



## Argument

### I. Evidence of the New Legislation Does not Alter the Court's February 4 Ruling.

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)). The Court's reconsideration of its prior ruling reopening the evidence correctly questions whether the due administration of justice will be served by reopening the evidence. Indeed, the State Defendants have not filed any motions urging the Court to reopen the evidence. Instead, the Calhoun County Movants (largely prevailing parties in this case) ask the Court to reopen the evidence, despite conceding that the outcome will not change.

Where the proffered evidence is not decisive of the issues in this case and likely will not change the outcome of the case, courts should not reopen the case. *See Alkas v. United Sav. Assoc.*, 672 S.W.2d 852, 860 (Tex. App.—Corpus Christi, 1984) (holding the evidence was not decisive to reopen the case because appellees had proved good title which had cut-off appellees' judgment liens, despite the liens being perfected). Here, the substantial record demonstrating the unconstitutional deficiencies in the current system—on all three claims of the Edgewood Plaintiffs—has not been changed by the 2013 legislation. As the Calhoun County Movants concede, and no other party challenges, the State of Texas did not alter its educational expectation of all students that they graduate college and career ready during the 2013 83<sup>rd</sup>

Legislative Session. *See* Tex. Educ. Code § 39.024(a). This is the same state standard used in the three-month trial as a benchmark for an adequate education and remains unchanged.

Likewise, the testing and graduation requirements litigated during the trial have only marginally changed under House Bill 5 (“HB 5”). During trial, the testimony demonstrated the significant challenges students (particularly English Language Learner and economically disadvantaged students) and school districts face under the new STAAR tests administered to ninth grade students. Those five high stakes end-of-course exams (ELA-Reading, ELA-Writing, Algebra I, World Geography, and Biology) have been reduced essentially by only one exam, with the World Geography end-of-course exam being eliminated and the separate ELA-Reading and ELA-Writing exams being combined into one end-of-course exam. *See* H.B. 5 § 31(c), 83rd Reg. Legis. Sess., (Tx. 2013). Students must still pass those rigorous STAAR end-of-course exams at the Level II Satisfactory standard in order to graduate, as well as the English Language Arts II and U.S. History end-of-course exam. *See* H.B. 5 §§ 35(a), 36(a). School districts must also continue to provide remediation for the numerous Texas students struggling to meet the standards. *See* H.B. 5 § 15. While it is true that eight of the remaining end-of-course exams were cut under HB 5, the evidence at trial demonstrated that four out of the five end-of-course exams *currently administered* created substantial remediation costs. This fact has not changed due to the new legislation.

And as previously argued in this case, the new accountability grading system under HB 5 does not become effective until 2016-17.<sup>1</sup> Hence, there is no significant change resulting from the 2013 legislation warranting the reopening of the record.

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<sup>1</sup> H.B. 5 § 31(b)-(c).

Similarly, the additional appropriations under Senate Bill 1 (“SB 1”) of \$3.2 billion and other legislation do not come anywhere near to replacing the \$5.4 billion cut by the Texas Legislature in 2011, much less the amount demonstrated during trial that is necessary for property-poor districts to afford all of their students a meaningful opportunity to acquire a general diffusion of knowledge. The appropriations made under SB 1 were still arbitrary and unrelated to educational need; they did nothing to alter the arbitrary, inadequate and unsuitable weights for bilingual/ESL education and compensatory education, which remain unchanged since 1985; and they are largely based on temporary appropriations and did not alter permanently the statutory formula funding. *Compare* Mot. to Reopen the Evidence, Ex. A, with Tex. Educ. Code § 42.101 (Basic Allotment set at lesser of \$4,765 or \$4,765 x (DCR/MCR)). And while the Texas Legislature did appear to appropriate slightly larger amounts to the poorest districts in the State (based on, but not conceding the accuracy of, Legislative Budget Board projections) in the approximate range of \$100-\$200 more per ADA, no party can legitimately argue that such appropriations decreased the substantial revenue and tax gaps between property-poor and property-rich districts in this case. *See, e.g.*, Ex. 4000, 4244 and 4251 (Expert Reports of Dr. Albert Cortez). Indeed, although the State argued at trial that the Legislature intended to reduce and eliminate target revenue (which benefitted predominantly property-wealthy school districts) through the 2017 school year, the State increased target revenue under SB 1. *See* S.B. 1, 83rd Reg. Legis. Sess. (Tx. 2013).

Plainly, there is no evidence that “would probably change the result if proved on a reopening of the case. . .” and certainly no argument from the Calhoun County Movants or any other party in this case asserting the same. *Joe R. Starks Constr. Co. v. G. A. Mallick, Inc.*, 425 S.W.2d 409, 413 (Tex. Civ. App.—Fort Worth 1968).

