

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

TEXAS TAXPAYER & STUDENT  
FAIRNESS COALITION, et al.,

Plaintiffs,

VS.

MICHAEL WILLIAMS, Commissioner of  
Education, et al.,

Defendants.

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200<sup>TH</sup> JUDICIAL DISTRICT

*CONSOLIDATED CASE:*

CALHOUN COUNTY INDEPENDENT  
SCHOOL DISTRICT, et al.,

Plaintiffs,

VS.

MICHAEL WILLIAMS, Commissioner of  
Education, et al.,

Defendants.

**CALHOUN COUNTY ISD PLAINTIFFS' OBJECTIONS TO  
DEPOSITION DESIGNATIONS FOR SECOND PHASE OF TRIAL**

The Calhoun County ISD Plaintiffs serve this their Objections to Deposition Designations for Second Phase of Trial. The Calhoun County ISD Plaintiffs object to the following designations of testimony from the deposition of Bill Hammond, taken on November 20, 2013:

**Intervenors' Designations:**

10:23 – 11:19  
11:24 – 12:13  
13:8-24  
14:24 – 17:21  
18:13 – 19:10  
20:18 – 22:2  
22:7 – 24:5  
24:19 – 25:6

The deposition passages cited above include opinion testimony on subjects (such as the impact of House Bill 5 on the rigor of the school finance system) for which Mr. Hammond is not qualified to offer opinions. The Intervenors have failed to meet their burden to show that Mr. Hammond is qualified to opine on these subjects. *See* TEX. R. EVID. 702; *Broders v. Heise*, 924 S.W.2d 148, 151-52 (1996) (“[T]he party offering the expert’s testimony bears the burden to prove that the witness is qualified under Texas Rule of Civil Evidence 702.”).

In addition, the opinion testimony contained in these portions of the deposition is not fairly encompassed within the Intervenors’ disclosure of subjects on which Mr. Hammond would testify as an expert. (*See* Efficiency Intervenors’ Fourth Supplemental Responses to Requests for Disclosure from All Parties, attached as Exhibit A, at p. 20). The Court should therefore sustain the Calhoun County ISD Plaintiffs’ objections to the deposition testimony cited above.

In addition, to the extent any party has designated a deposition exhibit as part of its deposition designations, the Calhoun County ISD Plaintiffs incorporate herein their Objections to Trial Exhibits for Second Phase of Trial. To the extent any party has designated deposition testimony that has already been admitted into evidence, the Calhoun County ISD Plaintiffs incorporate herein all objections previously asserted to such testimony. With respect to any witness who may be presented by deposition, or whose deposition may otherwise be used at trial,

but for whom specific excerpts have not been designated, the Calhoun County ISD Plaintiffs reserve the right to object upon the designation or use of specific excerpts from the depositions.

The Calhoun County ISD Plaintiffs expressly reserve the right to amend, supplement, and/or withdraw any objections to any party's designated testimony.

Respectfully submitted,

HAYNES AND BOONE, LLP

/s/ Mark R. Trachtenberg

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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 17th day of January, 2014 as provided below:

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1/17/2014 4:55:56 PM

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D-1-GN-11-003130

**EXHIBIT A**

Unofficial copy Travis County District Clerk Velda L. Price



**a. The correct names of the parties to the lawsuit.**

**RESPONSE:** The “Efficiency Intervenors” are Joyce Coleman, individually and as next friend of her minor children; Danessa Bolling, individually, and as next friend of her minor child; Lee Beall and Allena Beall, individually, and as next friends of their minor children; Joel Smedshammer and Andrea Smedshammer, individually, and as next friends of their minor children; Darlene Menn, individually and as next friend of her minor child; Texans for Real Efficiency and Equity in Education, a non-profit Texas corporation; and, Texas Association of Business. These are the correct names for these parties.

**b. The name, address, and telephone number of any potential parties.**

**RESPONSE:** None at this time. The Efficiency Intervenors will supplement, as necessary, as allowed under the Texas Rules of Civil Procedure and the court’s Scheduling Order.

**c. The legal theories and, in general, the factual basis of the responding party’s claims or defenses to this lawsuit.**

**RESPONSE:** Efficiency Intervenors Joyce Coleman, individually and as next friend of her minor children; Danessa Bolling, individually, and as next friend of her minor child; Lee Beall and Allena Beall, individually, and as next friends of their minor children; Joel Smedshammer and Andrea Smedshammer, individually, and as next friends of their minor children; Darlene Menn, individually and as next friend of her minor child are parents and children who are currently Texas residents and are receiving their education and/or eligible to receive their education from the Texas system of public free schools. The Texas Association of Business is a Texas non-profit corporation whose members do business throughout Texas, and it

is authorized to represent its members on any matter that may have an impact on their businesses, which includes the instant litigation. Texans for Real Efficiency and Equity in Education is a Texas non-profit corporation organized to fund and participate in the instant litigation and its members are parents who are Texas residents and whose children are receiving or eligible to receive an education in the Texas system of public free schools. The particularized harm suffered by each of the above-listed Efficiency Intervenors is that the current system of public free schools is not efficient as guaranteed by article VII, sec. 1 of the Texas Constitution.

