

I.
STATUS AND INTEREST OF *AMICUS CURIAE*

A. Brief History of Texas State Teachers Association

The Texas State Teachers Association originated in Mexia, Texas, in June 1880, when the North Texas Teachers Association and the Austin Teachers Association combined. The date was only four years after the adoption of Texas Constitution Article VII, § 1, which is at the heart of the current litigation. Electrification was beginning to transform urban life. The modern labor movement was emerging. Railroads were rapidly expanding westward, extending the Industrial Revolution into the western heartland. Millions of south Texas longhorn cows were herded north to the Missouri Pacific railroads in Sedalia, Missouri for resale in Eastern markets where a \$3 longhorn would bring \$40.

In Texas, cotton and wheat were the main cash crops, as they are today. The United States Army still had cavalry units deployed in West Texas to quell Indian uprisings. And the vast majority of schools dotting the hamlets and prairies were one-room common schools where farm children got the rudiments of an education. Teaching offered one of the few opportunities for rural women to support themselves and obtain a paying job, albeit for very skimpy wages.

The first state-wide gathering of teachers occurred in December 13, 1871, when the State Educational Convention met in Austin. At this time resolutions were adopted concerning the improvement of the teaching profession and the development of free public schools in Texas. One of the most significant resolutions called for the establishment of a state university.

On June 28, 1880, the two associations were joined. Membership dues were fixed at one dollar and arrangements were made to have the full proceedings published in the Texas Journal of

Education. The name, Texas State Teachers Association (“TSTA”), was officially adopted and the organization’s objectives were enumerated. A committee of seven members was appointed to direct the attention of the Legislature to changes needed in the public school laws and to the need for the establishment of a state university. Four years later, the Texas Legislature adopted language creating the University of Texas at Austin.

Early membership was open to anyone interested in the promotion of the welfare of education. In 1949, Texas State Teachers Association moved its headquarters from Fort Worth to Austin. It established its headquarters in a suite of rooms on the third floor of the Driskill Hotel. Since its origins in 1880, TSTA has been involved in historical legislation that affected public schools and teachers in Texas. TSTA has been involved with the original development of, and the evolutionary changes in, the State’s Foundation School Program. TSTA has been credited with the original development of laws that set statewide teacher salaries. TSTA authored legislation creating the Teacher Retirement System of Texas. TSTA remains actively involved to this day in the improvement of both statutory and regulatory standards to ensure, through development of rigorous educator certification standards. TSTA has supported the implementation child labor laws, mandatory schooling, and civil rights for all. It is duly proud of its heritage of advocacy for the children in this State.

Today, TSTA is a state-wide, professional association whose members are employed by the public schools of this State, and is affiliated with the National Education Association. It exists to further the interests of public education in the State of Texas by strengthening, promoting, and protecting the rights and privileges of employees of public education. To carry out its mission, TSTA has some 400 local affiliates throughout the

state that are made up of approximately 68, 000 members in various school districts and counties across the state.

B. The Specific Interests of Texas State Teachers Association

Over the course of the history of school finance litigation in Texas, beginning with the celebrated *Rodriguez* decision and then throughout the history of the *Edgewood* litigation and its progeny, Texas State Teachers Association has been an interested observer and sometimes participant, via the submission of *Amicus Curiae*, position statements throughout the course of the history of the school finance litigation. Texas State Teachers Association has historically advocated for attainment of the highest educational standards for all Texas students. It has taken positions in the litigation when the organization has felt that the system itself has come under unwarranted assault. On this occasion, Texas State Teachers Association is stepping forward, as a friend of the Court, to support and advocate for the betterment of the overall system of public education in this State. As will be discussed below in more thorough detail, TSTA believes that the Efficiency Intervenors are asking this Court to embark upon a review of individual statutory provisions, and to serially substitute its judgment for the wisdom of the Legislature which has enacted those provisions. As will be discussed below, none of the previous Texas Supreme Court decisions construing Article VII, § 1 of the Texas Constitution have undertaken such a review. Indeed, each of those decisions has expressly disavowed such an approach.

Texas State Teachers Association feels strongly that a portion of the pleadings filed on behalf of 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 (hereinafter collectively referred to by their colloquial name “Efficiency Intervenors”) represent an invitation to judicial error. Texas State Teachers Association acknowledges that the Efficiency Intervenors represent taxpayers and parents seeking to advocate additional improvements to the “efficient system of public free schools” mandated by Article VII, § 1 of the Texas Constitution. In that regard, they are little different from many other Plaintiffs or Intervenors in the case. However, the Efficiency Intervenors, under the guise of the constitutional mandate, are asking this Court to embark upon a process that is distinct from any other type of legal analysis that has been permitted to take place inside the process of Constitutional review. As part of their request for relief, the Efficiency Intervenors are asking this Court to undertake individual analyses of specific provisions within the Texas Education Code, determine, in isolation, whether they are efficient, and then discard individual statutory provisions found to be unworthy. This is new. It will break new ground in the history of judicial review, and as will be explained below, constitutes a substantial departure from previous judicial decisions in the *Edgewood* series of cases. MALDEF has interposed objections to the Efficiency Intervenors’ pleadings. TSTA supports those objections for the reasons set forth below.

II.

BRIEF REVIEW OF PREVIOUS DECISIONS

The Court has made it clear to the parties that it is well aware of the previous judicial history regarding school finance in Texas. Without belaboring the points of which the Court is well aware, a brief history of the judicial background concerning this particular issue may be helpful.

Kirby v. Edgewood Independent School District, 761 S.W.2d 859 (Tex.App---Austin 1988, rev'd,)

In this first appellate decision concerning school finance by a Texas Court, the Austin Court of Appeals had before it the Judgment of Hon. Harley Clark, entered in 1987, which declared the funding scheme in violation of Tex. Const. art. I, § 3 (equal rights), § 19 (due course of law) unconstitutional. The Court of Appeals looked at the system as a whole and then declared that the Constitutional definition of "efficient" was a political question, best left to the Legislature. The case was appealed to the Texas Supreme Court.

Edgewood Independent School District v. Kirby, (Edgewood I), 777 S.W.2d 391 (Tex. 1989)

On October 2, 1989, the Texas Supreme Court held that the latter at issue was "**the constitutionality of the Texas system for financing the education of public school children,**" (Emphasis added.) The Court went on to hold that the Constitution did not vest exclusive discretion in the Legislature. The language of article VII, section 1 imposed on the Legislature an affirmative duty to establish a system of public free schools, and make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." The Court held that while the constitutional terms were not precise terms, they did provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. Throughout the course of its decision, the Court made it clear that the system in its entirety was the matter under review. Various components of the system were discussed, but the Court's ultimate decision, was as to the system's constitutionality as a whole. The Supreme Court specifically held; "Whether the legislature acts directly or enlists local government to help meet its obligation, the end product

must still be what the constitution commands--i.e. an efficient system of public free schools throughout the state.” The court went on to hold "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." *Edgewood I*, id at 399.

Edgewood Independent School District v. Kirby, (Edgewood II) 804 S.W.2d 491, (Tex. 1991)

On January 22, 1991, the Texas Supreme Court held that, although the “funding system had been improved, it had not been sufficiently altered to remove the deficiencies discussed in *Edgewood I*.” The court again held the system to be unconstitutional, but in doing so, expressly held: “We do not prescribe the means which the Legislature must employ in fulfilling its duty.” *Edgewood II*, id at 498.

Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District, (Edgewood III), 826 S.W.2d 489 (Tex. 1992)

On January 30, 1992, the Texas Supreme Court held that the system of County Education Districts (CEDs) created by the Legislature in Senate Bill 351 to equalize school district wealth for Tier 1 of the Foundation School Program was unconstitutional as violative of Article VIII § 1-e of the Texas Constitution. Lifting a passage from the United States Supreme Court’s earlier decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 55 (U.S. 1973), the Texas Supreme Court noted that the history of Texas school finance has been one of a “rough accommodation of interests” in an effort to arrive at practical and workable solutions. The Texas Supreme Court went on to hold: “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." *Edgewood III*, id at 523.

Edgewood Independent School District v. Meno, (Edgewood IV), 917 S.W.2d 717 (Tex. 1995)

On January 30, 1995, the Texas Supreme Court upheld the recapture system created by Senate Bill 7 and now contained in Chapter 41 of the Texas Education Code. Possibly lost in the greater sweep of the issues before the Court on that occasion was the Court's disposition of an appeal from a Petition in Intervention that had been filed in the case on behalf of parents seeking voucher payments on behalf of their children. Although the issue of vouchers is not currently before this Court, the Supreme Court's discussion of the matter in Section VI of its Opinion has significant bearing on the matters being discussed in this *Amicus Curiae* Brief. So as not to misquote the Court the entire section is set forth below:

VI

Another group of appellants includes Guadalupe and Margie Gutierrez, individually and as next friends of their two minor children, along with two other sets of parents and children. As plaintiff-intervenors in the district court, the Gutierrez group alleged that the present system of public education denies them a constitutionally suitable and efficient education. They further alleged a constitutional right to select the schools of their choice and to receive state reimbursement for their tuition. Thus, they sought an immediate remedy ordering their school districts to contract with private entities of the parents' choosing for the education of their children.

The State filed special exceptions to the petition in intervention, asserting, among other things, that it "prays for a political remedy rather than alleging a statutory or constitutional right." At a hearing, the district court stated that it was granting the State's special exceptions, and explained its ruling as follows:

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.

After providing an opportunity to amend the petition, the district court dismissed the claims with prejudice. The Gutierrez appellants assert that the district court erred in sustaining the special exceptions because the petition in intervention asserted justiciable claims. We disagree.

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." 777 S.W.2d at 399. Since then, we have consistently refrained from prescribing "the means which the Legislature must employ in fulfilling its duty." *Edgewood II*, 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.

West Orange-Cove Consolidated Independent School District v. Alanis, (West Orange Cove I), 107 S.W.3d 558 (Tex. 2003)

On May 29, 2003, the Texas Supreme Court delivered its opinion in what was largely a procedural ruling concerning standing. Nevertheless the Court again reiterated its previous stance concerning the province of the Texas Legislature. The Court held that by assigning a duty to the Legislature, Article VII, § 1 of the Texas Constitution both "empowers" and "obligates."

Further:

It gives to the Legislature the sole authority to set the policies and fashion the means for providing a public school system. Thus we have said that "we do not prescribe the means which the Legislature must employ in fulfilling its duty." But the provision also requires the Legislature to meet three standards. First, the

education provided must be adequate; that is, the public school system must accomplish that "general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people". Second, the means adopted must be "suitable". Third, the system itself must be "efficient". These are admittedly not precise terms, as we have acknowledged, but they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions. The final authority to determine adherence to the Constitution resides with the Judiciary. Thus, the Legislature has the sole right to decide *how* to meet the standards set by the people in article VII, section 1, and the Judiciary has the final authority to determine *whether* they have been met.

Neeley v. West Orange-Cove Consolidated Independent School District, 176 S.W.3d 746 (Tex. 2005)

In this case, all of the Plaintiff groups contended that the public school system could not achieve "[a] general diffusion of knowledge" as required by article VII, section 1 of the Texas Constitution, because the system was underfunded. The Supreme Court labeled this issue as a challenge under the adequacy standard. In undertaking the adequacy analysis, the Court noted that its responsibility was limited to determining whether the public education system is "adequate" in the constitutional sense, not in the dictionary sense. As it defined the scope of review, the Supreme Court limited itself to deciding only whether public education is achieving the general diffusion of knowledge which the Constitution requires. In deciding whether public education is achieving all it *should* -- that is, whether public education was a sufficient and fitting preparation of Texas children for the future, the court expressly deferred to the Legislature to undertake those political and policy considerations. Deficiencies and disparities which fall short of constitutional violations could find remedy not through the judicial process, but through the political processes of legislation and elections. After announcing its standard of review, the Court went on to hold that the system was adequate because progress was being made. "The 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.”

III.

Application of the Supreme Court’s Analyses to the Efficiency Intervenors’ claims for Relief

It is clear from the foregoing analysis that the Texas Supreme Court has, since first announcing its position in *Edgewood I*, consistently and very carefully limited its scope of review under Article VII § 1 of the Texas Constitution to a determination of whether the specific principles articulated therein were being met. That is, whether the system of public free schools make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge."

Many of the allegations contained in the pleadings of the Efficiency Intervenors hold true to the Supreme Court’s limited scope of analysis. However, the Efficiency Intervenors also request that this Court undertake an individual review of specific statutory provisions contained in the Texas Education Code and presumably pass upon their worth in enhancing the overall efficiency of the system. Contained within the Efficiency Intervenors’ pleadings is a laundry list of individual statutes which they specifically allege to be adding to the inefficiency of the school finance system. See Paragraph 22 of Second Amended Plea in Intervention of the Efficiency Intervenors filed May 8, 2012. As *Amicus Curiae* understand the current pleadings, rather than asking that the overall system of public free schools be declared unconstitutional as being inefficient, the Efficiency Intervenors are requesting that specific provisions of the Texas Education Code be declared to be unconstitutional as being *individually* inefficient.

