

NO. D-1-GN-11-003130

TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al., Plaintiffs,	§ § § § § § § § § §	IN THE DISTRICT COURT OF    TRAVIS COUNTY, TEXAS    200TH JUDICIAL DISTRICT
v.		
MICHAEL WILLIAMS, Commissioner of Education, et al.  Defendants.		

**EDGEWOOD PLAINTIFFS' RESPONSE TO CALHOUN COUNTY PLAINTIFFS' MOTION TO REOPEN THE EVIDENCE AND MOTION FOR ISSUANCE OF DECLARATORY JUDGMENT**

Edgewood Plaintiffs respectfully move for declaratory judgment in this cause and ask the Court to deny Calhoun County Plaintiffs' Motion to Reopen the Evidence. In the alternative, should the Court reopen the evidence, Edgewood Plaintiffs urge the Court to first issue its findings of fact and conclusions of law based on the present record in order to allow the parties the opportunity to consider which new facts, if any, are material to the Court's findings and conclusions, and then allow the parties ample time for discovery and presentation of witnesses.

A. Background

In this case, the Texas Taxpayer & Student Fairness Coalition Plaintiffs, Edgewood Plaintiffs, Fort Bend Plaintiffs, and Calhoun County Plaintiffs filed suit against Defendants Michael Williams, Commissioner of Education, the State of Texas Board of Education, and Susan Combs, Texas Comptroller of Public Accounts alleging various constitutional infirmities of the school finance system. Later, Intervenors and Flores Plaintiffs also filed suit against

Defendants. Extensive discovery ensued and the Court held a 45-day trial from October 22, 2012 to February 4, 2013.

On February 4, 2013, this Court issued its oral ruling from the bench declaring the public school finance system unconstitutional, because it was financially and quantitatively inefficient, was unsuitable and inadequate for the provision of a general diffusion of knowledge, both overall and more specifically as to the education of economically disadvantaged and English Language Learner students, and the maintenance and operations property tax cap constituted an *ad valorem* state tax. Tr. 2/4/2013 at 159-164, *Edgewood v. Williams* (No. D-1-GN-11-003130) (2013). Consistent with the Court's ruling and based on the extensive trial record, the prevailing plaintiffs submitted proposed findings of fact and conclusions of law on March 15, 2013 and a proposed judgment on or about March 12, 2013. To date, no findings or conclusions have been made by the Court, nor has a judgment been issued.

In the 83rd Regular Legislative Session, which concluded on May 27, 2013, the Texas Legislature passed various pieces of legislation addressing educational matters.<sup>1</sup> Senate Bill 1, an appropriations bill, establishes the state budget for the next two school years *beginning September 1, 2013*. Through Senate Bill 1, the Texas Legislature modified its appropriations for school funding for the 2013-2014 and 2014-2015 school years (adding approximately \$3.2 billion for the biennium), thus restoring a portion of the funding that it cut from the public school finance system in 2011, *yet made no statutory changes to the basic allotment of school funding*. See Mot. to Reopen the Evidence, Ex. A, *compare with* Tex. Educ. Code § 42.101 (Basic Allotment set at lesser of \$4,765 or \$4,765 x (DCR/MCR)). House Bill 1025 appropriates about

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<sup>1</sup> For purposes of this briefing, Edgewood Plaintiffs limit their analysis to the statutes identified in Calhoun County Plaintiffs' Motion to Reopen: Senate Bill 1 ("SB 1") & Senate Bill 758 ("SB 758"), 83rd Reg. Legis. Sess., (Tx. 2013); House Bill 5 ("HB 5"), House Bill 866 ("HB 866"), & House Bill 1025 ("HB 1025"), 83rd Reg. Legis. Sess., (Tx. 2013); Tex. Educ. Code Ann. § 51.803, *amended by* S.B. 1093 § 4.008, 83rd Reg. Legis. Sess., (Tx. 2013).

an additional \$201 million for the biennium, with approximately \$100 million annually for the 2013-14 and 2014-15 school years, respectively. H.B. 1025 § 37(a), 83rd Reg. Legis. Sess., (Tx. 2013). Senate Bill 758 amends Tex. Educ. Code § 42.259 by merely advancing certain scheduled payments from the foundation school program to certain school districts from September 5 or no later than September 10, 2013, to August 25, 2013, but this statute expires after such payment is made. S. B. 758 § 1, 83rd Reg. Legis. Sess., (Tx. 2013).