The Texas Constitution guarantees an “efficient system of public free schools.”<sup>1</sup> The Texas Supreme Court<sup>2</sup> has stated: “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, the qualitative component is explicit.” *Edgewood IV*, 917 S.W.2d at 729. That Court has also stated: “[A]lthough the issues brought before us in *Edgewood I*, *Edgewood II*, and . . . *Edgewood III*, have all been limited to the financing of the public schools, as opposed to other aspects of their operation, **money is not the only issue, nor is more money the only solution.**” *West Orange-Cove II*, 176 S.W.3d at 793 (emphasis added). Throughout the school finance cases, the Court, noting it only has the power to rule on issues brought before it by the parties, has routinely called on the Texas Legislature to consider more fundamental, structural change to the State’s primary education system.<sup>3</sup> Finally, the Court has

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<sup>1</sup> Texas Constitution, article VII, section 1 (“A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”)

<sup>2</sup> The Texas Supreme Court decisions discussed herein will be referred to as follows: *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (“*Edgewood I*”); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991) (“*Edgewood II*”); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992) (“*Edgewood III*”); *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717 (Tex. 1995) (“*Edgewood IV*”); *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558 (Tex. 2003) (“*West Orange-Cove I*”); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 793 (Tex. 2005) (“*West Orange-Cove II*”).

<sup>3</sup> See *supra*, note 2.

written: “Perhaps . . . public education *could benefit from more competition, but the parties have not raised this argument . . .*” *Id.* (emphasis added).

Parents, students, taxpayers, and/or business entities Joyce Coleman, Danessa Bolling, Lee and Allena Beall, Joel and Andrea Smedshammer, Darlene Menn, Texans for Real Efficiency and Equity in Education, and Texas Association of Business file this Second Amended Plea in Intervention and show:

The stated purpose of article VII, section 1 of the Texas Constitution is the “preservation of the liberties and rights of the people” of Texas. Since a “general diffusion of knowledge” was deemed essential to that ultimate goal, the founders drafted language that required the legislature to “make suitable provisions for the support and maintenance of an efficient system of public free schools.” In fact, the Texas Supreme Court stated in *Edgewood I* that “article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools.” *Edgewood I*, 777 S.W.2d at 394. In a free society it is important we remember that the founder’s ultimate intent was for the “preservation of liberties and rights of the people,” and that a “general diffusion of knowledge” is essential to that end.<sup>4</sup>

The Texas school finance system has undergone recurring litigation based in part on article VII, section 1 of the Texas Constitution since the initial *Edgewood I* ruling in the 1980s. The Texas Supreme Court has consistently reiterated the explanation that “‘*efficient*’ conveys the meaning of *effective or productive of results and connotes the use of resources so as to produce results with little waste.*” *Edgewood I*, 777 S.W.2d at 395 (emphasis added).

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<sup>4</sup> TEX. CONST., art. VII, § 1.

In the last months of 2011, four lawsuits were filed by hundreds of school districts in Texas.<sup>5</sup> So, school finance is again before the courts. And yet once again, even though repeatedly requested by Texas' highest court, the issue of *qualitative* efficiency is absent from those pleadings.<sup>6</sup> More money may or may not be required for an efficient system of public free schools. But without determining if the system itself is *qualitatively* efficient, the question of more money cannot be answered accurately.

In *West Orange-Cove II*, the Texas Supreme Court stated:

In *Edgewood III*, we explained that ‘although the issues brought before us in *Edgewood I*, *Edgewood II*, and now *Edgewood III*, have all been limited to the financing of the public schools, as opposed to other aspects of their operation, **money is not the only issue, nor is more money the only solution . . . .**’

*West Orange-Cove II*, 176 S.W.3d at 793 (emphasis added). The Court further recognized that the issue of efficiency, as defined traditionally, has not been litigated: “We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system.” *Id.* (citing *Edgewood III*, 826 S.W.2d at 524). The Court also recognized that, “It is true that the plaintiffs and intervenors here have focused on funding . . . [we] cannot dictate how the parties present their case or reject their contentions simply because **we would prefer to address others.**” *Id.* (emphasis added). Lastly, the Court stated, “Perhaps, as the dissent contends, public education **could benefit from more competition, but the parties have not raised this argument**, and therefore we do not address it.” *Id.* (emphasis added).

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<sup>5</sup> *Tex. Taxpayer & Student Fairness Coalition v. Scott*, No. D-1-GN-11-003130(200th Dist. Ct., Travis County, Tex.); *Edgewood Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001972 (345th Dist. Ct., Travis County, Tex.); *Calhoun County Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (419th Dist. Ct., Travis County, Tex.); *Fort Bend Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-002028 (200th Dist. Ct., Travis County, Tex.).

<sup>6</sup> “While we considered the financial component of efficiency to be implicit in the Constitution's mandate, the *qualitative* component is **explicit.**” *Edgewood IV*, 917 S.W.3d at 719 (emphasis added).

