

I. DISCOVERY

1. Plaintiffs respectfully submit that discovery should proceed under Level 3 of Rule 190.4 of the Texas Rules of Civil Procedure.

II. OVERVIEW

2. Open-enrollment charter schools (“charter schools”) achieve better educational outcomes for less money, which in turn provides precisely the kind of educational efficiency envisioned by our Constitution. Yet, Texas law does not facilitate this efficiency.

3. Facilities funding is recognized to be an essential component of a constitutionally valid public school funding mechanism. At present, charter schools are categorically denied any measure of school facilities funding. When the Legislature enacted the Education Code in 1995, and created open-enrollment charter schools as a primary component of the Texas educational system, open-enrollment charter schools were, by statute, awarded state facilities funding.¹ In subsequent legislative sessions, however, funding for facilities was arbitrarily removed from open-enrollment charter schools. All Texas citizens are entitled to equal protection of the law under Article I, Sections 3 and 3a of the Texas Constitution. Texas charter schools are held to the same accountability and accreditation standards as are Texas independent school districts. Yet, charter schools are denied individualized basic state funding adjustments for size, location and populations, which customized adjustments are provided to independent school districts. Such arbitrary and capricious funding decisions coupled with the arbitrary and capricious removal of

¹ When charter schools were established under Chapter 12 of the Education Code in 1995 under Section 12.106, the Commissioner was instructed to distribute “from the foundation school fund to each school an amount equal to the cost of a Foundation School Program provided by the program for which the charter is granted as determined under Section 42.251, including the transportation allotment under Section 42.155, for the student that the district in which the student resides would be entitled to, less an amount equal to the sum of the school’s tuition receipts under Section 12.107 plus the school’s distribution from the available school fund.” At that time, Chapter 42 of the Education Code included Subchapter H – School Facilities Assistance Program, and Section 42.251 specifically included facilities funding as part of the total cost of the Foundation School Program.

facilities funding from charter schools schools denies the taxpayer/parent Plaintiffs, who have enrolled their children in open-enrollment charter schools, represented by those who bring this suit, equal protection under the Texas Constitution. Plaintiffs recognize the flexibility and discretion the Legislature enjoys in determining school funding. Examples of differences in funding mechanisms and funding results are indigenous to the entire public school funding system so that the State may not be required to fund Charter Schools dollar for dollar as it funds independent school districts. But, profoundly inadequate and/or inequitable public school funding, whether between school districts or a comparison of school district funding to charter school funding, remains judicially actionable, because arbitrary public school funding is clearly unconstitutional. The court has not previously addressed Plaintiffs' constitutional claims concerning the school finance system, as these claims uniquely apply to charter schools and their respective taxpayer/parents, to include the arbitrary decision-making of the Texas Legislature with regard to charter school funding despite prior school finance decisions. This has resulted in the current inadequate, unsuitable, inefficient and unconstitutional charter school funding system.

4. Plaintiffs face a second constitutional violation as Texas law currently caps the number of charter schools the State may authorize. While the Legislature may have recently lifted the cap, it is still a cap which operates as an arbitrary and unjustified barrier to the very efficiency that charter schools were intended to and are known to deliver, achieving better outcomes for children at lower costs to the State. If our State public school system is to reach the level of efficiency required by the Texas Constitution, this cap on charter school growth must be set aside.

5. While the legislature is not required to establish charter schools—and for that matter, it is likewise not required to establish or maintain independent school districts—once it determines to do so, it is limited and controlled in how it funds such public schools by the Texas Constitution, and, in particular, Tex. Const. article VII, Section 1 and article VIII, Section 1-e.

6. The current and amended school finance system and the two “primary” implementers of the public school system (both school districts and charter schools per Tex. Educ. Code § 11.002), is a package created by the State of Texas. To the extent that the system as a whole is unconstitutional, it is unconstitutional as to each component thereof, both the independent school districts and charter schools. Charter schools are undifferentiated parts of the unconstitutional school finance system.

III. PARTIES

A. Plaintiffs

7. Plaintiff Mario Flores brings this suit individually and as parent and next friend of his minor child Aidan Flores. Mr. Flores pays local property taxes in Travis County and the Austin Independent School District. All minor children of Mr. Flores presently attend, or will soon attend, public schools at Wayside Schools charter school in Austin, Texas.