Under House Bill 5, the legislature changed the graduation requirements for Texas students beginning the 2014-15 school year<sup>2</sup> and reduced the number of end-of-course exams that students must pass under the new STAAR regime.<sup>3</sup> H.B. 5 § 31(c), 83rd Reg. Legis. Sess., (Tx. 2013). Although students are no longer required to meet a minimum score as part of the cumulative core requirement, students must still pass the more rigorous STAAR end-of-course exams at the Level II Satisfactory standard in order to graduate. H.B. 5 §§ 35(a), 36(a). School districts will continue to have to provide remediation for struggling students. H.B. 5 § 15. The legislature also changed the school district accountability rating system under HB 5, but those changes do not become effective until the 2016-17 school year. H.B. 5 § 44 (a)-(b). Under HB 866, students in grades 4, 6, and 7 will no longer be tested *if* they pass the STAAR test in the preceding grade. H.B. 866 § 1(a)(4)-(6), 83rd Reg. Legis. Sess., (Tx. 2013). However, such exemptions will only take effect if a waiver is granted by the federal government. H.B. 866 § 1 (a)(9).

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<sup>2</sup> The new curriculum requirements for graduation become effective in the 2014-15 year but a “transition plan” allows students who enter ninth grade before the 2014-15 school year to choose whether to complete the new requirements or the current graduation requirements instead. Although Algebra II is not required under the newly created Foundation and Foundation Plus Endorsement graduation plans (H.B. 5 §§ 64(a), 16(a)), it is required to remain eligible under the Top Ten Percent law, which grants automatic admission to Texas state or public colleges for students ranking in the top ten percent of their graduating class. Tex. Educ. Code Ann. § 51.803, *amended by* S.B. 1093 § 4.008, 83rd Reg. Legis. Sess., (Tx. 2013). The transition plan expires Sept. 1, 2018.

<sup>3</sup> Calhoun County Plaintiffs also mention Senate Bill 2, which over time increases the statutory cap on the issuance of new charters from 215 to 305 by September 1, 2019. Edgewood Plaintiffs take no position on this bill in this response, but maintain their position in the lower court that such claims are non-justiciable.

## B. Argument & Authorities

Edgewood Plaintiffs seek declaratory judgment under the Texas Uniform Declaratory Judgment Act relating to their Article VII, Section 1 financial efficiency (equity), adequacy and suitability claims, and their Article VIII, Section 1-e state property tax claim. Declaratory relief is needed in order to rule definitively upon the constitutionality of the existing system and to prevent Defendants from reenacting the school finance system held in these proceedings to be unconstitutional.

The motion to reopen filed by Calhoun County Plaintiffs should be denied because the proffered “new evidence,” in the form of recent legislation signed into law, is not yet effective and allowing consideration of such evidence would not serve the due administration of justice. In the alternative, should the Court reopen the evidence, the Court should issue its findings of fact and conclusions of law and allow the parties ample time for discovery and presentation of witnesses.