Throughout the course of past school finance litigation, the Texas Supreme Court has consistently called for structural change in the system of public free schools:

- ***Edgewood I*** — The Court stated that “efficient” does not just mean equity as some may wish to contend. Instead, “[e]fficient’ conveys the meaning of **effective or productive of results** and connotes the use of resources so as to produce results with little waste; this meaning does not appear to have changed over time.” *Edgewood I*, 777 S.W.2d at 395 (emphasis added). The Court held that “the state’s school financing system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge statewide . . . .’” *Id.* at 397.
- ***Edgewood III*** — Once again calling for structural change, the Court stated: “In *Edgewood I*, we stressed, ‘the system itself must be changed.’ . . . As long as our public school system consists of variations on the same theme, the problems inherent in the system cannot be expected to suddenly vanish.” *Edgewood III*, 826 S.W.2d at 524. The Court went on to explain, “We are constrained by the arguments raised by the parties to address only issues of school finance. We have not been called upon to consider, for example, the improvements in education which could be realized by eliminating gross wastes in the bureaucratic administration of the system. The Legislature is not so restricted.” *Id.* (emphasis added).
- ***Edgewood IV*** — The Court stated that traditional “qualitative” efficiency is explicitly demanded by the Constitution: “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, the qualitative component is explicit.” *Edgewood IV*, 917 S.W.2d at 729 (emphasis added). The Court reiterated that although previous rulings focused on equity, the Constitutional standard is higher: “[A]t the time *Edgewood I* was decided, we did not then decide whether the State had satisfied its constitutional duty to suitably provide for a general diffusion of knowledge. We focused instead on the meaning of financial efficiency.” *Id.*
- ***West Orange-Cove II*** — Delivering the strongest call for traditional “qualitative” efficiency, the Court stated: “Efficiency implicates funding access issues, but it is certainly not limited to those issues.” *West Orange-Cove II*, 176 S.W.3d at 793. Alluding to the risk of perpetual litigation without real structural reform, the Court recognized that “[p]ouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled.” *Id.* at 754. The Court referred to deep divisions in drafting of the Constitution: “The delegates to the Constitutional Convention of 1875 were deeply divided over how best to provide for a general diffusion of knowledge, finally adopting article VII, section 1 by a vote of 55 to 25. No subject was more controversial or more extensively debated.” *Id.* at 785. The Court agreed with the state regarding the focus on results: “The State defendants contend that the district court focused too much on ‘inputs’ to the public education system—that is, available resources.

They argue that whether a general diffusion of knowledge has been accomplished depends entirely on ‘outputs’—the results of the educational process measured in student achievement. We agree that the constitutional standard is plainly result-oriented.” *Id.* at 788 (emphasis added).

Reform is required to fulfill the constitutional standards: “There is substantial evidence, which again the district court credited, that the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, **improved efficiencies, or better methods of education.**” *Id.* at 790 (emphasis added).

Ongoing school finance litigation in Texas may never end unless this Court considers the qualitative efficiency issue and examines the underlying need for structural, qualitative efficiency changes called for explicitly and repeatedly by Texas Supreme Court.

Ultimately, as set out in the Remedies requested below, the Efficiency Intervenors request the Court to rule that the entire system of public free schools is inefficient and therefore unconstitutional. A ruling of this breadth in this arena is not without precedent.<sup>7</sup> Intervenors will show that the system is unconstitutionally inefficient due to a number of current problems, considered individually or collectively. These problems include, but are not limited to, the following general and specific issues:

The current statutory cap on the number of charter schools breeds inefficiency in the system of public free schools. *See* TEX. EDUC. CODE §12.101(b). The cap of 215 prevents new charter operators from entering the Texas marketplace and providing students and parents more options. In fact, Defendant Commissioner of Education Robert Scott has reportedly sought ways to circumvent this arbitrary cap with some success. An estimated 56,000 students are on waiting

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<sup>7</sup> *Edgewood I*, 777 S.W.2d at 397 (“We hold that the state’s school finance system is neither financially efficient nor efficient in the sense of providing for a ‘general diffusion of knowledge’ statewide, and therefore it violates article VII, section 1 of the Texas Constitution.”); *Edgewood II*, 804 S.W.2d at 498 (“[W]e therefore hold as a matter of law that the public school finance system continues to violate article VII, section I of the Constitution.”); *Edgewood III*, 826 S.W.2d at 515 (“We therefore conclude, as we have in both those prior school funding decisions, that the constitutional defects we have found pertain not to individual statutory provisions but to the **scheme as a whole**. It is the system that is invalid, and not merely a few of its components.”) (emphasis added).

lists across the state, showing there is more demand than supply for charter schools. It is probable that even more students would apply if they thought that they had a chance to win the attendance lottery for charter schools. Placing an arbitrary, artificial cap on charter schools reduces the potential for both charter school operators and students, thereby restricting both supply and demand, and is therefore inefficient.<sup>8</sup> Current statutory restrictions on the number of charter schools restrict options for both providers and consumers thereby restricting the “liberties and rights of the people.” These restrictions violate both the “efficiency” requirement and the “liberty and rights” clause, which is the explicit purpose of article VII, section 1 of the Texas Constitution. Senate Bill 2, passed during the 83<sup>rd</sup> legislative session provides in part for an increase in the number of charter licenses by 15 each year until a total of 305 charter licenses is reached. Based on uncontroverted evidence during the trial of this matter, this new legislation barely scratches the surface of the true demand for charter schools in Texas. Senate Bill 376 created an unfunded mandate on charter schools to provide free breakfast to students who don’t qualify for free breakfast.

