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District Clerk
Travis County
D-1-GN-11-003130

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

THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al.	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	
vs.	§	**200th JUDICIAL DISTRICT**
	§	
ROBERT SCOTT, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL CAPACITY, et al.	§	
Defendants.	§	**TRAVIS COUNTY, TEXAS**

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REPLY FROM EFFICIENCY INTERVENORS

The Efficiency Intervenors file this short reply to respond to three issues raised by the ISD Plaintiffs, the Charter School Plaintiffs, and the State.

I.

The ISDs and Charter Schools argue that the Efficiency Intervenors "agreed" to *ex parte* communications between the ISDs' counsel and the court, and that the Efficiency Intervenors waived any right to complain because they did not object sooner. This argument is nonsense. There has never been any such agreement. The parties agreed only that, before trial, they could submit proposed findings of fact to the court without serving them on the other parties. It is a far different matter for the court to actively and repeatedly have conversations with the ISDs' counsel about the law, facts, and merits of the case—while intentionally excluding counsel for the Efficiency Intervenors and the State.

Further, it is axiomatic that a party cannot object to something about which it is unaware. After the retrial concluded in February 2014, counsel for the Efficiency Intervenors heard nothing substantive from either the ISDs' counsel or the court for months—and they had absolutely no idea that the court was actively communicating with the ISDs' counsel about the

merits of this case during that timeframe, while excluding them from those communications. Efficiency Intervenors did not learn until the hearing on May 15 that substantive *ex parte* communications had occurred between March 19 and May 15. Additionally, Efficiency Intervenors did not learn until ***two days ago***, when the ISDs' counsel submitted *in camera* documents to Judge Peeples, that there are apparently additional substantive *ex parte* communications from before March 19 that ***still have not been turned over to the Efficiency Intervenors or the State*** (remarkably because, according to the ISDs' counsel, the court ordered them not to do so). The Efficiency Intervenors object to all *ex parte* communications about the law, facts, and merits of this case. And the undisputed efforts to intentionally exclude the Efficiency Intervenors from these communications, at a minimum, creates a strong appearance of bias.

D.

Additionally, the Charter Schools ask the court to reject the motion to recuse in favor of "a resolution that would permit a final decision in this case without the necessity to retry the evidence." That argument is irrelevant to this recusal matter. In any event, the Efficiency Intervenors also oppose a retrial of this case. But the recusal of Judge Dietz does not necessitate a retrial. The evidence was presented in a bench trial—and most of it is undisputed. This case is not about credibility of witnesses: it's about reports, it's about studies, it's about funding formulas, and it's about statutes that impose inefficiencies. What is disputed is whether that evidence supports the parties' claims that the Texas public school system is unsuitable, inadequate, and qualitatively and quantitatively inefficient. A new judge could rightfully conclude no new evidentiary hearing would be required, that the record is complete, and that his or her duty would be to study the record and, with an impartial eye, render the judgment that the record supports.

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III.

Finally, the ISDs ask this Court to hold certain of these recusal proceedings in closed session and keep from public view some of the trial court's communications. The trial court's repeatedly discussing substantive issues in closed proceedings and without all parties present or invited to participate is what has led to where we are now. Continuing to conduct any proceedings in secret in connection with the motion to recuse will do nothing to help regain trust in an impartial justice system or in a fair result in this important school finance litigation. The Efficiency Intervenors therefore join in the State's Objection to Sealing the Pleadings, Evidence, and Closed Proceedings.

CONCLUSION

The Efficiency Intervenors never agreed that the trial court could negotiate *ex parte* with only selected parties about the facts, law, and merits of this case. To the extent this Court is encouraged to consider whether, on recusal, the new judge would be required to re-try the case, that argument is irrelevant. Regardless, a retrial is not required because the record is complete and need only be reviewed by the new judge, who would then render the judgment he or she determines is supported by the record. And the Efficiency Intervenors disagree with any part of this proceeding or any evidence offered at this proceeding being sealed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 19, 2014 a true and correct copy of the above has been served on the following:

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