8. Plaintiff Christopher Baerga brings this suit individually and as parent and next friend of his minor child Abby Baerga. All minor children of Mr. Baerga presently attend, or will soon attend, public schools at New Frontiers charter school in San Antonio, Texas.

9. Plaintiff Dana Allen brings this suit individually and as parent and next friend of her minor child Teal Evelyn Allen. Ms. Allen pays local property taxes in Dallas County and the Dallas Independent School District. All minor children of Ms. Allen presently attend, or will soon attend, public schools at Lindsley Park charter school in Dallas, Texas.

10. Plaintiffs Jason and Sarah Christensen bring this suit individually and as parents and next friends of their minor children Luke and Grace Christensen. The Christensens pay local property taxes in Bexar County and the Judson Independent School District. All minor children of the Christensens presently attend, or will soon attend, public schools in the Judson Independent School District and in the Harmony Public Schools charter school in San Antonio, Texas.

11. Plaintiff Brooks Flemister brings this suit individually and as parent and next friend of his minor child Ulric Flemister. All minor children of Mr. Flemister presently attend, or will soon attend, public schools at SER-Niños Academy charter school in Houston, Texas.

12. Plaintiff Texas Charter Schools Association is a Texas non-profit corporation composed of charter holder members educating over 110,000 students in more than 460 charter school campuses. Texas charter school members are directly affected by the Texas school finance system.

B. Defendants

13. Defendants are Michael Williams, in his official capacity as Commissioner of Education; the Texas Education Agency; the Texas State Board of Education; and Susan Combs, in her official capacity as the Texas Comptroller of Public Accounts. All Defendants have been duly served with process and filed an Answer in this proceeding.

14. The Honorable Greg Abbott, Attorney General of Texas, was also served with notice in compliance with Section 37.006(b) of the Texas Civil Practice and Remedies Code.

IV. JURISDICTION AND VENUE

15. Jurisdiction is proper in this Court under Article V, Section 8 of the Texas Constitution and the Texas Uniform Declaratory Judgments Act, as Plaintiffs are persons

whose rights are affected by the statutes, rules and administrative actions challenged by this suit, and seek to determine questions of construction and validity arising under said statutes, rules and administrative actions, and to obtain a declaration of their rights within the meaning of Texas Civil Practice and Remedies Code Sections 37.004(a) and 37.002(b).

16. Venue is proper in Travis County, Texas pursuant to Texas Civil Practice and Remedies Code Sections 37.006(b) and 15.002 and 15.005 because the relevant governmental entities must be made parties when a claim challenges the validity of statutes, rules and administrative actions; because all or a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in Travis County, Texas; because one or more of the official-capacity Defendants resided in Travis County, Texas at the time the causes of action accrued; and because one or more of the institutional Defendants maintained its principal offices in Travis County, Texas at the time the causes of action accrued.

V. BACKGROUND

17. The Texas Legislature (the "Legislature") created charter schools in 1995 as "part of the public school system of this state." Tex. Educ. Code § 12.105. Charter schools, together with traditional public schools, "have the primary responsibility for implementing the state's system of public education." *Id.* § 11.002.

18. Charter schools were designed to "increase the choice of learning opportunities within the public school system," to "create professional opportunities that will attract new teachers to the public system," to serve as a "new form of accountability for public schools," and to "encourage different and innovative learning methods." *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 77 (Tex. 2011); Tex. Educ. Code § 12.001.

19. When charter schools were established in 1995, they were, as they are today, held to the same accountability and accreditation standards as are school districts. For funding purposes they were originally entitled to the benefits of the Foundation School Program under Chapter 42 of the Texas Education Code. Tex. Educ. Code § 12.106. The Commissioner was instructed by statute to distribute to each charter school an amount equal to the cost of a Foundation School Program for which the charter was granted, as determined under Tex. Educ. Code § 42.251, for the student that the district in which the student resided would be entitled, less an amount equal to the school's tuition receipts under Tex. Educ. Code § 12.107, plus the school's distribution from the available school fund. And importantly, at this time, Chapter 42 included Subchapter H, School Facilities Assistance Funds as a part of the total cost of the Foundation School Program under Tex. Educ. Code § 42.251.