The system proves itself to be inefficient. One of the primary and most important differences between traditional public schools and charter schools (which together constitute 100% of the system of public *free* schools) is that charters operate under far fewer statutory and regulatory burdens. Charter schools provide for a “suitable” system of public free schools, and evidence will prove that traditional public schools could realize enormous savings to the system if allowed to operate under the same rules and regulations as charter schools. Thus, the waste caused by special interest-driven regulatory burdens on traditional public schools has rendered the entire system inefficient. If the charter system (the article VII, section 1 “system”) is

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<sup>8</sup> These inefficiencies were illustrated in the recent documentary film, “Waiting for Superman.” See [waitingforsuperman.com](http://waitingforsuperman.com).

“suitable” and “efficient”—i.e., constitutional—every district should be allowed to operate under those more efficient regulatory burdens. Such a system would be less arbitrary and more efficient.

The Commissioner has been delegated the duty to develop systems to rate financial accountability. *See* TEX. EDUC. CODE § 39.082(a). Little expertise is available within the Texas Education Agency to carry out this duty. The authority for the evaluation of a more than \$50 billion per year system should not be in the control of the same governmental branch that controls the funds. Efficiency requires that such evaluation should be conducted by an independent third party. No successful—or efficient—enterprise would spend over \$50 billion per year without assurance that the funds were to be allocated in an effective manner in the first place. Furthermore, successful enterprises assure efficiency by also conducting unbiased third-party evaluations. There currently exists no financial accountability information that would demonstrate cost effectiveness of the Texas Education Agency’s policies, processes, or the productivity of its financial decisions. Therefore, it is literally *impossible* for the legislature or other current managers of the school system in Texas to take the position, in cost-effective economic terms, that *any particular level of funding* is necessary for *efficiency*. Even the question of allocation of funding among districts cannot be determined in an efficient manner without a more substantive and comprehensive system of financial accountability. The lack of any system of measuring “productivity” or “cost effectiveness” of the expenditures of public funds is a clear constitutional failure of public policy. “To determine whether the system as a whole is providing for a general diffusion of knowledge, it is useful to consider how funding levels and *mechanisms* relate to better-educated students.” *West Orange-Cove II*, 176 S.W.3d at 788 (emphasis added).

The Cost of Education Index (“CEI”) found in TEX. EDUC. CODE § 42.102(a) and Texas Administrative Code, Title 19, §203.10 provide that the basic allotment for each district is adjusted to reflect the geographic variation in known resource costs and costs of education. But this index has not been updated since 1991. Texas has seen significant economic changes since 1991. At that time, Texas was just starting to recover from the “oil bust” and the economy was diversifying. Plaintiffs in this lawsuit also complain about this issue, stating: “Some of these weights and adjustments have not been reviewed or updated since before the fall of the Berlin Wall.” Plaintiffs’ Original Petition at 21. Research indicates that the state could save billions by aligning the CEI with today’s actual cost differentials. “Because the State has not made any effort to ensure that the existing weights and adjustments actually are related to the true cost of meeting the State’s own rising performance requirements for all students and all districts, the weights and adjustments now are inadequate, inequitable, **arbitrary, and inefficient.**” *Id.* (emphasis added).

Texas Education Code, Chapter 21 makes the system inefficient and therefore unconstitutional. Personnel decisions are seldom designed in the best interests of students. Current laws make it difficult to hire and efficiently compensate the most effective teachers and remove poor performing teachers. Districts are burdened with arbitrary and inefficient rules and regulations in dealing with personnel. Chapter 21 in its entirety drives millions of dollars in waste every year. A few specific examples include:

- The minimum salary schedule and state-mandated teacher salary grants, as set out in TEX. EDUC. CODE § 21.402 *et seq* set the standard for paying teachers based primarily on tenure, plus arbitrary across-the-board pay raises determined at the state level. This causes vast inefficiencies in the system as payroll is the largest single factor in school budgets. As it stands now, ineffective teachers are paid the same as similarly tenured effective teachers. Efficiency requires that teachers, as in every other profession, be compensated based on need, productivity, and performance.