### **1. This Court’s declaratory judgment is appropriate now.**

In spite of the recent legislation passed, Edgewood Plaintiffs are still entitled to declaratory judgment under the Uniform Declaratory Judgment Act based on the current system. “A [party] . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.” Tex. Civ. Prac. & Rem. Code Ann. § 37.004. Furthermore, a party is entitled to declaratory judgment when there is a justiciable controversy as to the rights and status of parties before the court for adjudication, and the declaration sought would actually resolve the controversy. *See Brooks v. Northglenn Ass’n*, 141 S.W.3d 158, 163-64 (Tex. 2004); *see also, The M.D. Anderson Cancer Ctr. v. Novak*, 52

S.W.3d 704, 708 (Tex. 2001); *Texas Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517–18 (Tex. 1995). The parties tried this case for over three months based on the Texas school finance system as it existed at the time of trial, and currently exists. A justiciable controversy still exists as to the constitutionality of the present system of school funding. As such, declaratory judgment is appropriate and Edgewood Plaintiffs urge the Court to issue its judgment in their favor and the Court's accompanying findings of fact and conclusions of law in support thereof.

Even if another party argues that the legislative changes moot the existing claims of Edgewood Plaintiffs and the relief requested, such argument is meritless. Under the mootness doctrine, legislative amendments and revisions to government policies do not moot declaratory challenges to prior statutes and policies where they do not eliminate the threats. *See Lakey v. Taylor*, 278 S.W.3d 6, 12 (Tex. App.– Austin 2009, no pet.). The voluntary-cessation exception holds that Defendants “may not moot” the case even “by voluntarily abandoning the policy at issue ‘without any binding admission or extrajudicial action that would prevent a recurrence of the challenged action.’” *Id.* at 12 (quoting *Texas Health Care Info. Council v. Seton Health Plan, Inc.*, 94 S.W.3d 841, 849 (Tex. App. – Austin 2002, pet. denied)). Where a policy is challenged as unconstitutional, voluntary cessation of such policy, without an admission or judicial determination regarding its constitutionality, is not sufficient to render the constitutional challenge moot. *Id.*, quoting *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App. – Austin 1993, writ denied).

Defendants never made any binding judicial admission that the school finance system prior to the legislative changes was unconstitutional, nor has there been any extrajudicial action that would prevent a reenactment of the former legislation. Even a binding judicial admission

will not moot the substantive case unless it makes it “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Bexar Met. Water Dist. v. City of Bulverde*, 234 S.W.3d 126, 131 (Tex. App. – Austin 2007, no pet.) quoting *Friends of the Earth v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 189 (2000). “The ‘heavy burden of persuading’ the court that the challenged conduct cannot reasonably be expected to resume lies with the party asserting mootness.” *Id.* Because no party can meet this burden, declaratory relief remains necessary.

Likewise, Edgewood Plaintiffs urge the Court to exercise its discretion and award them attorney’s fees as are “reasonable and necessary” in amount and are “equitable and just” to award. Tex. Civ. Prac. & Rem. Code § 37.009. The fact that the Legislature took action in response to a favorable ruling on behalf of Edgewood Plaintiffs “does not moot or void the [Plaintiffs’] interests in obtaining attorney’s fees and costs for the successful disposition of their claim.” *Camarena v. Texas Employment Comm’n*, 754 S.W.2d 149, 754 (Tex. 1988).

Although there is no prevailing party requirement under the UDJA, Edgewood Plaintiffs should nonetheless be awarded their reasonable and necessary fees in this case because they have in fact prevailed. By bringing this lawsuit, Edgewood Plaintiffs served as the catalysts that triggered the Texas Legislature to make changes to the school finance appropriations for the next two years and alter end-of-course exam and graduation requirements. *Del Valle Indep. Sch. Dist. v. Lopez*, 863 S.W.2d 507, 511 (Tex. App. – Austin 1993).

**2. The “new” legislative changes to the educational system do not take effect until a later date, and, thus, do not affect the constitutionality of the *current* system.**

Edgewood Plaintiffs respectfully urge the Court to deny Calhoun County Plaintiffs’ motion because Calhoun County Plaintiffs cannot satisfy the requirements under Rule 270. “When it clearly appears to be necessary to the due administration of justice, the court may

permit additional evidence to be offered at any time. . .” Tex. R. Civ. P. 270. Under Rule 270, the “due administration of justice” standard requires courts to determine whether (1) the moving party showed due diligence in obtaining the evidence; (2) the proffered evidence is decisive; (3) reception of such evidence will cause undue delay; and (4) granting the motion will cause an injustice. *See Matter of A.F.*, 895 S.W.2d 481, 484 (Tex. App. – Austin 1995), quoting *Word of Faith World Outreach v. Oechsner*, 669 S.W.2d 364, 366–67 (Tex. App. Dallas 1984, no writ). Here, the Rule 270 requirements are not met.

The crux of Calhoun County Plaintiffs’ motion is that new legislation has passed and must be considered before the Court issues its final judgment in this case in order to rule on the constitutionality of the *current* system. However, none of the legislation signed into law has become effective and, therefore, cannot possibly impact the current system. For example, part of the appropriation to the basic allotment and the Additional State Aid for Tax Relief (“ASATR”) under SB 1 will not effectuate until September 1, 2013, and the remaining appropriation will not take place until September 1, 2014.<sup>4</sup> Changes to the new “A-F” district accountability rating system under HB 5 do not become effective until 2016-17,<sup>5</sup> and other changes to the school accountability rating system will not be known until much later this year. Other legislative changes, such as those contemplated in HB 866, will not become effective unless a federal waiver is granted to Texas under the Elementary and Secondary Education Act (formerly, the No Child Left Behind Act).<sup>6</sup> As Calhoun County states in its motion to reopen, this Court’s judgment should be based on the constitutionality of the system “*as it currently stands.*” *See Mot. to Reopen* at 2 (emphasis added). That is precisely what forms the basis for this Court’s

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<sup>4</sup> *See Mot. to Reopen*, Ex. A. (LBB Summary); H.B. 5, 83rd Reg. Legis. Sess., (Tx. 2013); S.B. 1, 83rd Reg. Legis. Sess., (Tx. 2013).

<sup>5</sup> H.B. 5 § 31(b)-(c).

<sup>6</sup> H.B. 866 § 1 (a)(9), 83rd Legis. Sess., (Tx 2013).

oral ruling from the bench on February 4, 2013. The “new evidence” cited by Calhoun County pertains to changes to the system that are not yet effective. Thus, the “new evidence” cannot be decisive on the claims in this case. Any consideration of the legislative changes once they become effective will require undue delay, and granting their motion on such spurious grounds would cause an injustice to Edgewood Plaintiffs who have waited over four months for their judgment.

Equally important is the fact that neither the Court nor the parties can presently determine the effects of the changes on the financial efficiency of the system caused by SB 1, because there is no reliable or accurate data from which the Court can rely upon. As this Court recognized during trial last year, school district finance data is ever-changing for a variety of reasons. Consequently, the Court determined that the 2011-12 school finance data available on November 1, 2012, would be the most recent, accurate and reliable data in order to determine the constitutionality of the financial efficiency of the system. *See* RR9:74-75; *see also* RR9:49-52; Ex. 4240 at 3-4; RR23:33-34, 104. This is due, in part, to changes in student counts, property values and tax effort. *See, e.g.,* Mot. to Reopen, Ex. B (LBB Model 115, acknowledging that “All figures below are estimates and are subject to change based on actual and final student counts, property values, and tax effort.”). Accordingly, there is no “new evidence” as it relates to the financial efficiency of the system, and certainly none that is decisive, none that would not cause undue delay, and none that would not cause an injustice to the parties prevailing on the financial efficiency claim. Certainly, the Court cannot rely on LBB projections, much less hearsay reports published in local newspapers and referenced by Calhoun County Plaintiffs in their motion, as grounds for reopening the evidence on the financial efficiency claim.

Calhoun County Plaintiffs' likely motive is to continue to delay a judgment by this Court until it can take a second crack at the equity claim of the other school district plaintiffs. However, motions under Rule 270 should not be granted where they simply afford parties the opportunity to re-litigate questions settled by the Court. *See Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195, 203 (Tex. App. – Texarkana 2010). During the trial in this case, Calhoun County Plaintiffs failed in their attack on the financial efficiency claims of the other school district plaintiff groups, including the claim of Edgewood Plaintiffs. Allowing Calhoun County a second bite at the financial efficiency of the system, in particular, will provide them that exact opportunity. *Id.* at 203 (“[T]he interests of justice did not warrant a second bite at the apple.”).

Furthermore, contrary to Calhoun County Plaintiffs' argument, SB 1 does not modify some of the statutory school finance formulas. *See* Mot. to Reopen at 2. SB 1 is the State's major appropriations bill. Although the State increases appropriations to school districts for the basic allotment for the next two school years (2013-14 and 2014-15), the statutory formulas remain unchanged. Compare SB 1, 83rd Reg. Legis. Sess., (Tx. 2013) with Tex. Educ. Code § 42.101(a). There are no permanent legislative changes to the statutory formulas that can be considered by the Court at this time and allowing otherwise would cause an injustice to Edgewood Plaintiffs. *See Moore*, 315 S.W. 4d at 203.

Ultimately, the Court stated that it will be considering:

whether or not the Legislature's most recent actions cured what the Court found to be constitutionally inadequate, structural and funding problems under suitability, whether or not the most recent legislative actions would cure the adequacy deficiencies that the Court found, and whether or not the most recent legislative actions cured the financial efficiency/equity deficiencies that the Court found . . .

Tr. 6/5/13 at 11.

Under the “new” legislation, as discussed above, there are no permanent changes to the school finance system and certainly no reliable, accurate data exists to resolve the financial efficiency questions; and there are no changes to the existing weights to the compensatory and bilingual education allotments. Calhoun County Plaintiffs fail to identify any specific, material evidence that may help cure the constitutional deficiencies previously found by the Court. Allowing parties to reopen the evidence on such far-reaching allegations could lead to endless litigation; thus, Edgewood Plaintiffs respectfully urge the Court to deny their motion.

**3. Should the Court reopen the evidence, Edgewood Plaintiffs urge the Court to issue its findings of fact and conclusions of law and allow the parties ample time for discovery and presentation of witnesses.**

If the Court grants Calhoun County Plaintiffs’ Motion to Reopen and does not issue its declaratory judgment, Edgewood Plaintiffs ask the Court, at the very least, to issue its findings of fact and conclusions of law based on the trial record so Edgewood Plaintiffs may determine, for example: what issues they need to propound discovery, what evidence they need to supplement the record, what witnesses may need to be recalled, and what arguments they may make in response to evidence presented by other parties.<sup>7</sup> These are key questions for Edgewood Plaintiffs that cannot be answered with any certainty in the absence of the findings and conclusions because of the expansive record before the Court.

Taking at face value Calhoun County Plaintiffs’ vague and overly broad assertions in its motion of the potential impact of the new legislation, the amount of time that Calhoun County Plaintiffs request for discovery and for presentation of evidence would likely be inadequate for Edgewood Plaintiffs to meet their evidentiary burden in this case. Calhoun County Plaintiffs

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<sup>7</sup> Calhoun County Plaintiffs solicited a spreadsheet from the parties to identify their positions on: reopening the evidence, topics to be covered; views on possible witnesses required; length of hearing; timing of hearing; scope and timing of discovery; and issuance of findings. However, it is nearly impossible to determine the answers to these questions without findings and conclusions from the Court and a ruling on the scope of the evidentiary hearing.

request a discovery period of approximately one month, and five to seven days to present evidence on education legislation passed in the 83rd Regular Legislative Session. Mot. to Reopen at 5. Given the complexity of the issues involved in this case, and the fact that Plaintiffs carry the burden of proof, this time is insufficient to obtain full knowledge of the issues and facts related to recent legislation and present the same to the Court. Moreover, Edgewood Plaintiffs would not be prepared to present evidence on recently enacted legislation until after September 1, 2013, when school district officials have had the opportunity to implement these changes and monitor their effects.

