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NO. 04-1144

IN THE SUPREME COURT OF TEXAS

SHIRLEY NEELEY, TEXAS COMMISSIONER OF EDUCATION, THE TEXAS EDUCATION AGENCY, CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
Petitioner/Appellants,

V.

WEST ORANGE-COVE CONSOLIDATED INDEPENDENT SCHOOL DISTRICT, COPPELL INDEPENDENT SCHOOL DISTRICT, LA PORTE INDEPENDENT SCHOOL DISTRICT, PORT NECHES-GROVES INDEPENDENT SCHOOL DISTRICT, DALLAS INDEPENDENT SCHOOL DISTRICT, AUSTIN INDEPENDENT SCHOOL DISTRICT, AND HOUSTON INDEPENDENT SCHOOL DISTRICT, *ET AL.*,
Respondent/Appellees

On Direct Appeal from the 250th District Court, Travis County, Texas

BRIEF OF AMICUS CURIAE TEXAS BUSINESS AND EDUCATION COALITION IN SUPPORT OF APPELLEES

O'HANLON & ASSOCIATES
808 West Avenue
Austin, Texas 78701
(512) 494-9949
FAX: (512) 494-9919

Kevin O'Hanlon
State Bar No. 15235500

Leslie L. McCollom
State Bar No. 13431975

COUNSEL FOR AMICUS CURIAE TEXAS BUSINESS AND EDUCATION COALITION

NO. 04-1144

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SHIRLEY NEELEY, TEXAS COMMISSIONER OF EDUCATION, THE TEXAS EDUCATION AGENCY, CAROLE KEETON STRAYHORN, TEXAS COMPTROLLER OF PUBLIC ACCOUNTS, AND THE TEXAS STATE BOARD OF EDUCATION,
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O'HANLON & ASSOCIATES
808 West Avenue
Austin, Texas 78701
(512) 494-9949
FAX: (512) 494-9919

Kevin O'Hanlon
State Bar No. 15235500

Leslie L. McCollom
State Bar No. 13431975

COUNSEL FOR AMICUS CURIAE TEXAS BUSINESS AND EDUCATION COALITION

IDENTITY OF PARTIES AND COUNSEL

State Appellants:
Shirley Neeley, Texas Commissioner of Education; the Texas Education Agency; Carole Keeton Strayhorn, Texas Comptroller of Public Accounts; and the Texas State Board of Education.

Trial and Appellate Counsel for Appellants:

R. Ted Cruz, Solicitor General — Counsel in Texas Supreme Court
State Bar No. 24001953
Edward D. Burbach, Deputy Attorney General Litigation
State Bar No. 03355250
Jeff L. Rose, Assistant Attorney General
State Bar No. 00791571
Amy Warr, Assistant Attorney General
State Bar No. 00795708
Danica Milios, Assistant Solicitor General
State Bar No. 00791261
Merle Hoffman Dover, Assistant Attorney General
State Bar No. 00787706
Joseph Hughes, Assistant Solicitor General
State Bar No. 24007410
Shelly Dahlberg, Assistant Attorney General
State Bar No. 24012491
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711
[Tel] (512) 936-1824
[Fax] (512) 474-2697

Edward D. Burbach, Deputy Attorney General for Litigation — Trial Counsel
State Bar No. 03355250
Jeff L. Rose, Assistant Attorney General
State Bar No. 00791571
Robert O'Keefe, Assistant Attorney General
State Bar No. 15240850
Merle Hoffman Dover, Assistant Attorney General
State Bar No. 00787706

William T. Deane, Assistant Attorney General
State Bar No. 05692500
Linda Halpern, Assistant Attorney General
State Bar No. 24030166
Linda Shaunessy, Assistant Attorney General
State Bar No. 10382920
Kalli Smith, Assistant Attorney General
State Bar No. 24043928

