

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

TEXAS TAXPAYER & STUDENT	§	IN THE DISTRICT COURT OF
FAIRNESS COALITION, et al.,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
MICHAEL WILLIAMS, Commissioner of	§	
Education, et al.,	§	
	§	
Defendants.	§	250 TH JUDICIAL DISTRICT

**PLAINTIFFS’ TRIAL BRIEF REGARDING
ADEQUACY AND SUITABILITY STANDARDS**

The Calhoun County ISD Plaintiffs, the TTSFC Plaintiffs, and the Fort Bend ISD Plaintiffs (the “Plaintiffs”) file this trial brief on the relationship between the adequacy and suitability clauses and the manner in which they have pled and proven their claims.

I. Why Plaintiffs brought their claims as “adequacy” claims.

Plaintiffs brought their claims under the “general diffusion of knowledge”/adequacy clause of Article VII, Section 1 because the underlying facts they have pled and proven fit squarely within the *West Orange-Cove II* Court’s framework for such a claim.¹

First, the Supreme Court, in discussing the arbitrary standard for both adequacy and suitability claims, emphasized that “[i]t would be arbitrary, for example, for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals.” *West Orange-Cove II*, 176 S.W.3d 746, 785 (Tex. 2005). The disconnect between higher standards and declining resources is at the heart of Plaintiffs’ claims.

¹ All three plaintiff groups focused their requests for declaratory relief on the “general diffusion of knowledge”/adequacy clause. The Ft. Bend ISD Plaintiffs sought a declaration that the system is inadequate and unsuitable. The TTSFC Plaintiffs also cited to the “suitability” clause but referenced it interchangeably with the adequacy clause.

Second, the Supreme Court has provided extensive guidance on what is meant by constitutional adequacy. In *WOC II*, the Court held that districts must reasonably be able to:

provide *all* of their students with a *meaningful 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.” TEX. EDUC. CODE § 28.001 (emphasis added).

Id. at 787.

The Supreme Court properly framed the adequacy question as whether “the Legislature has acted arbitrarily in *structuring* and *funding* the public education system so that school districts are not reasonably able to afford all students the access to education and the educational opportunity to accomplish a general diffusion of knowledge.” *Id.* at 789-90 (emphasis added). It understood that the nature of the districts’ claim was that “the system is not producing a general diffusion of knowledge because the state has not provided sufficient funding,” *id.* at 780, and noted Lieutenant Governor Ratliff’s testimony that “we’re asking people to make bricks without straw.” *Id.* at 790.

The Supreme Court never questioned the districts’ formulation of the adequacy claim in that manner – it just found that the State had shown sufficient “forward progress” to avoid a present violation, despite the “predicted drift toward constitutional inadequacy.” *Id.* However, there are several key differences between the current record and *West Orange-Cove*:

- The increase in standards is much higher, with the Legislature’s recent adoption of college-readiness as the outcome measure of the educational system and the implementation of the STAAR/EOC regime;
- Along with the increase in standards, there was a simultaneous and substantial decline in funding (as opposed to districts simply being stuck at the \$1.50 cap); and
- Contrary to the situation in 2005, there is today no meaningful “forward progress” that the State can point to. *See Omnibus Proposed Findings of Fact, Part I.B.5.*

Plaintiffs' pleadings and proof are all focused on establishing an adequacy violation within the foregoing legal framework. The central question presented in this case is whether school districts lack access to the funding needed to accomplish the constitutionally required general diffusion of knowledge. If the Court concludes that districts have made this factual showing, Plaintiffs believe they have established an adequacy violation and seek a declaration from the Court to that effect.

II. The Suitability Standard

Suitability is closely related to adequacy. Suitability has been adjudicated as a distinct claim in Texas courts only once before, in *Edgewood IV*, when certain plaintiffs claimed that the public school system was unsuitable because of the extent to which the State relied on local revenue to fund public schools and because it failed to fund mandates imposed on local districts by state law. See 917 S.W.2d 717, 735-37 (Tex. 1995). The Supreme Court rejected these arguments and held that the record did not support a suitability violation. *Id.* at 737. In doing so, the Court explained that “if 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 736-37.

In *WOC II*, the Court confirmed that suitability “is not merely redundant” of adequacy. 176 S.W.3d at 795. The Court did not extensively define the scope of the suitability mandate, but explained that suitability “refers to the means chosen to achieve an adequate education through an efficient system.” *Id.* at 793. Thus, while the Court has generally defined suitability – and closely tied it to adequacy – it has provided less specific guidance relating to suitability than it has in the case of adequacy.

The Supreme Court has suggested that adjudication of a suitability claim ultimately requires a similar analysis of inputs (funding) and outputs (student performance measured against state standards). The Court looked to the outputs of the system in rejecting the suitability claim in *WOC II*:

Certainly, if 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. The present record, however, does not reflect any such abdication.