**II. The Court has correctly cautioned against the use of less reliable school finance data for future years.**

After receiving evidence and argument of the reliability of school finance data during trial in this case, the Court determined that reliable data needed to answer the serious questions of the financial efficiency of the Texas school finance system would be data available on November 1, 2012 for the 2011-12 school year. No party filed a motion for reconsideration nor did any party challenge such ruling. Now, Calhoun County Movants seek to use Rule 270 to re-litigate this matter.

Calhoun County Movants suggest that the Court has previously ruled upon the constitutionality of the financial efficiency of the system based on projections but that argument is unavailing. First, this Court has already made prior evidentiary rulings strongly questioning the reliability of the data<sup>2</sup>—rulings that were substantiated by testimony from affiant Joe Wisnoski. Mr. Wisnoski acknowledged that the data he presented in Exhibits 1861-1863 in this case were merely estimates based on the data available at the time that the data was calculated and not necessarily the best available data or the most current available data. *See* Edgewood Summary of Wisnoski Depo Testimony, Ex. 4240 at 4. Mr. Wisnoski also acknowledged deficiencies in the not-yet-final data, including estimations of the payment of state aid, the settlement process, and reliance on school district collection surveys. *Id.* Dr. Albert Cortez—one of only four experts<sup>3</sup> testifying in this case on the financial efficiency of the system—states in his attached affidavit that frequent changes to school district enrollment, property wealth and tax collections impact the accuracy of the data projections. *See* Affid. of Albert Cortez, Ex. A.

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<sup>2</sup> *See* RR9:49-52, 74-75 (Court acknowledging reliability concerns and holding that only November data for the 2011-12 data would be available); *see also* Ex. 4240 at 3-4; RR23:33-34, 104; 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.”).

<sup>3</sup> Neither Wisnoski nor Lynn Moak testified as financial efficiency experts in this case.

Dr. Cortez further notes that the unsteadiness of the school finance data is particularly “astute today with wind energy farms and Eagle Ford shale turning lower wealth districts into high wealth districts within a short period of time and impacting local enrollment due to the creation of jobs.” *Id.*

Second, there is no evidence in the prior five *Edgewood* cases that such reliability questions were raised in those courts so the fact that prior cases may have relied on data projections does not resolve the reliability issue. “The court must determine, not only that the facts or data are of the type relied upon by experts in the field, but also that such reliance is reasonable.” *See, e.g., Thompson v. Mayes*, 707 S.W.2d 951, 956 (Tex. App.—Eastland 1986, writ ref’d n.r.e.). Underlying data should be sufficiently reliable to provide assistance to the fact finder and this Court already made its determination on reliability of school finance data.

Third, in the prior Texas school finance cases, the analyses presented to the courts were largely based on statutory formulas. *See, e.g., Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 731-732 (Tex. 1995) (reviewing difference in yields under the formulas). Today, as the evidence proved in this case, hundreds of districts are not funded based on the formulas and similarly-situated districts can generate very different levels of revenue due, in part, to target revenue. *See, e.g., Ex. 5653* at 153.

Undoubtedly, Calhoun County ISD Plaintiffs, in particular, merely want a second chance to re-litigate the financial efficiency issues, which is inappropriate as a basis for reopening the evidence. *See Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195, 203 (Tex. App.—Texarkana 2010). Opening the record despite the reliability concerns acknowledged previously by the Court, and the minor, temporary appropriations made during the 2013 session, does not serve the administration of justice for the property-poor Edgewood Plaintiffs. Instead, it gives

State Defendants the incentive to provide temporary, unsubstantial “fixes” to the outstanding constitutional violations, allows parties like Calhoun County ISD to re-litigate issues, and deprives the parties like the Edgewood Plaintiffs from obtaining finality of judgment,

**III. Should the Court Reopen the Evidence, Projections for the 2014-15 are not Only Subject to Even Greater Reliability Concerns, but They Also do not Concern the Current School Finance System**

During the three-month trial in this case, the Court weighed the evidence presented by four separate parties in this case, including evidence presented by the State Defendants and the Calhoun County ISD Plaintiffs against the property-poor districts’ financial efficiency claim, and concluded that the system violated the efficiency clause of article VII of the Texas Constitution. Edgewood Plaintiffs maintain that the great disparities in revenue and tax rates between property-rich and property-poor districts have not been altered by the temporary, miniscule appropriations made during the 2013 Legislative Session.