20. In 1997 the Legislature repealed Subchapter H of Chapter 42 and enacted Chapter 46 of the Education Code, which refers solely to and grants facility funding only to "school districts." In 2001 the Legislature amended Tex. Educ. Code § 12.106. With this change, charter schools were no longer entitled to distribution of any of the funds from the available school fund, or to local taxes from the school district in which the students reside, which funds are integral to necessary facilities funding. Rather, charter schools from that point forward, and at present, receive a basic adjusted allotment under Tier I funding, which is the same for all charter schools, and is simply an average of that received by the school districts. It is not individually adjusted, as is done for the school districts. Moreover, charter schools would no longer receive facilities funding and would only receive funding without the Tier 1 local share, and while they would receive an average of the Tier II tax-based funds raised by the school districts, and having no taxing authority, would continue to have no statutorily self-directed

means for obtaining local revenues. There was no rational basis for this restructuring by the Legislature, which denied charter schools the individualized funding adjustments and facility support they had formerly received, while these adjustments and support remained in place for the school districts.

21. In the over two decades of Texas school finance litigation, the Legislature and the Texas Supreme Court have examined this State's school finance system from the school districts' perspective only. Under the current funding mechanisms, a portion of charter school funding is determined by the average funding provided to and raised by school districts, which results in at least some charter schools being partial recipients of economic benefits received by school districts in the form of funding increases offered by the Legislature in response to prior school finance decisions. But, in basing charter school funding system on "averages" derived from school district funding, the Legislature has abrogated its constitutional duty to refrain from arbitrary decision-making in the fashioning of a public school finance system, in addition to its constitutional responsibilities to make adequate, suitable, and efficient provision funding available for all public schools, including charter schools, and impinging if not trampling on the rights of the taxpayers and parents whose children attend these public schools. The rights of these taxpayers and parents have yet to be considered by the court.

22. Charter schools were created by the 1995 Texas Legislature to provide, and as Plaintiffs will show, have demonstrated capabilities of reaching the very qualitative and quantitative educational efficiencies envisioned by the Texas Constitution and the Texas Supreme Court in *WOC II* for our public school system. Yet the Legislature has threatened that efficiency by depriving charter schools of facility or equivalent funds which are provided to school districts for their facility expenses, leaving the charter schools with no other choice but to

redirect and allocate their available instructional and operational to pay for mortgages, leases, or rents.

23. Further, in 2001 the Legislature arbitrarily and capriciously set a prohibition on the State Board of Education, limiting its ability to grant charters to open-enrollment charter schools to a maximum of 215, an arbitrary 215 cap which operated as an artificial and unjustifiable barrier to the very efficiency in public education required by the Texas Constitution. The 83rd Legislature recently raised the cap, but there remains a cap that is no more or less an arbitrary determination than the prior 215 cap.

24. In denying charter schools individualized basic allotment adjustments and sufficient monies to provide for facility support, and in placing an arbitrary cap on the proliferation of open-enrollment charter schools, the Texas Legislature has failed to make suitable provision for the adequate support and maintenance of an efficient system of public free schools under the Texas Constitution and has additionally denied open-enrollment charter schools and their parents and students equal protection of the law under the Texas Constitution, Article I, Section 3 without rational basis.

VI. PLAINTIFFS' CLAIMS

A. Despite their Funding Setbacks, Charter Schools Have Achieved Superior Educational Outcomes For Less Cost Per Pupil

25. In years 2010 and 2011 the Texas Comptroller issued and updated her landmark report, the Financial Allocation Study for Texas ("FAST"), which measured academic progress and financial efficiency in Texas' public schools. The FAST report was created at the specific direction of the Texas Legislature in 2009. The FAST report assigned rankings to the approximately 1,237 Texas school districts and charter schools.

26. Using a variety of the most recent data indicators, such as dropout rates, transportation spending, state accountability ratings and math scores, FAST identified, in each year, a list of “Five-Star Schools.” School districts and charter schools in the top 20% of rated academic progress, and among the lower 20% of all fiscally comparable systems, received a Five-Star rating. Of the 43 public school systems identified as Five-Star systems in 2010, and the 46 identified in 2011, 11 were open-enrollment charter schools, comprising approximately 25% of all Five-Star schools.