176. S.W.3d at 794 (quoting *Edgewood IV*, 917 S.W.2d at 736-37).

III. The system is both inadequate and unsuitable based on the same proof.

In this case, the same facts demonstrate both the inadequacy and the unsuitability of the system. Plaintiffs urge the Court to find a violation on both grounds.

While the Supreme Court noted in *WOC II* that there is a distinction between adequacy and suitability, it also left no doubt that a system (or a district) that is unable to achieve the general diffusion of knowledge violates the adequacy requirement. Indeed, adequacy is nothing more than a shorthand term for achievement of the general diffusion of knowledge, as defined by the State’s own curriculum, assessment standards, and related policy decisions. *See WOC II*, 176 S.W.3d at 753, 787-90.

Plaintiffs acknowledge that in the hypothetical case of a school district that is individually educating all of its students to the new college and career ready standards, thereby satisfying the general diffusion of knowledge requirement – but which is forced to tax above \$1.04 to do so – might present a case in which that district (individually, at least) is achieving adequacy, but is being forced to violate the suitability requirement. A system which makes achievement of a constitutional standard subject to a voter referendum – something that former

Commissioner Scott acknowledged was intended to apply only to the enrichment tier – is plainly unsuitable, even if a district happens to be meeting GDK.

But the evidence in this case has not shown any district in this precise circumstance. To the contrary, the evidence has shown *no* single district achieving the general diffusion of knowledge, as now defined according to the rigorous standards of STAAR. Many districts taxing at \$1.04, moreover, have either attempted a failed TRE, or have explained why a TRE in their district is unlikely to succeed (including, for many Chapter 41s, a recapture rate for these additional pennies at or above 50 percent). Whether these districts *could* achieve GDK at a higher tax rate is a moot point, as they are either legally or practically unable to reach that rate.

Even if some number of individual districts were found to be achieving the general diffusion of knowledge, this would not defeat Plaintiffs' claim of *systemic* inadequacy. As noted above, the Supreme Court stated clearly in *WGC II* that “[i]t would be arbitrary . . . for the Legislature to define the goals for accomplishing the constitutionally required general diffusion of knowledge, and then to provide insufficient means for achieving those goals.” *Id.* at 785. This, in a nutshell, is what Plaintiffs have pleaded and proven with respect to the State as a whole.

In short, the system is both systemically inadequate (since districts and the state as a whole are not meeting the GDK standard) and systemically unsuitable (since GDK cannot be achieved at the Tier 1 level). Since the evidence has not shown any district meeting GDK but doing so above the Tier 1 level, Plaintiffs firmly believe it is appropriate to find both a suitability violation and an adequacy violation. The same facts prove both claims.

IV. Constitutional claims relating to the TRE requirement cannot be limited to districts with failed TREs.

As stated above, Plaintiffs agree that requiring any district to tax above \$1.04 to achieve GDK would, under the current statutory structure, present both a suitability violation and an adequacy violation. A TRE requirement, if it is to exist at all, must surely apply to taxation for local enrichment purposes only. But there are problems with finding a violation of either of these clauses *only* for districts that have tried and failed to pass TREs.

Districts may be effectively constrained in their ability to raise taxes above \$1.04 or \$1.06 even if they have not attempted a TRE. Many districts – including several of the plaintiffs in this action – have determined that a TRE cannot succeed in their districts. In the case of Chapter 41 districts, for example, the existence of recapture can make the prospect of a tax increase nearly impossible. For Chapter 42 districts, facilities needs or the poverty level of the population have prevented districts from going to the voters for a TRE. As a result, many districts cannot risk the time, resources, or goodwill to hold such an election.

The evidence on this point is extensive:

- The president of the Eanes ISD school board, Dr. Kal Kallison, testified that Eanes ISD is capped at an M&O tax rate of \$1.06 for all practical purposes. (11/28 Tr. at 79-80.) To raise Eanes ISD's tax rate above \$1.06, voters would have to approve a tax that would return seventy percent of the additional revenue to the State. (11/28 Tr. at 79.) Such a tax, according to Dr. Kallison, is not politically viable. (11/28 Tr. at 79.) Further, his board will not attempt an election because they “do not want to have failed elections of any kind.” (11/28 Tr. at 79-80.)
- Dr. Kay Waggoner, the Richardson ISD superintendent, testified that the voters of her district would be unwilling to approve a tax rate increase the M&O tax rate at this time in large part because of the recapture faced by the district. (RR3:36-38; Ex. 5616, Waggoner Dep., at 52, 53-54, 56.) Dr. Waggoner stressed that this very real risk of an unsuccessful attempt at an election is enough to deter her from even trying. (RR3:38.) “[I]f it doesn't pass[, it] is at the loss of a lot of goodwill...I think it brings into question the direction of the district, the level of confidence in what you're proposing to the community.” (RR3:38.)