- The teacher certification process as set out in TEX. EDUC. CODE § 21.031 makes the system inefficient. Today's strict certification laws are designed to protect the profession rather than the interests of the students. Because the state, not the local community, controls all aspects of the certification of teachers, local authorities have limited authority to hire those who they believe can do the most effective job.
- A school district has little flexibility in the length of teacher contracts – the minimum contract, as set out in TEX. EDUC. CODE § 21.401, is 10-months. This is inefficient. Local schools must have the flexibility to hire teachers on terms that correspond to the current needs of the district, and more importantly, the students.
- The appeal process for non-renewal of teacher contracts as set out in TEX. EDUC. CODE §§ 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, and 21.307, and corresponding regulations in Texas Administrative Code, Chapter 157, subchapters A and D, is inefficient.
- It is inefficient to notify a teacher during the school year that the teacher's contract will not be renewed. As it stands now, TEX. EDUC. CODE § 21.206 requires a teacher be notified "[n]ot later than the 10<sup>th</sup> day before the last day of instruction."
- TEX. EDUC. CODE § 21.057 and 21.355 require school districts to notify parents of a teacher that is not "certified," but if a teacher is not effective, there is no mechanism to report this to parents. In fact, teacher evaluations are deemed confidential. Imagine if the health department's evaluation of the cleanliness of a restaurant were made confidential by a governing body. Systems that withhold important information from consumers are inherently inefficient.
- The teacher appraisal process as set out in TEX. EDUC. CODE § 21.351 *et seq* is inefficient as the process is inherently flawed. "In many failing schools with dismal student achievement rates, the vast majority of teachers receive the highest possible rating on their evaluations. If our evaluation systems put students first, this dissonance would be impossible." [www.studentsfirst.org](http://www.studentsfirst.org). Moreover, the current appraisal system does not provide a meaningful measure of teacher performance that includes a value-added component.

Related to the charter school issue is that of Home-Rule School District Charters. *See* TEX. EDUC. CODE § 12.011-12.013. Home-Rule Charters were established in 1995. Home-Rule Charters are an explicit acknowledgment by the legislature that greater local freedom and parental control are needed for an efficient system. Due to special interest pressures, however, twenty-three very restrictive regulations were added to this class of schools. *See* TEX. EDUC. CODE § 12.013(b)(3)(F)-(S). These restrictions, in effect, took away the very benefit of

converting to a Home-Rule Charter school and are so restraining that the number of Home-Rule Charter schools today is *zero*. Removing the statutory (special interest-driven) mandates could make this program more efficient.

The Public Education Grant Program is another series of statutes that started with good intentions, but was watered-down in subsequent code sections so that it has little or no effect on the efficiency of the system. Under TEX. EDUC. CODE § 29.201, an “eligible” student may attend a local public school or, through the use of a public education grant, may attend “any other district chosen by the student’s parent.” This section, by itself, provides the power for parents to flee an under-performing school to a school in “any other district.” The problem lies mainly with the receiving district’s ability to arbitrarily reject an attempt to transfer, without cause or any ability to appeal. So, what the legislature gave in TEX. EDUC. CODE § 29.201 (an explicit admission that the power of parental choice is important) was taken away in TEX. EDUC. CODE § 29.203(d) (giving districts the ultimate power rather than parents). For every rejection by a receiving school, a child is left in a severely underperforming school—this is the *real inequity* in the system. *Student* equity, not just equity for school districts, is the key to an efficient system that will preserve the liberties and rights of the people.

There are also inefficiencies in the system not tied directly to any specific statute or regulation. One of the currently filed lawsuits describes system-wide problems with such things as the elimination of teaching positions, reduction of career and counseling services, restrictions in curriculum, and applications for class size waivers. *See* Plaintiffs’ Original Petition, paragraph 43, *Calhoun County Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (419th Dist. Ct., Travis County, Tex. Dec. 9, 2011). The following issues are known and studied problems in the system of public free schools that have yet been addressed:

- The current system is inconsistent with the original intent of the 1876 Constitution. In the years following the adoption of the 1876 Constitution, Texas had a mixed system of public free schools that included unlimited community schools operating alongside public schools. Community schools could be formed at will by any group of parents. The parents could form the school, hire the teacher, and allow any student to attend regardless of geographic residence. Similar to today's charter schools, they were free from overreaching state regulations. But unlike today's charter schools, the public was allowed to create as many community schools as needed or desired. "Concern for efficiency in the education article in the Texas Constitution arose from a basic Texan sense of frugality, distrust of opulence, and a **fear of government overreaching and excessive spending.**" Billy D. Walker, Intent of the Framers in the Education Provisions of the Texas Constitution of 1876, 10 REV. OF LITIG. 625, 661, n.289-90 (1991) (*cited in Edgewood III*, 826 S.W.2d at 524 (Cornyn, J., dissenting) (emphasis added). Today's highly bureaucratic system is grossly inefficient when compared to the consumer/parent-driven system in place in 1876.
- The near total absence of competition within the system causes the system to be inherently inefficient. History of economics proves that the absence of competition makes any system more inefficient. Additionally, the failure to allow for consumer-driven supply side change makes the system inefficient.
- The top-down bureaucratic nature of the system makes the entire system inefficient. Excessive state controls that usurp decisions at the district and campus levels make the entire system inefficient. State mandates not only drive excessive administrative expense, they also make it difficult, if not impossible, for local leaders to make effective decisions regarding taxpayer funds and student needs. One example of this is the two state mandated across-the-board teacher pay raises. The last two times the legislature gave districts more money, the legislature dedicated half of the new money to statewide across-the-board pay raises as mandated grants to individual teachers, instead of allowing local authorities to make pay decisions. This is clearly an arbitrary allocation of educational resources and therefore grossly inefficient. Another example is class size laws that are inflexible unless tedious, resource-consuming paperwork is completed. TEX. EDUC. CODE §§ 25.111-112.
- Some school districts are much more "productive of results" than others. Schools with similar demographics and budgets have dramatic differences in productivity—e.g., output per unit of input—than other school districts. There are school districts that spend far less per student with better results than other similarly situated districts. If all districts were as efficient as districts in the top quartile, significant additional funds would be available to spend in ways that are "effective or productive or results" and using "resources so as to produce results with little waste." *See Edgewood I*, 777 S.W.2d at 395.
- The system is not efficient for purposes of economic development needs. The "liberties and rights" of our citizens are at stake if our educational system cannot

