

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

THE TEXAS TAXPAYER & STUDENT  
FAIRNESS COALITION, et al.  
Plaintiffs

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IN THE DISTRICT COURT

vs.

200<sup>th</sup> JUDICIAL DISTRICT

ROBERT SCOTT, COMMISSIONER  
OF EDUCATION, IN HIS OFFICIAL  
CAPACITY, et al.  
Defendants.

TRAVIS COUNTY, TEXAS

**SUPPLEMENTAL REPLY FROM EFFICIENCY INTERVENORS**

The Efficiency Intervenors file this supplemental reply in response to the receipt of emails produced by the Independent School Districts for the first time *during* the recusal hearing on June 20, 2014.

**I.**

The Efficiency Intervenors is a group of parents and businesses who have complained about the constitutional inefficiency of the Texas school system. Their claims, in part, challenge the State’s inefficient funding mechanism. *See* Exhibit 1.

**II.**

The Independent School District’s justify their *ex parte* discussions with the trial court as being, if not expressly agreed to by the State, then acquiesced to. But there was no evidence offered at the June 20, 2014 recusal hearing, and the recently revealed emails do not show any evidence, that the Efficiency Intervenors were aware of or had any “agreement” to allow the school districts to indulge in ongoing, back-and-forth, *ex parte* communications with the Court. No party argued, nor is there any evidence, that the Efficiency Intervenors somehow waived their right to complain about these *ex parte* communications.

### III.

The harm to the Efficiency Intervenors is clear. First, even if the school districts could find authority permitting the kind of free-wheeling negotiations, questions, and merits arguments occurring between a judge and only one set of plaintiffs over findings of fact designed to support the trial court's judgment, there has been *no judgment* yet rendered in this case. Thus the negotiations between the trial court and the school districts over findings of fact and conclusions of law were not limited to that which would support the judgment, the discussions were for the purpose of helping the judge decide what judgment to render. Second, while the intervenors sued the state school system (which is both the State and its designated agents for implementing the system – the school districts) for a number of constitutional violations, their complaint also overlapped the school districts' more narrow complaints about the State's funding mechanisms. And precisely when the trial court was trying to figure out how to render judgment for the school districts, based on concluding the State's education funding was constitutionally inadequate, the intervenors' voice was silenced. It is a grave harm to have been silenced, excluded from the ear of the judge, right at the time the judge is considering what judgment to render.

### IV.

The prohibition of ex parte communications between a party and a tribunal is a fundamental principle of this country's demand that trials be fair. And there is an even greater harm than being excluded from the judge's ear. It is the harm of not having those conversations heard *on the record*. This case will not end just with the trial court's judgment, it will be appealed. The record of this case will be sent for study by appellate court law clerks and justices. And the appellate court will rely *solely* on that record. What was discussed and what decisions were made in unfiled emails and unrecorded telephone conversations will never be a part of the

record. It is undisputed that dozens of *ex parte* communications occurred. For each communication, the intervenors were not only harmed by being excluded from being heard, but by the inability to create a record of what was heard.

### CONCLUSION

Being excluded from the judge's ear at the point he is deciding the case, is a great harm. Greater still is the harm of being deprived of any record of what was said. Losing the right to speak and be heard is a harm compared to death by those who understand the true value of liberty. In the American system, having the liberty to speak and to be heard is greatly prized, even above life for some. "Give me liberty, or give me death," is a well-known statement made in a speech by Patrick Henry to the Virginia Convention in 1775. The context was the decision to send Virginia troops to the Revolutionary War. There are still some who would prefer to lose their lives than lose their liberty. It doesn't matter whether this case deals with \$500 in back rent or the education of over 5 million children in this State. What matters is that a party to litigation in our great State was silenced, and not given the ability to speak, on the record, in response to matters and decisions that directly affect their interests. Could there be a greater harm?

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on June 23, 2014 a true and correct copy of the above has been served via electronic service on the following:

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*/s/ Craig T. Enoch*

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*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 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:

### I. PARTIES AND STANDING

1. 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 (collectively “Efficiency Intervenors”).

