



The Justification for School Finance Litigation

August 26, 2011

Actions taken during the regular and special sessions of the 82nd Legislature put public education in an untenable financial position. And, there are clear indicators that this is not a short-term problem, necessary only to deal with a temporary budget shortfall, but what members of the leadership have termed “the new normal.”

We believe these legislative actions regarding the funding of Texas public schools are just cause for those committed to an efficient and adequate funding system for children in Texas schools, fair treatment for Texas taxpayers, and a return to local control of public schools to take necessary action to stop the erosion of these principles.

You are invited to join together with other Texas public schools, business owners, parents and other taxpayers for the purpose of speaking with one voice in the litigation of public school finance matters essential to the fair treatment of Texas taxpayers and public school children.

The following are particularly concerning, and represent a call to action:

- The Legislature’s failure to fund enrollment growth for the first time since at least 1949, even to the extent of opposing using *windfall* Rainy Day Funds (any money that comes in over the comptroller’s revenue estimate) to at least partially fund enrollment growth;
- The Legislature’s insistence on keeping the Regular Program Adjustment Factor (RPAF) in the calculation of Tier 1 Regular Program allotment, showing an intent to continue cutting every district’s regular program allotment well after next biennium;
- The Legislature’s attempt—which we helped block—to allow permanent reductions in public education funding in the appropriations bill through proration without the currently-required payback in the following school year;
- The Legislature’s opposition to a schedule of reducing Target Revenue and using the savings to increase the Basic Allotment.

Additionally,

- The Legislature’s continued refusal to address the \$10 billion structural deficit that will continue to plague us each biennium.
- The Legislature’s choice to avoid closing unjustified tax loopholes to fund public education when the alternative is a \$5.1 billion reduction in current funding levels (\$4 billion in FSP plus \$1.1 billion in grants).

These are all symptomatic of an overall new problem of tremendous significance, the Legislature’s change in philosophy—going from a commitment to maintaining current service levels of public education as a budget priority to using public education as a budget-balancing tool.

During the legislative session, these new issues overshadowed the Legislature's habitual complicity in maintaining a system that requires many districts to tax at the absolute highest levels in order to spend at levels that are below the state average. Although not discussed during the legislative sessions, the existing problems with the finance system were merely exacerbated. They include:

- The Legislature's failure to increase the Basic Allotment to a legitimate level, causing the percent of districts actually funded through the formula system to range from 0% (2007-08 and 2008-09) to less than 25% (2009-10 and 2010-11; estimated for 2011-12);
- The Legislature's continued refusal to update weights and formulas that the Legislature's own studies have determined to be seriously inadequate or based on hopelessly outdated data;
- The Legislature's failure to fund new applications for the Instructional Facilities Allotment next biennium ;
- The Legislature's failure to increase the guaranteed level for the Existing Debt Allotment for over a decade, even though building costs have more than doubled in many places;
- The Legislature's failure to eliminate the biennium lag of state equalization funding for facilities;
- The Legislature's failure to establish equalized funding above 29¢ of I&S tax rate even though the low equalization level has forced a significant number of districts above that rate;
- The Legislature's continued insistence upon maintaining arbitrary and inefficient hold-harmlesses like the Target Revenue funding system rather than raising all districts to appropriate levels of funding.

For these and other reasons, we believe litigation is the only way to ensure taxpayer equity and a quality education for Texas children. We must litigate for a school finance system that makes sense and is fair to all children, taxpayers, and districts.

Please review our entire litigation packet as your district makes its decision to get involved. We believe we have made the case for it. Please call me at 512-478-7313 if you have questions.

Thank you for all you do for Texas children and the future of our state.



Wayne Pierce, EdD
Executive Director

MEMORANDUM

To: Dr. Wayne Pierce
From: Buck Wood, Partner
Ray, Wood & Bonilla
Date: August 26, 2011
Subject: School Finance Litigation

In 2006 the legislature passed a school finance plan that was not a permanent system but a complex number of patches that tried to do the impossible; keep wealthy districts funded at their current level while spending the only real money available, not on schools, but in politically popular tax reductions.

The legislation could only be a temporary patch because holding so many districts harmless and not putting in the revenue to raise the level of funding for the lower wealth districts was going to drive an unreasonable distribution of state funding if the plan stayed in place which it did.

What has resulted can hardly be called a system. Built around a hold harmless scheme called "target revenue," the present "system" is little more than a hodgepodge of devices intended to satisfy some wants of certain legislators with no conception for a system that would address the real needs and priorities of our public schools.

