

CAUSE NO. D-1-GN-11-003130

TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, <i>ET AL.</i> ,	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
EDGEWOOD INDEPENDENT SCHOOL DISTRICT, <i>ET AL.</i> , (consolidated)	§	
	§	
Plaintiffs	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
ROBERT SCOTT, in his official capacity as Commissioner of Education, <i>et al.</i> ,	§	
	§	
Defendants,	§	200TH JUDICIAL DISTRICT

**EDGEWOOD PLAINTIFFS’ PLEA TO THE JURISDICTION AND  
MOTION TO DISMISS AS TO INTERVENORS’ SECOND AMENDED  
PLEA IN INTERVENTION**

TO THE HONORABLE COURT:

Plaintiffs, Edgewood Independent School District, *et al.*, (“Edgewood Plaintiffs”), file this plea to the jurisdiction and motion to dismiss the Second Amended Plea in Intervention filed by Joyce Coleman, *et al.*, Intervenor.<sup>1</sup> Similar to an action filed by a group of intervenors in *Edgewood IV* asking the court to direct the State to expand choice by implementing a voucher program, Intervenor urge this Court to order Defendants to expand choice by extending charter schools and to prescribe other components of the public school system in the name of “efficiency.” As further described below, Intervenor’s remaining article VII claim described in its Second Amended Plea in Intervention (“Plea”) constitutes a non-justiciable question that is better suited for the Texas Legislature and thus does not belong in this Court. Because

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<sup>1</sup> Intervenor include Joyce Coleman, Danessa Boling, Lee and Allena Beall, Joel and Andrea Smedshammer, Darlene Menn, Texans for Real Efficiency and Equity in Education, and the Texas Association of Business.

Intervenors' plea cannot be cured by amendment, their plea should be dismissed with prejudice for lack of jurisdiction in its entirety.

## Background

### Intervenors' Claims under Article VII § 1 of the Texas Constitution

Unlike the various plaintiffs' claims in this case, Intervenors do not focus on the provision of sufficient and equitable financial resources to enable all Texas schoolchildren to receive an adequate, efficient and suitable education—rights guaranteed under the Texas Constitution.<sup>2</sup> Instead, Intervenors seek, under the guise of “qualitative efficiency,” orders from the Court requiring the State to enact “structural” changes prescribing different educational choices that would, in their opinion, improve education. *See* Plea ¶ 8.

A simple review of Intervenors' allegations demonstrates that they are requiring this Court to “prescribe the structure of the school system:”

- a. The current statutory cap<sup>3</sup> on the number of charter schools<sup>4</sup> (numbered at 215) “breeds inefficiency in the system of public free schools.” *See id.* ¶ 11.
- b. Traditional public schools should operate more like public charter schools with fewer statutory and regulatory burdens. *See id.* ¶ 12.
- c. The Texas Education Agency has little expertise to develop a system to rate financial accountability of the education system and such evaluation should be

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<sup>2</sup> Article VII, section 1 of the Texas Constitution, states in relevant part, “a general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

<sup>3</sup> Tex. Educ. Code Ann. § 12.101(b).

<sup>4</sup> “Charter schools” are those to whom the State Board of Education has granted a charter on the application to operate in a facility of a commercial or nonprofit entity, an eligible entity, or a school district, including a home-rule school district. Tex. Educ. Code Ann. § 12.101 (a).

conducted by a “third party,” and not the agency that controls the funds.<sup>5</sup> *See id.* ¶ 13.

- d. “Many provisions in the Texas Education Code, chapter 21 make the system inefficient and therefore are unconstitutional,” especially those related to personnel decisions. *See id.* ¶ 15.
- e. Twenty-three regulations related to the Home-Rule School District Charters, described by Intervenors as “very restrictive regulations,”<sup>6</sup> that should be removed to “make this program more efficient.” *See id.* ¶ 16.
- f. The Public Education Grant Program<sup>7</sup> and how regulations have “watered-down” the statute because the receiving district can arbitrarily reject an attempt to transfer a student from an underperforming district. *See id.* ¶ 17.
- g. Other “inefficiencies in the system not tied directly to any specific statute or regulation.” *See id.* ¶ 18.