- Calhoun County ISD faces a recapture rate of close to 50%. The district's superintendent, Billy Wiggins, testified that his district has not tried a TRE because he believes it would be impossible given the amount of recapture due. (Ex. 5618, Wiggins Dep., at 68 -73.) Mr. Wiggins has made himself familiar with the views and attitudes of his community through his role as superintendent and in the course of conversations and presentations throughout the district. (RR12:21-22.) His community "truly believe[s] that sending their local tax dollars into our district and then seeing them move to the state or distributed to other districts is just not fair." (RR12:21.)
- Mr. Wiggins also testified to his experiences as superintendent in the three other property wealthy districts. (RR12:22-23.) All, he testified, felt the exact same as his Calhoun County community regarding a tax increase in the face of recapture. (RR12:22-23.)
- According to Aransas County ISD superintendent, Joey Patek, an election to approve an M&O tax rate above \$1.04 in his district would be "extremely [difficult] if not impossible" because approximately 50% of the additional revenue would be subject to recapture. (Ex. 5614, Patek Dep., at 50, 198-99.) His district has not attempted a TRE because such an election would be a "losing battle" and would cost the district around \$20,000 just to hold. (Patek Dep., at 211.)
- Lewisville ISD is one of the few Chapter 41 districts that actually attempted a TRE. But the district's attempt to raise the tax rate from \$1.04 to \$1.06 through a TRE failed by a margin of two-to-one. (Ex. 5615, Waddell Dep., at 36-37; Ex. 769.) Considering the widespread opposition to this TRE, the district cannot attempt to raise its M&O tax rate above \$1.04 at any time in the near future. (Ex. 5615, Waddell Dep., at 36-37, 81.) Dr. Waddell, the superintendent of the district, warned of holding an unsuccessful election: "When you lose an election like that, it creates a lot of troubles and trust issues; there's a lot of anxiety." (Waddell Dep., at 36.)
- Fort Bend ISD, a Chapter 42 district, cannot raise its M&O tax rate any further without holding a TRE. The district has not held a TRE because enrollment grown in the district and the resulting facilities needs (and the maintenance and technology needs discussed *supra*) has forced the district to steadily raise its I&S tax rate, which has increased by 11 cents since 2006. (Ex. 6338, Hoke Dep., at 35-38 (referencing Ex. 664 at 10); Ex. 6353 at 8.)
- Abilene ISD, another Chapter 42 district, cannot increase its tax rate further without holding a TRE. Abilene's superintendent testified that the district has several impending facilities needs, and as a result, it cannot hold a

TRE without jeopardizing the chances of being able to pass a bond election. (Ex. 6336, Burns Dep., at 122-23.)

- Northside ISD has grown by 25,000 students since *WOC II* and, as a result, has had to build 37 schools in ten years, and must go to the voters approximately once every three years to pass a bond referendum (Ex. 6438 at 2; 12/5 Tr. at 65, 69; Ex. 6345, Folks Dep., at 10-11.). Former superintendent John Folks testified that this necessity has prevented the district from also going to the voters for a TRE. (Ex. 6345, Folks Dep., at 147-48.)
- Superintendents from Belton ISD, Bryan ISD, Lubbock ISD, Pflugerville ISD, Quinlan ISD, and Everman ISD testified that their districts would have trouble passing a TRE because of the poverty of the district and the low yield compared to neighboring districts. (Ex. 3226, Kincannon Dep., at 148; Ex. 3200, Wallis Dep., at 38-39; Ex. 3198 Garza Dep., at 30; 11/27 Tr. at 80; 12/4 Tr. at 206; RR5:192.)

Survey results by Larry Harris of Mason-Dixon Polling and Research confirm the impact recapture has on the levels of opposition and support the notion that districts in these circumstances should not be expected to attempt a TRE when voters are so opposed. Echoing the sentiment of the superintendents who testified, the polls revealed that voter opposition to proposed tax increases became insurmountable when the idea of recapture was introduced. (Ex. 1023 at 2-5; 11/27 Tr. at 140-141 (referencing Ex. 5512 at 16-18).) In fact, one district saw opposition to such an increase jump to **90%** because of recapture. (11/27 Tr. at 140-141 (referencing Ex. 5512 at 16-18).) Faced with high levels of opposition like those revealed in the Mason-Dixon polls, Mr. Harris would advise a client ***not to attempt*** the election. (11/27 Tr. at 166.)

Finally, even if the Court only looks to evidence of failed TREs, a determination of unsuitability or inadequacy cannot be limited just to those districts. It would be an odd result that a district would have to have a failed TRE before having standing to pursue a claim. Just as the Supreme Court noted in *West Orange Cove I* that “[a] district taxing a few cents below the maximum rate . . . need not [raise taxes to the maximum rate] just to prove the point,” 107

S.W.3d at 583, districts that have concluded that a TRE is highly unlikely to succeed need not hold an election just to confirm their assessment.

In sum, the evidence is more than sufficient to support findings that the State is in violation of both the adequacy requirement and the suitability requirement – both with respect to the State as a whole and with respect to the many individual ISDs serving as representative districts in this action.

Respectfully submitted,

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