The legislature paid no attention to whether these plans were constitutional or not. They have been led to believe by some representing the interests of districts that

benefit from the current distribution scheme, that equity is no longer an issue that can be litigated. This belief is not grounded in any legal or logical grounds. In order for the Court to reach such a conclusion, it would have to overrule *Edgewood I* and *II* and parts of *IV*. Regardless of what the state may argue, the data are certainly on our side, and the futures of all Texas children and taxpayers are at stake. We believe our case is strong, and it is outlined in the following four points.

THE LEGAL CASE

The lawsuit will attack the legislature's actions on four fronts:

1. Equity, both for students and taxpayers.
2. Arbitrary fund distribution scheme.
3. Adequacy.
4. Tax operates as a state property tax.

1. **Equity for Students and Taxpayers.**

In *Edgewood I* and *II*, the rules for determining the constitutionality of the finance system were established. *Edgewood I* established that *districts (students) should have access to substantially equal revenues at similar tax rates.*

Edgewood II reaffirmed *Edgewood I* but extended the equality requirement to taxpayers. It held that property that was being taxed very low by wealthy school districts created inefficiency in the system. Because of the lack of taxes from those wealthy districts, the system was being deprived of the revenues from these undertaxed properties. Thus taxpayer equity was required.

Until *Edgewood IV*, the inequities were calculated in dollars per WADA. In that case the low wealth districts contended that there was a \$600 gap among weighted students and that was too great. In its decision, the Court used a different calculation. It converted the dollar gap to a tax rate gap by comparing the 15% of the wealthiest districts to the 15% of the poorest districts. This gap was calculated at 9 cents. The

Court concluded that a 9 cent gap was not so great to cause the system to be unconstitutional.

The latest data developed by the Equity Center show dollar gaps and tax rate gaps that would have shocked the Court in *Edgewood IV*. Gaps of \$1,500 per WADA (not including the huge gaps in facilities funding) are common, and, using the Court's top and bottom 15% of the districts, analysis reveals a gap in tax rates of approximately 50 cents. Such a huge disparity should cause the Court to declare the system unconstitutional.

2. Arbitrary Fund Distribution.

It is apparent to anyone reviewing the distribution of state funds to school districts that there is no rhyme or reason why comparable districts are receiving very different amounts of state funding.

We know that this first difference is due in large part to the so-called "target revenue" concept embedded in the 2006 funding scheme passed by the legislature. Whatever the rationale for using target revenue in 2006, it has resulted in funds being distributed in an arbitrary fashion. In short, there is no rational basis for the distribution of funds under current law.

Under our Constitution, if a legislative scheme has no rational basis, it is unconstitutional. This is a claim that has not been addressed by our Supreme Court because no funding scheme has ever been so irrational. The data are developed and the

results are undisputed. This claim has great potential in that the State is going to be forced to conjure up a reason for the scheme and that is going to be difficult if not impossible.

3. **Adequacy.**

In the *West Orange Cove* decision, the Supreme Court adopted the adequacy definition contained in the Education Code. Simply put, this definition requires that school districts be able to “provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in ... curriculum requirements ... such that upon graduation, students are prepared to “continue to learn in postsecondary educational, training, or employment settings.” TEX. EDUC. CODE § 28.001 (emphasis added) ...

The Court did add the following caveat:

“The public education system need not operate perfectly; it is adequate if districts are *reasonably* able to provide their students the access and opportunity the district court described.”

While a pure adequacy suit is difficult to prove, the Court in *West Orange Cove* conceded this about the system in place at that time: “the public education system has reached the point where continued improvement will not be possible absent significant change, whether that change take the form of increased funding, improved efficiencies, or better methods of education.”

Things are worse now and this claim should be made.

4. **Tax Constitutes a State Property Tax.**

In *West Orange Cove*, the Supreme Court held that because some school districts which were at or near the tax cap of \$1.50, were left with no meaningful discretion in meeting state standards, the tax had become an unconstitutional state property tax. In short, the Court said that the \$1.50 tax cap had become both a floor and ceiling for some school districts when raising revenues to meet their obligation under state law.

Presently, there are over 200 school districts in Texas which are at the \$1.17 tax cap. Almost all of these districts are low wealth districts. Using the same type of evidence that was used in the *West Orange Cove case*, we believe that a good case can be made that for many districts, the tax cap has created the identical situation that existed in that case. An important holding in *West Orange Cove* was that a single district may maintain a claim; no large group of districts was required. This allows plaintiffs to focus on specific districts where the evidence is strong.

Conclusion

The legal arguments presented here should leave no room for doubt that a challenge to the legislature's method for funding public schools in Texas is necessary and timely.