West Orange Cove Appellees:
West Orange Cove Consolidated Independent School District ("CISD"), Coppell Independent School District ("ISD"), La Porte ISD, Port Neches-Groves ISD, Dallas ISD, Austin ISD, and Houston ISD, Alamo Heights ISD, Allen ISD, Argyle ISD, Beckville ISD, Carrollton-Farmers Branch ISD, Carthage ISD, College Station ISD, Cypress-Fairbanks ISD, Darrouzet ISD, Deer Park ISD, Fairfield ISD, Graford ISD, Grapevine-Colleyville ISD, Hallsville ISD, Highland Park ISD, Humble ISD, Katy ISD, Kaufman ISD, Lake Travis ISD, Lewisville ISD, Lubbock ISD, Marble Falls ISD, McCamey ISD, Miami ISD, Northeast ISD, Northside ISD, Northwest ISD, Palo Pinto ISD, Pearland ISD, Plano ISD, Pringle-Morse CISD, Richardson ISD, Round Rock ISD, Round Top-Carmine ISD, Spring Branch ISD, Spring ISD, Stafford Municipal SD, Sweeny ISD, Terrell County ISD, Texas City ISD.

Counsel for West Orange Cove Appellees:
George W. Bramblett, Jr. — Trial and Appellate Counsel
State Bar No. 02867000
Nina Cortell
State Bar No. 04844500
Mark R. Trachtenberg
State Bar No. 24008169
Chip Orr
State Bar No. 00793749
HAYNES & BOONE, L.L.P.
One Houston Center
1221 McKinney, Suite 2100
Houston, Texas 77010

J. David Thompson, III
State Bar No. 19950600
Phillip Fraissinet
State Bar No. 00793749

BRACEWELL & PATTERSON, L.L.P.
711 Louisiana Street, Suite 2900
Houston, Texas 77002-2781

Alvarado Appellees:
Abbott ISD, Academy ISD, Aldine ISD, Alvarado ISD, Amarillo ISD, Anna ISD, Anthony ISD, Aspermont ISD, Athens ISD, Aubrey ISD, Avalon ISD, Avery ISD, Axtel ISD, Balmorhea ISD, Bangs ISD, Beeville ISD, Bells ISD, Belton ISD, Big Sandy ISD, Blanket ISD, Blooming Grove ISD, Boles ISD, Boling ISD, Bonham ISD, Booker ISD, Borger ISD, Bowie ISD, Brock ISD, Brownsville ISD, Bruceville-Eddy ISD, Bryson ISD, Buckholts ISD, Burkburnett ISD, Burkeville ISD, Cameron ISD, Campbell ISD, Canton ISD, Canutillo ISD, Canyon ISD, Central Heights ISD, Central ISD, Chappel Hill ISD, Childress ISD, China Spring ISD, Chireno ISD, Cisco ISD, City View ISD, Cleburne ISD, Clint ISD, Coleman ISD, Collinsville ISD, Commerce ISD, Community ISD, Como Pickton ISD, Connally ISD, Cooper ISD, Copperas Cove ISD, Corpus Christi ISD, Cotton Center ISD, Covington ISD, Crandall ISD, Crawford ISD, Crosby ISD, Dalhart ISD, Desoto ISD, Detroit ISD, Diboll ISD, Dickinson ISD, Dilley ISD, Dime Box ISD, Dummitt ISD, Dodd City ISD, Douglass ISD, Driscoll ISD, Early ISD, Ector ISD, El Paso ISD, Electra ISD, Elkhart ISD, Elysian Fields ISD, Ennis ISD, Era CISD, Etoile ISD, Everman ISD, Falls City ISD, Fannidel ISD, Ferris ISD, Forney ISD, Fort Davis ISD, Fort Worth ISD, Frost ISD, Gainesville ISD, Ganado ISD, Garrison ISD, Gilmer ISD, Godley ISD, Grandview ISD, Gregory-Portland ISD, Gunter ISD, Hale Center ISD, Hamlin ISD, Harleton ISD, Hart ISD, Haskell CISD, Hawely ISD, Hearne ISD, Hemphill ISD, Hereford ISD, Hico ISD, Hidalgo ISD, High Island ISD, Holland ISD, Honey Grove ISD, Hubbard ISD, Hudson ISD, Huffman ISD, Huntington ISD, Hutto ISD, Itasca ISD, Jacksboro ISD, Jasper ISD, Joaquin ISD, Karnes City ISD, Kermit ISD, Kirbeyville ISD, Knox City-O'Brien CISD, Kountze ISD, Kress ISD, Krum ISD, La Joya ISD, La Pryor ISD, Lake Worth ISD, Lamesa ISD, Lasara ISD, Latexo ISD, Leverett's Chapel ISD, Linden-Kildare CISD, Lingleville ISD, Lipan ISD, Lockhart ISD, Lorena ISD, Louise ISD, Lyford ISD, Lytle ISD, Mabank ISD, Magnolia ISD, Martinsville ISD, McGregor ISD, Meadow ISD, Megargel ISD, Mercedes ISD, Meridian ISD, Merkel ISD, Mesquite ISD, Mildred ISD, Millsap ISD, Mission CISD, Montague ISD, Morton ISD, Motley County ISD, Muenster ISD, Nederland ISD, New Boston ISD, New Castle ISD, New Home ISD, New Summerfield ISD, Newton ISD, Nocona ISD, Nueces Canyon CISD, Olfen ISD, Olton ISD, Orange Grove ISD, Paint Creek ISD, Pampa ISD, Panhandle ISD, Paradise ISD, Paris ISD, Perrin-Whitt CISD, Petersburg ISD, Pflugerville ISD, Poteet ISD, Pottsboro ISD, Prairiland ISD, Premont ISD, Presidio ISD, Princeton ISD, Quanah ISD, Ranger ISD, Redwater ISD, Ricardo ISD, Rice CISD, Rice ISD, Rio Vista ISD, Rivercrest ISD, Robinson ISD, Robstown ISD, Roby ISD, Rochester County Line ISD, Rocksprings ISD, Rogers ISD, Roosevelt ISD, Rosebud-Lott ISD, Rusk ISD, Sam Rayburn ISD, Samnorwood ISD, San Augustine ISD, San Perlina ISD, Sands CISD, Sanford ISD, Santa Anna ISD, Santa Fe ISD, Santa Maria ISD, Seagraves ISD, Seguin ISD, Seymore ISD, Shallowater ISD, Slanton ISD, Smyer ISD, Socorro ISD, Sulphur Bluff ISD, Sulphur Springs ISD, Sunray ISD, Tahoka ISD, Taylor ISD,

