

Charter Schools Plaintiffs' case. In joining Interveners' Plea to the Jurisdiction, State Defendants did. The Charter Plaintiffs now respond (hereafter "Response").

In this Response, Charter School Plaintiffs do not attack the soundness of the Plea to the Jurisdiction as it relates to any other party. However, assuming, *arguendo*, that as argued in the Plea to the Jurisdiction, the underlying case has been rendered moot by recent changes in the school laws passed into law by the 83rd Legislature as to one or more of the non-Charter School Plaintiff groups (The Texas Taxpayer and Student Fairness Coalition; Calhoun County ISD Plaintiffs; Edgewood Independent School District, *et al.* Plaintiffs; and Fort Bend ISD, *et al.* Plaintiffs), the changes in the school laws, hereinafter described, did not have a similar effect upon the underlying case filed by the Charter School Plaintiffs; and for such reason this case is not moot as to them.

Results of the 83rd Legislature and Its Effect Upon the Charter Schools Plaintiffs' Case

Out of the multitude of bills passed by the 83rd Legislature, only five (5) bills could conceivably impact the Charter School Plaintiffs' claims and this Court's rulings in this case to date. They are: Senate Bill 1 (General Appropriations), House Bill 10 (Emergency Supplemental Appropriations), House Bill 1025 (Supplemental Appropriations), House Bill 5 (Public School Accountability) and Senate Bill 2 (Charter Schools). A summary of these bills may be found in the 2013 Legislative Summary for Texas Charter School Leaders of the Regular Session

of the 83rd Legislature, produced by the Texas Charter School Technical Assistance Network, (the “Network”), available here: <http://www.txcharternetwork.org/site/default.aspx>, and incorporated herein by reference to this Response to the Plea to the Jurisdiction and Motion for Entry of Final Judgment and State Defendants’ Joinder. A hard copy will be provided upon request by the Court. As to the Charter School Plaintiffs uniquely, despite the passage of this legislation, a controversy regarding the Charter School Plaintiffs’ claims and a legally cognizable interest in the outcome of this case, continues to exist. *Williams v. Lara*, 52 S.W. 4d 184 (Tex 2001). As such, these bills do not moot the Charter School Plaintiffs’ claims,

ARGUMENT

A. Appropriations Bills (Senate Bill 1, House Bill 1025 and House Bill 10)

Senate Bill 1

The passage of Senate Bill 1 restored an estimated \$3.4 billion of the total \$5.4 billion in foundation school program cuts made by the 82nd Legislature in 2011. Senate Bill 1 did not make any changes to the state funding mechanism for public charter schools. No changes were made to the state funding mechanism for charter schools. Thus, the partial restoration of state funds by the 83rd Legislature did not result in a significant increase in funding for public charter schools. The crux of the Charter School Plaintiffs’ claims arise out of severe structural failures in the

state funding mechanism for public charter schools that result in persistent, continual inadequacies and inequities in the amount of funding charter school students receive, including a complete lack of facilities funding, and such claims do not hinge upon a general restoration of education funding. Despite restoring \$3.4 billion to the Foundation School Program, Senate Bill 1 did nothing to remedy the structural failures of the charter school funding formula. In fact, as a result of the passage of Senate Bill 1, the disparity in funding between public charter schools and school districts only *increased*. Thus, Senate Bill 1 does not render the Charter School Plaintiffs' claims moot, and the school finance system as it relates to charter schools remains unconstitutional.

House Bill 1025

The passage of House Bill 1025 resulted in an increase in the Basic Allotment for the Foundation School Program, establishing the Basic Allotment at \$4,950 for fiscal year 2014, and \$5,040 in fiscal year 2015. As is the case with Senate Bill 1, House Bill 1025 did not change the state funding mechanism for public charter schools and thus, the Charter School Plaintiffs' claims could not be rendered moot by House Bill 1025. The increase in the amount of the Basic Allotment did not result in any significant increase in funding for public charter schools, and the underlying evidence presented by the Charter School Plaintiffs at trial remains reliable and relevant, as the evidence at trial showed a level of unconstitutionality that far

exceeds the slight increase in educational funds as a result of House Bill 1025, including a complete lack of facilities or facilities funding for public charter schools. Moreover, despite the increase in the Basic Allotment made by House Bill 1025, the disparity in funding between public charter schools and school districts only *increased* as a result of the passage of House Bill 1025, again illustrating that the constitutional claims raised by the Charter School Plaintiffs arise out of severe structural failures in the state funding mechanism for public charter schools that result in persistent, continual inadequacies and inequities in the amount of funding charter school students receive, regardless of any incremental increase in the amount of the Basic Allotment. Thus, like Senate Bill 1, House Bill 1025 does not change the constitutionally inequitable, inadequate, and unsuitable school finance system with respect to public charter schools, and as such cannot render the Charter School Plaintiffs' claims moot.

House Bill 10

House Bill 10 merely funded enrollment under current school finance formulas through August 31, 2013. This type of supplemental appropriation is regularly needed because it is impossible to anticipate the precise number of students public schools will serve over a two-year budget cycle. As such, House Bill 10 did not address future education funding amounts or any restoration of

reductions made by the 82nd Legislature in 2011, and is, therefore, not relevant to this case nor can it have rendered Charter School Plaintiffs' claims moot.

B. Public School Accountability (House Bill 5)

House Bill 5 makes changes to the public education system in three significant ways—it alters the state's graduation plans, reduces standardized testing requirements, and makes changes and additions to the public education accountability system. House Bill 5, however, does not alter what is required of public schools to reach a general diffusion of knowledge, *i.e.* to graduate students post-secondary ready, and thus does not render the Charter School Plaintiffs' claims moot. House Bill 5 makes no change to the Education Code regarding this standard. While House Bill 5 alters the graduation plans required of Texas students, it does not change the number of credits required to graduate—it only changes the means by which a student may achieve the necessary credits for graduation. And, while House Bill 5 reduces the number of end-of-course exams required for graduation, it does not alter the obligation to graduate students post-secondary ready, or how a public school measures post-secondary readiness. Thus, these changes do not impact the Charter School Plaintiffs' case. The underlying evidence presented by the Charter School Plaintiffs—the college entrance exam performance data—is not altered by or called into question by House Bill 5. Also, while the number of end-of-course exams required was reduced, five end-of-course exams were not impacted by House Bill 5 and thus, the STAAR performance data for these exams, presented as

evidence in this case, is not affected or even called into question by House Bill 5. Moreover, House Bill 5 makes no changes to lower grade levels, and the STAAR performance data presented by the plaintiffs for these grades is not called into question by House Bill 5.

Lastly, and most importantly, House Bill 5 does not change the state funding mechanism with respect to public charter schools. The Charter School Plaintiffs' claims are based upon severe structural failures in the state funding mechanism for charter schools that result in persistent inadequacies and inequities in the amount of funding available to charter school students. As House Bill 5 does not change this state funding mechanism, it does not render the Charter School Plaintiffs' claims moot.

C. Public Charter Schools (Senate Bill 2)

The passage of Senate Bill 2 made a number of changes to the Education Code regarding the authorization and operation of public charter schools. However, none of these changes, with the exception of the provision regarding the cap on the number of open-enrollment charter schools, relate to or address the Charter School Plaintiffs' claims in this case. Senate Bill 2 does not address, much less change, any law with respect to the state funding mechanism for public charter schools. Nor does Senate Bill 2 provide any funding or facilities for public charter schools. As such, Senate Bill 2 does not make the state public school funding system

constitutionally equitable for public charter schools so as to render the Charter School Plaintiffs' claims moot under Article VII, § 1 of the Texas Constitution.

Moreover, Senate Bill 2 did increase the cap on the number of open-enrollment charters that may be granted in the State of Texas. However, Senate Bill 2 did not *remove* the cap. The Charter School Plaintiffs' claims, with respect to the cap, is that the cap on the number of open-enrollment charters is arbitrary, and an arbitrary prohibition against the efficiency called for by the Texas Constitution. Because there remains an arbitrary cap on the number of open-enrollment charters, the Charter School Plaintiffs' claims are not rendered moot by this provision of Senate Bill 2.

CONCLUSION

Only one case is necessary to demonstrate that the case brought by the Charter School Plaintiffs cannot be considered moot due to the legislative changes described above; that case being *United States v. Texas*, 680 F.2d 356 (5th Cir. 1982) (hereinafter cited as "LULAC").

Uniquely, we are citing to a case that actually holds that the underlying case was moot due to legislative changes. However, it is the stark differences between the facts in *LULAC* and those presented here that points out why the Charter Schools Plaintiffs' case is not moot.

LULAC involved an action brought by different groups, including the United States, the Mexican American Legal Defense Fund (MALDF) and *LULAC* (excluding the United States, collectively called *LULAC* plaintiffs), against the State of Texas and the Texas Education Agency (TEA) to bring about desegregation of Texas schools. After the case was won and a permanent injunction entered, the *LULAC* plaintiffs filed a motion to enforce certain aspects of that injunction. Intervening, however, between the time the original injunction was entered and the enforcement action, the Texas legislature passed into law substantial changes to one part of the Education Code, 1981 Bilingual and Special Language Programs Act, that was previously held to be in violation of the law.

Looking only at this aspect of the changes wrought by the Legislature, the Fifth Circuit held that injunctive remedy entered by the district court in its original judgment was rendered moot by the enactment of the Bilingual and Special Language Programs Act. The court wrote, as follows:

The TEA argued, in our opinion persuasively, that the Texas Legislature's enactment of the 1981 Bilingual and Special Language Programs Act made the court's injunctive relief unnecessary. The 1981 Act goes significantly beyond the 1973 scheme and tracks the court's eventual remedial order quite closely. Although it compels bilingual education only through the elementary grades, it, for example, mandates bilingual education in school districts with 20 or more students with limited English-speaking proficiency in the same grade, authorizes the TEA to adopt "standardized entry-exit criteria," and compels the TEA to take certain specific measures, including on-site monitoring, to insure compliance.

The court's refusal to reconsider its injunctive order in light of the 1981 Act imposed a judicial gloss on the new legislative scheme without testing that scheme against the requirements of section 1703(f).

United States v. State of Tex., 680 F.2d at 372.

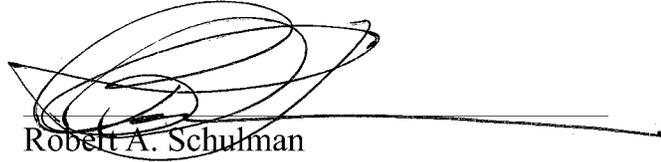
Here, the legislature did not touch the wording of the formula used to fund charter schools; and, while it might have tweaked the underlying variables, the legislation did not come close to imposing a new gloss on the unconstitutional mechanism for funding. Moreover, the legislature did not attempt to remedy the lack of any funding of facilities, which, by itself, keeps the Charter School Plaintiffs' case from being moot.

PRAYER

Wherefore, the Charter School Plaintiffs respectfully request the Court to deny the request in the Joinder of State Defendants to hold this case moot.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 4, 2013, a true and correct copy of the foregoing 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 Rule:

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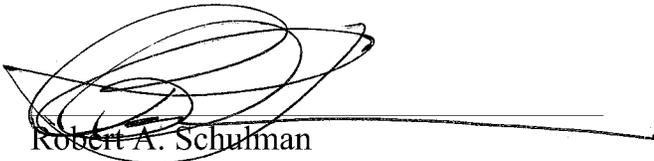
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