

No. 14-0776

IN THE SUPREME COURT OF TEXAS

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

Appellants/Cross-Appellees

v.

CALHOUN COUNTY INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees/Cross-Appellants/Cross-Appellees,

v.

**TEXAS CHARTER SCHOOLS ASSOCIATION, ET AL., and JOYCE
COLEMAN, ET AL.,**

Appellees/Cross-Appellants,

v.

**THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, ET
AL.; EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.;**
AND FORT BEND INDEPENDENT SCHOOL DISTRICT, ET AL.,

Appellees/Cross-Appellees

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

**BRIEF OF THE TEXAS PUBLIC POLICY
FOUNDATION AS *AMICUS CURIAE* IN SUPPORT
OF EFFICIENCY INTERVENORS**

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INTEREST OF *AMICUS CURIAE*

Pursuant to Tex. R. App. P. 11, this Brief is filed on behalf of the Texas Public Policy Foundation (Foundation), a Texas-based nonprofit policy organization that, among other things, works to help expand educational options for Texas students. Specifically, the Texas Public Policy Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

The Texas Public Policy Foundation believes that its guiding principles of liberty, personal responsibility and free enterprise are fundamental in providing choice and competition to every student, in all schools. As this Court's decision will influence the quality of the education available to all students, our goal is to bring the most relevant matters to the Court's attention.

This Brief is filed in support of the Efficiency Intervenors. However, the Foundation was not paid for its preparation and the Foundation did not pay another entity or attorney for doing so. The Foundation adopts by reference the Statement of the Case, Statement of Facts, and Issues

Presented by the Efficiency Intervenors and appreciates the opportunity to submit this Brief to the Court.

SUMMARY OF THE ARGUMENT

For twenty-five years and six previous rounds of public education litigation, this Court has invited the qualitative efficiency claim to be brought before it that is now ripe for adjudication. The Efficiency Intervenors have met their burden of proving that the Texas School System is not efficient, as required by Tex. Const. Art. VII, §1, by demonstrating that the status quo of Texas public education is not “productive of results with little waste” – this Court’s definition of constitutional efficiency under Art. VII. The Efficiency Intervenors have provided the same level of proof as the school district parties by demonstrating that the system is not “productive of results.” No party has the burden to prove a solution to the demonstrated inefficiencies, and it was error for the trial court to require the Efficiency Intervenors to do so.

ARGUMENT

I. THE EFFICIENCY INTERVENORS ARE HERE AT THE COURT’S INVITATION.

Albert Einstein is credited with saying that “the definition of insanity is doing the same thing over and over and expecting a different result.” After

over a quarter century of school finance litigation,¹ the insanity would be for another quarter century of litigation to continue without this Court availing itself of its obligation to (1) declare the Texas School System unconstitutionally structurally inefficient; and (2) demand that the Texas Legislature implement the fundamental changes needed to meet the Texas Constitution's Article VII, § 1 mandate of "an efficient system of public free schools" for the "general diffusion of knowledge" "essential to the preservation of the liberties and rights of the people."

The Foundation recognizes that this Honorable Court has been calling for the opportunity presented in this matter. In the first school finance case, the Court stressed that "the system itself must be changed."² Money is not the only issue, nor is more money the only solution.³ Defects in the structure of the public school system expose it to the constitutional challenge. Yet, in prior school finance system litigation, these issues have been withheld from

¹ The public school finance litigation cases are: *Edgewood Indep. Sch. Dist. V. Kirby (Edgewood I)*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. V. Kirby (Edgewood II)*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (Edgewood III)*, 826 S.W.2d 489 (Tex. 1992); *Edgewood Indep. Sch. Dist. V. Meno (Edgewood IV)*, 917 S.W.2d 717 (Tex. 1995); *W. Orange-Cove Consol. Indep. Sch. Dist. V. Alanis (W. Orange-Cove I)*, 107 S.W.3d 558 (Tex. 2003); *Neely v. W. Orange-Cove Indep. Sch. Dist. (W. Orange-Cove II)*, 176 S.W.3d 746 (Tex. 2005).

² *Edgewood I*, 777 S.W.2d at 397.

³ *Edgewood III*, 826 S.W.2d at 524.

consideration – seemingly, to the Court’s frustration.⁴ As the Court recognized,

“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.”⁵

The Legislature is not so restricted.⁶ The Legislature and the Governor have the responsibility of reforming the public school system to comply with the sovereign will of the people expressed in our Constitution.⁷ The Constitution gives to the Legislature the primary responsibility to decide how best to achieve an efficient system.⁸

As much as the independent school district (ISD) parties and proponents of the status quo seek more judicially-mandated blank checks from the legislature, the same parties desperately oppose reform to achieve what Justice Scott Brister described as a “Texas school system ‘efficient’ by 21st century standards.”⁹ ¹⁰ The trial court’s factual findings in terms of the

⁴ “We cannot dictate how the parties present their case or reject their contentions simply because we would prefer to address others. Perhaps, as the dissent contends, public education could benefit from more competition, but the parties have not raised this argument, and therefore we do not address it.” *W. Orange-Cove II*, 176 S.W.3d at 793.

⁵ *Id.*

⁶ *Id.*

⁷ *Edgewood III*, 826 S.W.2d at 524.

⁸ *Edgewood IV*, 917 S.W.2d at 747.

⁹ *W. Orange-Cove II*, 176 S.W.3d at 818 (Brister, J., dissent).

results produced currently by Texas public education are best described as abysmal. In fact, in support of their arguments, the ISDs themselves highlight their own “academic crisis for hundreds of thousands of students who were falling short of the state’s standards.”¹¹ Rather than acknowledge their significant contribution to the failings of Texas public education, the ISDs tout how poorly they have done in meeting the Constitutional requirement of a “general diffusion of knowledge.” Were the primary purpose of the ISDs’ advocacy the betterment of the school children served by public education, these parties would be in lockstep with the Efficiency Intervenors’ request for the Court to send the entire Texas School System to the Legislature for global reform.

Fortunately, Texans have this Court, which has been inviting a challenge on efficiency grounds for a quarter-century. The judiciary’s role, though important, is limited to ensuring *that* the constitutional standards are met - not *how* the standards should be met.¹² As Senator Ted Cruz described,

¹⁰ “But we should demand efficiency, as that is what the Texas Constitution requires. Recognizing the common meaning of “efficient” would not require us to abandon our previous school-finance cases, or the equity for Texas schools they require. But we cannot keep overlooking the one standard the Texas Constitution explicitly demands. Nor do we help Texas school children by insisting “efficient” means nothing beyond equal access to taxes.” *Id.*

¹¹ Calhoun County ISD Plaintiffs’ Brief of Appellees, p. 90.

¹² *W. Orange-Cove II*, 176 S.W.3d at 753.

the judiciary serves as an umpire calling balls and strikes.¹³ But, doing so requires the judiciary to “be in the game” and to make the difficult calls, recognizing that the consequences may be fundamentally transformative if the Court forces the legislative branch to address major reform.

The other Parties advocate every imaginable technicality and twisted argument against Efficiency Intervenors to invite the Court to avoid standing behind the plate and addressing the principal issue: *does Texas have an efficient system of public free schools?* This Court has waited twenty-five years to answer this question. Texans await the Court’s answer.

II. THE TRIAL COURT ERRED IN THE BURDEN OF PROOF APPLIED TO THE EFFICIENCY INTERVENORS.

The trial court erred by requiring the Efficiency Intervenors to provide a solution to the system’s inefficiency, when they were only required to prove that the system does not meet the constitutional standards. The final authority to determine adherence to the Constitution resides with the Judiciary.¹⁴ The Legislature has the sole right to decide *how* to meet the standards set by the people, and the Judiciary has the final authority to determine *whether* they have been met.¹⁵

¹³ http://www.cruz.senate.gov/?p=press_release&id=2366

¹⁴ *W. Orange-Cove II*, 176 S.W.3d at 777.

¹⁵ *Id.*

As recognized by the Trial Court and described by this Court, the Constitution first requires the Legislature to establish a public school system that is “adequate,” i.e. one that “achieve[s] ‘[a] general diffusion of knowledge ... essential to the preservation of liberties and rights of the people.’”¹⁶ Second, the Legislature must make “suitable provisions” to achieve the general diffusion of knowledge.¹⁷ That is, the Legislature must structure, operate, and fund the public school system “*so that it can accomplish its purpose* for all Texas children.”¹⁸ Third, in funding the public school system, the Legislature must be “financially efficient.”¹⁹ A party establishes the unconstitutionality of the school system if it establishes that any one of these standards is not met. It need not establish the best solution, as that is the role of the Legislature.

Tellingly, the trial court did not require the ISDs to meet the heightened burden it required of the Efficiency Intervenors. The trial court spent hundreds of pages finding facts demonstrating that the Texas School System failed the constitutional criteria. In terms of the ISDs’ claim that lack of funding resulted in these failings, the trial court accepted the evidence as credible *prima facie* proof of financial unconstitutionality – without any

¹⁶ Final Judgment at p. 4 (citing *W. Orange-Cove II*, 176 S.W.3d at 753).

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.*

requirement that the ISD's prove *why* more funding would improve public education or *how much* more funding would fix the identified deficiencies.

However, in evaluating the Efficiency Intervenors' qualitative efficiency constitutional claim based upon the same evidence taken as dispositive for the ISDs' unconstitutional funding claim, the trial court erred by requiring the Efficiency Intervenors to prove *how* and *why* the Texas School System is structurally broken. That is inconsistent, and it is error. This Court has observed that, while it has found "the financial component of efficiency to be implicit in the Constitution's mandate, the qualitative component is explicit."²⁰ The efficiency inquiry is binary: the system either is or it is not efficient. The "how" and "why" constitutionally belong to the Legislature; all that the judiciary should determine is "whether."²¹

A. The Trial Court Held Efficiency Intervenors to an Impossible Standard.

It is important to note that no criteria exists for how courts should evaluate a structural or qualitative efficiency constitutional claim because, as this Court has noted in past public education litigation, this qualitative efficiency claim has never been before the Texas judiciary.²² So, the trial

²⁰ *Edgewood IV*, 917 S.W.2d at 729.

²¹ *W. Orange-Cove II*, 176 S.W.3d at 777.

²² "The parties have not raised this [qualitative efficiency] argument..." *W. Orange-Cove II*, 176 S.W.3d at 793.

court invented its own criteria to apply to the Efficiency Intervenors, but it did not apply the same criteria to the ISDs.

In order to prevail on their qualitative efficiency claim, the trial court held that the Efficiency Intervenors would have to

“show that a means chosen by the Legislature, *e.g.* the structure controlling compensation, hiring, firing, and certification of teachers as alleged here, has no rational relationship to a necessary function of the public school system, or if the Legislature provided no structure for a necessary function.”²³

The trial court erred by requiring Efficiency Intervenors to prove that specific legislative means have no rational relationship to the system’s necessary function. 4.8 million students enrolled in Texas public schools in 2010.²⁴ The existence of more than 1,000 independent school districts, each with duplicative administrative bureaucracies, has been described by this Court as “a complex and unwieldy system.”²⁵

The Texas School System is a massive structure whose size and complexity make it impossible for any party to identify a single component or combination of components that results in an inefficient system. Yet, the trial court required the Efficiency Intervenors to prove which “means” in the Texas School System is not working, *i.e.* “has no rational relationship to a

²³ FOF & COL, p. 13.

²⁴ FOF 16

²⁵ *Edgewood II*, 917 S.W.2d at 726.

necessary function of the public school system.”²⁶ No such requirement was applied to the ISDs’ claims.

While the trial court applied this higher standard to the Efficiency Intervenors, it recognized that precedent did not require it to do so.²⁷ The trial court stated that “the final authority to determine adherence to the Constitution resides with the judiciary,” but “the parameters [to do so] are not clear.”²⁸ The trial court then relied upon this Court in identifying the constitutional limits for crafting the public school system to include being “so unsuitable that it cannot because of its structure achieve its purpose.”²⁹ Essentially, it is a pass or fail review where the Court does not ask if there is a better way.³⁰

The System should be evaluated by this Court as a sum of its parts rather than piecemeal.. It is the system that fails to meet constitutional standards rather than any particular piece of it. And, as the trial court acknowledged, the Efficiency Intervenors “do not seek any particular remedy besides a declaration that the system is qualitatively inefficient.”

²⁶ FOF & COL, p. 13.

²⁷ At trial, the Efficiency Intervenors identified proposals that could improve public education efficiency. The significance of these proposals is not necessarily to prove what would be best for Texas school children, a policy role best left to the legislature. Rather, the Efficiency Intervenors demonstrate options that do not currently exist in an inefficient system.

²⁸ FOF & COL, p. 6 (citing *W. Orange-Cove II*, 176 S.W.3d at 785).

²⁹ *Id.* (citing *W. Orange-Cove II*, 176 S.W.3d at 783).

³⁰ FOF 1466.

But the trial court then discredited the Efficiency Intervenors' challenge due to the fact that the constitutional cure would require the Legislature to take actions that it had declined to take thus far.³¹ If the Efficiency Intervenors' claims fail because the Legislature has declined to adopt the suggested reforms that would improve efficiency, shouldn't the ISD's funding claims fail because the Legislature has declined to appropriate more? Again, the trial court applied inconsistent standards to the claims before it.

B. The Trial Court Acted Arbitrarily by not Holding ISD Plaintiffs to the Same Standard.

The ISDs could not have prevailed if the trial court had held them to the same standard as the Efficiency Intervenors. The ISDs and the State of Texas keep suing each other - the system essentially suing itself - over public education funding, yet neither party will quantify how much funding would accomplish the "general diffusion of knowledge" "essential to the preservation of the liberties and rights of the people."³² After seven rounds

³¹ FOF 1463; FOF 1464 ("Nearly every one of the Intervenors' complaints about the current educational system and their suggested reforms have been made the subject of proposed legislation in past legislative sessions, but none of these proposals has yet attracted majority support.")

³² Apparently, the State has purposefully not done so. Texas has not conducted a study of the cost of an adequate education since 2003. Moreover, the State's witnesses acknowledge that the State has made no effort to determine the cost of meeting the State's new and higher standards or the costs of HB5's changes to the graduation, assessment, or accountability requirements. FOF 603.

of public education litigation, no one knows what it costs to educate a child in Texas!³³

The ISDs avoid a figure for fear that it would cap their potential recovery in terms of legislative funding. Texas avoids a figure for fear that the number would serve as a starting point for future litigation. Contrary to this Court’s admonitions, the ISDs continue to believe money is the only issue. During the trial, many school superintendents and other ISD witnesses testified regarding numerous programs that they would like to implement or expand, all of which would require significant cost.³⁴ Yet at trial, the ISDs did not prove – or even attempt to prove – that full funding of these wish lists would remedy the deficiencies and failures highlighted by the trial court in its findings.^{35 36}

If the trial court held the ISDs to the same standard as the Efficiency Intervenors, the trial court would have required these parties to prove how much money would cure the public education system. Instead, the trial court

³³ FOF 556, 603; COL 30, 78.

³⁴ *See, e.g.*, FOF 23, 416, 417, 429, 451, 523, 525 - 28, 580, 769

³⁵ The Court knows this and has recognized that “more money does not guarantee better schools or more educated students.” *W. Orange-Cove II*, 176 S.W.3d at 788.

³⁶ 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. The trial court contends that spending per Weighted Average Daily Attendance (WADA) causes increased student outcomes, yet the trial 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.” *See* FOF 275.

jumped from the problem of poor performance to the supposed solution of more funding. Where the ISDs pointed to school finance formulas that do not take into account the cost of providing all students a meaningful opportunity to be educated, they were not required to prove what formulas would accomplish this goal.³⁷ Where the ISDs identified that the use of target revenue as an alternative to formula funding unreasonably freezes district funding in time, they did not prove a solution.³⁸ The trial court offers no justification for accepting these arguments while rejecting those of the Efficiency Intervenors.

Neither the parties nor the trial court should be required to prove how to fix a broken system.³⁹ The judiciary's role, though important, is limited to ensuring that the constitutional standards are met.⁴⁰ It is not to prescribe how the standards should be met.⁴¹ Much of the design of an adequate public education system cannot be judicially prescribed.⁴²

III. TEXAS' SYSTEM OF PUBLIC FREE SCHOOLS IS NOT PRODUCTIVE OF RESULTS, AND THE SCHOOL DISTRICT PLAINTIFFS AGREE.

³⁷ FOF 39.

³⁸ FOF 51.

³⁹ To be clear, the Foundation's argument is not that the ISD's proof of a broken system is deficient. Rather, the Foundation argues that Efficiency Intervenors' challenge should be equally valid and given the same consideration.

⁴⁰ *W. Orange-Cove II*, 176 S.W.3d at 753.

⁴¹ *Id.*

⁴² *Id.* at 779.

Texas education is broken, and the Legislature has abdicated its constitutional duty to fix it. After the 83rd Legislature reinstated \$3.5 billion in public education funding and reduced by two-thirds the number of mandated standardized tests through House Bill 2, Texans were shocked when the first significant public education act of the 84th Legislature was Senator Kel Seliger's Senate Bill 149 exempting tens of thousands of public high school seniors unable to pass the end-of-year exam required to graduate.^{43 44} After the triumphs of victory for public education that came from the members of the 83rd Legislature, one might think a greater issue would have been made by this demonstrated failure two years later. Yet, only two Senators and nine Representatives voiced concern over this failure through votes against the bill.^{45 46} This indicates the level of expectation that the Texas Legislature has for the performance of Texas public schools.

This Court recognizes that the public school system must be efficient.⁴⁷ Implicit in the concept of an efficient school system is the idea

⁴³ <http://www.texastribune.org/2015/02/19/graduation-committees/>

⁴⁴ FOF 94, fn. 28.

⁴⁵ TX HOUSE JOURNAL, 84th Legislature, Regular Session, (April 22, 2015) <https://docs.google.com/viewer?url=http://www.journals.house.state.tx.us/hjrnl/84r/pdf/84RDAY55FINAL.PDF#page=4>.

⁴⁶ TX SENATE JOURNAL, 84th Legislature, Regular Session, (March 17, 2015), <https://docs.google.com/viewer?url=http://www.journals.senate.state.tx.us/sjrnl/84r/pdf/84RSJ03-17-F.PDF#page=12>

⁴⁷ *W. Orange-Cove II*, 176 S.W.3d at 752.

that the output of the system should meet minimum standards given its inputs; it should provide a minimally “adequate” education.⁴⁸ This was directly addressed in *Edgewood I*, when a unanimous court held:

[e]fficient conveys the meaning of effective or productive of results and connotes the use of resources so as to produce results with little waste.⁴⁹

Article VII, Section 1 of the Texas Constitution and the previous *Edgewood* decisions mandate that efficiency be measured against both qualitative and financial standards.⁵⁰ This requires consideration of the system as a whole, not each of its components individually.⁵¹ Granted, it is difficult to quantify the cost of an adequate education – one that achieves a general diffusion of knowledge.⁵² But it is clear from the record that the Legislature has not provided it—even by the Legislature’s own standards. The State’s own witness, Former Commissioner Scott, acknowledged that the achievement gaps between economically disadvantaged students (and ELL students) and non-economically disadvantaged students (and non-ELL students) can be narrowed with the implementation of sound, effective educational programs.⁵³ The system has not done so.

⁴⁸ *Edgewood III*, 826 S.W.2d at 528 (Cornyn, J., concurring).

⁴⁹ *Id.* (citing *Edgewood I*, 777 S.W.2d at 395).

⁵⁰ *Edgewood IV*, 917 S.W.2d at 730.

⁵¹ *W. Orange-Cove II*, 176 S.W.3d at 790.

⁵² *W. Orange-Cove II*, 176 S.W.3d at 769.

⁵³ FOF 293.

A. How the Legislature Defines “Productive of Results.”

The Legislature has itself identified the goals for public education, i.e. the “results” that our public free schools should produce. The Legislature has tied the general diffusion of knowledge to the goal of preparing all Texas students to graduate from high school ready to enter college or the workforce.⁵⁴ The Legislature first articulated its intent in 1995 when it adopted Texas Education Code §28.001, stating “The essential knowledge and skills shall also prepare and enable all students to continue to learn in postsecondary educational, training, or employment settings.”⁵⁵ The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.⁵⁶ More specifically, the mission of Texas public schools is to produce college or career ready graduates.⁵⁷

B. The Trial Court’s Findings Support the Efficiency Intervenors’ Claim that Texas Public Schools do not meet the Legislature’s Definitions of “Productive of Results.”

⁵⁴ FOF 82.

⁵⁵ FOF 83.

⁵⁶ FOF 85 (quoting Tex. Educ. Code §4.001).

⁵⁷ FOF 87.

The Legislature has implemented testing standards to evaluate the performance of students and establish a benchmark standard for graduation.⁵⁸ While it has specifically noted that the satisfactory score requirement “does not require a student to demonstrate readiness to enroll in an institution of higher education,” the Legislature has deemed students meeting the Level II passing standard as being “on track” to graduate from high school.^{59 60 61} The trial court focused on whether students are actually meeting the standards identified as reliable indicators of college and career readiness.⁶²

The trial court’s findings unequivocally establish that Texas public education is not “productive of results” as defined by the Legislature, and it therefore erred in not ruling for the Efficiency Intervenors. For example,

- After the first two years of STAAR exams, hundreds of thousands of students had failed to meet even the lower, phase-in standard on at least one test.⁶³

⁵⁸ Under the new STAAR system, students must pass a rigorous set of five End-of-Course exams to graduate from high school. FOF 94.

⁵⁹ FOF 97.

⁶⁰ The Foundation asserts that overall performance on the standardized testing system established by the Legislature as a means of evaluating student’s readiness to enter college or the workforce is a *prima facie* indicator as to whether the Texas School System meets constitutional requirement of qualitative efficiency, i.e. “productive of results.”

⁶¹ In rebuttal to the argument that the Legislature has not tied test performance accountability standards to whether districts are achieving a general diffusion of knowledge, the trial court specifically cited this as indicating that the State’s accountability system does not measure a general diffusion of knowledge. FOF 117, 118.

⁶² FOF 110.

⁶³ FOF 102.

- Even after HB5’s reduction of EOC exams required for a student to pass, the dire situation remained, presented by hundreds of thousands of the state’s 2012-2013 ninth and tenth graders being off track to graduate for failure to pass still-required EOC exams.⁶⁴
- Under the current accountability system, a district can have what can only be described as incredibly poor performance results on the STAAR exam and still achieve “met standard” on the accountability system.⁶⁵
- The State is far from meeting its objectives relating to college and career readiness.⁶⁶
- An alarming percentage of Texas students graduate high school without the necessary knowledge and skills to perform well in college.⁶⁷
- At the initial administration of the STAAR EOC Tests for Typical 9th Grade Courses, 53% of ninth-graders (representing 185,757 students) were off track to graduate from high school.⁶⁸
- The summer 2012 retest passing rates (using the Level II phase-in standard) ranged from 23% for English I Writing to 48% for Biology.⁶⁹
- After three administrations, 35% of the state’s 2011-2012 ninth graders and 47% of the economically disadvantaged students from that class, still had not passed all of their ninth-grade level EOC exams.⁷⁰

64 FOF 109.

65 FOF 120.

66 FOF 126.

67 FOF 128.

68 FOF 131.

69 FOF 137.

70 FOF 139.

- In spring 2013, over one-third (35 percent) of ninth grade students scored below the passing standard in reading, over one-half (52 percent) in writing, 22 percent in Algebra I, and 15 percent in Biology.⁷¹
- Approximately 40 percent of the students failed the relatively low standard set for 2013.⁷²
- The Spring 2013 administration of EOC tests combined with the grades 3 – 8 tests indicate that over 1.2 million students failed at the phase-in I standard and 2.2 million students did not reach the recommended standard for full implementation of the program.⁷³
- Roughly 139,000 students in the Class of 2015 Cohort still had not passed all exams taken after the Summer 2013 administration, despite five testing opportunities.⁷⁴
- Even after multiple testing opportunities and after application of the transition rule, nearly 183,000 in both the Class of 2015 and Class of 2016 (which have now had, respectively, six and three testing opportunities) combined still have not passed all exams taken at the Level II phase-in standard – after more than 50,000 students in both classes combined were exempt, by virtue of the transition rule, from retaking a test they previously failed.⁷⁵
- Even if retesters are able to meet passing standards, they are largely unable to meet the higher standards associated with college readiness.⁷⁶
- Large numbers of students still have not passed all the exams they have taken after numerous attempts. Even more students are nowhere near reaching college-readiness standards on those exams.⁷⁷

⁷¹ FOF 141.

⁷² FOF 143.

⁷³ FOF 144.

⁷⁴ FOF 149.

⁷⁵ FOF 153.

⁷⁶ FOF 156.b.

⁷⁷ FOF 157.

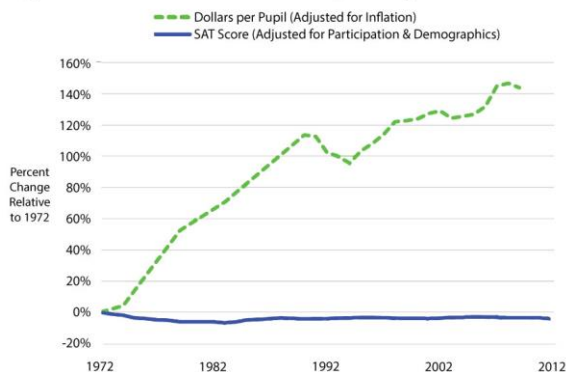
- Less than 27% of the graduating class of 2010 that took either the ACT or SAT met the state’s benchmarks for readiness on the composite ACT or combined reading and mathematics for SAT.⁷⁸ This is while per pupil education spending (adjusted for inflation) continues to rise dramatically.⁷⁹
- In the Spring 2013 administration, only 4% of economically disadvantaged students passed English I Reading and only 1% passed English Writing at Level III.⁸⁰
- For students in the Class of 2012 cohort, over a four-year period, nearly one out of twelve economically disadvantaged students (7.8%) dropped out of school and nearly one out of six (15%) failed to graduate within four years.⁸¹

C. The Record at Trial Further Supports the Efficiency Intervenors’ Claim that Texas Public Schools are not Productive of Results with Little Waste.

The deficient testing results highlighted by the trial court in its factual findings were not the only manner with which the Texas School System was proven to be structurally inefficient at trial. The key to an efficient system is

⁷⁸ FOF 160.

Figure 1: Texas Education Trends: Spending & Achievement



⁷⁹ FOF 315.

⁸¹ FOF 329.

the effective allocation of resources.⁸² Testimony at trial identified other categories of waste inherent to the Texas School System. For example,

- **Legislative mandates interfere with the efficient operation of public schools.** Money is not being spent wisely in Texas schools.⁸³ State mandates are rarely evaluated on a cost-benefit basis; instead, mandates are based upon political appeasement, forcing schools to buy the wrong things.⁸⁴ For example, whereas 72% of private school employees are teachers, only about half of Texas public school employees are teachers.⁸⁵ ⁸⁶ These mandates drive up costs and prohibit the efficient allocation of resources to the detriment of students.⁸⁷ As a result, state mandates divert dollars from district goals, resulting in inefficiencies.⁸⁸
- **State labor laws protect poor performance.** Texas labor laws benefit the people who work in the building and do not provide the

⁸² As leading school finance expert Dr. Erik Hanushek testified, if resources were used better, we could expect higher achievement for our schools and our students.” 37RR23. “In simplest terms, if resources are not used to achieve the maximum possible student outcomes, it is not possible to describe the student outcomes that will result from added funding.” Ex. 1001.

⁸³ 37RR50-54.

⁸⁴ 62RR105-106; 36RR85 – 86; 37RR43.

⁸⁵ Ex. 8069; 39RR46-47.

⁸⁶ See *Brief of the Goldwater Institute as Amicus Curiae in Support of Efficiency Intervenors*, p. 7 – 10.

⁸⁷ Ex. 9031.

⁸⁸ 19RR223 – 225.

optimal environment for children.⁸⁹ This adversely affects district and system efficiency.⁹⁰

CONCLUSION

This is the Court's opportunity to provide for the future of Texas. Whereas the Parties' arguments and trial court record reflect cross-finger pointing and assessments of blame as to the *how* and the *why*, the *what* is not in dispute: Texas public schools are not meeting their constitutional mandates to provide for the general diffusion of knowledge. The problem is globally systemic. And growing. According to Steve Murdock, the former state demographer and former director of the U.S. Census Bureau, total enrollment in Texas public schools is projected to grow from 4.8 million in 2010 to nearly 9.3 million in 2050.⁹¹

If the Legislature is not forced to address the current inefficient system of public free schools, Texas children will be even further behind, slipping towards failure when the eighth public education lawsuit comes before this Court. To extend Senator Cruz's metaphor of an umpire for the role of the judiciary, the Legislature has "struck out" in globally meeting its Tex. Const. art. VII, §1 obligations. It is this Court's judicial role to call the

⁸⁹ 26RR252; 36RR79 – 80; 24RR218-220.

⁹⁰ 8RR146-166.

⁹¹ FOF 16 (citing Ex. 3228 at p. 72).

current Texas School System “out.” The Foundation respectfully urges the Court to reverse and render for the Efficiency Intervenors on the merits and declare that the System is unconstitutionally inefficient.

Respectfully Submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3) of the Texas Rules of Appellate Procedure, I certify that the body of the attached *Brief of the Texas Public Policy Foundation as Amicus Curiae in Support of Efficiency Intervenors* appears in proportionately spaced type of 14 points, is double-spaced using a Roman font, and contains 5,038 words, excluding the caption, identity of parties and counsel, table of contents, table of citations, signature, proof of service, certification, and certificate of compliance.



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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, the *Brief of the Texas Public Policy Foundation as Amicus Curiae in Support of Efficiency Intervenors* was served via electronic service on the following:

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