Tenaha ISD, Texline ISD, Thorndale ISD, Throckmorton ISD, Timpson ISD, Tolar ISD, Tornillo ISD, Trenton ISD, Trinidad ISD, Troup ISD, Troy ISD, Tulia ISD, Uvalde ISD, Valley View ISD, Van Alstyne ISD, Van ISD, Vernon ISD, Warren ISD, Weatherford ISD, Wellman-Union ISD, Wells ISD, West Hardir County ISD, White Oak ISD, and Whitesboro ISD.

Counsel For Alvarado Appellees:
Randall B. Wood
State Bar No. 21905000
Doug W. Ray
State Bar No. 16599200
Ray, Wood & Bonilla, L.L.P.
P.O. Box 165001
Austin, Texas 78716

Edgewood Appellees;
Edgewood ISD, Ysleta ISD, Laredo ISD, San Elizario ISD, Socorro ISD, South San Antonio ISD, La Vega ISD, Kenedy ISD, Harlandale ISD, Brownsville ISD, Pharr-San-Juan-Alamo ISD, Sharyland ISD, Monte Alto ISD, Edcouch-Elsa ISD, Los Fresnos ISD, Raymondville ISD, Harlingen ISD, Jim Hogg County ISD, La Feria ISD, Roma ISD, San Benito ISD, and United ISD.

Counsel for Edgewood Appellees;
David G. Hinojosa — Trial and Appellate Counsel
State Bar No. 24010689
Nina Perales
State Bar No. 24005046

Leticia Saucedo — Trial Counsel
State Bar No. 00797381
Norma Cantu
State Bar No. 18826900
Mexican-American Legal Defense and Educational Fund, Inc.
140 East Houston Street, Suite 300
San Antonio, Texas 78205

Amicus Curiae in Support of Appellees:
Texas Business and Education Coalition

Counsel for Amicus Curiae:
Kevin O'Hanlon
State Bar No. 15235500

Leslie McCollom
State Bar No. 13431975
O'Hanlon & Associates
808 West Avenue
Austin, Texas 78701

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Respondent/Appellees

On Direct Appeal from the 250th District Court, Travis County, Texas

---

BRIEF OF AMICUS CURIAE TEXAS BUSINESS AND EDUCATION COALITION IN SUPPORT OF

TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF INTERESTS OF AMICUS CURIAE

On behalf of its many members, the Board of Directors of the Texas Business and Education Coalition ("TBEC") feels compelled to join this crucial public policy debate concerning the future direction of education in the State of Texas. It is not hyperbole to suggest that the future of the State of Texas is at stake in the matter pending before this Court. As an organization comprised of Texas leaders in the fields of business, industry, and education, TBEC has a strong interest in the outcome of this case involving the future direction of both our State's system of taxation and our public school system. As will be discussed below, the two are inextricably intertwined.

It is axiomatic that, in a democratic society, a well functioning system of public education is a necessity. Article VII § 1 of our Texas Constitution expresses this proposition succinctly when it states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people . . . ." A public school system that creates an environment which fosters educational excellence is critical to societal and economic success. Governmental investment in human capital through its public education systems is essential to the long term success of an economic system in today's increasingly complex world.

Human capital is a way of defining and categorizing peoples' skills and abilities applicable to employment and which otherwise contribute to the economy. Human capital is similar to physical means of production such as factories and machines, in that one can invest in human capital via education and training. In our democratic society, the investment is most commonly paid for through taxation and administered through public

education systems. In the aggregate, a society's income, often calculated as gross domestic product, depends partly on the rate of return on its human capital. Human capital is a stock of assets present in an economy, which allows it to receive a flow of income. Human capital is substitutable: it will not replace land, labor, or capital totally, but it can be substituted for them to various degrees, and is included as a separate variable in a production function.The trial court made numerous Findings of Fact concerning the long term consequences of failing to address the State's educational needs in a timely and effective fashion. In Finding of Fact No. 104, the trial court found that because the State has not adjusted the funding formulas to keep up with rising costs, districts have had to increase their reliance on local property tax and have been pushed to the $1.50 cap.[1] Indeed, the projected increase in the State's projected income in the year 2040 with a quality education system is in excess of three hundred billion dollars per year.[2] This difference is critical to the economic future of the State. It's small wonder that the issue has drawn the attention of the Texas business community. With such high stakes, it seems clear that the State must invest in its future by investing in its own citizens. Because of these concerns, TBEC joins the debate firmly on the side of making the required investment.

TBEC's position in this matter should be of little surprise to those who have followed the policy debates over public education in this State. In 1989, many businesses, increasingly concerned by the disparity between their workforce needs and

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1 See, Findings of Fact 65-73.

2 See, Finding of Fact 73.

the supply of qualified people graduating from public schools in this State, formed TBEC in order to advocate for quality in our public education system. The idea to create TBEC grew out of a sense of frustration as business people attended an endless number of education conferences and seminars with varying corporate representation, but without follow-up or coordination. TBEC evolved from the business community's concerns that there was no permanent organization of business support for education in this State. Influence over education policy must not be the sole province of the educational community. TBEC is an extension of the business community's efforts to change public education policy in a positive way, and to implement meaningful reforms in a cost effective manner.

TBEC has provided a conduit for the business community to present its agenda for improvement of the education community to the Legislature. TBEC has also created the opportunity for business people to fully understand the demands, expectations and pressures placed on the State educational system by our increasingly technological knowledge based society. TBEC began pushing for fundamental changes. Once state-wide performance was measured, TBEC was an active participant in the conceptualization, early implementation, and improvement of the State's accountability system. TBEC's focus has evolved from concentration on accountability and standards to curriculum and delivery. The current iteration of the Coalition's strategic plan includes the following objectives:

- Protect and enhance the public school assessment and accountability systems.
- Support initiatives that use the assessment and accountability systems to improve the academic achievement of each student.

- Promote and support the use of a statewide fiscal accountability system that optimizes the use of school resources.
- Promote and recommend rigorous K-12 academic standards that will prepare Texas students for success in further education as responsible citizens, equip them to compete in the global economy, and enable them to live fulfilling and satisfying personal lives.

TBEC believes that an effective statewide student assessment program is the only reliable vehicle through which to achieve desired levels of public school performance. Texas public schools are moving in the right direction. Well-designed state policy, targeted investments, and effective accountability throughout the 1990s brought about positive changes in public schools. And the changes that are associated with the implementation of the TAKS based accountability system are heading Texas schools in the right direction. TBEC realizes that the only way the accountability systems will achieve the desired goal of improving student performance is if educators are given time, support, and resources sufficient to do the job expected of them. No progress in accountability can be sustained without the necessary resources to produce the rigorous academic achievement standards that Texas students need to attain.

TBEC believes that it is necessary to develop a new system of funding Texas public schools that satisfies certain principles. The public school finance system must provide substantially equal resources to school districts regardless of their property wealth. And, TBEC rejects the narrow dictionary definition of adequacy as a suitable standard for financing public schools. The "adequacy standard" based on minimal performance requirements is not an appropriate basis for funding public schools. The provision of financial resources to school districts must be related appropriately to the highest

performance expectations established by the state.

In addition, adjustments in funding must be made for known cost factors. It is necessary to establish appropriate and up-to-date formula weights and adjustments for cost factors, including, but not limited to, English language learners, the variable cost of education, fast growth, declining enrollment, and transportation.

TBEC believes that the provision of financial resources to school districts must be adjusted according to important known factors, including the characteristics of the student population served, the costs of operations in different areas of the state, district size, and significant increases or decreases in student enrollment. Because a school finance system must satisfy the equity standards established by the Texas Supreme Court in its *Edgewood IV* decision, TBEC vigorously opposes any attempt to establish a system that is not equitable.

No fee has been paid or will be paid to Texas Business and Education Coalition for the preparation of this brief.

ISSUES PRESENTED

1. **The State of Texas has much to be proud of regarding its recent record of educational achievement.**
2. **There remains much to be done before Texas can be satisfied with its public school system.**
3. **The State's accountability system, while a significant achievement, cannot guarantee a general diffusion of knowledge for all Texas students.**
   - **A. Appellants' view of the state accountability system**
   - **B. The difference between student and institutional expectations of the system**
   - **C. There are many other dimensions of student performance**
4. **The local taxing capacity has been a significant contributing element to the State's recent record of success**
   - **A. Access to the local taxing capacity**
   - **B. Local control of educational programs**
   - **C. History of the local tax under Article VII § 3 supports the maintenance of local enrichment and local taxing capacity**
5. **The sky has not fallen—Why this Court's prior constitutional rulings have not undermined legislative authority**
   - **A. School finance equity**
   - **B. The prohibition in Article VII § 1-e**

SUMMARY OF THE ARGUMENT

As will be set forth below in much greater detail, it is the position of the Texas Business and Education Coalition that although there have been many improvements in the Texas public school system over the last decade, there is much left to be accomplished. Although there is a record of steady improvement in student performance, an unjustifiably high number of today's public school students cannot meet the expectation that they master the State's Curriculum.[3]

The pattern of low performance, which is concentrated in those segments of the State's population with the lowest income and those who have language barriers, raises issues of resource allocation and fundamental fairness. If the State is to require by the provisions of state law that students must meet various benchmarks throughout their academic careers to advance, and ultimately to graduate, that system must provide a meaningful opportunity for the student to master the required skills.

Appellants argue that the Legislature's adoption of an accountability system is sufficient, in and of itself, to ensure the general diffusion of knowledge required by the Texas Constitution. TBEC would argue that Appellant's arguments ignore critical elements of the success of the last decade. An accountability system, standing alone, will not ensure success. It must be accompanied by resources in order to accomplish the required results. The provision of resources, in turn, has two dimensions. The first of the resource dimensions is distributive. That is, in order to ensure the broadest distribution of results, it was necessary

[3] The State's curriculum is set forth at 19 Tex. Admin. Code Chapter 74 and Chapters 110-128.

to fairly allocate the resources. This Court's decisions in the *Edgewood* series of cases were critical elements in the State's success. The second element in the provision of resources is the capacity of the system.

No party in this case would argue that it is not necessary to provide additional resources in order to meet the State's rising expectations. Even a cursory review of the mountains of data introduced into the record in this case clearly demonstrate that in achieving the record of increasing performance of the last decade, the local school districts have exhausted the capacity of the local ad valorem tax. At the same time, the State's share of educational funding has dramatically declined. There are simply no new local resources left to meet the educational mandates imposed by the State's more demanding curriculum. With virtually all of the local taxing capacity already committed, there remains virtually no more local discretion left in the system. If the State is to meet its obligation to provide a full educational opportunity to all of its students, the system simply must be given additional capacity.

Finally, a review of the historical development of the constitutional provisions governing public education points directly to the Texas Legislature as the only body which can fulfill the promise of our Texas Constitution. After a review of the facts and the law in this case, the Texas Business and Education Coalition respectfully requests that this Court direct the Texas Legislature to meet its constitutional responsibilities.

ARGUMENT and AUTHORITIES

Issue Number One

The State of Texas has much to be proud of regarding its recent record of educational achievement.

Beginning at page 1 of Appellant's Brief, the Texas Attorney General describes in glowing terms the educational progress the State of Texas has made. [4] Indeed, the very opening lines of Appellant Brief states:

> For more than a decade Texas has been a national leader in education reform. Beginning in the 1990s, Texas pioneered an integrated statewide system of required curriculum, standardized testing, and accountability measures designed to hold campuses and districts responsible for students" academic performance. And the system has yielded results...

As an active participant in the legislative process, which has consistently advocated for higher educational standards, the Texas Business and Education Coalition takes pride in the record of academic progress made by the State of Texas. The Texas Legislature as well as all citizens should be justifiably proud of the progress which has been made. Among the accomplishments which can be counted by State officials are the following:

- In 2000, both fourth and eighth grade students from the State of Texas ranked first in the nation in mathematics on the National Assessment of Educational Progress (NAEP), when the test scores were adjusted for socioeconomic status (SES) and limited English proficiency (LEP) rates.
- In 2002, fourth grade students from the State of Texas ranked first in the nation in

[4] See, *Appellants' Brief* at pages 1-2.

reading on the National Assessment of Educational Progress (NAEP).

- In 2003, Texas ranked first in the nation in closing the gap between African-American students and Anglo students in mathematics.
- In 2003, Texas ranked second in the nation in closing the gap between Hispanic students and Anglo students in mathematics and reading.

These statistics show that a definite pattern of progress which has been achieved by many of our Texas students. These students, along with their parents, and the State's educators have accomplished great things in the past decade. Educational policy makers, including multiple Governors, Commissioners of Education, Legislators, School Board members and local school administrators also have much to celebrate. However, as will be discussed below, the task is far from complete.

Issue Number Two

There remains much to be done before Texas can be satisfied with its public school system.

Despite the numerous successes listed above and heralded by Appellants, there are also numerous areas where significant educational improvement is clearly necessary. The following Findings of Fact issued by the trial court are among the most significant:[5]

- In Finding of Fact 30, the trial court noted that for the 2003-04 school year, a school district or campus could be rated as having acceptable performance in

[5]Since the State chose to take a direct appeal to the Texas Supreme Court under the provisions of Tex. Const. Art. V § 3b and under the express provisions of Rule 57.2, Tex. R. App. Proc., this Court has no jurisdiction over any question of fact. Therefore, Amicus will assume as it must under the rules of this Court that all of the Findings of Fact which are cited herein have been conclusively established.

science education so long as 25% of the students passed the TAKS test.

- In Finding of Fact 31, the trial court also found that in order to pass the 11th Grade TAKS Science test in 2003-04, a student was required to answer 24 of the 55 questions correctly (a 43.6% correct response rate).
- Stated alternatively, in order for a school to be considered low performing in 11th Grade Science, more that 75% of the school's students who did not receive an exemption, would be required to get at least 58% of the questions wrong on multiple administrations of the test.
- In Finding of Fact 30, the trial court noted that, for the 2003-04 school year, a school district or campus could be rated as having acceptable performance in mathematics so long as 35% of the students passed the TAKS test.
- In Finding of Fact 31, the trial court also found that in order to pass the 11th Grade TAKS Mathematics test in 2003-04, a student was required to answer 25 of the 60 questions correctly (a 41.7% correct response rate).
- Stated alternatively, in order for a school to be considered low performing in 11th Grade Mathematics, more that 65% of the schools's students who did not receive an exemption, would be required to get at least 59% of the questions wrong on multiple administrations of the test.
- There are 21,198 seniors who have not yet passed one or more sections of the exit-level exam.
- Seventy-nine percent of fifth-grade students passed the TAKS mathematics exam in April. After two administrations, the cumulative passing rate on the

reading TAKS is 86 percent.

- On the Spanish version of the math exam, 44 percent of the students passed, while 78 percent have now passed the reading test.
- For the first time this year, under Tex. Educ. Code §28.0211(2), students must pass both the reading and math exams to be promoted to sixth grade.
- For fourth-grade students, passing rates for all tests taken were 55 percent for African Americans, 63 percent for Hispanics, and 81 percent for whites.
- On the Spanish version of the fourth-grade test, 55 percent of the students passed all tests taken.
- The all-tests-taken passing rate for the 293,320 sixth-grade students who took English language TAKS was 69 percent. Among the major ethnic groups, the passing rates were 52 percent for African Americans, 60 percent for Hispanics and 82 percent for whites.
- At seventh grade, 59 percent of the students passed all tests taken. The passing rates were 43 percent for African Americans, 49 percent for Hispanics, and 74 percent for whites.
- Fifty-seven percent of eighth-grade students passed all tests taken. Passing rates were 41 percent for African Americans, 45 percent for Hispanics, and 72 percent for whites.
- Fifty-four percent of the state's ninth-grade students met the passing standards on all tests taken. Only 37 percent of African Americans passed all tests taken, compared to 42 percent of Hispanics and 71 percent of white students.

- Only 39 percent of the 281,505 tenth-grade students passed all exams taken. African Americans had a passing rate of 22 percent, while Hispanics had a passing rate of 26 percent. Fifty-four percent of white students passed all tests taken.
- At 11th grade, 68 percent passed all tests taken. The passing rate was 51 percent for African Americans, 55 percent for Hispanics, and 81 percent for white students.

Even a cursory review of the above-cited results taken from the Texas Education Agency's May 20, 2004 press release would give one pause. As argued by Appellants, the TAKS test measures the State curriculum (Texas Essential Knowledge & Skills or TEKS) adopted by the State Board of Education. The TAKS test, therefore, represents the knowledge expectations of the Legislature. If that is so, student performance on the TAKS tests constitutes the legislatively mandated measurement of the dispersion or "general diffusion" of knowledge envisioned by the Constitution. Given the low levels of student performance on the examination, it cannot reasonably be argued that the required knowledge has been generally diffused at this time.

Issue Number Three

The State's accountability system, while a significant achievement, cannot guarantee a general diffusion of knowledge for all Texas students.

A. Appellants' view of the state accountability system

Appellants' Brief describes the State's educational system as having four components, to wit: (1) a state curriculum; (2) a standardized test that matches the curriculum; (3)

accountability standards; and (4) sanctions and remedial measures.[6] Appellants omit a great deal from their educational typology. First, they omit students with varying needs. Next, they omit the need for instructional space and materials. Finally, they omit the need for quality instructional and administrative staff to instruct the more than four million students in this State. Appellants' omissions are glaring in a case involving the issue of school finance, because they exclude all of the elements of the system which call for the infusion of financial resources into the system. While Texas' progress towards a standardized educational system has been significant, neither the test nor the curriculum teach themselves. For that, financial resources are needed. An accountability system is not enough. It is unfair and potentially misleading to ignore the other significant inputs into the educational system that have had equally profound impacts upon the progress which the State has made in recent years.

B. The difference between student and institutional expectations of the system

In their Briefs before this Court, Appellants tout the success of school districts and campuses in meeting the State's standards for achieving acceptable or higher accountability ratings issued by the Commissioner of Education. While high ratings for schools are admirable, it is fair to say that the State's definition of campus and/or district success is fairly low. As detailed above, for the 2003-04 school year, a school district or campus could be rated as having acceptable performance in science education even if 74% of the 11th grade students could not pass the TAKS Science test, and/or if 64% of its 11th grade students could not pass the TAKS mathematics test. (See p.12 above)

[6]See, *Appellants' Brief* at page 5.

Appellants ignore the fact that the current system also holds individual students accountable for their own performance, and in this regard the system is not so forgiving. Under the express provisions of Tex. Educ. Code § 39.025, 100% of students who cannot pass all parts of the TAKS exit level examination are barred from high school graduation. Similarly under the provisions of Tex. Educ Code § 28.011, third and fifth grade, and beginning with the 2007-08 school year, eighth grade students who do not pass all sections of the TAKS test will presumptively be retained from advancement to the next grade. