

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

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al.	§	IN THE DISTRICT COURT
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	§	
Plaintiffs	§	
	§	
	§	
vs.	§	200 th JUDICIAL DISTRICT
	§	
ROBERT SCOTT, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY, et al.	§	
	§	
	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

**EFFICIENCY INTERVENORS' RESPONSE TO
EDGEWOOD PLAINTIFFS' PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE OF SAID COURT:

As parents whose children are educated in the public school system and Texas businesses that must rely on the school system to educate their workforce, the Efficiency Intervenors are aggrieved by an inefficient system that fails to provide the general diffusion of knowledge required by the Texas Constitution. Accordingly, they suffer an actual injury as a result of the current inefficient school system and have standing to challenge that it is unconstitutional. The claims asserted by the Efficiency Intervenors have been invited to this litigation by the Texas Supreme Court, which has urged that the issue of whether the Texas public schools are qualitatively efficient should be part of the constitutional debate. And the Efficiency Intervenors seek the relief that can be and has been granted by the courts: a declaration that the system of public schools is qualitatively inefficient, leaving to the Legislature precisely how to reform the system to achieve the constitutional mandate of efficiency. This Court should deny Edgewood Plaintiffs' Plea to the Jurisdiction. Alternatively,

this Court should reserve ruling on the Plea until after the presentation of evidence in this matter concludes.

A. *The Efficiency Intervenors, who are harmed by the public school system's inability to provide the general diffusion of knowledge required by the Texas Constitution, have standing to challenge the qualitative inefficiency of the public schools.*

In the more than two decades during which the constitutionality of the public school system has been repeatedly litigated, numerous school children and parents have asserted claims challenging the constitutionality of the Texas public schools and their standing to do so has never been challenged. In *Edgewood I*, the State acknowledged that students and parents would have standing to assert a constitutional right to an efficient education, only asserting that Edgewood and other school districts lacked standing to raise constitutional violations on their own. And then, Edgewood School District did not dispute that students and parents have standing to challenge the constitutionality of the public schools.¹ Years later, in *West Orange-Cove II*, when the Texas Supreme Court expressly addressed standing, it stated: "We think the guarantee of public free schools assured by article VII, section 1, ***extends not only to school children, but to the public at large***, which is vitally concerned that there be a general diffusion of knowledge."² School children (and their parents) have standing to challenge the efficiency of the system of public free schools.

¹ Edgewood School District argued that school districts, though creatures of the State, also had standing to sue the State, consistent with the general test for standing articulated in *Rogers v. Brockette*. See Edgewood's response to the State's motion for summary judgment, pp. 9-10 (available at Texas State Library and Archives Commission, call no. C8353, box no. 29, vol. no. 1, pp. 191-92); see 588 F.2d 1057, 1063 (5th Cir. 1979) (holding standing of school district was not defeated on the basis that any decision would be hypothetical and contingent, since Texas could theoretically abolish the district to defeat a judgment).

² *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex. 2005) ("*W. Orange-Cove II*") (emphasis added).

Standing exists when there is a real controversy between the parties that will be actually determined by the judicial declaration sought.³ The Efficiency Intervenors allege that the Texas public school system is facially unconstitutional: that is, that public school children are not receiving the general diffusion of knowledge mandated by the Texas Constitution. A two-part test governs whether parties have standing to bring a facial constitutional challenge to a statute: "First, the plaintiff must suffer some actual or threatened injury under the statute. Second, the plaintiff must contend that the statute unconstitutionally restricts the plaintiff's own rights."⁴ The Efficiency Intervenors' Second Amended Plea in Intervention alleges that Intervenors are parents of school-aged children who attend Texas public schools; they are injured because the public schools are not providing their children the constitutionally mandated general diffusion of knowledge. As the Texas Supreme Court has expressly recognized, when the public school system does not meet the constitutional mandate, it is the public school students (including the Efficiency Intervenors' children) who suffer.⁵

Indeed, Edgewood Plaintiffs recognize that parents have standing to challenge whether their children are receiving the general diffusion of knowledge mandated by the Constitution. The parent plaintiffs in their lawsuit allege precisely the same harm as the parent Intervenors here: that they are parents of children who "presently attend, or will soon attend, public schools," which they contend do not meet constitutional mandates. The Efficiency Intervenor parents have standing to assert their challenge that the school system be declared unconstitutional.