27. Over half of all charter school campuses are located in the metropolitan areas of Houston, Dallas, and San Antonio, resulting in a disproportionate minority and economically disadvantaged charter school student population. For example, in 2010, 58.7% of the students served by all Texas public schools were economically disadvantaged, 14% were African American, and 48% were Hispanic. Whereas, that same year, Texas open-enrollment charter schools served 70.6% economically disadvantaged, 26% African American and 53% Hispanic. But within these disproportionate urban minority and economically disadvantaged student populations, standard accountability charter schools outperformed school districts.

B. While Students Attending Charter Schools Share in the Currently Unconstitutional Texas Public School Funding System, Their Plight is Unique

28. Plaintiffs agree with the school district Plaintiffs in this cause, that the current public school funding formulas, claimed unconstitutional by the school districts in this litigation are for all recipients unconstitutional, and that the suffering experienced by the entire system reaches both the school districts and charter schools, as primary implementers of the system.. But, Plaintiffs would also show that compared to school districts, charter schools face an even greater unconstitutional and arbitrary denial of funding.

29. Unlike school districts, which have a local tax base and receive State aid for facilities, charter schools have neither a local tax base, nor receive direct State aid for instructional facilities. Consequently, charter schools are forced to spend operating dollars to support the cost of their instructional facilities. An efficient system of public education requires not only classroom instruction, but also the classrooms where that instruction will occur. These two components of an efficient system—instruction and facilities—are inseparable. The current system forces charter schools to deplete funding which would otherwise be available for operational and instructional supports.

30. Charter schools suffer other unique funding inequities. The current public school funding formulas for school districts utilizes weighted criteria relevant to the uniqueness of each school district (*i.e.*, Cost of Education Adjustment, Small and Midsized District Adjustments, and the Sparsity Adjustment), as well as a district's entitlements to added revenue from local property taxes. Charter school funding varies significantly from the school districts in that the charter school formulas are based on a state-wide average and do not adjust for individual school's geographic location, purpose or populations. The school districts assert that their formulas are unconstitutionally arbitrary, including that current costs of education are not reflected by these formulas. Charter schools, which receive no measure of facility support, and only receive a one-size-fits-all averaged adjustment, suffer even greater harm under the Cost of Education formulas, which were not designed with the mostly small-sized charter schools in mind. Many charter schools are caused additional harm by the calculation of average Cost of Education adjustments paid to school districts, which averages are used to determine the adjusted financial support paid to charter schools, averages which are based on a formula which already is

deficient in the provision of adequate aid and which, for the charter schools, completely ignores their individualized needs and circumstances.

31. The “target revenue” adjustments for charter schools is calculated independent of that applied to the school districts producing inequitable, unsuitable and inadequate funding results for many of the charter school subject to its application.

32. Inadequate and arbitrary funding adjustments, the wholesale elimination of other funding adjustments, and the total deprivation of facility funding (or other sources of funds sufficient to provide for facilities) for charter schools has depleted charter schools revenues intended for instruction, resulting in gross inequities in the distribution of funding to many charter schools, offending the Texas Constitution and the Texas Supreme Court’s pronouncements on constitutionally required “efficiency.”

C. The Statutory Cap on Charter Schools is an Unconstitutionally Arbitrary Obstacle to The Ability of The State Commissioner of Education to Achieve Greater Efficiency in Education

33. The Legislature has imposed an arbitrary cap on the growth of charter schools. The cap limits the number of charters that can be authorized.. This presents an arbitrary obstacle to the State’s ability to achieve constitutional efficiency and stymies the very efficiency charter schools were intended to promote.

34. The cap is as an arbitrary barrier to efficiency, and if our State public school system is to reach the level of efficiency required by the Texas Constitution, this cap on charter school growth must be set aside. The educational reform mission of charter schools is far too important to the current public school system’s success than any justification for a cap on charter school growth.

