who has considerable knowledge of major national universities, the campus is lacking about ten thousand students, mostly at the graduate level. Its schools and programs for graduate education are, almost without exception, far too small, measured in faculty, programs, facilities and the imperatives of "trickle down" to support undergraduate education. Flagship 2030 clearly, if diplomatically, demonstrates this imperative for growth. Further, there has been a devastating turnover in leadership: either the president or the chancellor or the provost has changed on this campus every eighteen months during the fifteen years we have been here. That rate of turnover presents utterly impossible leadership problems.

## V.

The campus has achieved a small modicum of financial independence by being accorded Enterprise Status. This doubtful accomplishment has been achieved as a result of the significant diminishment in state support. But acquiring that status is, at best, confounding when direct state support is rapidly becoming negligible.

It is my view that the Boulder Campus needs to be PRIVATIZED and it is my recommendation to this Commission that it so recommend to the state legislature. This should include specific and very coherent steps to be taken to enable the Boulder Campus to become what I shall refer to as a QUASI-PRIVATE INSTITUTION. It is my recommendation that this objective be accomplished by a series of transition steps starting with the conversion of the campus to Public Authority Status, a change that was previously made for the University's Hospital. My recommendation in this regard is not unique: it is expressly included in the "Flagship 2030" plan for the campus. But, unlike that plan, I certainly would not stop with public authority status. I believe that a critically important step beyond public authority status is privatization and I recommend that what I refer to as the "Cornell Plan" be considered as a model.

Nor is privatization of public universities any longer a novel idea. Privatization of schools within state university campuses is going on apace as we speak. My law school alma mater, at the University of Virginia, is an excellent and very successful example of such a plan. The Cornell plan would create a public-private partnership between the state

and the university. State students who are qualified today would remain qualified under such a change; their costs would be no greater; their education would be greatly enhanced and, among other things, the further development of the campus, particularly its graduate schools would enable the University to realize a crucial obligation to the state and that is to enlarge very high quality graduate programs. The need to do this is clearly demonstrated by the statistics noted above and by the Flagship 2030 plan itself.

There is little question about the fact that this proposed reorganization would require a huge change in the state's constitutional and legislative structure for its higher education system. Such a change is very long overdue. And making that change would mean that Colorado would be the first state in the union to privatize fully a state university.

The obvious question is “how better would this enable the financing of the institution?”

The answer is in several distinct categories.

First, and most generally, it would infuse the capabilities of private enterprise concepts, brought to an already remarkable education institution, to seek and obtain funding that is inadequately sought and gained by the University in its wholly state operated capacity.

This is not mere speculation: it has been the primary motivating factor in the several school privatization activities that have been ongoing and continue at an accelerating pace.

Second, it would enable the Boulder campus to marshal, in a single operating entity, its outreach, treasury, endowment, alumni, and parent organizations so that its approach to

all of its possible venues could be rebranded to enhance not only fund raising but a wide base of loyalty that the University does not now enjoy. I should note that this remarkable, national institution, having alumni scattered all over this country and the world, has one of the LOWEST RATES OF ALUMNI GIVING OF ANY MAJOR UNIVERSITY IN THE COUNTRY.

Third, it is unquestionable that the ability of major private universities to attract funding not only for their specialized schools and programs but generally far outstrips all but a few public universities. This includes not only programmatic funds, but endowment directed funding as well. I should note in this connection that the entire system's endowment is less than a half billion. While university endowments have taken a big hit (along with all others), this University's endowment was puny to start with and showed promise of little better. At about a half billion, it did not rank anywhere near the endowments of its peers, no matter how one defines "peers"; indeed it appears to be less than half of those peers. This is, I believe, a barometer not only of inability to fund as a public institution, but a strong argument for privatization.

## VI.

Most germane to the work of this Commission, it is my view that privatization of the Boulder Campus not only would relieve the state of SOME of its current funding obligations to the University, it would place the campus on a footing for the future that is far less dependent on the state for its growth and prosperity.