Edgewood Plaintiffs will be prejudiced severely if they are not permitted to discover and present fully evidence in support of their claims because any trial court judgment in their favor must be supported by findings that are not speculative or conclusory. *See, e.g., RM Crowe Prop. Servs. Co., L.P. v. Strategic Energy, L.L.C.*, 348 S.W.3d 444, 448 (Tex.App. – Dallas 2011, no pet.) (holding that on a legal sufficiency challenge to findings on an issue, the evidence must “conclusively establish[], as a matter of law, all vital facts in support of the issue”).

None of the recent legislation at issue in Calhoun County Plaintiffs’ Motion, namely SB 1, SB 2, SB 758, HB 5, HB 855, and HB 1025, is presently in effect and the different pieces of legislation go into effect at different times in the future. Consequently, although the legislation taken as a whole or by piecemeal does not likely impact the Court’s ultimate rulings in this case, these new laws set forth modifications to the school funding system whose impacts, until implemented, cannot be assessed, observed, or reported fully by the school districts until the modifications are enacted. Because the effects of SB 1 and HB 1025 on the financial efficiency of the system cannot be analyzed, Edgewood Plaintiffs urge the Court to not re-open the evidence on that claim.

Furthermore, some school districts have not finalized their budgets or determined how they will prioritize the additional funds, especially in light of the continued underfunding of programs that offer needed support for ELL and low income students, and for students who are struggling to pass their STAAR exams.

HB 5 also creates systemic changes to graduation, curriculum and accountability requirements but those changes become effective during different school years. For example, HB 5 overhauls testing requirements for Texas high school students beginning in the 2013-14 school year. It reduces the number of tests that students must complete to graduate from fifteen to five<sup>8</sup> – English Language Arts I; English Language Arts II, Algebra I, Biology, and U.S. History. Depending on the scope of reopening the evidence, it appears that, at a minimum, superintendents and some experts may need to be recalled in order to testify about the impacts of such legislation on the respective educational systems.

The Court could easily take judicial notice of the statutes themselves. But if the Court finds that these changes are materially relevant, and orders discovery and a hearing to determine how these changes will impact and affect school districts, such a process would not be as simplistic as Calhoun County Plaintiffs infer for the above reasons.

Edgewood Plaintiffs have the burden of proof in this case. Based on the scope of Calhoun County Plaintiffs' motion to reopen, Edgewood Plaintiffs would require sufficient time to recall many of their trial witnesses, apart from parent witnesses and a handful of national experts, in order to meet their burden. Therefore, Edgewood Plaintiffs respectfully request that if the Court reopens the record, it first issue its findings and conclusions on the present system,

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<sup>8</sup> It should be noted, however, that the previously separated English I and II Reading and Writing STAAR tests have been merely consolidated into one STAAR test per subject; therefore, it could be argued that there are still seven tests.

then allow ample time for discovery, and set the evidentiary hearing at least one month from the deadline of discovery to allow the parties to supplement the record.

C. Conclusion

Edgewood Plaintiffs pray that this Court enter its findings of fact, conclusions of law and judgment in this cause and deny the motion to reopen evidence. In the alternative, should this Court grant the motion to reopen, Edgewood Plaintiffs pray that the Court issue its findings of fact and conclusions of law and enter a scheduling order that allows ample time for discovery and presentation of evidence and for all further relief, whether at law or in equity, to which they may show themselves to be justly entitled.

Dated: June 18, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on June 18, 2013, a true copy of *Edgewood Plaintiffs' Response to Calhoun County Plaintiffs' Motion to Reopen the Evidence and Motion for Issuance of Declaratory Judgment* was served on all counsel of record via the Court's electronic case filing system as follows:

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