2. The Efficiency Intervenors are parents, students, taxpayers, and/or business entities. The Efficiency Intervenors have a significant interest in this litigation, as article VII, section 1 of the Texas Constitution guarantees an “efficient system of

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

public free schools.”<sup>4</sup> While the above-styled consolidated lawsuit challenges, *inter alia*, adequacy, suitability and financial efficiency of the current system of school finance, the Efficiency Intervenors’ claims regarding lack of *qualitative* efficiency of the system of public free schools would be prejudiced if this litigation were to proceed without their involvement.<sup>5</sup> Most recently, in *West Orange-Cove II*, the Texas Supreme Court, citing cases all the way back to *Edgewood I*, summed it up succinctly: “More money allocated under the present system would reduce some of the existing disparities between districts but would at best only postpone the reform that is necessary to make the system efficient.” *West Orange-Cove II*, 176 S.W.3d at 793 (citing *Edgewood I*, 777 S.W.2d at 397).

3. Judicial economy and judicial precedent demand that the claims of the Efficiency Intervenors be litigated along with the above-styled lawsuit. As acknowledged in Plaintiffs’ Original Petition, “There are two aspects to the efficiency requirement. *First*, the system must be ‘effective or productive of results . . . .’” See Plaintiffs’

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

<sup>5</sup> “While we considered the financial component of efficiency to be implicit in the Constitution’s mandate, the *qualitative* component is *explicit*.” *Edgewood IV* at 729 (emphasis added). *Edgewood IV* also drew the critical distinction between equity and efficiency:

The district court viewed efficiency as synonymous with equity, meaning that districts must have substantially equal revenue for substantially equal tax effort at all levels of funding. This interpretation ignores our holding in *Edgewood II* that unequalized local supplementation is not constitutionally prohibited. The effect of this ‘equity at all levels’ theory of efficiency is to ‘level-down’ the quality of our public school system, a consequence which is universally regarded as undesirable from an educational perspective. Under this theory, it would be constitutional for the Legislature to limit all districts to a funding level of \$500 per student as long as there was equal access to this \$500 per student, even if \$3500 per student were required for a general diffusion of knowledge. Neither the Constitution nor our previous *Edgewood* decisions warrant such an interpretation. Rather, the question before us is whether the financing system established by Senate Bill 7 meets the financial and qualitative standards of article VII, section 1.

*Id.* at 730.

Original Petition at 14 (emphasis added). Additionally, the Texas Supreme Court has clearly recognized, “*money is not the only issue.*” *West Orange-Cove II*, 176 S.W.3d at 793 (citing *Edgewood III*, 826 S.W.2d at 524). In fact, the Texas Supreme Court, as set out in more detail in paragraph 8 below, has consistently called for structural change in the system of public free schools in Texas. The issues in the underlying lawsuit and this intervention are interrelated such that separate litigation would result in substantial duplicative efforts, both on the part of this Court, and the parties. To put it colloquially, the claims of the underlying consolidated lawsuit and the Efficiency Intervenors are collectively arguing both sides of the same coin.

## **II. THE TEXAS SUPREME COURT HAS REPEATEDLY CALLED FOR *QUALITATIVE* CHANGE**

4. 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>6</sup>

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<sup>6</sup> TEX. CONST., art. VII, § 1.

5. 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).

6. In the last months of 2011, four lawsuits were filed by hundreds of school districts in Texas.<sup>7</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>8</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.

7. In *West Orange-Cove I*, 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.*

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<sup>7</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>8</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).

(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).

8. 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).

9. 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.

### III. CURRENT INEFFICIENCIES IN THE SYSTEM

10. 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>9</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:

11. 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 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>10</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

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<sup>9</sup> *Edgewood I*, 177 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).

<sup>10</sup> These inefficiencies were illustrated in the recent documentary film, “Waiting for Superman.” *See* [waitingforsuperman.com](http://waitingforsuperman.com).

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.

12. 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 "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.

13. 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).

14. 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).

15. 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.

16. 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.

17. 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.

18. 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.

#### IV. CAUSES OF ACTION

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

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

21. For the reasons stated above, the Efficiency Intervenor requests 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.

22. 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.

#### **V. 83<sup>RD</sup> LEGISLATIVE SESSION**

23. 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.

## **VI. PRAYER FOR RELIEF**

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



**CERTIFICATE OF SERVICE**

I hereby certify that, on the 7<sup>th</sup> day of August 2013 a true and correct copy of the above and foregoing has been served via email pursuant to the agreement of the parties:

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/S/

J. Christopher Diamond