provide graduates who can compete in today's competitive world economy. According to the U.S. Chamber of Commerce ICW website: "America is failing. Among 34 developed countries, American students rank 14th in reading, 17th in science, and 25th in mathematics, and an American high school student drops out every 27 seconds." See <http://icw.uschamber.com/publication/education-reform-initiative>.

- The high drop-out rate in Texas is a clear indicator that the system is inefficient. The drop-out rates in our public schools are unacceptable, higher than many other states, and higher than most charter schools and private schools. Lower graduation rates make for a less productive workforce and therefore contribute to greater economic hardship.
- Remediation is a significant problem arising out of the inefficient system. Half of public university students require remediation in the core subject areas, indicating that the public schools are not adequately or efficiently preparing their students for post-secondary education. A currently filed lawsuit notes that districts are hindered in "the preparation of their students to meet college and post-secondary preparedness standards, a task that both the Supreme Court and the Legislature have identified as central to the State's constitutional obligation." See Plaintiffs' Original Petition, paragraph 43, *Calhoun County Indep. Sch. Dist. v. Scott*, No. D-1-GV-11-001917 (419th Dist., Travis County, Tex. Dec. 9, 2011). Both the Texas Supreme Court and the legislature have identified college and post-secondary preparedness as central to the State's constitutional education obligation, with the Court noting that "***We agree that the constitutional standard is plainly result-oriented.***" *West Orange-Cove II*, 176 S.W.3d at 788 (emphasis added). The "result" of the current inefficient system is a vast number of students not ready for the challenges of college. This is an objective indication of systemic, unconstitutional inefficiency.

Intervenors bring the following claims under the Uniform Declaratory Judgment Act. See TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

All of the foregoing factual allegations are incorporated herein by reference.

For the reasons stated above, the Efficiency Intervenors request that the Court render judgment declaring that the current system of public free schools violates article VII, section 1 of the Texas Constitution in that it is not efficient in providing for the general diffusion of knowledge in order to preserve the liberties and rights of the people. The evidence will show that the system fails the qualitative efficiency test.

The Intervenors seek a judgment that Texas Education Code, Chapter 21 is not efficient as required by article VII, sec. 1 of the Texas Constitution, and are therefore unconstitutional. Such a judgment would also include the same finding as to the following code sections: 12.101(b); 25.111-112; 12.013(b)(3)(F)-(S); 21.402; 39.082; 42.102; 21.031; 21.401; 21.207, 21.209, 21.251, 21.252, 21.253, 21.254, 21.255, 21.256, 21.257, 21.258, 21.259, 21.301, 21.302, 21.304, 21.3041, 21.307, 21.206; 21.057; 21.355; 21.351; and 29.203(d), including any and all corresponding regulations in the Texas Administrative Code.

Legislation passed during this session, including but not limited to House Bill 5 and Senate Bill 2, exemplify the Efficiency Intervenor's claims in this lawsuit. In response to a trial where the overriding message was, "Look how bad we're doing - give us more money," the legislature simply increased funding and decreased accountability. Greater input/Less output is the textbook definition of inefficiency. Qualitative efficiency, in spite of overwhelming evidence at the trial of this case, was actually decreased. The 83<sup>rd</sup> Legislative message was, yet again, "money is the only issue." There were other bills where efficiency was not ignored, but was affirmatively hindered:

- House Bill 1751 - created yet another fund to provide district-wide grants for educator excellence, but again, skirted the real issue of paying teachers based on performance, not just length of tenure.
- House Bill 1926 - deals with the Virtual School Network and allows districts to deny access to an efficient use of technology for arbitrary reasons.
- House Bill 2012 - calls for the gathering and analysis of professional employee salary information, including cost-of-living data. In short, this bill calls for the analysis of a

system that is inefficient on its face as it is not driven by market forces, but by monopsony characteristics.

24. Parents and students of any socio-economic background should have the ability to choose any school they deem appropriate for their children. It was uncontroverted at trial that only the wealthy have the choice of educational opportunities for their children. Yet, Senate Bill 1575 and House Bill 3497, allowing true parental choice, failed. This was in spite of findings by the Texas Education Agency and the Legislative Budget Board that significant savings to the State could be realized with just such a program. This despite the uncontroverted finding in trial that teachers would also benefit from school choice, and that choice would make the entire system more efficient.

25. The 83<sup>rd</sup> Legislature, without use of any relevant measure, both increased funding and decreased student performance standards. The lack of use of any relevant measure substantiates the need for this Court to address an issue that was prominent during the trial of this case. Trial Exhibit 8001, as explained by noted education finance expert, Dr. Eric Hanushek, contained a graphical representation of student performance levels, comparing various school districts and that adjusted the results based on the demographics of the various student bodies (a regression analysis of school district student performance). The analysis demonstrated that the difference in the school districts' student performance levels was consistent irrespective of the level of funding. That is to say, regardless of the level of funding, and after adjusting for the difference in ethnicity, native English speakers and economic level, the higher performing school districts consistently out-performed the lower performing school districts. This Court even commented when presented with this study that this pattern of performance irrespective of the level of funding was not random. In spite of

the Court's admonition in its February 4, 2013 ruling, suggesting that this phenomenon was appropriate for consideration by the Legislature, it did not do so. Funding was simply increased, and not tied to any efficiency considerations at all. This was in spite of the fact that *there is no showing that increased funding leads to an increase in educational outcomes*. As Ronald Reagan said in 1998, paraphrasing Education Secretary William Bennett:

If you serve a child a rotten hamburger in America, federal, state, and local agencies will investigate you, summon you, close you down, whatever. But if you provide a child with a rotten education, nothing happens, except that you are liable to be given more money to do it with. Well, we've discovered that money alone isn't the answer.

The Court should order the State, through the Texas Education Agency, to hire an independent party to study this phenomenon and report back on its findings as to the cause.

The Efficiency Intervenors respectfully request that this Court grant the following relief:

- a. The Efficiency Intervenors request that the Court grant the declaratory relief described more specifically above;
- b. "There remains for the Legislature and the Governor the responsibility for reforming the public school system to comply with the sovereign will of the people expressed in our Constitution." *Edgewood III* at 524. The Efficiency Intervenors seek a permanent injunction prohibiting Defendants from giving any force and effect to the sections of the Texas Education Code relating to the financing of public school education (Chapters 41 and 42 of the Texas Education Code) and from distributing any money under the current Texas school financing system until the constitutional violation is remedied. The Efficiency Intervenors further request that the Legislature be given a reasonable opportunity to cure the constitutional deficiencies in the finance system before the foregoing prohibitions take effect;
- c. That the state be ordered to conduct a study on the efficient use of education resources by an unbiased third party;
- d. The Efficiency Intervenors request 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;

- e. The Efficiency Intervenors seek recovery of reasonable attorneys' fees, costs, and expenses as provided by Section 37.009 of the Texas Civil Practice and Remedies Code and as otherwise allowed by law; and
- f. The Efficiency Intervenors request that they be awarded such other relief at law and in equity to which they may be justly entitled.

**d. The amount and any method of calculating economic damages.**

**RESPONSE:** Not applicable. The Efficiency Intervenors herein are seeking only declaratory relief as set out in (c) above.

**e. The name, address, and telephone number of persons having knowledge of relevant facts, and a brief statement of each identified person's connection with the case.**

**RESPONSE:** The Efficiency Intervenors, as listed above can be contacted through the undersigned counsel's telephone number and address. The Efficiency Intervenors have also filed a Designation of Fact Witnesses related to the "new trial" which is incorporated herein by reference as if set out verbatim. The Efficiency Intervenors also hereby incorporate by reference any and all persons with knowledge of relevant facts listed by any other party to this litigation.

**f. Any testifying:**

- 1) the expert's name, address, and telephone number;
- 2) the subject matter on which the expert will testify;
- 3) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information;
- 4) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:
  - a) All documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
  - b) The experts current resume and bibliography;

**RESPONSE:**

As related to the trial of this matter, the Efficiency Intervenors designated the following retained expert witnesses. Given that the current extent of the "new trial" is yet to be determined,

the below-listed experts remain designated. The Efficiency Intervenors designate Dr. John Merrifield as an expert in the “new trial” in accordance with the Scheduling Order.

**RETAINED TESTIFYING EXPERT WITNESSES:**

Name: Paul Hill  
Address: 1247 21<sup>st</sup> Ave. E, Seattle, WA 98112  
Telephone No.: 206-669-7629  
Subject Matter: Previously produced  
General Substance: Previously produced.  
Documents: Previously produced  
C.V./Bibliography: Previously produced  
Compensation: \$400/hour for all work on the case  
Deposition dates: Previously produced

Name: Eric Hanushek  
Address: 1092 Cathcart Way, Stanford, CA 94305  
Telephone No.: 650-736-0942  
Subject Matter: Previously produced  
General Substance: Previously produced  
Documents: Previously produced  
C.V./Bibliography: Previously produced  
Compensation: \$375/hour for all work on the case  
Deposition dates: Previously produced.

Name: Terry Moe  
Address: 650 Gerona Rd., Stanford, CA 94305  
Telephone No.: 650-322-8700  
Subject Matter: Previously produced  
General Substance: Previously produced.  
Documents: Previously produced  
C.V./Bibliography: Previously produced  
Compensation: \$250/hour for all work on the case  
Deposition dates: Previously produced.