³ *W. Orange-Cove II*, 176 S.W.3d at 773 (citing *Wilson v. Andrews*, 10 S.W.3d 663, 669 (Tex. 1999)); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

⁴ *See Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996).

⁵ *See W. Orange-Cove II*, 176 S.W.3d at 805 (Brister, J., dissenting).

Further, the Intervenor parents who are businesses (members of the Texas Association of Business) are also harmed by the public school system, because it is failing to provide an adequate education to their workforce. As the Texas Supreme Court has recognized, "the guarantee of public free schools assured by article VII, section 1, extends . . . to the public at large,"⁶ including business owners. Because Texas businesses have suffered an actual injury, the Texas Association of Business also has standing to assert their challenge that the school system be declared unconstitutional.⁷ The Court, though, need not reach this question. Because the Efficiency Intervenor parents have standing to challenge the constitutionality of the public schools, the standing of Texas Association of Business is immaterial.⁸ "When several parties make the same claim for declaratory or injunctive relief, standing for some renders standing for the remainder immaterial."⁹ Edgewood Plaintiffs' Plea should be denied.

B. The Efficiency Intervenor parents' claims have been invited to this litigation by the Texas Supreme Court.

The Texas Supreme Court has held that while it has "considered the financial component of efficiency to be implicit in the Constitution's mandate, the qualitative component is explicit."¹⁰ And the Court has clearly signaled that the question of whether the public schools are **qualitatively** efficient should be part of the analysis of the constitutionality of the Texas

⁶ *W. Orange-Cove II*, 176 S.W.3d at 774.

⁷ *See Tex. Ass'n of Bus.*, 852 S.W.2d at 447 ("[A]n association has standing to sue on behalf of its members when '(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'").

⁸ *See W. Orange-Cove II*, 176 S.W.3d at 804 (Brister, J., dissenting).

⁹ *Id.* (citing *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 519 (Tex. 1995); *Robbins v. Limestone County*, 268 S.W. 915, 917 (1925)).

¹⁰ *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 718 (Tex. 1995) ("*Edgewood IV*").

public school system.¹¹ Yet once again the school district plaintiffs have ignored this directive and focus solely on the financing of the school system. The Efficiency Intervenors, on the other hand, have raised precisely the issue invited to this litigation by the Texas Supreme Court: is the system of public free schools qualitatively efficient?

Specifically, the Texas Supreme Court has held that "[e]fficiency implicates funding access issues, but it is certainly not limited to those issues."¹² The Court has recognized the risk of perpetual litigation about school funding without real structural reform, noting that "[p]ouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled."¹³ The Court has gone on to state: "[A]lthough the issues brought before us in *Edgewood I*, *Edgewood II*, and . . . *Edgewood III*, have all been limited to the financing of the public schools, as opposed to other aspects of their operation, **money is not the only issue, nor is more money the only solution.**"¹⁴ To the contrary, reform is required to fulfill the constitutional standards. As the Court held in *West Orange-Cove II*:

There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, improved efficiencies, or better methods of education.¹⁵

The Court further recognized that the real issue of efficiency, as it is traditionally defined, has not been litigated: "We have not been called upon to consider, for example, the

¹¹ See, e.g., *W. Orange-Cove II*, 176 S.W.3d at 793.

¹² *W. Orange-Cove II*, 176 S.W.3d at 793 (emphasis added).

¹³ *Id.* at 754.

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* at 790; see also *id.* at 754 ("We remain convinced, however, as we were sixteen years ago, that defects in the structure of the public school finance system expose the system to constitutional challenge."); *Edgewood III*, 826 S.W.2d at 523-24 ("[C]onsensus for at least two decades has been that systemic change is essential to correct the deficiencies in the school finance system.").

improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system" or whether "public education could benefit from more competition."¹⁶ The Court noted that the plaintiffs and intervenors to date "have focused on funding" and acknowledged that the Court "cannot dictate how the parties present their case or reject their contentions simply because ***we would prefer to address others.***"¹⁷ The Court has been clear in its invitation that challenges about whether structural reforms are required to meet the mandate of qualitative efficiency should be part of litigation about the constitutionality of Texas public schools. And the Court would not have expressly invited a challenge if it believed that the issue of efficiency, as Edgewood Plaintiffs contend, solely "involves political and policy considerations properly directed to the Legislature." Edgewood Plaintiffs' Plea should be denied.

C. The Efficiency Intervenors seek a declaration that the current public school system is unconstitutional, not a mandate of specific structural reforms.

Edgewood Plaintiffs mischaracterize the Efficiency Intervenors' pleadings in attempting to analogize the Efficiency Intervenors to the Guterrez Intervenors in *Edgewood IV*. In *Edgewood IV*, the Guterrez Intervenors "alleged a constitutional right to select the schools of their choice and to receive state reimbursement for their tuition" and "sought an immediate remedy ordering their school districts to contract with private entities of the parents' choosing for the education of their children."¹⁸ The trial court recognized it did not have authority to grant the remedy requested:

¹⁶ *W. Orange-Cove II*, 176 S.W.3d at 793.

¹⁷ *Id.* (emphasis added).

¹⁸ *Edgewood IV*, 917 S.W.2d at 747.

What I am saying is, is that the courts of the State of Texas have no authority to order a hybrid voucher system.

And it doesn't matter what state of facts you show with regard to suitability or efficiency, that we have got no authority to order a hybrid voucher system. And that that's what you are requesting and we have got no authority to do it.¹⁹

The Texas Supreme Court agreed, holding:

[The courts] 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. Our role is only to determine whether the Legislature has complied with the Constitution.²⁰

In contrast here, the Efficiency Intervenors seek precisely the remedy Texas courts can and have granted: a declaration that the Legislature has not complied with the constitutional mandate to provide an efficient system of public free schools, leaving to the Legislature the decision of how to reform the system to obtain qualitative efficiency. The Texas Supreme Court has held several times that this is a question within the jurisdiction of the courts; for example:

- In *Edgewood I*, the Court held that article VII, Section 1 of the Texas Constitution provides "a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions."²¹
- In *Edgewood IV*, the Court held that while the duty to establish and provide for "an efficient system of public free schools" is committed by the Constitution to the Legislature, the Court's role is "to determine whether the Legislature has complied with the Constitution."²²
- In *West Orange-Cove II*, the Court held: "[W]e conclude that the separation of powers does not preclude the judiciary from determining whether the Legislature has met its constitutional obligation to the people to provide for public education."²³

¹⁹ *Id.*

²⁰ *Id.* at 747-48 (citations omitted).

²¹ See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) ("*Edgewood I*").

²² *Edgewood IV*, 917 S.W.2d at 747-48.

²³ *W. Orange-Cove II*, 176 S.W.3d at 780-81.

Despite Edgewood Plaintiffs' contentions, nowhere in the Efficiency Intervenors' Second Amended Plea in Intervention do Efficiency Intervenors "urge the Court to order Defendants to expand choice by extending charter schools and to prescribe other components of the public school system." The Efficiency Intervenors allege that the entire system of public free schools is not qualitatively efficient—i.e., the system does not produce results with little waste²⁴—and is therefore unconstitutional. In support of their claim, the Efficiency Intervenors identify in their Second Amended Plea in Intervention a number of Texas statutes that impair qualitative efficiencies, which should properly be declared unconstitutional, and also identify the absence of any meaningful accountability measures. But Efficiency Intervenors do not ask the Court to mandate that the Legislature impose any particular solution. To the contrary, the Efficiency Intervenors request the following declaratory relief, and (like the Plaintiff School Districts) leave to the Legislature how to reform the system to meet the constitutional mandate of efficiency:

[T]he Efficiency Intervenors request that the Court render judgment declaring that the current system of public free schools violates article VII, section 1 of the Texas Constitution in that it is not efficient in providing for the general diffusion of knowledge in order to preserve the liberties and rights of the people. The evidence will show that the system fails the qualitative efficiency test.