D. Results of The 83rd Legislature (R.S.) – Recent Legislation Enacted After the Tnitial Ruling

35. As the court is aware, in June 2011, the Texas Legislature cut approximately \$5.4 billion dollars from the public education budget. Among the cuts were approximately \$1.4 billion required to serve the needs of at-risk students. These funding cuts were arbitrary.

36. During the recently concluded 83rd Legislature Regular Session, the Legislature restored an estimated \$3.4 billion of the total \$5.4 billion in cuts. It is anticipated that several hundred dollars per ADA may be restored to the school district and charter school plaintiffs for the 2013-14 school year, but this is speculative at this time. Regardless, this welcome but woefully insufficient funding restores only a portion of the funds cut in 2011, appears to expand the gaps between charter school and school district funding so that the system remains financially inefficient.

37. Moreover, as disparities between the public school systems has increased, the restored funds are insufficient to meet the costs necessary to provide opportunities for charter school students to acquire a general diffusion of knowledge.

38. The Texas Education Agency (“TEA”) assesses public school students on learning and sets school district and charter school accountability ratings, and the State Board of Education, establishes required curriculum and accreditation standards, which apply equally to school districts and charter schools. And while HB 5 changed the graduation requirements, endorsements options and, state mandated standardized testing requirements, as well as modifying the state accountability system, none of the changes will enable charter schools to save or conserve funds.

39. In 2009, the Legislature passed House Bill 3 (HB3) amending public school curriculum and graduation requirements. This law also set college readiness performance

standards required in the K-12 accountability system. These graduation requirements have not been amended by any new legislation. House Bill 5 (“HB 5”) passed this past 83rd Session, requires charter schools to prepare their students for college level coursework (English language and math) without remediation.

40. Charter schools are under the same STAAR exam requirements as school districts and also must implement the same STAAR end-of-course exams (“EOCs”). While one provision of HB5, effective this next school year, reduces the number of mandatory EOCs, the requirements remain substantial. And while TEA is phasing in score requirements for the mandatory exams, TEA’s standards are not tied to what is necessary for a general diffusion of knowledge, but was instead a lowering of the bar, as alleged by the school district plaintiffs.

41. With respect to the current and amended accountability system, HB 5 requires multiple measures of student academic performance, beyond the standardized test scores. It establishes a rating system to evaluate school districts and charter schools on academic performance, financial performance, and community and student engagement.

42. Simply put, HB 5 did not resolve the multitude of failings of the Texas school finance system. The Court’s definition of a general diffusion of knowledge however, has not been altered or amended nor has the State’s definition of college readiness been altered.

43. For the charter schools and the schools where the Plaintiff taxpayers and parents students attend, the increased rigor has placed numerous additional demands on teachers, support staff and administration.

44. This last legislative session accomplished nothing by way of reviewing or addressing the inadequacy of the formula funding for all public schools nor did it address the arbitrary and inefficient formulas uniquely applied to charter schools. Thus, the current school

finance system under Chapter 42 of the Texas Education Code remains arbitrarily structured and funded so that school districts and charter schools are not reasonably able to afford all students the constitutionally required access to educational opportunity as necessary to accomplish a general diffusion of knowledge. The Texas school finance system has been and continues to be arbitrary, inefficient and unsuitable as to all its components and especially so, as to its charter schools.

VII. CONCLUSION

45. Charter schools provide choice and innovation in the public school system and are an example of how our public school system may one day function more efficiently, meeting the Texas Supreme Court's expectations for public education efficiency.

46. However, charter schools, parents, and students continue to be shortchanged. The current school finance system provides traditional school districts with two types of funding: operations and facilities funding. Charter school students generate, on average, less instructional funding per pupil than their traditional school district peers, and their schools receive no facilities funding. The arbitrary denial of facilities funding, a necessary component for suitability and efficiency, combined with the arbitrary cap on charter school growth, impedes the progress toward an efficient system of public schools. Removing these arbitrary limitations on charter schools is not only constitutionally compliant, it continues the charter schools' impressive start toward the achievement of an efficient state school system and a brighter educational future for the school children of our State.

VIII. CAUSES OF ACTION

47. The above factual allegations, arguments and authorities are incorporated, re-alleged and repeated herein by reference as though set forth in full.