Litigation Talking Points

Why is a lawsuit necessary?

A lawsuit is necessary because:

- The Texas Legislature has failed to fund public schools in an efficient, equitable and adequate manner, as required by the Texas Constitution.
- The Texas Legislature has failed to implement a school funding system that lives up to the promise of the 2006 special session, called in response to a Texas Supreme Court ruling that the system in place at that time created, in effect, an unconstitutional state property tax. Since 2006, the funding system has deteriorated to the point that, with only sporadic exception, districts are funded by arbitrary and inequitable hold-harmless and other outside-the-system schemes.
- The Texas Legislature has refused to adopt a rational, efficient system that treats all school children and taxpayers fairly.

Why must equity be a key component of school finance litigation?

- **Student Inequity:** Per weighted student¹ revenues for the basic education program, including both state and local, across Texas will range from less than \$5,000 per student to more than \$12,000 per student for the 2011-12 school year.
 - Even within the same city, revenues range greatly—even at the same property tax rate. For example, at \$1.04 M&O Tax Rate, San Antonio ISD is funded at \$5,036 per student for 2011-12, while Alamo Heights is funded at \$6,243.
 - It's important to note that the children in these districts are held to the same accountability and graduation standards—and will be expected to compete with one another in colleges, universities, and in the workforce.
- **Taxpayer Inequity:** M&O tax rates range across the state from \$.70 to \$1.17 per \$100 of property valuation. Taxpayers in the districts currently at the maximum M&O rate of \$1.17 are able to generate only \$49.80 per student per penny of adopted tax rate. The same number of districts with the lowest tax rates are able to generate \$68.89. This is unfair to taxpayers and businesses.

What outcome will the lawsuit seek?

- The goal of this lawsuit is to achieve a funding system that treats all Texas children and taxpayers fairly.

¹ The state uses a weighted student count for school funding purposes that takes into account extra student costs, such as in special education. "Student" will have this meaning throughout this document.

1) How should the item appear on the board agenda?

Agenda appropriate for consultation with attorney and action item:

"Consultation with attorney under Texas Government Code Sect. 551.071 – consultation with attorney in closed session to discuss contemplated litigation related to the school finance system."

Action Item:

"Consider Resolution to join unincorporated association concerning the Texas school finance system and potential litigation to protect the taxpayers and school children of Texas."

Agenda appropriate to consider resolution when attorney is not present with action item:

"Consider resolution related to potential school finance litigation."

Action Item:

"Consider Resolution to join unincorporated association concerning the Texas school finance system and potential litigation to protect the taxpayers and school children of Texas."

Note: A school board cannot go into closed/executive session to discuss school finance litigation unless they are doing so to consult with their attorney.

2) What is the resolution language we should approve?

"The _____ ISD Board of Education authorizes an expenditure not to exceed \$1 per WADA to join together with other Texas public schools, taxpayers and parents as an unincorporated association for the purpose of speaking with one voice in the litigation of public school finance matters essential to the fair treatment of Texas taxpayers and public school children."

3) What if my district wants to participate, but we can't commit to the \$1/WADA recommended cost?

Replace the relevant language in the resolution with an amount you feel comfortable. We don't want any district to not participate because of the cost, but we do need a board resolution committing the district to the suit.

(continued)

4) Will the district be liable for additional financial support?

No, there is no additional liability. In the event additional funds are needed, you may be asked for further consideration, but whatever the district chooses to do will be 100% its own decision. If you wish to add that to the resolution, please do.

5) Can a district support the litigation financially without being a named plaintiff?

Yes, each district has a unique set of circumstances to take into consideration.

6) Is there a deadline to join the Equity Center group?

No, however the sooner districts are able to officially join (pass the resolution), the sooner we can move forward. We realize some districts are waiting to first pass a TRE before bringing up the issue in order to not complicate messages. That's understandable and fine. But please keep in mind that the sooner we can file (with a confirmed group of plaintiffs), the stronger our position will be.

7) What do I do after my board adopts the resolution?

Please send a copy of the adopted resolution to us -- either fax to 512/478-6433 or e-mail to nickell@equitycenter.org

We will put you on a special contact list and will get in touch with you about next steps, payment, and your preferred level of involvement, etc.

Board Resolution Template

The _____ ISD Board of Education authorizes an expenditure not to exceed \$1 per WADA to join together with other Texas public schools, taxpayers and parents as an unincorporated association for the purpose of speaking with one voice in the litigation of public school finance matters essential to the fair treatment of Texas taxpayers and public school children.