

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

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

**CALHOUN COUNTY ISD PLAINTIFFS, FORT BEND ISD PLAINTIFFS, AND  
TTSFC PLAINTIFFS' RESPONSE TO STATE DEFENDANTS'  
FIRST REQUEST TO COURT TO TAKE JUDICIAL NOTICE**

The Calhoun County ISD Plaintiffs, Fort Bend ISD Plaintiffs, and TTSFC Plaintiffs (together, the "School District Plaintiffs") hereby file this Response to State Defendants' First Request to Court to Take Judicial Notice.

**INTRODUCTION**

The State Defendants ask this Court to take judicial notice of certain adjudicative facts under Texas Rule of Evidence 201. The School District Plaintiffs do not oppose the State Defendants' request for this Court to take judicial notice of certain legislation from the 83rd Legislative Session, but the State Defendants have failed to meet the strict standards of Rule 201 as to the remaining facts for which they seek judicial notice. The Court should therefore grant the State Defendants' First Request to Court to Take Judicial Notice ("State's Request") as to the legislation, but should deny the State's Request as to all remaining facts. Although judicial notice is improper as to these remaining facts because they are not adjudicative facts whose accuracy cannot be reasonably questioned, the School District Plaintiffs would not oppose

admission of the documents containing these facts as exhibits at the January 2014 evidentiary hearing.

## **ARGUMENT AND AUTHORITIES**

### **A. Judicial Notice of Adjudicative Facts Standard**

Texas Rule of Evidence 201 governs judicial notice of adjudicative facts. TEX. R. EVID. 201(a). Adjudicative facts are “the facts of the particular case” to which the law is applied. *O’Connell v. State*, 17 S.W.3d 746, 749 (Tex. App.—Austin 2000, no pet.); *O’Quinn*, 77 S.W.3d 438, 447 (Tex. App.—Corpus Christi 2002, no pet.). Thus, “when a court or an agency finds facts concerning the immediate parties, including who did what, where, when, how, and with what motive or intent, the court or agency is performing an adjudicative function, and the facts are called adjudicative facts.” *O’Quinn*, 77 S.W.3d at 447 (quotation omitted). To take judicial notice of an adjudicative fact, the fact must not be “subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” TEX. R. EVID. 201(b).

### **B. The Court may take judicial notice of legislation.**

The State Defendants ask the Court to take judicial notice of the following legislation from the 83rd Legislature:

- Senate Bill 1 (State’s Request at 14-940)<sup>1</sup>;
- House Bill 10 (State’s Request at 1153-62);
- House Bill 1025 (State’s Request at 1164-99);
- Senate Bill 758 (State’s Request at 1201-04);

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<sup>1</sup> Citations to pages from the State’s Request are based on the PDF page numbers of the State’s Request, which includes exhibits.

- Senate Bill 1458 (State’s Request at 1206-23);
- House Bill 5 (State’s Request at 1242-1352); and
- Senate Bill 2 (State’s Request at 1370-1416).

The School District Plaintiffs do not oppose this request. Courts regularly take judicial notice of legislation, although they typically treat legislation as legislative facts,<sup>2</sup> rather than adjudicative facts. *See Perkins v. Delaney*, 170 S.W.3d 136, 137 (Tex. App.—Eastland 2005, no pet.) (finding that provision of the Texas Transportation Code is a legislative, not an adjudicative, fact); *Chapa v. State*, 729 S.W.2d 723, 728 n.3 (Tex. Crim. App. 1987) (taking judicial notice of a city ordinance as a legislative, not an adjudicative, fact). Regardless of how the legislation is categorized, this Court may properly take judicial notice of the legislation identified above.

**C. The State Defendants’ remaining facts do not satisfy Rule 201.**

In addition to legislation, the State Defendants also ask the Court to take judicial notice of a number of adjudicative facts, but none of these facts satisfy the strict standards of Rule 201. The remaining facts fall into three categories: (1) financial projections, (2) facts contained in various Texas Education Agency (“TEA”) documents, and (3) summaries and analyses of changes resulting from legislation from the 83rd Legislative Session. These are not facts that are “not subject to reasonable dispute” under Rule 201 – they are not “generally known within the territorial jurisdiction” of this Court and they are not “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” TEX. R. EVID. 201(b). Moreover, contrary to the State’s argument, these facts are not subject to judicial

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<sup>2</sup> In contrast to adjudicative facts, legislative facts “are general and usually do not touch individual questions of particular parties to a proceeding.” *Alaniz v. Hoyt*, 105 S.W.3d 330, 351 n.6 (Tex. App.—Corpus Christi 2003, no pet.); *see also Gaston v. State*, 63 S.W.3d 893, 900 (Tex. App.—Dallas 2001, no pet.).

notice simply because they are publically available. *See* State’s Request at 2 (stating that “a court may take judicial notice of publically available documents to aid in its determination of jurisdiction”). The State Defendants cite two cases to support their argument to the contrary, but in both cases, the Texas Supreme Court cited and relied on Rule 201 to decide the question of judicial notice. *See Univ. of Houston v. Barth*, 403 S.W.3d 851, 856 (Tex. 2013); *Freedom Commc’ns, Inc. v. Coronado*, 372 S.W.3d 621, 623-24 (Tex. 2012). The State Defendants must therefore satisfy Rule 201 regardless of whether the adjudicative facts are publically available.