48. Plaintiffs bring the following claims and seek declaratory relief under the Uniform Declaratory Judgment Act, Tex. Civ. Prac. & Rem. Code § 37.001 *et seq.*, in order to settle and to receive relief from uncertainty and insecurity with respect to their rights, status, and other legal relations under Article VII § 1 of the Texas Constitution and under the applicable statutes of the Education Code. The claims arise under both Article VII, Section 1-Adequacy and Suitability and Article VII, Section 1-Quantitative/Financial Efficiency (Equity). The public school finance system is further arbitrary and unsuitable because charter schools do not have access to funds for facilities or equal access to funding adjustments based on their individualized needs.

49. More specifically, Plaintiffs ask the Court to declare that the school finance system violates the “efficiency” provisions of Article VII, Section 1 of the Texas Constitution, in that it fails to provide efficient and non-arbitrary access to revenues, including facility and other funding necessary for public charter schools to provide a general diffusion of knowledge, and that the school finance system, as applied to public charter schools, does not make suitable provision for the support and maintenance of the education system, in violation of the Texas Constitution.

50. Plaintiffs ask the Court to declare that the school finance system violates the equal protection provisions of Article I, Sections 3 of the Texas Constitution, in that in 1997 and again in 2001 (and continuing therefrom) the Texas Legislature arbitrarily and capriciously amended open-enrollment charter school funding statutes and fails to provide charter schools with substantially equal access to revenues and funding adjustments which are provided to independent school districts, entirely omitting facility funding, and other funding, as well as failing to provide adequate funding for the support and maintenance of the education system in

general, doing so without rational basis, all in violation of Article I, Sections 3 of the Texas Constitution.

51. Plaintiffs ask the Court to declare that the artificial limitation on the number of open-enrollment charter schools violates the equal protection provisions of Article I, Sections 3 of the Texas Constitution and Article VII, Section 1 of the Texas Constitution, in that it is without rational basis, is arbitrary in concept and scope and that serves as a deterrent to constitutionally required qualitative efficiency in the public schools system.

52. Plaintiffs seek from Defendants their reasonable attorneys' fees and costs pursuant to Section 37.009 of the Texas Civil Practice and Remedies Code.

IX. PRAYER

53. WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that the Court grant the declaratory relief sought herein:

- a. That the Court declare that Article VII, section 1 of the Texas Constitution, with respect to the public school finance system, applies equally to open-enrollment charter schools;
- b. That the Court grant Plaintiffs declaratory relief pursuant to the Texas Uniform Declaratory Judgments Act, in order to settle and to receive relief from uncertainty and insecurity with respect to their rights, status, and other legal relations under the Texas public school finance system under Article VII, section 1 of the Texas Constitution, the Texas Education Code, and other law;
- c. That the Court declare that the public school finance system, insofar as it creates artificial, arbitrary and capricious differences between the sources of

- funding available to open-enrollment charter schools, without rational basis, is in violation of the equal protection provisions of Article 1, Sections 3 of the Texas Constitution;
- d. That the Court grant a permanent injunction prohibiting Defendants from giving any force and effect to the unconstitutional sections of the Texas Education Code relating to the financing of open-enrollment charters schools until the constitutional violation is remedied;
 - e. That the Court retain continuing jurisdiction over this matter until the Court has determined that the Defendants have fully and properly complied with its orders;
 - f. That the Court find that the constitutional requirements upon the Legislature, for a suitable and efficient free public school system to provide general diffusion of knowledge, requires facility funding for open-enrollment charter schools;
 - g. That the Court find that the charter school cap in Section 12.101(b) of the Education Code is arbitrary and inefficient within the meaning of Article VII, section 1 of the Texas Constitution;
 - h. That the Court grant Plaintiffs recovery of reasonable attorneys' fees and costs, as allowed by Chapter 37.009 of the Texas Civil Practice and Remedies Code, and as otherwise provided by law; and
 - i. That the Court grant Plaintiffs such other and further relief, general and special, at law and in equity, to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 7, 2013, a true and correct copy of Plaintiffs' Second Amended Original Petition was served upon the following counsel of record *via* e-mail pursuant to the agreement of the parties and in compliance with the Texas Rules of Civil Procedure and the Texas Local Rules:

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