

Texas Public Policy Foundation

# Analysis of the District Court's SCHOOL FINANCE **Ruling**

Michael Barba & The Honorable Kent Grusendorf

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# Analysis of the District Court's School Finance Ruling

Look how bad we are doing. Look how bad we are doing.  
Give us more money.<sup>1</sup>

*by Michael Barba & The Honorable Kent Grusendorf*

## Background

On August 28, 2014, just before the Labor Day holiday, Judge John Dietz issued his long-awaited school finance ruling. However, as history has shown, this ruling cannot be viewed as final. Policymakers will not know the final legal ramifications until the Texas Supreme Court speaks.

Judge Dietz issued a similar ruling in 2004, which was overturned almost in its entirety by the Texas Supreme Court on November 22, 2005.<sup>2</sup> In that opinion, the state's top court overturned Judge Dietz on both the adequacy and equity issues. They almost totally ignored his Findings of Fact and Conclusions of Law and only upheld the decision regarding the state property tax issue. Common consensus is that they will act in a similar manner and once again overturn the ruling of the District Court.<sup>3</sup>

Although the second phase of the trial was concluded in the first week of February 2014, the delay of a ruling until Labor Day guarantees that this judgment will still be in effect at the start of the next legislative session. Required timelines for motions and other appellate action assure the Supreme Court will not receive the case until the end of 2014 or early 2015.

Once in the hands of the top court, timing is totally within their control, yet still dependent on providing parties with adequate time for briefs and responses. On a highly expedited basis, the court could rule late in the 2015 legislative session.<sup>4</sup> However, based on past timelines, a ruling in late summer or fall of 2015 appears more likely.

By issuing only a verbal decision with no official judgment in February 2013, then reopening the trial for another

## Key Points

- Based on precedent it is unlikely the Texas Supreme Court will uphold the district court ruling.
- The opinion is a 400 page shopping list of how ISDs could spend more money on a system the Court itself calls a "dismal" failure to "hundreds of thousands" of students.
- According to the District Court, not one performance measure considered at trial demonstrated that Texas school districts are fulfilling their task of educating children.
- The District Court's opinion, in contrast to past Supreme Court decisions, assumes more money is the cure to the failure of school districts to provide an education.
- The opinion is an indictment of the failure of the system, yet the ruling refused to "ask if there is a better way."

three weeks starting on January 21, 2014, and then delaying a decision and judgment until August 28, the District Court's decision will have been in place for two legislative sessions without the risk of being overturned by the Supreme Court. The delay has led some to question whether this timing is more political than judicial.<sup>5</sup>

## Needs vs. Wants

During the trial, many school superintendents and other school witnesses testified regarding numerous programs which they would like to implement or expand, all of which would require significant cost. That testimony pro-

vided a long list of potential items on which to spend more money. However, few witnesses offered cost-benefit analysis between different options for the expenditure of funds. In fact, expert testimony and the Court's opinion confirmed that neither the state nor the districts know what it costs to adequately educate a child,<sup>6</sup> much less the trade-offs necessary to assure that every dollar is expended in an efficient manner for the benefit of Texas students.

The list below may contain some good ideas; however, the design of any efficient system requires an intelligent determination and weighing of costs to determine the most effective way to educate our children.<sup>7</sup> Every family, business, or organization could spend more than it currently spends. However, life requires the allocation of limited resources. We must all make decisions regarding what we value more, and what will result in greater benefit. Based on individual values, we distinguish and prioritize our wants and needs. We do that because, unfortunately, there will never be enough money to do everything we want.

We all ask: "What are my priorities? Which items will result in greatest benefit? What priority should be placed on each item?" By foregoing this analysis, the Court implies that funds are unlimited and that we must do everything regardless of any cost/benefit analysis. Using such logic, funding will never be Sufficient or Adequate. Yet this method animates the District Court as it offers the following things as a list of "necessary interventions"<sup>8</sup> that demand more money:

1. More librarians<sup>9</sup>
2. More support personnel<sup>10</sup>
3. More books<sup>11</sup>
4. More equipment<sup>12</sup>
5. More classrooms<sup>13</sup>
6. More instructional coaches for teachers<sup>14</sup>
7. More teacher training programs<sup>15</sup>
8. More teachers<sup>16</sup>
9. More teacher's aides<sup>17</sup>
10. More reading specialists<sup>18</sup>
11. More tutors<sup>19</sup>
12. More nurses<sup>20</sup>
13. More security guards<sup>21</sup>
14. More counselors<sup>22</sup>
15. More certification<sup>23</sup>
16. More parental engagement counselors<sup>24</sup>
17. Trauma programs for immigrant students<sup>25</sup>
18. Better nutrition programs<sup>26</sup>
19. Smaller class sizes, approaching as close to 1-on-1 support as possible<sup>27</sup>
20. Summer school expansion<sup>28</sup>
21. "Competitive" teacher pay, especially in low-income/minority communities<sup>29</sup>
22. More and better facilities<sup>30</sup>
23. More libraries<sup>31</sup>
24. More materials in any language spoken by children at home<sup>32</sup>
25. Better computer hardware<sup>33</sup>
26. Better computer software, such as language recognition programs<sup>34</sup>
27. Textbooks in English & Spanish in all classrooms<sup>35</sup>
28. Curriculum specific to each culture<sup>36</sup>
29. After-school & extended-day programs<sup>37</sup>
30. Teacher recruitment programs<sup>38</sup>
31. Training so that all teachers are bilingual<sup>39</sup>
32. Universal, year-round, Pre-K, beginning at age two or younger<sup>40</sup>
33. Higher requirements and pay for Pre-K teachers<sup>41</sup>
34. "a fuller and deeper range" of intervention programs<sup>42</sup>
35. Drop-out prevention programs<sup>43</sup>
36. More rigorous coursework<sup>44</sup>
37. More rigorous testing standards<sup>45</sup>
38. Transportation to every new program<sup>46</sup>
39. Additional curriculum design for low-performing students<sup>47</sup>
40. More community engagement programs<sup>48</sup>
41. New measures of community engagement<sup>49</sup>
42. More SSI funds for remediation<sup>50</sup>
43. Regional Education Service Centers for teachers' continuing education<sup>51</sup>
44. A Reading, Science, & Math initiative<sup>52</sup>
45. "other things"<sup>53</sup>
46. "other resources"<sup>54</sup>
47. More state government oversight<sup>55</sup>

The authors of this paper conclude that this list of items is a list of "wants" instead of a list of quantified needs. There may be some "needs" on the list, but the Court does not distinguish them from "wants." In other words, although the District Court's recommendations may be beneficial for the education of certain children, what is at issue is

whether spending more money on these programs can satisfy the constitutional standards of Adequacy and Qualitative Efficiency within the *status quo* system.<sup>56</sup>

As the Supreme Court has stated, more money will never make the system constitutionally sound in the long-term.<sup>57</sup> More money has been the preferred legislative solution for decades, but as a recent SMU report concluded: “Bigger budgets don’t translate into better educational outcomes in part because of how school systems spend money.”<sup>58</sup> Further, the report contends, “The superiority of the private sector over government arises from choice and competition.”<sup>59</sup> That same report notes that markets reward success whereas governments often reward failure. Success is achieved by allocating resources effectively. “Markets offer choice by giving individuals the power of ‘no.’”<sup>60</sup> When consumers say “no” producers are forced to make better decisions regarding resource allocation decisions. That dynamic is missing in our *status quo* school system, yet the District Court refused to consider this structural defect.

