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Filed
12 August 28 P4:28
Amalia Rodriguez-Mendoza
District Clerk
Travis District
D-1-GN-11-003130

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Re: Cause No. D-1-GN-11-003130; *The Texas Taxpayer & Student Fair Coalition, et al. v. Robert Scott, Commissioner of Education, et al.*, in the 200th Judicial District Court of Travis County, Texas

THE EFFICIENCY/EQUITY STANDARD

Although the Texas Supreme Court's articulation of its efficiency/equity standard has evolved somewhat over the years, the essential requirements of the Texas Constitution remain unchanged. The most current articulation of the efficiency/equity standard by the Texas Supreme Court sets forth a reasonably clear, judicially determinable and enforceable framework to guide both the trial court's actions and the legislature's policy decisions.

In *West Orange Cove I*, the Texas Supreme Court summed up and clarified its previous determinations about efficiency/equity by stating, "Constitutional efficiency under article VII, section 1 requires only that 'districts must have substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge.'" *West Orange-Cove Consolidated ISD v. Alanis*, 107 S.W. 3d 558, 571 (Tex. 2003) ("*WOC I*") (quoting *Edgewood ISD v. Meno*, 917 S.W. 2d. 717, 730-31 (Tex. 1995) ("*Edgewood IV*"). Although the State has broad policy discretion to define what constitutes a general diffusion of knowledge, this discretion is not without boundaries. The Court recognized that GDK is a dynamic standard that inevitably must change over time as the needs of Texas and Texans change. As the Court observed in *WOC I*, "...the State's provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations." *WOC I*, 107 S.W.3d at 572 (quoting *Edgewood IV*, 917 S.W.2d at 732). The Court has clearly stated that the duty imposed by Article VII, Section 1 is to establish and suitably provide for a system that equalizes up to the State's own standard of GDK, not level down to a funding level insufficient to provide for GDK. *WOC I*, 107 S.W.3d at 571 (citing *Edgewood IV*, 917 S.W.2d at 729-730). Likewise, the State cannot artificially lower the standard of GDK in order to lower its funding obligation. *West Orange-Cove Consolidated ISD v. Neeley*, 176 S.W.5d 746, 784 ("*WOC II*").

Since the legislature has a clear duty to establish a system that equalizes up to its own definition of GDK, the analysis of whether or not the legislature has met its duty under Article VII, Section 1 must begin with determining the legislatively established level of GDK. Some might argue that this effort is futile and that the cost of GDK is unknowable, but the Texas Supreme Court's past decisions clearly establish otherwise. In *Edgewood IV*, the Court accepted and based its analysis on the trial court's determination that the cost of meeting accreditation standards, which was the legislatively defined level of GDK, was \$3,500 per weighted student. *Edgewood IV*, 917 S.W.2d at 731, footnote 10. In *WOC I*, the Court stated that the legislatively defined level of GDK was an accredited education. *WOC I*, 107 S.W.3d at 571. Interestingly, Texas statutes require the State

itself to examine and determine the cost of its own accreditation requirements, but the State has not consistently performed these studies over the past decade.

Under the current statutory and regulatory regime, accreditation certainly is the starting point to determine the cost of the State's own definition of GDK, but it is not the entirety of that determination. Accreditation focuses on the performance of school districts, and only indirectly looks at the performance of students. Separate and apart from accreditation for school districts, the State also now has an elaborate set of statutory and regulatory requirements that affect individual students—requirements that determine whether students are able to be promoted or graduate. The State cannot set accreditation requirements for school districts so low as to create the appearance that districts are meeting those requirements, while tens of thousands of students are not able to be promoted or graduate because they do not meet the State's performance standards. This potential disconnect between State accreditation standards for districts and State performance standards for students is precisely what the Texas Supreme Court cautioned against when it said that, "(t)his is not to say that the Legislature may define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1." *WOC I*, 107 S.W.3d at 571 (quoting *Edgewood IV*, 917 S.W.2d at 730, n.8); see also *WOC II*, 176 S.W.3d at 784-85. Therefore, a determination of the State's own definition of GDK must look not only at accreditation standards and requirements for school districts, but also at the State's performance standards and requirements for students.

The cost of meeting the State's determination of GDK is judicially determinable using well established procedures. Just as a court may hear evidence and make findings as to the amount of lost future earnings in a personal injury case, or damages in a breach of contract case, the trial court may hear evidence and make determinations regarding the costs of providing an education that meets the State's definition of GDK. The determination of cost to meet GDK must take into consideration the cost of providing safe and appropriate facilities. Because "[a]n efficient system of public education requires not only classroom instruction, but also the classrooms where that instruction is to take place," the system must be analyzed as a whole, taking into consideration both the instruction and facilities components. *WOC II*, 173 S.W.3d at 790 (quoting *Edgewood IV*, 917 S.W.2d at 726).

