

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 THE GOLDWATER INSTITUTE 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 Goldwater Institute, an Arizona-based national nonprofit policy organization that, among other things, supports the expansion of educational options throughout the United States. In particular, the Goldwater Institute designed the concept of education savings accounts, which allow eligible students to opt out of public schools and instead receive savings accounts funded by the State in the amount of their pro rata share of State education funding, which can be used for an array of educational expenses such as private school tuition, distance learning, software, tutors, public school classes or activities, and community college classes. Any amounts remaining after graduation may be used for college. Education savings accounts allow families to customize education to the needs, interests, and abilities of their children. See *Niehaus v. Huppenthal*, 310 P.3d 983, 987-88 (Ariz. App. 2013). Education savings accounts have been adopted for some students in Arizona, Ariz. Rev. Stat. Ann. § 15-2401, et seq. (2015); Fla. Stat. Ann. § 1002.385 (2015); Tennessee, S.B. 27, 109th G.A., 2015 Sess. (Tenn. 2015); and Mississippi, S.B. 2695, 2015 Reg. Sess. (Miss. 2015); and for all public school students in Nevada, S.B. 302, 2015 Reg. Sess. (Nev. 2015).

The Goldwater Institute believes that choice and competition benefit all students, including those who remain in traditional public schools. To the point of this litigation, choice and competition are essential elements in efficiently delivering high-quality education. Because this Court's decisions are widely respected and

considered by courts in other states, we hope to contribute to the Court's understanding of the important issues before it in this case.

This brief is filed in support of the Efficiency Intervenors. No fee was paid to the Goldwater Institute for preparing this brief nor will the Institute be paying any other entity or attorney for doing so. *Amicus* adopts by reference the Statement of the Case, Statement of Facts, and Issues Presented by the Efficiency Intervenors, and is grateful for the opportunity to submit this brief to the Court.

Summary of the Argument

Despite a plethora of evidence presented by the Efficiency Intervenors (see Br. at 20-35), the trial court failed to seriously address what this Court has referred to as “qualitative” efficiency, which is the broad constitutional command to establish and maintain a school system that is “effective or productive of results” in which resources are used “so as to produce results with little waste.” *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 752-53 (Tex. 2005) (citing *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395 (Tex. 1989)).

Were it to do so, it would find that a statewide system of schools organized into over 1,000 school districts, with massive administrative costs and largely bereft of meaningful and widespread choice and competition, is qualitatively inefficient.

Argument

The Framers of the Texas Constitution were prescient when they crafted the guarantee of Tex. Const. Art. VII, § 1, which 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.

In embracing the term “efficient” as the manner in which the school system must achieve its educational objectives, it is as if the Framers were anticipating the modern phenomenon in which entities charged with that responsibility would come before the courts, hat in hand, asking for ever-increasing amounts of money, yet never producing an efficient or effective educational system.

The term efficient is both a mandate and a limitation: it is a mandate that education must be provided in an efficient manner while at the same time a limitation on the judicial remedies that may be deployed in redressing constitutional violations, foreclosing remedies that would make the system less efficient—that is, making the system more costly yet no less likely to achieve its educational goals.

That is the road that many other states have gone down by focusing exclusively on what this Court has termed “financial” or “quantitative” efficiency. *See Neeley*, 176 S.W.2d at 753. The results are as disappointing as they are predictable: judicially mandated increases in public expenditures unaccompanied by either necessary structural reforms or improved educational outcomes. Assessing academic research following decades of school finance cases focused first on funding “equity” and subsequently on “adequacy,” the Hoover Institution’s Eric A. Hanushek states that the “simplest summary is that *no* currently available evidence shows that past judicial

actions about school finance—either related to equity or to adequacy—have had a beneficial effect on student performance.”¹

Why haven’t court-ordered spending increases boosted student performance? “The reason is now unfortunately quite obvious,” Hanushek says. “Measures of school resources do not provide guidance either about the current quality of schools or about the potential for improving matters.”² Increasing expenditures without fixing underlying causes of failure does little or nothing to solve the problem. Education surely is one of the few services, if not the only one, for which violations of the product guarantee (in this case, the education guarantee of the Texas Constitution) are remedied by giving the failing producers more money.

Alfred Lindseth, who has litigated a substantial number of school finance cases, writes that “[a]lthough many state constitutions use the word ‘efficient’ to describe the education system required, the critical question of whether waste, mismanagement, and inefficiency at the local district level are the reason for the lack of critical resources or of acceptable outcomes is seldom addressed by court decisions.”³ The State Cross-Appellees contend (Br. at 7-18) that the qualitative efficiency claim is an improper attempt to set education policy in court, is based on

¹ Eric A. Hanushek, ed., *Courting Failure: How School Finance Lawsuits Exploit Judges’ Good Intentions and Harm Our Children* (2006), pp. xxiii-xxiv.

² *Id.*, p. xxiv.

³ Alfred A. Lindseth, “The Legal Backdrop to Adequacy,” in Hanushek, ed., p. 64.

standardless conjecture, and is non-redressable. Nonsense. This Court has never held or even intimated that some parts of Art. VII, § 1 are justiciable while others are not. To the contrary, 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.” *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 729 (Tex. 1995).

The Efficiency Intervenors’ claims are constitutional torts. Courts decide matters of injury, causation, and remedy in tort cases all the time. As Lindseth argues, “Courts are empowered to make determinations about the effects of waste and mismanagement at the local level and about what part of a problem calls for a nonfinancial remedy. Such a finding would notify the legislature that funding is only part of the solution, and perhaps not even the principal solution, and allow it to concentrate on cutting out waste and inefficiency, instead of solely on appropriating more money.”⁴ The problem in this case is not that the constitutional injury is not susceptible to judicial inquiry but that the trial court failed to make the inquiry or to credit the evidence presented by the Efficiency Intervenors.

Had such a serious inquiry been made, the court would have found a number of systemic flaws that prevent Texas from effectively diffusing knowledge through an efficient K-12 education system. The first is one that this Court itself has identified.

⁴ Lindseth, p. 65.

With 1,262 school districts, Texas has more districts than any other state in the nation.⁵ Justice Cornyn, speaking for the Court in *Edgewood II*, 917 S.W.2d at 726, observed:

Yet sadly, the existence of more than 1000 independent school districts in Texas, each with duplicative administrative bureaucracies, combined with widely varying tax bases and an excessive reliance on local property taxes, has resulted in a state of affairs that can only charitably be called a “system.” . . . The rationality behind such a complex and unwieldy system is not obvious.

Although the funding aspects of this observation repeatedly have been addressed by this Court and the Legislature, the “duplicative administrative bureaucracies” and “complex and unwieldy system” have not. They speak directly to an inefficient education delivery system that is responsible in large measure for the educational inadequacy complained of in this lawsuit.

Local school districts are inherently susceptible to control and manipulation by special-interest groups that derive their livelihoods or otherwise profit from the system. School board elections are notoriously low-turnout affairs, enabling such groups to divert resources to their own ends.⁶

The multiplicity and duplicative nature of school districts leads to soaring costs of administrators and other non-teaching personnel, which makes the delivery of

⁵ National Center for Education Statistics, “Selected Statistics from the Common Core of Data: School Year 2011-2012 (Oct. 2013), Table 2 (http://nces.ed.gov/pubs2013/2013441/tables/table_02.asp).

⁶ See, e.g., John E. Chubb, “The System,” in Terry M. Moe, ed., *A Primer on America’s Schools* (2001), p. 25.

education more costly and less efficient. David Berliner and Bruce Biddle, staunch defenders of public schools, explain that “educational bureaucracies become endlessly expanding financial sinkholes that eat up resources and create only mischief and red tape.”⁷ Indeed, the explosive nationwide growth of non-teaching personnel in recent years is a principal cause of soaring educational expenditures, even as much of the resources never reaches the classroom.

Between 1970 and 2012, the number of pupils in public schools increased by eight percent. The number of teachers during that same period increased by 60 percent and the number of non-teaching personnel grew by 138 percent—more than 17 times the growth of the number of students.⁸ The growth in administrators is not attributable to the federal No Child Left Behind Act (NCLB)—in both the nine years preceding NCLB and the seven years following, overall public school staffing grew at more than double the rate of the public school student population.⁹ The net result is that today “non-teachers comprise a robust half of the public-school workforce (totaling roughly three million individuals), and their salaries and benefits absorb one-quarter of current education expenditures.”¹⁰

⁷ Quoted in Benjamin Scafidi, *The School Staffing Surge: Decades of Employment Growth in America’s Public Schools* (Oct. 2012), pp. 4-5. Most of the statistics compiled in this report, as well as in Part II cited *infra*, are derived from the U.S. Department of Education. (<http://www.edchoice.org/wp-content/uploads/2015/07/11-2012-Staffing-Surge-WEB.pdf>).

⁸ *Id.*, p. 4.

⁹ *Id.*, p. 5.

¹⁰ Matthew Richmond, *The Hidden Half: School Employees Who Don’t Teach* (Aug. 2014), p. 6.

By comparison, with the 25 percent of American education resources devoted to non-teaching personnel the other OECD nations, which are our prime economic competitors, expend on average less than 15 percent of their education budgets on non-teaching personnel.¹¹ Indeed, the U.S. devotes a higher percentage of its educational spending to non-teaching personnel than all but one (Denmark) of the 34 OECD countries.¹² That spending emphasis has not resulted in higher academic achievement, as U.S. students scored above only five of the 33 other OECD nations in mathematics in 2009.¹³ Nor have national graduation rates or student achievement improved during the past four decades of explosive growth in teaching and non-teaching personnel.¹⁴

Given that non-teaching personnel costs have not contributed to improved student performance, they are by their nature inefficient on a massive scale, diverting resources from more-productive educational uses. In the 17 years between 1992-2009, if the ratio of non-teaching personnel to students had remained the same, and if the number of teachers had increased “only” 50 percent more than the number of students, it would yield a recurring national savings of at least \$37.2 billion each

<http://edexcellence.net/publications/the-hidden-half>).

¹¹ Scafidi, p. 6.

¹² Richmond, p. 13.

¹³ Scafidi, p. 6.

¹⁴ *Id.*, pp. 6-8.

year.¹⁵ Among the possible uses of those saved funds would be to raise every public school teacher's salary by \$11,700 per year, to more than double taxpayer funding for early childhood education, to give families of each child in poverty more than \$2,600 in cash or school vouchers, to provide tax relief, or for a combination of those or other purposes.¹⁶

Unfortunately, Texas has the dubious distinction of having increased public school staffing in greater numbers than any other state between 1992-2009, particularly in non-teaching personnel. During that period, the number of Texas K-12 students increased by 37.2 percent, while the number of teachers grew by 49.6 percent—and the number of non-teaching personnel soared by 171.8 percent. By contrast, the second-highest growth of non-teaching personnel among the states was Virginia, which increased its numbers by 100 percent.¹⁷ To put those numbers into context, the growth rate for non-teaching personnel in Texas was 4.6 times higher than the increase in the number of students during the same period.¹⁸

Hence, it is clear that K-12 expenditures in Texas are being used in disproportionate measure to fund growth in bureaucracy and other non-teaching

¹⁵ *Id.*, pp. 17-18. The sum is at least that much because it is based on the assumption that the average cost and benefits for each non-teaching staffer is \$40,000. Given that administrators are at the highest end of the public school pay scale, the actual sum may well be a multiple of that number.

¹⁶ *Id.*, p. 2.

¹⁷ *Id.*, p. 12.

¹⁸ *Id.*, p. 15.

purposes. Absent structural change, it is likely that the remedies sought by the plaintiffs in the case would result in more of the same, producing greater inefficiency rather than less.

The numbers specific to Texas are compelling. The excess rate of growth in non-teaching personnel compared to the increase of students produced an extra 159,228 administrators and other non-teaching personnel as of 2009.¹⁹ Texas again “leads” the nation in aggregate non-teaching personnel growth over student population growth; Virginia again is a distant second with 51,788 extra non-teaching personnel beyond student growth.²⁰ The good news is that reversing that trend in turn would yield massive savings. Had Texas held its rate of non-teaching personnel growth to the rate of student population growth between 1992-2009, it would have saved nearly \$6.4 billion²¹—fully one-fourth of the entire savings if the entire nation had done the same. When translated into tangible alternative uses, those savings alone would make the plaintiffs’ funding claims evaporate: they amount to \$33,506 per classroom of 25 students²² or a salary increase of \$19,424 for every teacher.²³

¹⁹ Benjamin Scafidi, *The School Staffing Surge: Decades of Employment Growth in America’s Public Schools, Part II* (Feb. 2013), p. 5 (<http://www.edchoice.org/research/the-school-staffing-surge/>).

²⁰ *Id.*

²¹ *Id.*, p. 6.

²² *Id.*, p. 7.

²³ *Id.*, p. 8.

Returning to an earlier point, the dramatic growth in non-teaching personnel in Texas may be attributed in large measure to its plethora of school districts, as smaller school districts in Texas have a higher ratio of non-teaching personnel to students than do large districts.²⁴ The existence of more than 1,000 school districts with duplicative administrative bureaucracies, which this Court remarked upon in *Edgewood, supra*, inevitably leads to waste and inefficiency.

Accordingly, to be effective, any court order vindicating the rights guaranteed under Art. VII, § 1 must include a qualitative component, whether or not it includes a quantitative component. A group of scholars comprised as the Hoover Institution's Koret Task Force on K-12 Education, after examining the dismal record of decades of school finance litigation, recommended three specific features of a qualitative school reform remedy. First, strong accountability systems, which "involves a combination of clear and well-defined outcome standards for schools, of the accurate assessment and testing of student achievement against those standards, and of clear data reporting on the performance of each school."²⁵ Second, "a combination of sanctions and rewards to provide direct incentives to meet the standards . . . focused directly on performance by teachers and schools."²⁶ Third, systems of resource transparency "so that everybody knows what allocation decisions are being made," and programmatic

²⁴ Richmond, p. 27.

²⁵ Koret Task Force on K-12 Education, "Funding for Performance," in Hanushek, ed., p. 348.

²⁶ *Id.*, p. 349.

transparency, “so that judgments can be made about the instructional program that is put in place.”²⁷

Again, the particulars of such remedies need not and should not be directed by the courts. But a trial court is fully competent to identify structural defects in the State’s K-12 school system that arbitrarily impede the diffusion of knowledge in an efficient manner, and to direct the Legislature to fulfill its constitutional duty by remedying those defects. *Vergara v. State of Calif.*, Case No. BC484642 (Los Angeles Cty. Super. Ct. June 10, 2014) (holding statutes unconstitutional where they result in grossly ineffective teachers obtaining and retaining permanent employment and being disproportionately assigned to schools serving mainly minority and low-income students). If there is a financial component to those remedies, that would necessarily be a part of the overall legislative response; but it may well be that needed structural reforms will yield substantial cost savings.

In addition to those structural reforms, we along with the Efficiency Intervenors add one other that is essential to fulfilling Texas’ constitutional mandate: choice and competition. It is peculiar that the state that is most associated with robust freedom of enterprise has a school system that is characterized by massive bureaucratic growth and a paucity of choice and competition, both of which contribute to its constitutional inefficiency.

The National Center for Policy Analysis found that as of 2013, the “state of

²⁷ *Id.*, pp. 351-52.

Texas has only limited public school choice, which includes magnet schools and charter schools. State law limits the growth in charter school authorization to 10 per year. All private school choice legislation introduced to the Texas legislature has failed to become law. With no private school choice programs and limited public school choice, Texas offers a very limited selection of school options for students. Unrestricted charter law and private school choice would increase competition and therefore improve school efficiency, teacher quality and student achievement.”²⁸

Those conclusions are backed by clear and uncontroverted scholarship. A recent report compiling academic research on school choice programs found significant benefits for students in both school choice programs and in public schools subject to competition through those programs. As of 2013, 12 empirical studies had examined academic results from school choice programs, using the academic “gold standard” in comparing outcomes between students who were selected for the programs through random admissions with those who applied and were not selected. Of those, 11 found positive outcomes and one found no impact—none found negative effects.²⁹ Likewise, 23 studies have examined the competitive effect of school choice on public schools, with 22 finding improved student performance in public schools,

²⁸ Lloyd Bentsen IV and Gabriel Odom, *A Comparison of School Choice in Texas School Districts* (Dec. 2013), p. 3. (<http://www.ncpa.org/pdfs/bg170.pdf>).

²⁹ Greg Forster, *A Win-Win Solution: The Empirical Evidence on School Choice* (Apr. 2013), p. 7-8 (<http://www.edchoice.org/wp-content/uploads/2015/07/2013-4-A-Win-Win-Solution-WEB.pdf>).

one finding no effect—and none finding a negative effect.³⁰ To the point of efficient delivery of educational services, six empirical studies have examined the fiscal impact of school choice, with all six concluding that school choice saves taxpayers money and none finding otherwise.³¹ To the point of Art. VII, § 1 that the diffusion of knowledge is “essential to the preservation of liberties and rights of the people,” seven empirical studies have examined the impact of school choice on inculcation of civic values and knowledge, with five finding that school choice has a positive effect and two finding no effect—and none finding a negative effect.³²

The evidence is overwhelming that choice and competition contribute greatly to the diffusion of knowledge in an efficient manner by providing options to students and presenting healthy competition to public schools. To the argument that some rural districts are too small to provide private or charter school options, technology can make such options available through virtual charter schools and distance learning.