Based on the authorities discussed in Section II, above, in particular the Court’s disposition of the Plea in Intervention filed in the *Edgewood IV* case, the clear teaching of the Supreme Court with

respect to constitutional analysis is one of judicial restraint. In each of the prior decisions, the Texas Supreme Court has expressly noted that deference in must pay to legislative enactments. In exercising such deference, the Supreme Court has previously applied the constitutional mandates discussed above to the system as a whole. This precedent would require this Court to restrict its analysis of the constitutionality to the “system” of public education as a whole. Existing precedent would further indicate that individual statutory mandates are, in the constitutional sense, nonjusticiable.

While most of the previous school finance litigation has revolved around financial provisions mostly involving the Foundation School Program, the “system” of public free schools is obviously composed of and is governed by a great many number of other factors. Most, but not all, of the legislative pronouncements concerning mandated components of the “system” of public free schools are set forth within the provisions of Titles I & II of the Texas Education Code. Most of the provisions in the Texas Education Code impose duties upon either the local school districts (including charter schools) or upon the Texas Education Agency. Virtually all of the provisions contained in the Texas Education Code require the expenditure of resources, either in the form of direct cash expenditures or in the utilization of human resources available to the various school districts. Each of the mandates set forth in statute, or applicable via an authorized administrative regulation, is logically premised upon a policy determination that the mandate was either necessary or useful to the provision of education to the scholastics of the State or to the governance and management of those local entities to which the provision of education is entrusted. In this sense, the “system” of public free schools is comprised of:

1. The boundaries and founding documents of the districts and charters directly responsible for the direct provision of education to the students of this State.
2. The requirements and mandated procedures required of the entities responsible for the instruction.

3. Definitions of the curriculum to be offered.
4. Staffing requirements governing educator personnel, including minimum qualifications, staffing ratios, required benefits, and employment status of public school personnel.
5. Assessment standards and protocols.
6. Accountability provisions for students, campuses and for districts.
7. Health and safety mandates.
8. The resources available to the providers at the State level such as the Texas Education Agency, the Teacher retirement System or the Regional Educational Service Centers.
9. The financial resources available to the local providers for the purpose of meeting all of the foregoing.

Meeting any of the foregoing requirements requires the expenditure of resources. In a closed system with a finite amount of resources, the pursuit of any one of the foregoing necessarily limits the resources available for the pursuit of other goals. In their pleadings, the Efficiency Intervenors have invited this Court to serially substitute its judgment for the collective judgment of the many Texas Legislative sessions which have collectively created a system of public free schools in its current form.

In all of previous cases, as outlined above, the Texas Supreme Court has cautioned against this very approach. This Court should heed the Court's consistent admonitions.

Respectfully Submitted,



By: _____

JOEY MOORE

General Counsel and Director of Legal Services
Texas State Teachers Association
316 W. 12th Street
Austin, Texas 78701
512-476-5355, ext. 1140
512-486-7045 (fax)
State Bar No. 24027525

Attorney for *Amicus Curiae*
Texas State Teachers Association

CERTIFICATE OF SERVICE

I also certify that on July 21, 2012, I served the foregoing document via facsimile to Intervenor
and 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 Fax:
Austin, Texas 78711
Fax: (512) 320-0667

Attorneys for Defendants

Mark R. Trachtenberg
HAYNES AND BOONE,LLP
1 Houston Center

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
(512) 328-1156

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

J. David Thompson, III
Philip Fraissinet
THOMPSON & HORTON, LLP

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.

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

Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027
Fax: (713) 583-9668

Attorneys for Plaintiffs, Fort Bend ISD

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

Attorneys for Intervenors, Joyce Coleman, et al.

Lonnie P. Hollingsworth
Paige Bruton
TEXAS CLASSROOM TEACHERS
ASSOCIATION
P.O. Box 1489
Austin, Texas 78767
Facsimile: (512) 469-9527

Attorneys for Amicus Curiae, TCTA

By: 
Joey Moore