Name: John D. Merrifield  
Address: 511 W. Russell Place, San Antonio, Texas 78212  
Telephone No.: (210) 458-2519  
Subject Matter: Public education efficiency; see attached report  
General Substance: See attached report which is incorporated herein by reference.  
Documents: See attached spreadsheet; see also link to TEA publically available data in report  
C.V./Bibliography: See attached  
Compensation: \$250/hour for all work on the case  
Deposition dates: Week of November 11 at a mutually agreeable time and location.

**NON-RETAINED EXPERT WITNESSES:**

Name: Don McAdams  
Address: 549 Chelsea St., Bellaire, TX 77401  
Telephone No.: 713-682-9888  
Subject Matter: Previously produced  
General Substance: Previously produced  
Documents: Non-retained expert  
C.V./Bibliography: Previously produced  
Deposition dates: Previously produced.

Name: Joe Bast  
Address: One South Wacker Drive #2740, Chicago, IL 60606  
Telephone No.: 312-377-4000  
Subject Matter: Previously produced  
General Substance: Previously produced.  
Documents: Non-retained expert  
C.V./Bibliography: Previously produced  
Deposition dates: Previously produced.

Name: Mark Hurley  
Address: See deposition testimony  
Telephone No.: See deposition testimony  
Subject Matter: Public education financial accountability  
General Substance: Mr. Hurley's report has already been produced  
Documents: See documents attached as exhibits to Mr. Hurley's deposition and documents produced in response to any subpoena *duces tecum*.  
C.V./Bibliography: None  
Deposition dates: Deposition already taken.

Name: Bill Hammond  
Address: c/o attorney for Texas Association of Business, J. Christopher Diamond  
Telephone No.: c/o attorney for Texas Association of Business, J. Christopher Diamond  
Subject Matter: Education reform issues, the effects of inefficiency in the system of public free schools on the business community  
General Substance: The current system of public free schools is inefficient and not preparing students for college or careers. Because of that, colleges have to spend money teaching students again what they are supposed to learn in public free schools according to the Texas Essential Knowledge and Skills (TEKS) education standards. That lack of preparation also hurts the Texas workforce and Texas employers, who often have a difficult time finding people with the skills and qualifications to fill open positions.  
Deposition dates: Confer with the undersigned counsel for available dates for this non-retained expert/party representative witness. See also Designation of Fact Witnesses.

Name: Justice Craig Enoch, ret.

Address: 600 Congress, Suite 2800, Austin, Texas 78701

Telephone No.: (512) 615-1200

Subject Matter: Reasonable and necessary attorney's fees and expenses.

General Substance: The nature, description, reasonableness and necessity of attorney's fees and expenses sought by the Efficiency Intervenors in this case. Justice Enoch's testimony will be based on his work on this case, his review of pleadings, discovery and other matters, and will base his opinions on his education, experience and the work performed in this case. He may also testify regarding the reasonableness and necessity of expert fees in this case. He may also testify as to the reasonableness and necessity of expenses in this case. This testimony entails all pre-trial, trial, and appellate work on the case. The work on this case is ongoing and fees, expert fees and expenses are continuing to be incurred. He has not created a report.

C.V.: See attached

Deposition dates: Confer with counsel for a mutually agreeable date.

Name: J. Christopher Diamond

Address: 17484 Northwest Freeway, Suite 150, Houston, Texas 77040

Telephone No.: (713) 983-8990

Subject Matter: Reasonable and necessary attorney's fees and expenses.

General Substance: The nature, description, reasonableness and necessity of attorney's fees and expenses sought by the Efficiency Intervenors in this case. Mr. Diamond's testimony will be based on his work on this case, his review of pleadings, discovery and other matters, and will base his opinions on his education, experience and the work performed in this case. He may also testify regarding the reasonableness and necessity of expert fees in this case. He may also testify as to the reasonableness and necessity of expenses in this case. This testimony entails all pre-trial, trial, and appellate work on the case. The work on this case is ongoing and fees, expert fees and expenses are continuing to be incurred. He has not created a report.

C.V.: See attached

Deposition dates: Confer with counsel for a mutually agreeable date.

The Efficiency Intervenors also hereby designate and incorporate by reference any and all experts designated by any party herein, or any parties that enter this litigation in the future. This designation is only to the extent that each such designated expert qualifies as an expert in their designated field and/or subject matter.

See also the Fact Witness Designation, incorporated herein by reference. To the extent those listed witnesses' testimony contains expert testimony for which they are qualified to proffer, they are designated herein.

Respectfully submitted,

By: \_\_\_\_\_/s/\_\_\_\_\_  
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INTERVENORS

Unofficial copy Travis Co. District Clerk Kelly L. Price

**CERTIFICATE OF SERVICE**

I hereby certify that, on the 14<sup>th</sup> day of October 2013 a true and correct copy of the above and foregoing has been served *via* email pursuant to agreement of the parties and in compliance with Texas Rule of Civil Procedure:

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/s/

\_\_\_\_\_  
J. Christopher Diamond