As a remedy, Intervenors request this court to declare that the current system of public free schools violates the Education Clause of the Texas Constitution because it fails the “qualitative efficiency test.” *See id.* ¶ 21. They further seek a judgment declaring that Chapter 21 of the Texas Education Code is not efficient under article VII, sec. 1, as well as similar declaratory relief pertaining to the following sections of the Education Code: 12.101(b); 25.111-112; 12.013(b)(3)(F)-(S); 21.402; 39.082; 42.102, 29.203(d); over twenty (20) subparts of

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<sup>5</sup> Tex. Educ. Code Ann. § 39.082(a).

<sup>6</sup> Tex. Educ. Code Ann. § 12.013(b)(3)(F)-(S).

<sup>7</sup> Tex. Educ. Code Ann. § 29.201.

Chapter 21<sup>8</sup> and all corresponding regulations in the Texas Administrative Code. *See id.* ¶ 22. They request a permanent injunction prohibiting Defendants from giving any force and effect to Chapters 41 and 42 of the Texas Education Code. *Id.* As described further below, however, these and other complaints belong at the Legislature’s doorstep, not in this Court.

## Argument

### I. Standard of Review for Plea to the Jurisdiction

A plea to the jurisdiction challenges the court’s subject matter jurisdiction. *See Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex.2000); *State v. Holland*, 221 S.W.3d 639, 642-43 (Tex. 2007). Whether a court has subject matter jurisdiction is a question of law. *Miranda*, 133 S.W.3d at 226. The determination of whether a trial court has subject matter jurisdiction begins with the pleadings. *Id.* The pleader has the initial burden of alleging facts that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Id.* The purpose of a plea to the jurisdiction is to “defeat a cause of action without regard to whether the claims asserted have merit.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d at 554.

Subject matter jurisdiction requires, among other things, that the case be justiciable. *The State Bd. of Texas v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). Thus, a plea to the jurisdiction is proper to challenge subject matter jurisdiction for lack of a justiciable issue. An issue is nonjusticiable if there is no real controversy that will be resolved by the judicial relief sought. *Id.*

If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend. *See Hendee*

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<sup>8</sup> These include Tex. Educ. Code Ann. §§ 21.402 *et seq.*; 21.031; 21.401; 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, and 21.307, 21.206, 21.057, 21.355, 21.351 *et seq.*

*v. Dewhurst*, 228 S.W. 3d. 354, 366 (Tex. App. Austin 2007) *review denied*; *Miranda*, 133 S.W.3d at 227.

**II. Intervenors’ Article VII Claim Seeks to Usurp the Texas Legislature’s Authority on the Design of the Public School System and is thus, Nonjusticiable**

**A. Legal standard under article VII section 1 of the Texas Constitution**

A system of public free schools must be both qualitatively efficient and financially efficient in order to survive a constitutional challenge. *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729 (Tex. 1995) (*Edgewood IV*). Financial efficiency focuses on the “direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.” *Id.* Financial efficiency requires that “[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds.” *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753 (Tex. 2005) (*West Orange-Cove II*), (quoting *Edgewood I*, 777 S.W.2d at 397).

The qualitative component of the efficiency clause (i.e., an “adequate education”) is “simply shorthand for the requirement that public education accomplish a general diffusion of knowledge.” *West Orange-Cove II*, 176 S.W.3d at 753. Qualitative efficiency requires the school finance system to provide the resources necessary for school districts to provide a general diffusion of knowledge to every child. *See Edgewood IV*, 917 S.W. 2d at 736. An adequate education is accomplished when districts are able to provide:

“[reasonable] access to a quality education that enables all Texas children to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation. Districts satisfy this constitutional obligation when they provide all of their students with a [reasonable] *opportunity* to acquire the essential knowledge and skills reflected in . . . curriculum requirements. . . such that upon graduation, students are prepared

to “continue to learn in postsecondary educational, training, or employment settings.”

*West Orange-Cove II*, 176 S.W.3d at 787 (citations omitted) (emphasis in original).

