

No. 14-0776

In the Supreme Court of Texas

**MICHAEL WILLIAMS, COMMISSIONER OF EDUCATION, IN HIS OFFICIAL
CAPACITY, *ET AL.*,**

Appellants/Cross-Appellees,

v.

**THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, *ET AL.*; CALHOUN
COUNTY ISD, *ET AL.*; EDGEWOOD ISD, *ET AL.*; FORT BEND ISD, *ET AL.*; TEXAS
CHARTER SCHOOL ASSOCIATION, *ET AL.*; AND JOYCE COLEMAN, *ET AL.*,**

Appellants/Appellees/Cross-Appellants.

On Direct Appeal from the
200th Judicial District Court, Travis County, Texas
No. D-1-GN-11-003130

**BRIEF OF SENATOR PHIL GRAMM AND STACY HOCK AS AMICI
CURIAE IN SUPPORT OF THE EFFICIENCY INTERVENORS**

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IDENTITY OF AMICI CURIAE

Senator Phil Gramm and Stacy Hock submit this brief as amici curiae in support of Appellants Texans for Real Efficiency and Equity in Education, Texas Association of Business, and Joyce Coleman, *et al.* (collectively, the “Efficiency Intervenors”).

Senator Gramm is a well-known economist and policy-maker. He graduated in 1964 from the University of Georgia. He received a doctorate in economics from the University of Georgia’s Terry College of Business in 1967. He then taught economics at Texas A&M University from 1967 to 1978. In 1978, Senator Gramm was elected to the United States House of Representatives, where he served through 1984. In that year, he was elected to the United States Senate. He retired from the Senate in 2002 after serving three terms.

Stacy Hock received her bachelor degree in Computer Science and Electrical Engineering from the Massachusetts Institute of Technology and her MBA from the University of Texas at Austin. She held senior management positions at I.B.M., and is now manager of the Joel & Stacy Hock Charitable Fund and co-owner of Hock, LLC. In addition, she serves on the boards of the Texas Public Policy Foundation, the African Dream Initiative, and other corporate and non-profit organizations. She personally funds tuition at high-performing private schools for dozens of low-income children who otherwise would be relegated to attending low-

performing public schools. Mrs. Hock is a product of Texas public schools and is the mother of four young boys, two of whom attend Texas public schools and two of whom will attend such schools when they are of age.¹

ARGUMENT

The Texas Constitution provides: “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.” Tex. Const., art VII, § 1. An essential element of the Legislature’s constitutional obligation under this provision is the creation not just of a public school system, but also one that educates Texas’ children *efficiently*. Indeed, unlike Texas, many state constitutions that require the state legislature to establish a public school system do not *also* impose the additional mandate that the system be efficient. *See, e.g.*, Ariz. Const., art. XI, § 1; Cal. Const., art. IX, § 1; Ga. Const., art. VIII, § 1, ¶ 1; Okla. Const., art. XIII, § 1; Va. Const., art. VIII, § 1. The efficiency mandate in Texas’ Constitution, therefore, is not merely precatory. As this Court has explained, the Constitution’s use of the term “efficient” implies two separate elements: not only “the use of resources so as to produce results with little waste,” but also a school system that is “*effective or productive of results.*” *Edgewood Indep. Sch. Dist. v.*

¹ No fee has been or will be paid for preparing this brief. Tex. R. App. P. 11.

Kirby (Edgewood I), 777 S.W.2d 391, 395 (Tex. 1989) (emphasis added). This latter aspect—a system that actually educates its students—has been termed “structural” or “qualitative” efficiency. *See* Efficiency Intervenors Br. 2 & n.6.

The Efficiency Intervenors’ brief explains why the trial court erred in dismissing their structural efficiency claims. Amici agree with and adopt the legal arguments as to Issues One and Two in that brief.² The evidence at trial presented by the Efficiency Intervenors established that the Texas public school system, as established by the Legislature, is constitutionally inefficient. This Court should correct the trial court’s errors and remand for the entry of appropriate relief.

This brief will not repeat the arguments advanced ably by the Efficiency Intervenors. Instead, this brief will draw on amici’s public policy experience to provide context for the issues in this case. In amici’s view, it is critical to improving education for all Texas students that the Efficiency Intervenors prevail. This brief makes the following points in turn. *First*, in far too many cases, the public school system is failing our students, particularly lower-income and minority students. *Second*, there is no direct relationship between educational expenditures and student performance. The school districts naturally want more money—of course, with no concomitant obligation to demonstrate improved results—but simply throwing more money at the problem without structural reforms will not fix

² Amici take no position on the attorneys’ fee argument advanced by the Efficiency Intervenors.

it. *Third*, there is no question that the Texas public education system is inefficient. The schools are not exempt from the immutable economic principle that monopoly harms consumers—here, the students, who are the “consumers” of education—and that competition would benefit students. Restrictions on charter schools, therefore, directly harm students. Moreover, the Legislature has mandated that the schools operate under a system of rules that benefit *teachers* at the expense of *students*.

For these reasons, this Court should reverse the dismissal of the Efficiency Intervenors’ claims.

I. THE CURRENT TEXAS PUBLIC SCHOOL SYSTEM IS FAILING OUR STUDENTS.

No one can seriously dispute that Texas’ public schools are in crisis. While Texas has many good public schools, it also has many failing schools, and many mediocre ones. Both failing and mediocre schools betray our students. By not educating them competently and fully, such schools deny students the skills required to succeed and excel in the modern workforce, particularly in the “knowledge economy.” At best, they consign many students to a life of lower-paying, insecure, and unfulfilling jobs. At worst, they result in chronic unemployment or a life of crime. Failing and mediocre schools betray our broader society as well—not just by depriving employers of a competent workforce and burdening the social-welfare system with increased poverty caused by inability to find good jobs. The failure to competently educate our students also strikes at the

heart of the purpose of the education provision of the Texas Constitution, by depriving students of the “knowledge . . . essential to the preservation of the liberties and rights of the people.” Tex. Const., art VII, § 1. After all, in order to be in a position to help “preserv[e] . . . the liberties and rights of the people,” a Texan must understand such things as the principles underlying the Constitution, the views of the Founders about the proper role of government, and the profound changes wrought by the Civil War Amendments and the Civil Rights Era. An uneducated or undereducated population can no more effectively “preserv[e] . . . the liberties and rights of the people” than can such citizens obtain a well-paying, secure, and rewarding job.

The data demonstrate that Texas’ public school system is failing to educate many of our students. To see this, one need look no further than the Texas Education Agency’s January 2015 comprehensive report. *See Texas Educ. Agency, 2014 Comprehensive Biennial Report on Texas Public Schools: A Report to the 84th Legislature (2015) (2014 Comprehensive Biennial Report), available at http://tea.texas.gov/acctres/comp_annual_index.html.* The report speaks for itself:

In reading, percentages of students meeting the passing standard in 2014 ranged from 74 percent in Grade 4 to 83 percent in Grade 8. . . .

In writing, 73 percent of Grade 4 students and 70 percent of Grade 7 students met the passing standard in 2014. . . .

In mathematics, passing rates in 2014 ranged from 67 percent for seventh graders to 79 percent for both fifth and eighth graders. . . .

In science, 73 percent of fifth graders and 70 percent of eighth graders met the passing standard in 2014. . . .

In social studies, the passing rate for Grade 8 students was 61 percent in 2014. . . .

Id. at 41-42. On average, about one-quarter of all students do not pass the state standard. That is a shocking failure.

But it gets worse when the results for minority students are examined. The Comprehensive Biennial Report found for African-American students as follows:

In reading, percentages of students meeting the passing standard in 2014 ranged from 62 percent in Grade 4 to 76 percent in Grade 8. . . .

In writing, 63 percent of both Grade 4 and Grade 7 students met the passing standard in 2014. . . .

In mathematics, passing rates in 2014 ranged from 53 percent for third, fourth, and seventh graders to 68 percent for eighth graders. . . .

In science, 59 percent of both fifth graders and eighth graders met the passing standard in 2014. . . .

In social studies, the passing rate for Grade 8 students was 51 percent in 2014. . . .³

Id. at 42. Finally, it is important to note that not only is there an “achievement gap” between white and African-American students, but that gap actually *widens*

³ The results for Hispanic students were generally between those of white and African-American students.

as students get older. The nationwide data “show that the small achievement gaps between white and black children in kindergarten continue to widen as these students progress through the grades,” as demonstrated both by “overall reading and math proficiency scores” and by “data for specific skill areas.” Rod Paige & Elaine Witty, *The Black-White Achievement Gap* 29 (2010) (hereinafter “*Black-White Achievement Gap*”). Thus, not only do schools fail to overcome the achievement gap between white and black children that exists when they first arrive at school, but in fact the gap gets *larger* the more education is provided by our schools.

No one should be happy with these outcomes. And nothing will change unless our public schools adopt a different approach. Albert Einstein reportedly defined “insanity” as “doing the same thing over and over again and expecting different results.” *The Ultimate Quotable Einstein* 474 (Alice Calaprice ed., 2011). We cannot dramatically improve student performance without fundamentally transforming our educational system. Unfortunately, as the next section explains, more money by itself will not solve the problem.

II. BECAUSE THERE IS NO DIRECT RELATIONSHIP BETWEEN PERFORMANCE AND FUNDING, MERELY INCREASING FUNDING WILL NOT IMPROVE STUDENT PERFORMANCE.

There is no doubt that appropriate resources are necessary for effective teaching, and there certainly are examples of schools with inadequate resources.

But to explain poor performance as a result of underfunding is simply incorrect. For example, the average per pupil expenditure in the United States significantly exceeds that in other industrialized countries, even though our performance lags. One report indicated that the United States spends \$10,800 on average to educate each student—the highest reported amount. By contrast, other nations spend less than \$9,000. See Nat'l Ctr. for Educ. Statistics, *Comparative Indicators of Education in the United States and Other G-8 Countries: 2011* at 43 (Oct. 2011), available at <http://nces.ed.gov/pubs2012/2012007.pdf>. Despite the United States' significantly higher spending, of the eight countries surveyed, we place only sixth in math literacy, fifth in science literacy, and third in reading literacy. *Id.* at 19.

What can be seen from the international data also is true within the United States. One comprehensive study, which examined the relationship between spending and academic performance changes over 40 years in all 50 states, concluded that “there is essentially no link between state education spending (which has exploded) and the performance of students at the end of high school (which has generally stagnated or declined).” Andrew J. Coulson, *State Education Trends: Academic Performance and Spending over the Past 40 Years* 4 (Mar. 18, 2014), available at <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa746.pdf>. Clearly, money does not by itself translate into results.

As the late economist (and Nobel Prize winner) Milton Friedman explained, “in a bureaucratic system” like the public school system, “increase in expenditure will be matched by fall in production. . . . Such systems will act rather like ‘black holes’ in the economic universe, simultaneously sucking in resources, and shrinking in terms of ‘emitted’ production.” Milton Friedman, *et al.*, *Free to Choose* 145 (1979). In Friedman’s analysis, “production” means the education provided to our children. The lesson taught by Dr. Friedman 40 years ago still holds true today: in the realm of public education, adding resources without changing the way public schools operate will not lead to improved results.

In short, simply spending more money is not a panacea.

**III. THE VIRTUAL MONOPOLY OF PUBLIC SCHOOLS AND
TEACHER-PROTECTIVE—RATHER THAN STUDENT-
PROTECTIVE—LAWS ENSURE THE INEFFICIENCY OF THE
PUBLIC SCHOOL SYSTEM.**

Two aspects of the public school system are the primary causes of both its failure to adequately educate many of Texas’ students and its constitutional inefficiency: its virtual monopoly of education (at least for all those but the wealthy) and the legally imposed bureaucratic rules that benefit teachers at the expense of the students. The Efficiency Intervenors’ brief (pp. 21-35) explains the trial evidence about both aspects in detail; that evidence is correct and should have been adopted by the trial court. And we know from experience that when the monopoly is broken and bureaucratic rules relaxed, educational results improve.

First, our public school system in Texas is a virtual monopoly. The wealthy, of course, can opt out and obtain a high-quality education at a private school. But these schools are beyond the economic reach of most Texans and therefore cannot be said to provide meaningful competition to the public schools. Further, the Legislature has permitted some open-enrollment charter schools—even increasing the number to 305 over the next several years. Tex. Educ. Code § 12.101(b-1), (b-2). But this number is so small that charters also do not provide meaningful competition in most places. This is demonstrated by the fact that there are more than *100,000 children* on charter school waiting lists. Efficiency Intervenors’ Br. 28. The Legislature has denied those children the school of their choice, consigning them to worse-performing public schools.

Generations of economists have taught us the effects of monopoly. Monopolists are “largely immune” to competitive pressures to improve, leaving consumers—here, Texas’ children—with “fewer choices, higher costs, and lower quality.” Timothy Tregarthen, *et al.*, *Economics* 219 (2d ed. 2000). “The problem with monopolies is that there is no competition, and when there is no competition, there is no incentive to adjust, change, or, in the case of public schools, improve.” Barbara M. DeLuca, Counterpoint, *in School Finance* 270 (William E. Tro ed., 2012). “[B]ecause monopoly firms are unchecked by competition, the outcome in a market with a monopoly is often not in the best interest of society.” N. Gregory

Mankiw, *Principles of Microeconomics* 312 (4th ed. 2007). Economic theory demonstrates “the inefficiency of monopoly”; by increasing the cost and lowering “output” (here, educational output), “a deadweight loss arises.” Douglas McTaggart, *et al.*, *Economics* 223 (7th ed. 2013). There is no reason to believe that the public education system is immune to these adverse effects of monopoly—indeed, experience demonstrates that they are pervasive.

To be sure, just like public schools, charter schools vary in quality—some are excellent and some mediocre. But when charter schools fail, they are driven out of business. When public schools fail, they continue to operate. It is the *competition* provided by the presence of one or more charter schools that would induce the public schools to improve. Competition in the private economy leads to higher quality and lower prices, and the same result would occur in education—if only the Legislature permitted competition. There is substantial empirical evidence from other states that this is true. For example, one study examined the effects of the introduction of the Florida Tax Credit Scholarship Program, which offers scholarships to eligible low-income students to attend private schools. The study concluded that “the increased competitive pressure faced by public schools associated with the introduction of Florida’s FTC Scholarship Program led to general improvements in public school performance.” David N. Figlio, *et al.*, *Competitive Effects of Means-Tests School Vouchers*, NBER Working Paper 16056,

at 35 (2010), *available at* <http://www.nber.org/papers/w16056>. Another study found that competition induces public-school principals to innovate more, to devote more time to increasing efficiency, and to seek more autonomy from school authorities. Paul Teske, *et al.*, *Does Charter School Competition Improve Traditional Public Schools?*, at 10 (2000), *available at* http://www.manhattan-institute.org/pdf/cr_10.pdf. A study by the United States Department of Education found that, after entry of charter schools, “[m]ost districts implemented new educational programs, made changes in educational structures in district schools, and/or created new schools with programs that were similar to those in the local charter schools,” and “nearly half of district leaders reported becoming more customer service oriented, increasing their marketing and public relations efforts, or increasing the frequency of their communication with parents.” U.S. Dep’t of Educ., *Challenge and Opportunity: The Impact of Charter Schools on School Districts 1-2* (2001), *available at* http://www2.ed.gov/rschstat/eval/choice/district_impact.pdf.

Here in Texas, even with the limited number of charter schools, there are indications that charter schools improve results, particularly for minority students. For example, the four-year graduation rate for white students in the class of 2013 in public schools was 80.6 percent, while in charter schools it was 85.8 percent—more than 6 percent better. *2014 Comprehensive Biennial Report* 234. That is a

significant improvement. But for black students in the class of 2013, the improvement was astounding: in public schools the graduation rate was only 68.8 percent, while it was 84.6 percent in standard charter schools—*23 percent better*.⁴ *Id.* These statistics alone demonstrate that the monopoly provided to the public schools by the Legislature has a disparate adverse impact on black and other minority students. Finally, one study of Texas found that charter schools have a positive impact on public schools. That study found “a positive and significant effect of charter school penetration on traditional public school student outcomes. These findings support the potential for systemic achievement gains from competition-enhancing school reform policies.” Kevin Booker, *et al.*, *The Effect of Charter Schools on Traditional Public School Students in Texas: Are Children Who Stay Behind Left Behind?*, at 3-4 (Sept. 2005), available at http://www.ncspe.org/publications_files/OP104.pdf.

Second, not only does the Legislature deprive students of the choice of which school to attend, but it imposes rigid bureaucratic rules on public schools. As the Efficiency Intervenors explain (Br. 22-27), those rules limit the ability of schools to hire, reward, and promote the best teachers. These rules serve the interests of teachers—not students. Our most successful companies—Apple, Google,

⁴ For Hispanic students, the standard charter-school graduation rate was 19 percent higher—88.9 percent versus 74.5 percent—than for public schools. *2014 Comprehensive Biennial Report* 234.

Amazon—compensate employees based on *performance*, not years of service.

When an employee at Apple, Google or Amazon underperforms, he or she is fired, not provided lengthy hearings. The same merits-based hiring, compensation, and termination processes should be applied in our schools.

Abundant real-world experience demonstrates that the removal of the public school monopoly and the lifting of bureaucratic, teacher-protective rules would dramatically improve results:

One example is the YES Prep Public Schools, a system of five state-chartered schools operating in Houston, that serve low-income students in grades six through twelve. YES Prep is the vision of founder Chris Barbie, a Teach for America alumnus who taught for two years at the HISD's Rusk Elementary School. YES Prep's strategies to prepare students for college graduation include a rigorous college prep academic model that includes parents and student contracts to comply with the YES culture and standards, an intensive summer school program, Saturday classes, introductory classes to college life, a longer school day, student support services that include access to faculty twenty-four hours a day, seven days a week; social services and student advisory group sessions; and acceptance by a four-year college as a requirement for high school graduation. Eighty percent of YES students are economically disadvantaged, 95 percent are Hispanic or African American, 88 percent are first-generation college bound, and most students enter

YES one grade level behind in math and science. Yet despite the enormous challenges to achieving its mission of “increasing the number of low-income Houstonians who graduate from a four-year college prepared to compete in the global marketplace and committed to improving disadvantaged communities,” YES is spectacularly successful. In 2007, for the second consecutive year, *Newsweek* ranked YES as one of the 100 best high schools in the nation. For seven consecutive years, all YES Prep seniors have been accepted into four-year colleges; 90 percent of YES Prep graduates have graduated from college or are still enrolled; and in 2008, Children at Risk, a Houston nonprofit organization, ranked YES as the number-one high school in the Houston area. *See Black-White Achievement Gap* 110-11.

Another example is the Knowledge Is Power Program (“KIPP”), a national network of public charter schools established by two Teach for America alumni—Mike Feinberg and Dave Levin—who, after finishing their two-year fifth-grade teaching assignments at HISD’s Garcia Elementary School, launched their own school in Houston. KIPP schools operate on a set of core principles that are called the five pillars: High Expectations, Choice and Commitment, More Time, Power to Lead, and Focus on Results. KIPP operates 162 schools and serves 60,000 students nationwide. *KIPP: 2014 Report Card* 8, available at <http://on.kipp.org/1aQFc7J>. KIPP’s enrollment is approximately 96 percent African American and Hispanic,

and 87 percent of the students are eligible for the federal free and reduced-price meals program. KIPP accepts students without regard to their prior academic record, conduct, or socioeconomic background. *Id.* In addition to the attention paid to a strong school culture that supports great student performance, KIPP's school day is longer than that of the traditional public schools. They start earlier and they last longer; KIPP students attend school a half day on Saturday; parents of KIPP students are required to participate in their children's educational activities; and KIPP teachers undergo special training. KIPP student performance is outstanding. When the class of 2018 began KIPP in the fifth grade, 65 percent were at least one grade level behind their peers in math and 58 percent in reading. After four years at KIPP, only 37 percent of students were below grade level in math and 43 percent in reading. *Id.* at 15.

A final example is what happened to the New Orleans public schools after Hurricane Katrina. Before Katrina in 2005, New Orleans was the second-lowest-ranked district in the second-lowest-ranked state in the country, as measured by student performance on state and national tests. After the hurricane devastated that city, as explained by the Education Research Alliance for New Orleans at Tulane University:

Within the span of one year, all public-school employees were fired, the teacher contract expired and was not replaced, and the state took control of almost all public schools and began holding them to relatively strict

standards of academic achievement. Eventually, the state turned all the schools under its authority over to charter management organizations (CMOs), dramatically reshaping the teacher workforce. . . .

Douglas N. Harris, *Good News for New Orleans*, EducationNext, vol. 14, no. 4 (Fall 2015), available at <http://educationnext.org/new-orleans-reforms-boost-student-performance/>. The results of these reforms are impressive. The performance of students improved by 0.2 to 0.4 standard deviations by 2012, improving the average student’s performance by 8 to 15 percentile points. During the same period, the high school graduation rate rose by 10 percentage points and the share of high school graduates entering college rose by 14 percentage points.

Id.

* * * * *

Not every charter school will be as successful as YES and KIPP, and not all system-wide reforms will achieve results like those in New Orleans. But it is clear that the public school monopoly—which severely restricts the number of charter schools and regulates the hiring, compensation, and termination of teachers and imposes other school rules for the benefit of teachers not students—deprives students of the ability to choose successful non-public schools and prevents new schools from developing, competing, and succeeding. That competition would not only give students additional options for successful schools, but it would also compel the public schools themselves to improve. This Court should hold that the

current Texas public school system is not “an efficient system of public free schools.”

PRAYER

For the foregoing reasons, and for the reasons set forth in Parts One and Two of the Efficiency Intervenors’ brief, the judgment of the trial court should be reversed and this Court should render judgment for them on their efficiency claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.4

This brief complies with the type-volume limitation of Tex. R. App. P. 9.4(i)(2)(C) because the brief contains 4,036 words, excluding those parts of the brief exempted by Tex. R. App. P. 9.4(i)(1). This brief also complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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