### Status Quo Fails

The District Court’s ruling contends that the current system is a “dismal” failure to “hundreds of thousands”<sup>61</sup> of Texas students. For example, the Court found:

1. No one knows what it costs to educate a child.<sup>62</sup>
2. Outdated and inaccurate formulas result in the complete misallocation of funds.<sup>63</sup>
3. A “disastrous” 25% of Texas students fail to graduate from high school.<sup>64</sup>
4. 34% of English Language Learners (ELL) in grades 3-12 failed to progress even one grade level in learning English after a year of school.<sup>65</sup>
5. In most Plaintiff school districts, fewer than 1% of ELL students were college-ready.<sup>66</sup>
6. Only 17-18% of all Texans in the graduating classes of 2010-2013 achieved college-readiness on the SAT or ACT.<sup>67</sup>
7. Under the AP/IB program, only 11% of all students were college-ready.<sup>68</sup>
8. Under the lowest phase-in “Level I” standard, 53% of students failed at least one STAAR test,<sup>69</sup> which the Court described as “especially dismal” since students only needed to answer, on some portions, 37% of

The District Court’s ruling is a 400-page indictment of how the *status quo* public free school system is failing Texas children, as well as a huge shopping list of ways to spend more money within this inefficient system.

- questions correctly to pass.<sup>70</sup>
9. Under the future recommended “Level II” standard, 81% failed at least one STAAR test.<sup>71</sup>
10. Under the college-ready “Level III” standard, 99% of students failed at least one test.<sup>72</sup>
11. After three tries, 35% of 9th graders failed at least one STAAR End of Course (EOC) exam.<sup>73</sup>
12. After three tries, 47% of economically disadvantaged students failed EOC exams.<sup>74</sup>
13. Per the TEA, performance by ELL students on the STAAR exam is “dismal.”<sup>75</sup>
14. Even under the former TAKS standardized test, less than 1% of 10th and 11th grade ELL students passed their tests at the commended standard.<sup>76</sup>
15. Not one student performance measure presented at trial demonstrated sufficient student achievement.<sup>77</sup>

The District Court’s ruling is a 400-page indictment of how the *status quo* public free school system is failing Texas children, as well as a huge shopping list of ways to spend more money within this inefficient system. Unfortunately, the District Court confines itself to a discussion of the policies of school districts even though the Texas Supreme Court has supported a broader scope of judicial review.<sup>78</sup> The District Court declares that it “*does not ask if there is a better way*.” The Court only looks at what structure is in place or what is absent and determines whether it is arbitrary.<sup>79</sup> Nevertheless, the Court rules that certain programs are arbitrarily rejected by the Legislature while others are deliberately rejected. Universal Pre-K, for example, is arbitrarily rejected and therefore the Court issued an Advisory Opinion supporting its implementation.<sup>80</sup> School choice, on the other hand, is deliberately rejected and therefore beyond the power of the Court to support.<sup>81</sup> The District Court’s ultimate justification for supporting increased spending on the programs it favors



is as follows:

The Court identifies these practices as examples of ways to accomplish the general diffusion of knowledge, not to order the Legislature to adopt these practices as per se constitutional; however, where research supports a practice as effective, an approach that undermines those practices, without replacing them with another approach that is supported by research as reasonable, could be considered arbitrary and unconstitutional.<sup>82</sup>

To summarize, the Legislature acts in an arbitrary and unconstitutional manner when it acts contrary to the District Court's Advisory Opinions about effective practices. Oddly, the District Court's ruling does not judge the ineffective practices within school districts. The Court should declare that ineffective current school district practices are arbitrary and unconstitutional. But the Court does not do this.

Rather, the Court concludes that the current school districts are Qualitatively Efficient, though the facts in the opinion prove that the existing system fails both elements of the Texas Supreme Court's two-pronged Qualitative Efficiency test, namely: (1) to achieve a general diffusion of knowledge, and (2) do so without waste. The ruling commiserates with the school districts' core argument: "See how bad we are doing; See how bad we are doing; Give us more money."

### Money = Results

The District Court's opinion that the *status quo* system requires increased funding is predicated upon the idea that more money will result in better student outcomes. The Court states, "Districts with higher revenue per WADA perform better across many different performance measures..."<sup>83</sup> The implication is that more money per student produces better performance.

The Court provided **Table 1** as evidence that this contention is correct, and was persuaded by this evidence that

**Table 1: Moak's Original Table, with Revenue per ADA Added**

Current Law						
Performance Measure	# Districts	# ADA	# WADA	WADA Ratio	Revenue per WADA	Revenue per ADA*
District Rating						
Unacceptable	15	35,360	51,067	1.4442	\$5,495	\$7,936
Acceptable	271	2,509,239	3,367,847	1.3422	\$5,645	\$7,577
Recognized	182	1,582,587	2,050,021	1.2954	\$5,801	\$7,515
Exemplary	10	78,823	91,488	1.1607	\$6,474	\$7,514
% Commended – Math						
< 20%	97	353,153	500,365	1.4169	\$5,596	\$7,929
20% to < 30%	257	2,296,522	3,111,911	1.3551	\$5,593	\$7,579
30% to < 40%	83	966,646	1,229,553	1.272	\$5,835	\$7,422
40% and Greater	41	589,687	718,594	1.2186	\$6,115	\$7,452
% Commended – Reading						
< 20%	25	97,744	140,915	1.4417	\$5,657	\$8,156
20% to < 30%	194	1,760,236	2,410,353	1.3693	\$5,558	\$7,611
30% to < 40%	177	1,494,088	1,963,199	1.314	\$5,739	\$7,541
40% and Greater	82	853,941	1,045,955	1.2249	\$6,038	\$7,396
% Commended – ALL						
0% to 5%	11	26,052	38,229	1.4674	\$5,669	\$8,319
6% to 10%	133	961,595	1,334,754	1.3881	\$5,611	\$7,789
11% to 15%	189	1,452,759	1,968,336	1.3549	\$5,585	\$7,567
16% to 20%	80	956,083	1,230,391	1.2869	\$5,769	\$7,424
> 20%	65	809,520	988,712	1.2214	\$6,046	\$7,385
% At/Above Criterion - SAT/ACT						
0% to < 10%	87	786,234	1,100,932	1.4003	\$5,620	\$7,870
10% to < 20%	125	845,510	1,155,219	1.3663	\$5,554	\$7,588
20% to < 30%	155	1,131,074	1,495,099	1.3218	\$5,684	\$7,513
30% to < 40%	69	809,683	1,035,540	1.2789	\$5,744	\$7,346
40% and Greater	41	632,402	772,169	1.221	\$6,106	\$7,455
Missing or N/A	1	1,106	1,464	1.3237	\$6,690	\$8,856
% Satisfactory on 2012 STAAR five tests						
<= 40%	198	1,740,074	2,399,798	1.3791	\$5,592	\$7,712
41% to 52%	133	1,023,584	1,361,689	1.3303	\$5,693	\$7,573
53% to 64%	102	988,226	1,250,037	1.2649	\$5,757	\$7,282
65% and Greater	45	454,125	548,898	1.2087	\$6,207	\$7,502
STATE TOTALS	478	4,206,008	5,560,423	1.322	\$5,714	\$7,554

Source: Finding of Fact 644. See also exhibit 6322, Moak Report, at page 63. \*Note that Revenue per ADA does not appear in Moak's original table.

increased spending caused better student outcomes.<sup>84</sup> However, there are two basic flaws in this justification.

First, poor performing districts actually spend more per child than high performing districts. For example, revenue per ADA shows that "Unacceptable" districts spend \$422 more per student than "Exemplary" districts. Similar results can be found for each Performance Measure in the modified Table 1. How is this possible?