The State Defendants first ask the Court to take judicial notice of financial projections, but these financial projections fail to meet the requirements of Rule 201. These projections are contained in the following documents:

- An Economic Stabilization Fund history from 1990 through 2015, with projected values for 2013-2015 (State’s Request at 964);
- TEA’s estimated allotments of supplemental funding for pre-K for SY 2013-2014, calculated on a per-district basis (State’s Request at 944-962);
- A Legislative Budget Board (“LBB”) summary of the impact of the 83rd Legislature’s actions on the Foundation School Program, with projected changes in M&O revenue per WAEA for FY 2014 and 2015 (State’s Request at 966); and
- LBB runs reflecting projected M&O revenue for FY 2014 and 2015, calculated on a per-district basis (State’s Request at 968-1002, 1004-1038, 1040-1074).

The documents referenced above contain *projections* of future financial information. The TEA acknowledges that its estimates of pre-K funding “reflect[] estimated allotments for planning purposes only” (State’s Request at 942). The LBB runs specifically note that “[a]ll figures below are estimates and are subject to change based on actual and final student counts, property values, and tax effort.” (State’s Request at 968-1002, 1004-1038, 1040-1074). Although the Court may appropriately evaluate the impact of the 83rd Legislature’s actions without “near final” or “final” data for future years (*see* CCISD, FBISD, and TTSFC Plaintiffs’ Brief in

Support of Reopening the Evidence at 10-13), the data contained in the documents above does not satisfy Rule 201(b)'s requirement that the information be "generally known within the territorial jurisdiction" of the Court or that it be "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Judicial notice of these financial projections is therefore improper.

The State Defendants also ask the Court to take judicial notice of various TEA press releases, letters, and other documents. These documents include the following:

- A description of how the TEA releases STAAR test questions and the source of those questions (State's Request at 1226-27);
- March 1, 2013 press release announcing TEA's request for a waiver of the requirements of the No Child Left Behind Act (State's Request at 1239-40);
- July 25, 2013 letter from the Director of State Funding describing how the TEA estimates allotments of supplemental pre-K funding (State's Request at 942);
- August 2, 2013 letter describing the TEA's intent to propose policy changes to Texas's assessment program for the 2013-2014 school year (State's Request at 1229-32, 1234-37);
- August 13, 2013 press release indicating that the State Board of Education is seeking input on new graduation plans (State's Request at 1362-63);
- August 29, 2013 letter describing TEA's intent to file rules relating to graduation requirements for 2013-14 seniors (State's Request at 1365-66) and an outline of what the proposed rule will include (State's Request at 1357-60); and
- A "draft" timeline related to STAAR program results and accountability and college readiness indicators (State's Request at 1419-20).

The facts contained in these press releases, letters, and other documents are not generally known and cannot readily be verified through sources whose accuracy cannot be questioned. Although the School District Plaintiffs would not oppose the admission of these documents as exhibits, the School District Plaintiffs must be allowed the opportunity to challenge the accuracy and

completeness of the information contained in these documents. Judicial notice is improper under Rule 201.

The third category of documents that do not satisfy Rule 201 are summaries and analyses of legislation from the 83rd Legislature. These documents include:

- TEA's Briefing Book on Public Education Legislation for the 83rd Legislative Session, which contains a summary of the new legislation and an analysis of the changes from current law (State's Request at 1422-1584);
- A comparison of current graduation requirements with graduation requirements under House Bill 5 (State's Request at 1355); and
- LBB's June 2013 Summary of Senate Bill 1, which includes calculations and descriptions of various appropriations (State's Request at 1076-1151).

Although the Court may take judicial notice of the legislation itself, it should not take judicial notice of summaries of laws or analyses of the changes from prior law that are not part of the official legislative history of the legislation. Such facts are not generally known within the jurisdiction, and cannot be accurately and readily determined by sources whose accuracy cannot reasonably be questioned.

The Court should deny the State Defendants' request to take judicial notice of the three categories of documents identified above, because they fail to satisfy Rule 201. While the School District Plaintiffs would not oppose admission into evidence of these documents at the final evidentiary hearing, the documents must not be deemed to meet the strict requirements of Rule 201. The School District Plaintiffs should be allowed the opportunity to cross examine witness on the accuracy or completeness of the information contained in these documents.

### **CONCLUSION**

For the reasons stated above, the School District Plaintiffs respectfully request that this Court (1) grant the State Defendants' First Request to Court to Take Judicial Notice ("State's

Request”) as it pertains to the legislation attached to that request, (2) deny the State’s Request as to all remaining facts, and (3) grant any other appropriate relief.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing document has been served this 2<sup>nd</sup> day of October, 2013 as provided below:

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