In addition to determining the costs of meeting GDK, the trial court also must determine whether school districts have substantially equal access to funding to meet GDK. The Texas Supreme Court has determined that this standard focuses primarily on differences in tax rates needed to meet GDK. In 1995, the Texas Supreme Court determined that a 9 cent difference in tax rate was not so significant as to violate the efficiency requirement of Article VII, Section 1. *Edgewood IV*, 917 S.W.2d at 731. Of course, this determination was prior to the compression of tax rates by legislative action in 2006. In the current compressed system, the 9 cent difference when the maximum M&O rate was \$1.50 now is more equivalent to a .05-.06 difference. Thus, in the current compressed system, the State has a duty to provide all school districts with access to state and local revenue needed to meet GDK at a difference in M&O tax rates of no more than 5-6 cents.

In addition to providing access to equalized state and local funding necessary to meet GDK, the Court has clearly found that all districts must have "meaningful discretion" above the level of funds needed to meet GDK; otherwise, the State would have violated the prohibition on a state ad valorem property tax in Article VIII, Section 1-e. We believe that all districts must have access to at least 10% additional revenue above the level of GDK in

order to have “meaningful discretion.” In order for this discretion to be truly meaningful for all districts, this additional “enrichment” revenue must be substantially equalized. In addition, the Texas Supreme Court has stated that some unequalized revenue above the level necessary for GDK is permissible. The Court has not defined the specific amount of unequalized revenue above the level of GDK, but the Court has cautioned “that the amount of supplementation in the system cannot become so great that it, in effect, destroys the efficiency of the entire system.” *WOC I*, 107 S.W.3d at 571. We believe that unequalized revenue should not exceed 10% of the total revenue in the system, in order to avoid destroying the efficiency of the entire system. Since the Texas Supreme Court has not made a definitive statement about the level of funding above GDK, this issue is appropriate for fact findings and conclusions of law by the trial court, and ultimately for consideration by the Texas Supreme Court.

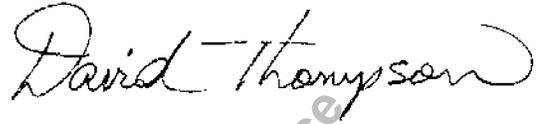
While the Supreme Court has linked both equity and adequacy to GDK, the standards are not one and the same. The adequacy standard necessarily takes into account outputs; it must be measured primarily by whether school districts are able to meet the accreditation standards, and whether students are able to meet the performance standards and have a meaningful opportunity to graduate from high school ready to enter college or the workforce. The efficiency/equity standard, on the other hand, is focused primarily on inputs. Even if every district in the state is reaching GDK, if some must tax at a substantially higher rate in order to do so, the system is unconstitutionally inefficient.

In summary, the current Texas Supreme Court articulation of its efficiency/equity standard is as follows:

- The State must provide equalized access to state and local funds necessary for all districts to meet the State’s own determination of GDK.
- There is no compelling or rational reason for the State to fund any school district at a level below that necessary to meet GDK.
- Although the legislature has broad policy discretion to define what constitutes GDK, this discretion is not unlimited, since GDK must reflect changing times, needs, and public expectations.
- GDK must include both accreditation standards for school districts and performance standards for students to be promoted and graduate ready for college or the workforce.
- The cost of meeting GDK must take into consideration both operations and facilities.
- All districts must have access to funds needed to meet GDK at a range of tax rates not to exceed .05-.06 cents.
- School districts must have access to revenue above the level of GDK; otherwise, the system will operate as if it were an unconstitutional state ad valorem property tax.
- Although some unequalized revenue above the level of GDK is permitted, such unequalized revenue cannot be so substantial that it destroys the efficiency of the entire system.
- All school districts, regardless of wealth, must have “meaningful discretion” to access funds above the level of GDK.

Respectfully submitted,

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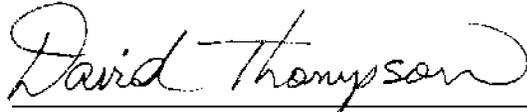
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been forwarded on this 28th day of August, 2012 to counsel of record in accordance with Rule 21a of the Texas Rules of Civil Procedure and the parties Rule 11 agreement, as noted below.



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