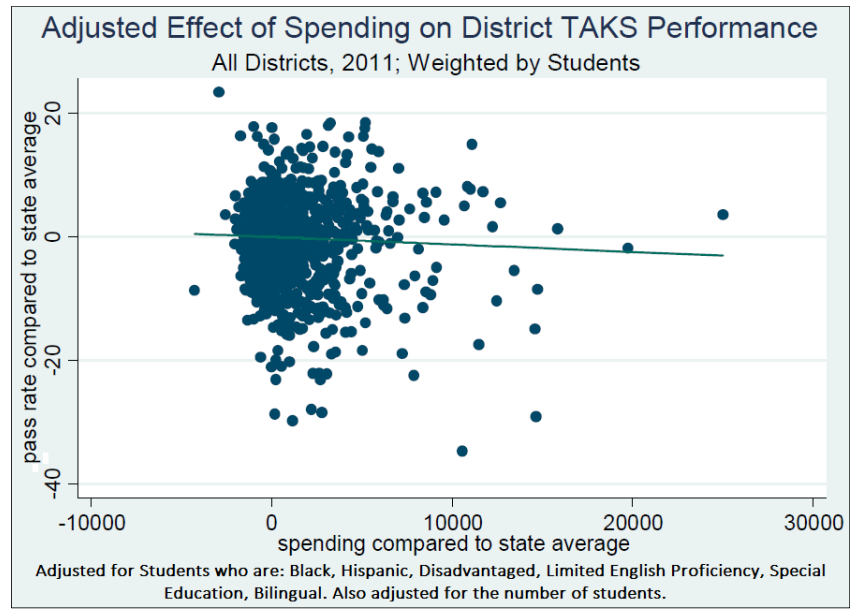
The table used by the court failed to include simple per-student revenue data. In order to see the entire picture, we took Table 1, as presented to the court, and added one more column representing spending per student in attendance. We did so because Average Daily Attendance (ADA) represents the actual physical presence of a child in school, while Weighted Average Daily Attendance (WADA) is simply a mathematical calculation. WADA is derived by taking the Average Daily Attendance and multiplying it by what the court calls “arbitrary” formula elements. The intent is to adjust for the factors that potentially increase the cost of educating children, such as whether the student is an English Language Learner, is pregnant, or is disabled.<sup>85</sup> Although there may be rational reasons for such adjustments, a comparison of spending per child and performance based on ADA fails to support the contention that more spending causes improved results. To summarize: increased revenue indicates increased achievement if revenue data is subjected to arbitrary and inaccurate multipliers.

The argument that the solution to poor results is to pump more money into the *status quo* system is undercut by the complete picture of the facts upon which the Court rests its case.

There is a second significant problem with the Court's line of argument. The District Court contends that spending per WADA causes increased student outcomes, yet the Court also contends that the weights and adjustments used to calculate WADA bear no relation to the actual costs of educating a child: “The State still uses arbitrary, outdated weights in the funding formulas that have no real connection to actual student need or program costs.”<sup>86</sup>

Calculations based on incorrect data produce incorrect results. Nonetheless, the evidence in Table 1 moved the court to conclude that there is a relationship between (1) student outcomes and (2) funding per WADA.<sup>87</sup> To repeat, the 250th District Court arrived at two conflicting opinions:

1. Increased WADA spending produces increased student achievement.



2. WADA adjustments bear no relation to the actual costs of educating a student.

If WADA does not bear a relation to the actual cost to educate a student, as the Court concludes, then it is more helpful to consider how much is being spent per student in attendance (ADA), as in the final column of Table 1.

Furthermore, there was significant evidence presented at trial that spending is not indicative of results. Expert witness Eric Hanushek, for example, extracted comparative information about Texas school districts. By comparing the percentage of students who passed their standardized tests to the spending in that district, he determined that high spending levels often go hand in hand with the lowest student achievement levels.<sup>88</sup> As the above figure illustrates, even after taking student characteristics into account, there is still a slightly lower achievement rate for the higher spending districts.

Hanushek shows that districts that spent the same amount of money could differ by up to 40 percent in student pass rates. This demonstrates the gross inefficiencies of the system. Even when Hanushek limited the districts examined to those who spent less than \$15,000 per pupil, eliminating the outliers that imbalanced the data, he still found no relationship between spending and performance.

The facts derived from the complete picture of Lynn Moak's and Eric Hanushek's evidence demonstrate that conversations about increasing student performance cannot be limited to the question of "how much more should we spend?" The Texas Supreme Court has stated this unequivocally: "more money does not guarantee better schools or more educated students."<sup>89</sup> However, the most fundamental reform offered by the District Court was to alter the taxing structure so that it can collect and distribute more money for school districts.<sup>90</sup> As demonstrated below, the 250th District Court limits itself to this reform because of the ways it defines—and redefines—the standards established by the Texas Constitution.

## The Constitutional Standards

The Texas Constitution establishes public education in Article 7, Section 1, which states:

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.

In *West Orange Cove II*, the Texas Supreme Court ruled that this clause establishes three tests by which the constitutionality of public education must be judged:

1. **Efficiency** means the same thing as it did when the Texas Constitution was written in 1875.<sup>91</sup> Efficient means: "effective or productive of results and connotes the use of resources so as to produce results with little waste."<sup>92</sup> According to the Texas Supreme Court, the Efficiency standard has two components:
  - a. **Explicit:** The explicit requirement of Efficiency is the "qualitative" component.<sup>93</sup> Qualitative Efficiency is the results-oriented part of the broader Efficiency standard.<sup>94</sup> This is the traditional definition.
  - b. **Implicit:** The implicit requirement of Efficiency is the "quantitative" or "financial" component commonly referred to as "equity."<sup>95</sup> Financial Efficiency is the inputs-oriented part of the broader Efficiency standard.

2. **Adequacy** is "simply shorthand for the requirement that public education accomplish a general diffusion of knowledge."<sup>96</sup>
3. **Suitability** is the standard that "requires that the public school system be structured, operated, and funded so that it can accomplish its purpose for all Texas children."<sup>97</sup>

Each of these three tests relates to the others. Suitability, unlike Adequacy and Efficiency, focuses upon the means to attain the general diffusion of knowledge by testing the (1) structure, (2) operation, and (3) funding. Suitability requires that these three attributes of "the public school system" be ordered in such a way that "all Texas children" receive an Adequate and Efficient education.

Adequacy requires the attainment of a goal, namely, the general diffusion of knowledge. If this goal is not attained, then Adequacy is violated. Qualitative Efficiency overlaps with Adequacy because it is results-oriented.<sup>98</sup> If the general diffusion of knowledge is not attained, Qualitative Efficiency is also violated. Regarding the relation between these tests, the Court declared: "The qualitative component of the efficiency clause is 'simply shorthand for the requirement that public education accomplish a general diffusion of knowledge.'"<sup>99</sup> The District Court is here quoting the Texas Supreme Court's ruling in *West Orange Cove II*, in which the Supreme Court stated:

"Another standard set by the constitutional provision is that public education achieve '[a] general diffusion of knowledge ... essential to the preservation of the liberties and rights of the people'. We have labeled this standard 'adequacy', and the parties have adopted the same convention. The label is *simply shorthand for the requirement that public education accomplish a general diffusion of knowledge.*" (Emphasis added)

To repeat, the District Court ruled that the Qualitative Efficiency and Adequacy standards are identical. *It did this by giving Qualitative Efficiency the definition that the Texas Supreme Court gave to Adequacy.*

This ruling is unprecedented. Whereas Adequacy requires only that a goal be attained, Qualitative Efficiency requires that a goal be attained *in a specific way*, namely, "with little



waste.”<sup>100</sup> Whereas Adequacy and Qualitative Efficiency can stand and fall together when the goal is attained or not attained, they are *not* identical, as the District Court implies. Qualitative Efficiency requires *more* than Adequacy. The Texas Supreme Court's precedence indicates that the two standards are substantially distinct.<sup>101</sup> The Texas Supreme Court has ruled:

There is no reason to think that “efficient” meant anything different in 1875 [when article VII, section 1 was written] from what it now means. “Efficient” 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.<sup>102</sup>

Qualitative Efficiency requires that the State produce results with little waste, not simply that it produce results. Adequacy, on the other hand, only requires that public education produce results.<sup>103</sup>

If accepted without correction, the District Court's equivocation would gut the Texas Supreme Court's precedent regarding Efficiency. It would redefine Efficiency in such a way that Financial Efficiency would be all that remains. As the District Court's ruling demonstrates, “Efficient” would come to mean “Equity.”<sup>104</sup> This would have the effect of rewriting the Texas Constitution and confine future litigation efforts only to “the context of funding.”<sup>105</sup> Such a decrease in judicial power is clearly unprecedented:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make “suitable” provision for an “efficient” system for the “essential” purpose of a “general diffusion of knowledge.” While these are admittedly not precise terms, they do provide a standard by which this court *must*, when called upon to do so, measure the constitutionality of the legislature's actions.<sup>106</sup> (Emphasis added)

## Efficiency Intervenors' Argument Upheld in Part

The 250th District Court's ruling on Efficiency is much more nuanced than most initial readings report. According to the common perception, the District Court ruled that the public schools are Qualitatively Efficient and Financially Inefficient. In the Court's opinion, only the implicit Financial Efficiency test is failed.

The Efficiency Intervenors are seeking a declaration of the public school system's unconstitutionality on the grounds that it fails the explicit standard of Qualitative Efficiency.<sup>107</sup> Among other things, the Efficiency Intervenors contend that an essential component of Efficiency is an accurate determination and control of cost. Their pleadings read, “The lack of any system of measuring ‘productivity’ or ‘cost effectiveness’ of the expenditures of public funds is a clear constitutional failure.”<sup>108</sup> They go on to say, “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.”<sup>109</sup>

Though it has been overlooked by many, the District Court strongly affirmed this argument. Interestingly, the Court declared:

Part of the duty to ensure that districts have sufficient resources is a duty to make a reasonable effort to determine what it will cost to adequately provide for its own standards and meet its own definition of a general diffusion of knowledge. The State effectively has recognized and accepted this constitutional responsibility by enacting Section 42.007 of the Texas Education Code, which requires rule making and the conduct of specific studies on a biennial basis to determine the cost of meeting state performance requirements. *As urged by the [Efficiency] Intervenors, this is a necessary aspect of making suitable provision for public education and being productive of results without waste.*<sup>110</sup> (Emphasis added)

Unfortunately, the District Court did not encourage or require an evaluation of the cost of each program it requires through its Advisory Opinions. In fact, when the Court does recommend increasing spending per student in at-

A notable portion of the 250th District Court’s ruling is how it defines the third constitutional standard to which the public education system is held: Suitability.

tendence (FOF 629), it explicitly states that this increase is conservative and does not include many of the programs the District Court wants established (FOF 618).

In addition, the Efficiency Intervenors did not “urge”, as the Court says. As noted throughout this work, the District Court redefines many things in its opinion. Whereas the Efficiency Intervenors plead and offered numerous examples as evidence of the inefficiency of the system, the Court consistently mischaracterized these examples of inefficiency as legislative proposals in numerous findings of fact.<sup>111</sup> By attempting to redefine the Efficiency Intervenors’ case, the Court avoids ruling in their favor while also agreeing that not considering costs is unconstitutional.

### Suitability, Redefined

A notable portion of the 250th District Court’s ruling is how it redefines the third constitutional standard to which the public education system is held: Suitability. This definition is notable in light of the Texas Supreme Court’s *West Orange Cove II* definition. Both quotes are reproduced in **Table 2**, with emphasis added.

**Table 2: Suitability Test Redefined**

250th District Court	Texas Supreme Court
Suitability claim: The “suitable provision” clause has been interpreted by the Texas Supreme Court as requiring <b>the school finance system</b> to be structured, operated, and funded so it can accomplish a general diffusion of knowledge for all Texas children. <sup>113</sup>	In essence, “suitable provision” requires that <b>the public school system</b> be structured, operated, and funded so that it can accomplish its purpose for all Texas children. <sup>114</sup>

The 250th District Court alters the definition: “the public school system” is changed to “the school finance system.” Similar to the District Court’s redefinition of Qualitative

Efficiency, this has the effect of narrowing the scope of the 250th District Court’s focus to money alone, and the subsequent effect of narrowing the power of the judiciary to check and balance the Legislature. Whereas the 250th District Court explains that it derives its own understanding from the Texas Supreme Court, a line-by-line comparison reveals an unprecedented interpretation.

### “The School Finance System” vs. “The Public School System”

Legally, the “school finance system” is not the same as the “public school system.” The public school system, in light of Texas Supreme Court precedent, is defined as schools that exist for the public’s education. As such, it refers to the same idea as “system of public free schools,” which is the language employed by the Texas Constitution. As a result, the public school system’s structure is (1) animated by a goal beyond the existing system and (2) can adapt to meet that goal. The Texas Supreme Court stated this in *Edgewood IV*, where it ruled that a recent Bill passed by the Legislature was one solution among many:

In Senate Bill 7, the Legislature fulfills its mandate to provide a general diffusion of knowledge by establishing a regime administered by the State Board of Education. The Constitution does not require, however, that the State Board of Education or any state agency fulfill this duty. *As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means.*<sup>115</sup> (Emphasis added)

In light of this Supreme Court ruling, the structure, operation, and funding of the public school system can be executed by several parties, not just a state agency or school districts. Examples might include open-enrollment charter, online, and private schools.<sup>116</sup> According to this precedent, organizations other than school districts are constitutionally able to operate within the bounds of Suitability for the sake of providing all Texas children with a general diffusion of knowledge. The Texas Supreme Court has not said the same thing about “the school finance system”, which is structured and operated only by the government.

## Adequacy, Redefined

Likewise, the District Court redefines Adequacy as in **Table 3** below.

**Table 3: Adequacy Test Redefined**

250th District Court	Texas Supreme Court
<p>Adequacy claim: The “general diffusion of knowledge” clause has been interpreted by the Texas Supreme Court as requiring the Legislature to ensure that <b>school districts</b> are reasonably able to provide all students with a meaningful opportunity to learn the essential knowledge and skills reflected in the state curriculum such that upon graduation, students are prepared to continue to learn in postsecondary educational, training, or employment settings.<sup>117</sup></p>	<p>We have labeled this standard “adequacy”, and the parties have adopted the same convention. The label is simply shorthand for the requirement that <b>public education</b> accomplish a general diffusion of knowledge.<sup>118</sup></p>

As compared to the Texas Supreme Court’s definitions, “public education” is changed to “school districts.” Again, this alteration narrows the judiciary’s focus. In this case, the focus is narrowed to the existing system. It suffices to recall the *Edgewood IV* ruling, stated above, to see how the Texas Supreme Court distinguishes the two concepts: “As long as the Legislature establishes a suitable regime that provides for a general diffusion of knowledge, the Legislature may decide whether the regime should be administered by a state agency, by the districts themselves, or by any other means.”<sup>119</sup> In addition, the Texas Supreme Court also ruled: “The standards of article VII, section 1—adequacy, efficiency, and suitability—do not dictate a particular structure that a system of free public schools must have.”<sup>120</sup>

In light of these rulings, it is evident that school districts are not equivalent to a system of public free schools. Why then does the 250th District Court offer such a definition? One finding of fact by the District Court sheds light on the answer:

*The Court’s function is merely to ensure that resources are adequate to allow school districts to fulfill the State’s constitutional mission.*<sup>121</sup> (Emphasis added)

The 250th District Court takes the view that Adequacy is a test of the currently established 1,052 school districts, rather than a test of the public’s education. Inasmuch as this redefinition is relied upon by the District Court, its ruling is unprecedented and will likely be overturned.

## Gross Waste

As the Texas Supreme Court has demanded since *Edgewood I*, an efficient system must be “productive of results” with “little waste.”<sup>122</sup> As noted above, the Court’s findings are a “dismal” indictment of the bad results from a system which fails “hundreds of thousands” of Texas students.<sup>123</sup> The District Court’s findings of fact provide convincing evidence that the system is not productive of results. If the system is not productive of results then what about the second half of the Efficiency standard, which requires “little waste”?

The District Court found that the Cost of Education Index accounts for \$2.36 billion in funding to school districts.<sup>124</sup> The CEI is a formula which is intended to adjust for labor cost differentials between districts. The Court found that this index was “badly outdated” and based on data collected before 1990.<sup>125</sup> The Court cited a 2004-05 study which found that uncontrollable labor costs varied by “over 30 percent” and that “geographic pattern of cost” had changed much since 1989.<sup>126</sup> Costs and demographic patterns have changed even more since 2005. Therefore, at a minimum, the state is allocating \$2.36 billion in a wasteful manner. However, since the CEI acts as a multiplier of other formula elements—including *WADA*—it actually impacts far larger expenditures.<sup>127</sup> Although the Efficiency Intervenors made the claim that the CEI was proof of waste in an inefficient system, and although the Court agreed with that claim, the Court failed to rule for the Efficiency Intervenors.

## Productivity, Transparency, and Equity

Although the District Court determined that funding for schools is inadequate, it failed to assess the productivity of current funding. As Bill Hammond, President of the Texas Association of Business, testified, no one knows whether more money is needed.<sup>128</sup>

Failure to measure productivity and act on such measurements, as well as those mandates which impede productivity, are major factors in the failure of the current system.

The reason for this uncertainty is that there is an information gap between what schools are spending and our ability to ensure spending is Efficient, Adequate, and Suitable. No effective cost accounting system exists which would allow evaluation of the productivity of expenses. Mark Hurley, a Dallas venture capitalist, researched school spending and financial reporting for two years. Testifying to the court, he explained what would happen to a private company that reported financial activities as the school districts do:

It is quite probable that the management of the company would face civil sanctions from the SEC and even potential criminal ones from the Department of Justice. Further, it is also highly likely that the company would quickly find itself in a class action lawsuit for inadequate and misleading financial disclosure. But in the Texas system of public education, making such grossly insufficient financial disclosure is not only acceptable under the current rules for financial reporting, it is required.

Perhaps, as the District Court has ruled, schools are being funded inequitably and/or inadequately, but the Court focuses on *what* is being spent without analyzing *the productivity* of those expenditures. Even the District Court acknowledged this gross deficiency, though it only did so in passing.<sup>129</sup>

The current system imposes restrictions on schools which force inefficient allocation of resources. The labor laws contained in Chapter 21 of the Education Code are just one example. Even a California court rejected such labor laws as being inconsistent with the interest of children and taxpayers.<sup>130</sup> However, despite evidence to the contrary, the Texas District Court's ruling overtly denies this, as it declares: "Having found no credible evidence of large inefficiencies in Texas schools, and having heard many

superintendents testify concerning specific efforts needed to improve performance on STAAR exams, the Court is persuaded that school districts are incentivized to use additional funding in ways that are productive of better academic performance."<sup>131</sup>

This ignores the testimony of many witnesses.<sup>132</sup> For example, former Austin Superintendent Maria Carstarphen stated in her deposition that Chapter 21 labor laws add up to \$80,000 to each dismissal process.<sup>133</sup> In addition, the District Court acknowledged that all the parties agree that bad teachers should be improved or fired, regardless of Chapter 21 restrictions. But the Court did not support this idea because it could not "be straightforwardly implemented," and should not "replace the need for other improvements and interventions."<sup>134</sup>

Failure to measure productivity and act on such measurements, as well as those mandates which impede productivity, are major factors in the failure of the current system.<sup>135</sup> No analysis exists concerning the productivity of spending, nor the impediments to better productivity. Instead, the focus is more money<sup>136</sup> and the equitable allocation of money between districts.

When the first lawsuit dealing with school equity was filed in the 1970s, poor school districts actually had significantly less money per student than their rich counterparts.<sup>137</sup> As discussed when Table 1 was introduced, many low-performing districts currently have more money per student than high-performing districts.<sup>138</sup> The District Court made a determination that the system failed the equity test based on WADA rather than ADA. Yet, the Court also concluded that the very weights used to determine WADA are arbitrary, and have little relationship to cost.<sup>139</sup>

## Nailing Down the Cost

As mentioned above, the cost of an adequate education is unknown. As a result, the 250th District Court suggested estimates for the amount of Operating Expenditures coming from all funds. The Court's preferred level for the 2010-11 school year was \$11,054 of spending per student in average daily attendance.<sup>140</sup> In the 2010-11 school year, actual "all funds" Operating Expenditures was \$9,396 per student in average daily attendance, according to the Tex-



as Education Agency.<sup>141</sup> This \$1,658 increase per student, when multiplied by the 4.5 million students in attendance would result in a spending increase of \$7.6 billion in the 2010-11 school year alone.<sup>142</sup>

However, this does not account for total disbursements per student, which was already \$12,028 in the 2010-11 school year.<sup>143</sup> The Court explains why it does not consider total spending:

The “total expenditure” values presented by Mr. Currah [senior advisor and data analysis director for the Texas Comptroller of Public Accounts] also include, not only operational spending, but also amounts paid by districts for debt service and capital outlays. Both of these most often apply to spending for the building of new facilities or renovating existing facilities. These items are not measured in the basket of goods used for the CPI. Moreover, including both debt service and capital outlays in the “total expenditures” metric double-counts the amounts school districts spend to build facilities financed by debt, since the sum includes both the initial capital outlay and the eventual repayment of the debt incurred to pay for it. The inclusion of debt service and capital outlays in total expenditures, therefore, overstates the growth in real (inflation-adjusted) educational spending over time. As a result, “total expenditure” values are not relevant to the issue of spending per student.<sup>144</sup>

The practical conclusion of the District Court's justification is that total expenditures are not relevant to estimating the cost of an adequate education. What is relevant, contends the Court, is only that part of Total Expenditures called Operating Expenditures. Operating Expenditures do not account for—among other things—capital outlays used to build and maintain school buildings. However, this is inconsistent with the standard declared by the District Court in several other parts of its ruling, which refuse to distinguish the need for education from the need for facilities in which an education takes place. For example, the District Court ruled: “An efficient system of public education requires not only classroom instruction, but also the classrooms where that instruction is to take place. The system must be analyzed as a whole, taking into consideration both the instruction and facilities components.”<sup>145</sup> The fact that the 250th District Court did not include all

spending in its estimate of the cost of an adequate education is self-contradictory.

The District Court mandated billions of additional revenue for schools while failing to consider total current spending. Additionally, the court mandated billions in new spending without an evaluation of gross waste in the bureaucratic administration of the system, waste driven by the culture of the system, waste driven by unnecessary state mandates, and waste driven by a lack of failure of system administrators to make logical cost-benefit decisions to maximize productivity and efficiency. Further, the court, although acknowledging the fact that funding formulas are arbitrary and outdated, refused to acknowledge that such obvious misallocations make an accurate cost determination impossible.

The cost of operating an efficient system can never be known within a system where government assigns children to schools, rather than parents selecting schools for children in the market. Milton Friedman opined in *Capitalism and Freedom*, that government run schools produce conformity, wasteful spending, and pay scales which fail to reward success and attract mediocrity.<sup>146</sup> Although the District Court's Findings of Facts tends to confirm Dr. Friedman's conclusion, the court demands more spending for the structure which it has found “fails hundreds of thousands” of Texas students.

## Conclusion

The focus of any discussion regarding public education must be our children. As such, we take two of the District Court's conclusions with deadly seriousness:

Not one performance measure considered at trial demonstrated that the Texas public schools are accomplishing a general diffusion of knowledge.<sup>147</sup>

“Waiting for school districts to make slow progress on improving the passing rates is not an option for the hundreds of thousands of ninth and tenth graders who are no longer on track to graduate because of their performance...”<sup>148</sup>

While the judiciary should not issue Advisory Opinions telling the Legislature how to attain a general diffusion of



knowledge,<sup>149</sup> the Court is well within its bounds to declare that the existing system of school districts & state agencies is failing to educate our children. As the Texas Supreme Court has consistently implied, it is also well within the constitutional standard to declare that this failure is occurring because of deficiencies in the operation and structure—not just the funding—of the public school system.

It is very easy to compile a list of wants to justify more money, as the District Court did in this opinion. However, without a productivity analysis, the Efficiency standard cannot be satisfied. For that reason the District Court's decision will most likely be overturned.

There were no surprises in this ruling. Most people anticipated a ruling focused on more money for school districts from Judge Dietz because he has been consistent in ruling that money is the solution in the past. In contrast, the Texas Supreme Court's consistent position is that money *is not* the only issue.<sup>150</sup> A review of the Texas Supreme Court opinions since 1989 send a strong signal that they are inclined to deal with the real, explicit, efficiency issue. The Texas Supreme Court has stated, "While we considered the financial component of efficiency to be implicit in the Constitution's mandate, the qualitative component is explicit."<sup>151</sup>

The Supreme Court also noted that it only has the power to rule on issues brought before it by the parties, and has routinely called on the Texas Legislature to consider fundamental changes to the structure and operation of the State's education system, saying, "Perhaps ... public education could benefit from more competition, but the parties have not raised this argument."<sup>152</sup>

For the first time in three decades, the issues of efficiency, productivity, and waste are before the court. Market-based decisions allocate resources more effectively and productively than do politically-driven decisions. School choice and competition for students will make the Texas school system constitutionally efficient. That issue is finally before the court. ★

## Endnotes

<sup>1</sup> This was the jest of a Tweet by a local reporter at the beginning of the school finance trial in 2012. That Tweet summarizes the testimony of school superintendents and experts during the trial. The original Tweet was by @QRKimmy. References to that Tweet were made by the *Dallas Morning News* on 25 Oct. 2012 and the Tweet was also referenced by TexasSD.com in Oct. 2012.

<sup>2</sup> National Education Access Network. School Funding Cases in Texas (accessed 2 Oct. 2014).

<sup>3</sup> As the *Quorum Report's* Kimberly Reeves recently commented, the status quo's hope for a favorable outcome from the Texas Supreme Court "would be a mistake." She averred that the Court will "do some saber rattling over equity or adequacy, but that's about it." Kimberly Reeves. KR: Road to School Finance Solution Looks Bleak. The *Quorum Report*, 18 Sept. 2014 (accessed 2 Oct. 2014).

<sup>4</sup> Ibid.

<sup>5</sup> Kent Grusendorf, "Grusendorf: Judge Dietz Erred—Money Alone is No Solution," *Quorum Report*, 10 Sept. 2014 (accessed 2 Oct. 2014).

<sup>6</sup> See Executive Summary at page 5, Finding of Fact 556, 603, 1245; Conclusion of Law 30, 78. Unless otherwise noted, Executive Summary will be hereinafter referred to as ES, Findings of Fact will be FOF, Conclusions of Law will be COL.

<sup>7</sup> According to the expert report by Paul Hill, 1) costs of education are hidden and unknown, 2) schools are forced to do many things that detract from their main work and tie up resources that could be used more aggressively, 3) there are many barriers to experimentation with new ideas and transfers of funds from less- to more-efficient schools and programs. See Paul Hill, *What Keeps Texas Schools from Being as Efficient as They Could Be?*

<sup>8</sup> FOF 383.

<sup>9</sup> FOF 523, 580.

<sup>10</sup> FOF 523.

<sup>11</sup> FOF 23, 451.

<sup>12</sup> FOF 769.

<sup>13</sup> FOF 525.

<sup>14</sup> ES at page 6, FOF 417.

<sup>15</sup> FOF 416.

<sup>16</sup> FOF 526-8.

<sup>17</sup> FOF 429.

<sup>18</sup> FOF 429.

<sup>19</sup> ES at page 6, FOF 615.

<sup>20</sup> COL 32.

<sup>21</sup> COL 32.

<sup>22</sup> FOF 433-9, 240, 579.

<sup>23</sup> FOF 517, 530-40.

<sup>24</sup> FOF 444.

<sup>25</sup> FOF 288, 432.

<sup>26</sup> FOF 273.

<sup>27</sup> FOF 427-30, 562-71.

<sup>28</sup> ES at page 6.

<sup>29</sup> FOF 414, 518, 543.

<sup>30</sup> FOF 525.

<sup>31</sup> FOF 580.

<sup>32</sup> FOF 486.

<sup>33</sup> FOF 427.

<sup>34</sup> FOF 452.

<sup>35</sup> FOF 453.

<sup>36</sup> FOF 486.

<sup>37</sup> FOF 420.

<sup>38</sup> ES at page 11, FOF 419, 455.

<sup>39</sup> FOF 415.

<sup>40</sup> FOF 524. See FOF 551, where the Court stated: "the evidence indicates that starting earlier produces greater long-term gains; two years beginning at age three produces better results than one year beginning at age four, and starting *prior to age three* may produce even better results." (emphasis added)

<sup>41</sup> FOF 555, 392.

<sup>42</sup> FOF 1412.

<sup>43</sup> FOF 440-1, 205-7, 374.

<sup>44</sup> FOF 241.

<sup>45</sup> FOF 119, 156(b), 311, 366.

<sup>46</sup> FOF 23.

<sup>47</sup> FOF 241.

<sup>48</sup> FOF 379, 381, 435, 442-45, 968.

<sup>49</sup> FOF 241.

<sup>50</sup> FOF 68, 422, 457, 1194.

<sup>51</sup> FOF 68, 457.

<sup>52</sup> FOF 68.

<sup>53</sup> FOF 482, COL 32.

<sup>54</sup> FOF 23.

<sup>55</sup> FOF 556.

<sup>56</sup> The District Court's justification of its Advisory Opinions is notable: "The interventions referenced by these superintendents and experts (and described in detail below) are not part of a 'wish list'; rather, they are *necessary* interventions, without which these populations cannot achieve a general diffusion of knowledge." (FOF 383,

emphasis added). Yet the District Court also state the following about its Advisory Opinions: “The Court identifies these practices as examples of ways to accomplish the general diffusion of knowledge, not to order the Legislature to adopt these practices as per se constitutional...” (COL 31) These statements are, to say the least, difficult to reconcile.

<sup>57</sup> In *West Orange Cove II*, the Texas Supreme Court stated, “We remain convinced, however, as we were sixteen years ago, that defects in the structure of the public school finance system expose the system to constitutional challenge. Pouring more money into the system may forestall those challenges, but only for a time. They will repeat until the system is overhauled.”