In providing a public school system, the State must provide an “efficient” system, not one that is “cheap,” “inexpensive,” or even “economical.” *Edgewood I*, 777 S.W.2d at 395. The means adopted by the Legislature must be “a suitable regime that provides for a general diffusion of knowledge...” *W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (*West Orange-Cove I*). The Legislature has the right to determine the “methods, restrictions, and regulations...” of the educational system. *Edgewood IV*, 917 S.W.2d at 736 (quoting *Mumme v. Marrs*, 40 S.W.2d 31, 36 (Tex. 1931)). The Supreme Court of Texas has stated unequivocally that in discharging its review of article VII claims, it will “not dictate to the Legislature how to discharge its duty. . . [nor will it] judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.” *West Orange Cove I*, 107 S.W. 3d at 563-564 (citation omitted).<sup>9</sup>

However, “[w]hile the Legislature has broad discretion to make the myriad policy decisions concerning education that discretion is not without bounds.” *Edgewood IV*, 917 S.W.2d at 730, n.8 (citation omitted). “[I]f the Legislature substantially defaulted on its responsibility such that Texas school children were denied access to that education needed to participate fully in the social, economic and educational opportunities available in Texas, the “suitable provision” clause would be violated.” *Id.* at 736.

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<sup>9</sup> While Intervenors’ claims are appropriately left to the Legislature, *Edgewood* Plaintiffs’ claims are justiciable. The Court has long recognized that the three elements of a constitutional system of public schools provide measurable standards to review the Legislature’s actions and clearly has delineated its own judicial limitations. See *West Orange Cove II*, 176 S.W.3d at 777; *West Orange-Cove I*, 107 S.W.3d at 563; *Edgewood I*, 777 S.W.2d at 394; accord *Edgewood IV*, 917 S.W.2d at 736.

## B. Legal Standard for Non-Justiciable Political Questions

A political question is one involving “a lack of judicially discoverable and manageable standards for resolving it,” or (2) “a textually demonstrable constitutional commitment of the issue to a coordinate political department. . .” *Baker v. Carr*, 369 U.S. 186, 217 (1962)). This standard has been used by Texas courts as well. See *Hendee*, 228 S.W.3d at 359, *West Orange-Cove II*, 176 S.W.3d at 777-78.

Seventeen years ago, in *Edgewood IV*, the Supreme Court of Texas reviewed a similar intervention, where the Gutierrez Intervenors urged the court to prescribe a system that would permit their children to receive vouchers because the State’s system denied them an efficient education guaranteed by the Education Clause. Having failed to persuade the Texas legislature to allow private vouchers, for which the Gutierrez Intervenors believed to be the better course of action than public schools, Gutierrez turned to the courts. In granting the State’s special exceptions to the petition in intervention, the Court stated that the petition “prays for a political remedy rather than alleging a statutory or constitutional right.” *Edgewood IV*, 917 S.W.2d at 747. The Court went on to hold:

In *Edgewood I*, we held that article VII, section 1 provides “a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.” 777 S.W.2d at 394. The Constitution gives to the Legislature, however, the “primary responsibility to decide how best to achieve an efficient system.” *Id.* at 399. Since then, we have consistently refrained from prescribing “the means which the Legislature must employ in fulfilling its duty.” *Edgewood I*, 804 S.W.2d at 498. Most recently, we explained our role as follows: We do not prescribe the structure for “an efficient system of public free schools.” The duty to establish and provide for such a system is committed by the Constitution to the Legislature. Tex. Const. art. VII, § 1. Our role is only to determine whether the Legislature has complied with the Constitution. *Edgewood III*, 826 S.W.2d at 523. The Gutierrez appellants now ask the Court to go beyond this role, and to prescribe the structure of this state’s public school system. For the reasons stated in our prior opinions, we decline to do so.

*Edgewood IV*, 917 S.W.2d at 747-48.

In *West Orange Cove II*, the Supreme Court expressly addressed the judicial limitation doctrine when courts are asked to dictate educational policy beyond its Constitutional authority:

The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness. This is not to say that the standards in article VII, section 1 involve no political considerations beyond the judiciary's power to determine. We have acknowledged that much of the design of an adequate public education system cannot be judicially prescribed. Litigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted. The judiciary's choice is not between complete abstinence from VII, section 1 issues, and being, in the State defendants' words, "the arbiter of education and policy, overseeing such issues as curriculum and testing development, textbook approval, and teacher certification." Rather, the judiciary's duty is to decide the legal issues properly before it without dictating policy matters. The constitutional standards provide an appropriate basis for judicial review and determination. ... [T]he standards of article VII, section 1—adequacy, efficiency, and suitability—do not dictate a particular structure that a system of free public schools must have. We have stressed this repeatedly. In *Edgewood I* we wrote: "Although we have ruled the school financing system to be unconstitutional, we do not now instruct the legislature as to the specifics of the legislation it should enact; nor do we order it to raise taxes." In *Edgewood II*, we said: "We do not prescribe the means which the Legislature must employ in fulfilling its duty." In *Edgewood III*, we reiterated: "As before, we do not prescribe the structure for 'an efficient system of public free schools.' ... We have not, and we do not now, suggest that one way of school funding is better than another, or that any way is past challenge, or that any member of this Court prefers a particular course of action ..., or that one measure or another is clearly constitutional."

*West Orange Cove II*, 176 S.W.3d at 778-83 (footnote citations omitted).

### **C. Application of Political Question Doctrine to Intervenors' Claims**

Throughout their plea, Intervenors clearly and unequivocally ask this Court to direct the Texas Legislature to implement a particular system of public education through the prism of their own views of how the public educational system should work. Not one substantial constitutional claim has been made by Intervenors nor have they presented a proper case for this court to adjudicate. "Whether public education is achieving all that it *should*. . . involves political and policy considerations properly directed to the Legislature." *Id.* at 753 (emphasis in original).

Defendants have singled out statutes and regulations for which they find disfavor but they have no constitutional right (certainly not under article VII, section 1) to: unlimited charters, unregulated schools, uncertified teachers, unrestricted home-rule charter schools, and automatic transfers from low performing schools in a given year. By asking this Court to declare various, independent provisions of the Texas Education Code unconstitutional, Intervenor essentially ask this Court to dictate to the Texas Legislature the policy choices they prefer and such is not allowed under the political question doctrine.

**1. Charter school provisions.** Intervenor's strong preference for charter schools over traditional public schools is evident with the call for the removal of the statutory cap on the number of charter schools, as well as the rules and regulations imposed on traditional public schools and to which charter schools are not subjected. *See* Plea ¶¶ 11, 12. Intervenor is certainly free to draft proposed legislation and have it vetted publicly at the Capitol. However, asking this Court to do the same in the name of "efficiency" would violate the separation of powers. In addition, it ignores the Legislature's consideration of risks associated with charter schools, which have been deemed largely as experimental, have been criticized for their racially segregative effect,<sup>10</sup> and have been found to be no more effective than public schools.<sup>11</sup> This is not to say that all charter schools are failing and that affording students choice is an inappropriate

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<sup>10</sup> *See, e.g.,* Frankenberg, E., Siegel-Hawley, G., Wang, J. *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standard*, The Civil Rights Project/Proyecto Derechos Civiles at UCLA 1 (Jan. 2010) available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf> (finding that charter schools are even more segregated than traditional public schools). (last visited June 21, 2012).

<sup>11</sup> *See, e.g.,* Press Release, Charter Schools in Texas Perform Significantly Below Their Traditional Public School Peers (June 15, 2009) available at <http://credo.stanford.edu/reports/statepressreleases/Texas.pdf> (finding that 17 percent of charter schools reported academic gains that were significantly better than traditional public schools, while 37 percent of charter schools showed gains that were worse than their traditional public school counterparts, with 46 percent of charter schools demonstrating no significant difference), full report available at [http://credo.stanford.edu/reports/MULTIPLE\\_CHOICE\\_CREDO.pdf](http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf). *See also* 2011 Accountability System State Summary (as of Nov. 2, 2011), Texas Education Agency available at: <http://ritter.tea.state.tx.us/perfreport/account/2011/statesummary.html> (last visited June 21, 2012) (showing 17.6% of Texas school schools as "Academically Unacceptable").

policy decision, but it is just that: a policy decision for the Legislature to consider, not the courts.

**2. Teachers.** Although the Texas Legislature has obviously balanced the due process rights of teachers against the need to terminate ineffective teachers in its creation of statutes concerning the employability of teachers, in the eyes of Intervenor, the end result is a system of arbitrary and inefficient rules and regulations concerning personnel. See Plea ¶ 15. Here, Intervenor complains of minimum salary schedules and state-mandated teacher salary grants under Tex. Educ. Code Ann. § 21.402. These statutes take into account important measures, for example, to avoid substantial teacher attrition, recruit teachers from other states and pay experienced teachers. Intervenor also complains of the teacher certification process under Tex. Educ. Code Ann. § 21.031, which is meant to ensure students have access to teachers who are properly trained and certified, but in Intervenor's eyes, these measures infringe on local authorities' discretion to hire the people Intervenor believes may be better-suited to teach. *Id.*

Intervenor further complains of various other provisions affecting teachers, arguing that each is inefficient: the minimum teacher contract under Tex. Educ. Code Ann. § 21.401, of ten months; the appeal process for non-renewal of teacher contracts set out in various statutes in Chapter 21 and rules in the Texas Administrative Code; the requirement to notify a teacher not later than the 10<sup>th</sup> day before the last day of instruction under Tex. Educ. Code Ann. § 21.206; the lack of public disclosure of teacher evaluations; and the teacher appraisal process in Tex. Educ. Code Ann. § 21.351, *et seq.*, as well as the failure to provide a meaningful measure of teacher performance that includes a value-added component. *Id.*

Each of these provisions are certainly debatable in the public forum but can find no recourse in the courts where such matters will be litigated endlessly without any judicially

discoverable and manageable standards for resolving the matters. *See Baker v. Carr*, 369 U.S. at 217.

**3. Financial Rating Accountability.** Intervenors state that the financial accountability system currently in place is inefficient, though they cite to no authority when making statements such as “successful enterprises assure efficiency by also conducting unbiased third-party evaluations,” or “[l]ittle expertise is available within the Texas Education Agency to carry out this duty.” Plea ¶ 13. Intervenors seek to rewrite the current financial accountability legislation and go so far as to admit that their motives are political, stating that they wish to reform a system that “is a clear constitutional failure of public policy.” *Id.* Regardless of whether their proposed policy change has merit or not, the courthouse is not the place for a debate on a legislatively enacted financial accountability system. As the court has stated, “Deficiencies... in public education that fall short of a constitutional violation find remedy not through the judicial process, but through the political processes of legislation and elections.” *West Orange-Cove II*, 176 S.W.3d at 753.

**4. Home-Rule School District Charters.** Intervenors challenge the statutes governing Home-Rule School District Charters as outlined in Tex. Educ. Code §§ 12.011-12.013. *See* Plea ¶ 16. Intervenors state that § 12.013 (b)(3)(F)-(S) are “very restrictive regulations” and that removing the mandates therein could make the program more efficient. The Supreme Court has previously stated that its role, “though important, is limited to ensuring that the constitutional standards are met. [They] do not prescribe *how* the standards should be met.” *West Orange-Cove II*, 176 S.W.3d at 753. Because Intervenors explicitly seek to change the regulations detailed below, their request should be taken to the Legislature and not the Court.

Among these “restrictive regulations” are items such as subsection (G): elementary class size limits under Section 25.112. The relevant section, Tex. Educ. Code Ann. § 25.112, was added over 25 years ago and places a cap of twenty-two students for classes in grade K-4. It is of such importance that notice of class size waivers must be provided to parents of affected children. *See id.* § 25.113. In performing its duties, the Legislature debated increasing class sizes in the most recent legislative session but such legislation failed to pass. *See* Terrence Stutz, *Texas Teachers Urge Senate to keep class-size limit*, Dallas Morning News, March 08, 2011; Mose Buchele, *Special Session Revives Texas Class-Size Debate*, The Texas Tribune, June 7, 2011. Additionally, the Legislature is already aware that the regulation may cause undue hardship on a district, and has enacted a procedure for requesting a waiver from the requirement. Tex. Educ. Code Ann. § 25.112 (d). It would be nonsensical to suddenly declare the courts are responsible for a regulation like this when the Texas Legislature is plainly already considering the issue during its sessions.

The Intervenor also complains about subsection (H): high school graduation under Section 28.025. This regulation states that “The State Board of Education by rule shall determine curriculum requirements for...high school programs.” Tex. Educ. Code Ann. § 28.025 (a). The regulation goes on to state how many math, science, English, foreign language, etc., courses a student must take to graduate under the minimum, recommended, or advanced high school programs. Tex. Educ. Code Ann. § 28.025 (b-1). Asking the courts to debate whether or not this regulation is “very restrictive” for home-rule charters ignores considerations made by the legislative committees when establishing three different plans to meet the needs of Texas high school students.

Similarly, Intervenors take issue with subsection (J), which references bilingual education under Subchapter B, Chapter 29. This law was enacted in response to a prior court ruling holding that Latino English language learner (“ELL”) children were being denied educational opportunities under the Equal Educational Opportunities Act of 1974. *See U.S. v. Texas*, 680 F.2d 356, 371-372 (5th Cir. 1982) (Fifth Circuit noting that “the 1973 Texas bilingual program was pedagogically unsound, largely unimplemented, and unproductive in its results” and that the Texas Legislature's enactment of the 1981 Bilingual and Special Language Programs Act tracked the lower court's eventual remedial order, compelling bilingual education through the elementary grades in school districts with 20 or more students with limited English-speaking proficiency in the same grade, authorizing the Texas Education agency to adopt "standardized entry-exit criteria," and compelling the TEA to take certain specific measures, including on-site monitoring, to ensure compliance). Many of these provisions remain in place today in order to ensure ELL students access equal educational opportunities, but Intervenors still want to present their case asking that home-rule charter schools be excused from implementing this section of the Education Code.

These statutes include those involving preschool programs for ELL students, evaluation of transferred students, teacher certification, and student enrollment and exiting criteria. *See* Tex. Educ. Code Ann. § 29.051-29.066. The importance of these statutes can be seen in the policy statement in the subchapter, which states, in part: “Experience has shown that public school classes in which instruction is given only in English are often inadequate...” Tex. Educ. Code Ann. § 29.051. Yet, Intervenors seek to exempt home-rule charters from these provisions under their definition of efficiency.

Another “restrictive regulation” for home-rule charters alleged by Intervenor in § 12.013 is subsection (K), concerning kindergarten and prekindergarten programs. Intervenor wishes to remove these statutory mandates for home-rule charters, that require: “programs must at a minimum comply with the applicable child-care licensing standards adopted by the Department of Protective and Regulatory Services...” (Tex. Educ. Code Ann. § 29.1532 (h)), or that allow the commissioner to “administer grants...in a manner that provides the greatest flexibility allowed under federal law.” Tex. Educ. Code Ann. § 29.1561 (b). Whether or not the Intervenor is correctly judging these regulations to be restrictive, the issue is not one to burden the courts with; instead, it is a nonjusticiable question.

Intervenor goes as far as to state that safety provisions relating to the transportation of students are among “special interest pressures” that “in effect, took away the very benefit of converting to a Home-Rule Charter.” Plea ¶ 15. Whether or not requiring that “each school district shall meet or exceed the safety standards for school buses...” under Tex. Educ. Code Ann. § 34.002 (b) is related to special interest pressures that make the educational system inefficient is not a question for the court.

Other statutes and regulations governing home-rule charter schools that Intervenor complains about include items such as special education, extracurricular activities, and other day-to-day matters that help make up the structure of the public school system. See Plea ¶ 16 (citing Tex. Educ. Code Ann. § 12.013 (3) (F)-(S)). The Texas Supreme Court has already declined to “prescribe the structure of this state’s public school system.” *Edgewood IV*, 917 S.W.2d at 747-48. Because the legislature makes the thousands of decisions that make up the state’s public school system, these issues should be taken to the legislature’s doorstep.

**5. Public Education Grants.** Intervenors likewise complain of Tex. Educ. Code § 29.201, which allows students to attend another public school campus, if for example, their present school had 50 percent or more of the students failing to perform satisfactorily on a state standardized test. The subchapter further provides that a district cannot accept or reject a student on the basis of a student's race, ethnicity, academic achievement, athletic abilities, language proficiency, sex or socioeconomic status. *Id.* § 29.203(d). The chapter further provides that a receiving school district with excess applications must give priority to students at risk of dropping out and requires the sending school district to provide transportation free of charge. *Id.* Despite these statutory protections, Intervenors complain of these policy decisions, claiming the statute has little or no effect.

Intervenors' plea is wrought with structural policy choices it prefers and amounts to nothing more than their own personal legislative "reform" agenda. If this Court entertains the merits of the Plea and allows it to go forward, undoubtedly there will be no end to potential issues that persons may raise in the courts under the "efficiency" provision after failing in the legislature, including challenges to the no-pass/no-play rule, statutes governing Adult and Community Education Programs, the Texas Troops to Teachers Program, specified curriculum decisions made by the State Board of Education, or any other infinite challenges that could be created.<sup>12</sup> Certainly this is not what the courts envisioned as enforceable rights under the Education Clause.

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<sup>12</sup> Interestingly, Defendants have yet to file a plea to the jurisdiction on Intervenors' claim. Never slow to challenge the viability of a claim, such silence may reflect Defendants' own desire to establish reforms that they themselves support but are unable to pass in the Texas Legislature. *See, e.g.*, Plea ¶ 11 (reporting that Defendant Commissioner has successfully sought to circumvent the charter cap).

**Conclusion**

WHEREFORE, Edgewood Plaintiffs respectfully request that this Court grant this motion and dismiss with prejudice the Plea in Intervention filed by Intervenors and grant any other relief that this Court deems proper.

DATED: June 22, 2012

Respectfully Submitted,

**Mexican American Legal Defense and  
Educational Fund, Inc.**

David G. Hinojosa  
State Bar No. 24010639  
Marisa Bono  
State Bar No. 24052874  
110 Broadway, Suite 300  
San Antonio, Texas 78205  
(210) 224-5476  
(210) 224-5382 Fax

By: /s/ David G. Hinojosa  
David G. Hinojosa

**Multicultural, Education,  
Training and Advocacy, Inc.**

Roger L. Rice\*  
240A Elm Street, Suite 22  
Somerville, MA 02144  
Ph: (617) 628-2226  
Fax: (617) 628-0322  
\*Pro Hac Vice Application Filed

Attorneys for Edgewood Plaintiffs

**Certificate of Service**

I also certify that on June 22, 2012, I served the foregoing document **via electronic mail and hand-delivery** to Intervenor listed below and via electronic mail to the other parties listed below:

GREG ABBOTT  
Attorney General of Texas

DANIEL T. HODGE  
First Assistant Attorney General

DAVID C. MATTAX  
Deputy Attorney General for Defense Litigation

ROBERT B. O'KEEFE  
Chief, General Litigation Division

SHELLEY N. DAHLBERG  
Assistant Attorney General Texas  
Texas Attorney General's Office  
General Litigation Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711  
Fax: (512) 320-0667

Attorneys for Defendants

Mark R. Trachtenberg  
Haynes and Boone, LLP  
1 Houston Center  
1221 McKinney St., Suite 2100  
Houston, Texas 77010  
Fax: (713) 547-2600

John W. Turner  
Hayes and Boone, LLP  
2323 Victory Avenue, Suite 700  
Dallas, Texas 75219  
Fax: (214) 651-5940

Attorneys for Plaintiffs, Calhoun County ISD, et al.

Richard Gray  
Toni Hunter  
Gray & Becker, P.C.  
900 West Ave.  
Austin, Texas 78701  
Fax: (512) 482-0924

Randall B. Wood  
Doug W. Ray  
Ray & Wood  
2700 Bee Caves Road #200  
Austin, Texas 78746  
Fax: (512) 328-1156

Attorneys for Plaintiffs, Texas Taxpayer &  
Student Fairness Coalition, et al.

J. David Thompson, III  
Philip Fraissinet  
Thompson & Horton, LLP  
Phoenix Tower, Suite 2000  
3200 Southwest Freeway  
Houston, Texas 77027  
Fax: (713) 583-9668

Attorneys for Plaintiffs, Fort Bend ISD

J. Christopher Diamond  
The Diamond Law Firm, P.C.  
17484 Northwest Freeway  
Ste. 150  
Houston, Texas 77040  
Fax: (832) 201-9262

Craig T. Enoch  
Melissa A. Lorber  
Enoch Kever PLLC  
600 Congress, Ste. 2800  
Austin, Texas 78701  
Fax: (512) 615-1198

Attorneys for Intervenors, Joyce Coleman, et al.

By:           s/David G. Hinojosa  
David G. Hinojosa

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