Because Texas Education Code, Chapter 21 impairs efficiency, the Efficiency Intervenors further request a declaration that the statute is unconstitutional, in violation of article VII, section 1 of the Texas Constitution.

A plain reading of the Efficiency Intervenors' Second Amended Plea in Intervention defeats Edgewood Plaintiffs' attempt to mischaracterize Efficiency Intervenors' claims as

²⁴ The Texas Supreme Court has held "[t]here is no reason to think that 'efficient' meant anything different in 1875 [when article VII, section 1 was written] from what it now means. 'Efficient' conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time." *W. Orange-Cove II*, 176 S.W.3d at 752-53.

seeking to mandate particular legislative solutions. And because this central tenet of Edgewood Plaintiffs' argument fails, so must their Plea.

D. The Plaintiff School Districts' claims are not ripe without adjudication of the Efficiency Intervenors' claims.

There can be no determination of the financial efficiency of the Texas public schools (which the Texas Supreme Court has held is implicit in the constitutional mandate) without first determining the underlying qualitative efficiency (which is explicit). The Plaintiff School Districts are asking for an alteration of the school finance system—without confronting the Efficiency Intervenors' challenge that the system must first rid itself of qualitative inefficiencies so that, in fact, a proper assessment of financial need can be made. Historically, the school districts' lawsuits have required the courts to assume that the system is operating efficiently on a qualitative basis, as the issue of whether it is actually operating efficiently has never been litigated. The Texas Supreme Court has continually urged that this assumption be challenged, and it is an assumption that cannot be made in this case because the assumption is now disputed by the Efficiency Intervenors. In short, the issues presented by the Plaintiff School Districts cannot be decided without consideration of the issues raised by Efficiency Intervenors.

E. The Court should deny the plea to the jurisdiction or, alternatively, reserve ruling on the plea until all evidence is presented at trial in this case.

The Efficiency Intervenors have standing to seek a declaration that the public schools are not operated efficiently and are thus unconstitutional; the Texas Supreme Court has invited claims challenging the qualitative efficiency of the Texas school system; and the Plaintiff School Districts' claims seeking to reform the financing of the school system are premature without

consideration of whether the system is being operated efficiently. For all of these reasons, this Court should deny Edgewood Plaintiffs' plea to the jurisdiction.

Alternatively, the Court should defer ruling on the Plea until all evidence is presented in the trial of this matter. To ensure that challenges to the Efficiency Intervenors' intervention would be resolved early in this case, and if necessary could be reviewed on appeal before trial of this matter, the parties in this case agreed that all "motions to strike or otherwise challenge the basis of the intervention" must be filed by May 15, 2012. Edgewood Plaintiffs, though, did not file their Plea until June 22. If the Plea is granted at this time, the Efficiency Intervenors will seek mandamus relief and to stay trial of this matter so they can—as invited by the Texas Supreme Court—present their challenge that the school system is not qualitatively efficient as part of the overall constitutionality analysis. Even if a stay is not issued, the Plaintiff School Districts and the State would risk unnecessary duplication of efforts and waste of judicial resources if they go forward with presenting their case now and the dismissal of the Efficiency Intervenors is reversed by the higher courts. To avoid this risk, the Court should allow the Efficiency Intervenors to present their evidence during the trial of this matter and allow a full record to be created, deferring its ruling on the Plea until after this evidence is presented.

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Efficiency Intervenors pray that this Court deny the Plea to the Jurisdiction and award the Efficiency Intervenors such other relief to which Intervenors are justly entitled.

Respectfully submitted,

By: /s/ Craig T. Enoch

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**ATTORNEYS FOR THE EFFICIENCY
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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2012 a true and correct copy of the above and foregoing has been served by electronic service, email or facsimile on all attorneys of record in this matter.

/s/ Craig T. Enoch
Craig T. Enoch