<sup>58</sup> Michael Cox and Richard Alm, *Rebuilding America’s Middle Class: Prosperity Requires Capitalism in the Classroom*, O’Neil Center 2012 Annual Report (accessed 11 Nov. 2014).

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> ES at page 3 & 5, FOF 94 n28, 102, 305, 322, 364, 1108.

<sup>62</sup> ES at page 5, FOF 556, 603, 1245, COL 30, 78.

<sup>63</sup> FOF 496, 591-602.

<sup>64</sup> FOF 205-7. Note that the Court vacillated upon which measure to use, but found the 25% dropout rate, published by the National Center for Education Statistics (NCES), compelling, and that it ought to “be a focus of state policy.” The other measure, published by the U.S. Department of Education, estimates that Texas has a graduation rate of 86%. Dropouts are three times as likely to be unemployed as students who earn a diploma, and if they are employed, they will earn less. (FOF 103)

<sup>65</sup> FOF 352.

<sup>66</sup> FOF 368. The District Court observed that in a few of the districts that performed better than this 1% achievement level, ELL college readiness ranged from 7%-11%. Note that the District Court found that this failure is not due to any recent influx of immigrants. (FOF 358).

<sup>67</sup> FOF 160. The District Court here cites the Kallison College-Readiness Report, which provides a definition of “College-Readiness” as it applies to SAT and ACT scores. “College-readiness” is defined as an ACT score of 19 on the Math and English sections only, with an average test score of 23. On the SAT it is defined as a score of 500 on the Reading and Math sections only, with an average test score of 1070. For context on ACT scores, see ACT Profile Report – National, which explains that a score of 18 on English and 22 on Algebra (i.e. Math) “indicate a 50% chance of obtaining a B or higher or about a 75% chance of obtaining a C or higher in the corresponding credit-bearing college courses...” For context on SAT scores, see The SAT Report on College & Career Readiness: 2012, which explains that a total average “score of 1550 is associated with a 65 percent probability of obtaining a first year GPA of a B- or higher...”

Test Scores that Indicate College Readiness		
	Scores given by the District Court	Scores given by test administrators
ACT score	19 English / 19 Math	18 English / 22 Math
SAT score	1070 average	1550 average

<sup>68</sup> FOF 319.

<sup>69</sup> FOF 130.

<sup>70</sup> FOF 311.

<sup>71</sup> FOF 130.

<sup>72</sup> FOF 130. Since receiving test results, the TEA has begun to recommend that Level II be redefined as the “college-ready” standard. (FOF 101, 119-20) While the District Court found that the witnesses “universally” supported increasing the standards to which students are held (FOF 108), the Court also found that the standards established by the TEA are *not established based upon what students need to do to perform well*, “but rather to ensure that most districts and campuses fall on the ‘academically acceptable’ or ‘met standards’ side of the line.” (FOF 117) To see the urgency of a 99% failure rate, note that *passing* at the Level III standard reflects a 75% chance or greater of obtaining a C in college. (FOF 101, 87) As such, and considering current passing rates, extensive college remediation will be necessary. This is a direct violation of the statutory requirement placed upon the Texas education system by the Legislature. The Texas Education Code defines “college-readiness” as “the level of preparation a student must attain in English language arts and mathematics courses to enroll and succeed, without remediation, in an entry-level general education course for credit in that same content area for a baccalaureate degree or associate degree.” (§ 39.024(a)).

<sup>73</sup> FOF 139.

<sup>74</sup> FOF 139.

<sup>75</sup> FOF 364.

<sup>76</sup> FOF 371. Note that this rose to 7% for ELL students in all grades.

<sup>77</sup> COL 71.

<sup>78</sup> *Edgewood IV*, footnote 8.

<sup>79</sup> FOF 1466 (emphasis added).

<sup>80</sup> Pre-K was one of several “arbitrary” choices made by the Texas Legislature. (FOF 56, bullet point 2) As “arbitrary” the Court concludes that each of these choices is subject to judicial checks upon power. See the District Court’s section I(B)(2) for the declaration that the Legislature’s choices affecting Pre-K—and many other programs—are “arbitrary.” For a definition and analysis of Advisory Opinions, see the scathing concurring opinions of Justices Gonzalez, Gammage, Doggett, and Mauzy in *Edgewood II* at 500-506.

<sup>81</sup> FOF 1480.

<sup>82</sup> COL 31.

<sup>83</sup> FOF 644.

<sup>84</sup> However, it should be noted that the Moak report data in Table 1 excludes all schools districts “with less than 1,000 ADA.” *The majority of Texas school districts enroll*

Number of Texas School Districts, by Student Enrollment: 2010-11	
0-999 students	700 districts
1,000-4,999 students	357 districts
5,000-9,999 students	71 districts
10,000-24,999 students	53 districts
25,000-49,999 students	29 districts
50,000 students & above	18 districts

Source: Snapshot 2011 Summary Tables, District Size

*less than 1,000 students.* Data derived from the Texas Education Agency can be used to illustrate the distribution in the Table to the left. The reason provided by Lynn Moak for excluding these districts was that, “Districts with less than 1,000 students comprise less than 5.1 percent of the total student population.” This is true. Nevertheless—according to the Snapshot data—smaller districts have higher Total Operating Expenditures Per Pupil and lower student achievement than the larger districts. This directly affects an answer to the question: ‘does increased spending produce increased student achievement?’ An impartial observer should at least supplement the Moak report, and the District Court’s analysis, with an analysis of all the Texas school districts. This is especially relevant to conversations about whether the school districts in the purview of the judiciary are representative of all Texas school districts, which is what the District Court contends. (see ES at page 7; FOF 210, 680).

<sup>85</sup> FOF 644. For a complete explanation of WADA, see the Texas Education Agency’s *School Finance 101: Funding of Texas Public Schools*, 13-17.

<sup>86</sup> FOF 275. Further, the Court stated, "The State still uses arbitrary, outdated weights in the funding formulas that have no real connection to actual student need or program costs" (FOF 275). See also ES at page 9. The Court also described the situation in more detail:

Relatedly, the special program weights and allotments in the State's statutory school funding formulas are sorely out-of-date and in need of adjustment. They do not approximate the actual cost of education (ES at pages 5-6).

<sup>87</sup> FOF 125. Based upon this fact, the District Court declared that the public education system is "precisely the opposite" of what is required by the constitutional standard of Suitability.

<sup>88</sup> Eric Hanushek considered the TAKS tests in this analysis.

<sup>89</sup> *West Orange Cove II*.

<sup>90</sup> COL 19, 72, 84.

<sup>91</sup> *West Orange Cove II*.

<sup>92</sup> *Edgewood I, III, West Orange Cove I, II*.

<sup>93</sup> *Edgewood IV*.

<sup>94</sup> *West Orange Cove II*.

<sup>95</sup> *Edgewood IV, West Orange Cove II*.

<sup>96</sup> *West Orange Cove II*.

<sup>97</sup> *Ibid*.

<sup>98</sup> See *West Orange Cove II*: "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."

<sup>99</sup> COL 58. In this passage, the 250th District Court is quoting *West Orange Cove II*, 176 S.W.3d at 753.

<sup>100</sup> See *West Orange Cove II*: "In *Edgewood I*, we said 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. Efficiency implicates funding access issues, but it is certainly not limited to those issues."

<sup>101</sup> The term "Qualitative Efficiency" is not mentioned by the Texas Supreme Court in *Edgewood I, II, or III*. However, the Texas Supreme Court formulated the idea of Qualitative Efficiency at least as early as *Edgewood I*, and the justices were cognizant of the concept in *Edgewood II*. (see *Edgewood I* at 397; *Edgewood II* at 500) The term "Qualitative Efficiency" is mentioned in *Edgewood IV* 3 times, *West Orange Cove I* 1 time (in a quote from *Edgewood IV*), and *West Orange Cove II* 1 time.

<sup>102</sup> *West Orange Cove II*.

<sup>103</sup> *West Orange Cove II*.

<sup>104</sup> See ES at page 12, where the District Court equates the "financial efficiency" and "equity" claims. See also FOF 26, which is silent on the Efficiency standard in its list of the constitutional tests.

<sup>105</sup> See *West Orange Cove II*: "We have referred to efficiency in the broader sense as 'qualitative', and to efficiency in the context of funding as 'financial'. The parties have also referred to financial efficiency as 'quantitative'." The District Court's alteration would thus decrease the judiciary's power to check the Legislature in the future.

<sup>106</sup> *West Orange Cove II*.

<sup>107</sup> A comparison of the District Court's COL 58 with the actual pleadings by the Efficiency Intervenors indicates that the judge misconstrued their case and also ignored pleadings which coincide with the Court's findings.

<sup>108</sup> Third Amended Plea in Intervention of the Efficiency Intervenors, page 10.

<sup>109</sup> Third Amended Plea in Intervention of the Efficiency Intervenors, page 7.

<sup>110</sup> COL 30. See also, ES at page 5, FOF 556, 595, 604-6, 1245, COL 78.

<sup>111</sup> For example, see FOF 673. For a list of the District Court's redefinitions, see sections of this work titled: Status Quo Fails, Suitability, Redefined, and Adequacy, Redefined.

<sup>112</sup> *West Orange Cove II*.

<sup>113</sup> ES at page 1.

<sup>114</sup> *West Orange Cove II*.

<sup>115</sup> *Edgewood IV*, footnote 8, see also *West Orange Cove I*.

<sup>116</sup> The District Court acknowledges part of this fact in FOF 1490, where it states that charter schools operate "within the public school system."

<sup>117</sup> ES at page 1.

<sup>118</sup> *West Orange Cove II*.

<sup>119</sup> *Edgewood IV*, footnote 8, see also *West Orange Cove I*.

<sup>120</sup> *West Orange Cove II*.

<sup>121</sup> FOF 654.

<sup>122</sup> *Edgewood I, III, West Orange Cove I, II*.

<sup>123</sup> ES at page 3 & 5, FOF 94 n28, 102, 305, 322, 364, 1108.

<sup>124</sup> FOF 598.

<sup>125</sup> FOF 599. See also FOF 40, 597-8.

<sup>126</sup> FOF 599.

<sup>127</sup> See Lisa Dawn Fisher's *School Finance 101*, slide 19. For a detailed explanation, see the TEA's *School Finance 101: Funding of Texas Public Schools*, which explains: "A district's WADA is calculated by first subtracting from a district's Tier I entitlement any transportation funding the district is due, any funding the district is due for new instructional facilities, the district's high school allotment, and 50 percent of the CEI adjustment. The resulting amount is then divided by the district's basic allotment amount to arrive at a district's WADA" (pg. 21, emphasis added).

<sup>128</sup> See Oral Deposition of William Oliver Hammond (16 Nov. 2012).

<sup>129</sup> FOF 556: "Lack of state capacity for monitoring and oversight precludes a continuous improvement process that would ensure that programs actually use resources effectively and provide a high quality education." The Court referred specifically to Pre-K programs, but it would be surprising if it thought this statement did not apply to the K-12 finance system as a whole.

<sup>130</sup> *Vergara v. California*.

<sup>131</sup> FOF 654.

<sup>132</sup> See "Expert Reports" of Donald McAdams, Eric Hanushek, and Paul Hill.

<sup>133</sup> See Oral Deposition of Dr. Maria Carstarphen (2 Oct. 2012).

<sup>134</sup> FOF 673.

<sup>135</sup> See "Expert Reports" of Donald McAdams, Eric Hanushek, and Paul Hill.

<sup>136</sup> For example, see the comments made by Bonny Cain, superintendent of the Waco ISD following the 250th District Court's ruling: "I don't care what anyone says. Better education is spelled M-O-N-E-Y because of what it buys. It buys extra tutors. It buys extended days. It (provides) money for parent training. It includes being able to buy resources we couldn't bring in before. All of those things make a huge difference." Stephanie Butts, "After Texas education cuts, local schools need grants, other funds to be competitive," *The Waco Tribune* (26 Sept. 2014).

<sup>137</sup> See *Edgewood I*: "The 100 poorest districts had an average tax rate of 74.5 cents and spent an average of \$2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of \$7,233 per student."

<sup>138</sup> See Table 1.

<sup>139</sup> See the explanation of the CEI, above. See especially endnote 127.

<sup>140</sup> FOF 629.

<sup>141</sup> See 2010-11 Financial Actual Reports, which states that "Total Operating Expenditures" from "All Funds" were 42,804,942,407. Then see County ADA Reports: 2004-05 through estimated 2012-13, which state that average daily attendance in 2010-11 was 4,555,484 students. Therefore, \$42.8 billion divided by 4.5 million students equals \$9,396 per student.

<sup>142</sup> See County ADA Reports: 2004-05 through estimated 2012-13.

<sup>143</sup> See 2012-13 Actual Financial Data, Totals for State Totals (All Districts). Most recently, in the 2012-13 school year, total spending was \$12,106. See 2012-13 Actual Financial Data, Totals for State Totals (All Districts).

<sup>144</sup> FOF 74.

<sup>145</sup> COL 49. See also ES at page 7, FOF 585.

<sup>146</sup> Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962).

<sup>147</sup> COL 71.

<sup>148</sup> FOF 102.

<sup>149</sup> As the Texas Supreme Court stated in *West Orange Cove II*, "The final authority to determine adherence to the Constitution resides with the Judiciary. Thus, the Legislature has the sole right to decide how to meet the standards set by the people in article VII, section 1, and the Judiciary has the final authority to determine whether they have been met."

<sup>150</sup> The Texas Supreme Court stated in *West Orange Cove II*:

... 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.... In *Edgewood I* we stated: "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." 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.

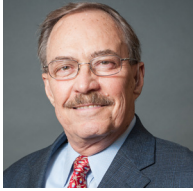
<sup>151</sup> *Edgewood IV*, 917 S.W.2d at 729.

<sup>152</sup> *West Orange Cove II*.





## About the Authors



**The Honorable Kent Grusendorf** is a Senior Fellow and director of the Foundation's Center for Education Freedom. He represented Arlington for 20 years, 1987-2007, in the Texas Legislature where his primary interest and focus was education. In his freshman term, due to his prior service on the State Board of Education, he was viewed as a leader on education issues. Through his appointments, by three governors and three House Speakers, to the House Public Education Committee and various Select Committees, he played a significant role in crafting legislative responses to the *Edgewood I*, *Edgewood II*, *Edgewood III*, *Edgewood IV*, and *West Orange Cove* school finance court decisions.

On the national level he was first appointed to the Southern Regional Education Board (SREB) by Governor Clements. He was reappointed to the SREB by Governors Bush and Perry and also served on the SREB's Executive Committee. Grusendorf also served a term as Chairman of the American Legislative Exchange Council (ALEC) Education Task Force.



**Michael Barba** joined the Texas Public Policy Foundation in June 2014 as a policy analyst in the Center for Education Freedom. He focuses upon education finance, school choice, and multimedia. His work is animated by the belief best-articulated by Thomas Jefferson: "I think by far the most important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised, for the preservation of freedom and happiness." Barba completed his undergraduate education at the University of Dallas, where he majored in philosophy and politics. Following graduation, he completed a Graduate Student Fellowship at the Dallas-based National Center for Policy Analysis.

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