If the Court decides to reopen the evidence and consider projections in order to determine the constitutionality of the system, Edgewood Plaintiffs urge the Court not to allow evidence for the 2014-15 school year. As the Calhoun County Movants repeatedly impress upon the Court, it is the constitutionality of the “current” system that should be weighed. *See, e.g.,* Brief in Support of Reopening the Evidence at 3 (“...*the Court should enjoin the operation of the current system based on evidence of the current system and current law.*”) (emphasis in original). Allowing projections based on appropriations under SB 1 for the 2014-15 school year will not prove or disprove the constitutionality of the *current* system and therefore should not be allowed.

Furthermore, as Dr. Albert Cortez—states in his attached affidavit, the unreliability of data projections is ever more heightened for the 2014-15 school year. *See* Ex. A. This is due to changes in key district characteristics such as enrollment, wealth, etc. *Id.* Based on his extensive

experience of over thirty-five years in school finance including his experience as an equity expert in this case, Dr. Cortez recommends that the Court (if the evidence is reopened) use near final data for the 2012-13 when that becomes available later this year and revenue projections for a subsequent year (2013-14) as the best option to ensure reliability of analyses that may be conducted on the equity and adequacy of the Texas funding system. This practice is more consistent with methods traditionally used in past litigation.

**IV. The Court Cannot Merely Take Judicial Notice of the New Legislation and Close the Record, as Intimated by Defendants.**

If the Court considers *sua sponte* taking judicial notice of the new legislation, Edgewood Plaintiffs urge the Court to reopen the record for the limited purpose of adjudicating evidentiary matters related to their claims in order to develop a full record. Standing alone, the legislation does not prove the system is now constitutional. See Brief in Support of Reopening the Evidence at 5-7 (legal analysis on judicial notice fully incorporated herein).

Should the Court take judicial notice of the legislation, at the very least, Edgewood Plaintiffs should be allowed the opportunity to submit affidavits demonstrating the inconsequential impact of the new legislation on the unconstitutionality of the system.

**Conclusion**

For the reasons stated above, Edgewood Plaintiffs urge the Court to not reopen the evidence and issue its findings of fact and conclusions of law and final judgment in this case. In the event the Court reopens the evidence, Edgewood Plaintiffs ask the Court to consider near-final data for the 2013-14 school year and not consider unreliable projections of the financial efficiency of the system for the 2014-15 school year; Edgewood Plaintiffs further ask the Court for an opportunity to present fully their case on the limited scope of reopening the evidence, and for any other relief so entitled.

DATED: September 12, 2013

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

By my signature below, I certify that on September 12, 2013, I served the foregoing document via electronic mail to Defendants and to the other parties listed below:

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# Exhibit

## A

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5. I currently serve as Director of Policy at the Intercultural Development Research Association in San Antonio, Texas.
6. I have reviewed the affidavits of Joe Wisnoski and Lynn Moak attached to the Brief in Support of Reopening the Evidence filed by Calhoun County I.S.D., et al.
7. As this court has previously determined and I have testified in this case, school finance data, until nearly final, tends to change over a short period of time. This is impacted by changes in enrollment, tax collections, and local school district property wealth, among other factors. The changes are particularly acute today with sub-sets of school districts impacted by wind energy farms and Eagle Ford shale turning lower wealth districts into high wealth districts within a short period of time and impacting local enrollment due to the creation of jobs.
8. While it has been past state practice to use data across two years – these have tended to involve only a two-year span with near final data for the initial year used. Projections for subsequent years beyond that are considered far more speculative due to on-going district changes that occur yearly and will be compounded when spanning multiple years in a data set
9. While it is accurate to state that district changes in both positive and negative directions may offset one another when making overall state projections, this may not be the case with sub-group data (such as decile groups used in this case for equity and adequacy analyses) since the changes may not be evenly or similarly distributed across all property wealth sub-groups.
10. Using near final data for a base year in tandem with data projections that are two years out multiplies the margin of error considerably, and that variation may be very important in small school districts where small changes in key district characteristics – enrollment, wealth etc., result in notable impacts in funding per student.
11. For all of the reasons noted above, I would recommend using near final data for the 2012-13 when that becomes available later this year and revenue projections for a subsequent year (2013-14) as the best option to ensure reliability of analyses that may be conducted on the equity and adequacy of the Texas funding system. This is a practice more consistent with methods traditionally used in past litigation on these issues.

Further Affiant sayeth not.

  
Albert Cortez

SWORN TO AND SUBSCRIBED by said Albert Cortez before me, the undersigned authority, on this 12<sup>th</sup> day of September, 2013.

  
Notary Public, State of Texas



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