One state, Florida, has combined widespread school choice with public school accountability and performance incentives. The results have been extremely impressive. In 2012, nearly 800,000 Florida students attended schools selected by their parents rather than dictated by district zoning, including charter schools, private schools, and online learning. Florida rewards teachers for their students’ academic

³⁰ *Id.*, p. 11-13.

³¹ *Id.*, p. 15-17.

³² *Id.*, p. 23.

performance and provides monetary incentives for teachers to accept positions in low-performing school districts. Following the enactment of such reforms, student performance increased across the board, with the most noteworthy gains experienced by low-income Black and Hispanic children. By 2009, Black students in Florida were scoring above or equal to the average test scores for *all students* in eight states, while Hispanic fourth graders were scoring equal to or above statewide averages for all students in 31 states.³³

Why does Texas have so little school choice? Here, the structural defects in Texas' K-12 school system come full circle. The system has created its own defense mechanism to insulate itself against structural reform. Even as school districts come to this Court seeking more money, they use precious taxpayer dollars to thwart school choice and competition. In many states, the principal opposition to school choice comes from teacher unions; but in Texas, it comes from the school districts. The Texas Association of School Boards (TASB), which represents all Texas school districts and has a multi-million dollar budget, lobbies against and organizes opposition to school choice.³⁴ Public school administrators have their own advocacy organization as well, the Texas Association of School Administrators, which also

³³ The Florida reforms and results are described in Jeb Bush and Clint Bolick, *Immigration Wars: Forging an American Solution* (2013), pp. 185-88.

³⁴ http://ballotpedia.org/Texas_Association_of_School_Boards.

opposes school choice.³⁵ In 2013, TASB created a fill-in-the-blank resolution for school districts to adopt to oppose school choice programs.³⁶ School districts also organized anti-school choice rallies.³⁷

So long as significant taxpayer resources are mobilized against structural reform in the legislative arena, it is highly doubtful that the defects of the current system will be cured through ordinary political processes. To the contrary, it is far more likely that additional taxpayer resources will be pumped into the system without meaningful reform, thus rendering the system even more qualitatively inefficient.

That is why it is so important for this Court to enforce the guarantees of Art. VII, § 1. The intended beneficiaries of that guarantee are not the school system and the people employed by it. The intended beneficiaries are the people of the State of Texas, especially children of school age.

The core ruling below that the current system does not fulfill the constitutional mandate is sound; the findings of why and what to do about it are not. As this Court warned a decade ago, “Pouring more money into the system may forestall those

³⁵ <http://tasanet.org>

³⁶ Lou Ann Anderson, “TASB Encourages School Boards’ Rejection of School Choice Reforms,” *Watchdogwire* (Feb. 16, 2013) (<http://watchdogwire.com/texas/2013/02/16/education-industry-mounts-new-school-choice-resistance/>). An example of the resolution adopted by the Georgetown Independent School District can be found at <http://www.georgetownisd.org/cms/lib/TX01001838/Centricity/Domain/4/Funding%20Resolution.pdf>.

³⁷ Lou Ann Anderson, “Texas School Districts Use Taxpayer Resources in Anti-Education Reform Advocacy,” *Watchdogwire* (Feb. 20, 2013) (<http://watchdogwire.com/texas/2013/02/20/texas-school-districts-use-taxpayer-resources-in-anti-education-reform-advocacy/>).

challenges, but only for a time. They will repeat until the system is overhauled.” *Neeley*, 176 S.W.3d at 754. Justice Brister’s words in dissent in that case bring us to where we are today: “there is no end in sight; if the past is any indication, the new funding will not last long, and public education will not change much. . . . Someday, the Texas school system must become efficient by 21st century standards. As that is what the Texas Constitution requires, we should start that process today.” *Id.* at 801 & 817-18 (Brister, J., dissenting).

Request for Relief

We respectfully urge the Court to remand the case to the trial court for a full and rigorous examination of the qualitative inefficiency of the Texas K-12 school system.

Dated this 17th day of August, 2015.

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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 Goldwater Institute 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 3,984 words, excluding the caption, identity of parties and counsel, table of contents, table of citations, signature, proof of service, certification, and certificate of compliance.

/s/ Clint Bolick
Clint Bolick

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, the foregoing Motion was served via electronic service on the following:

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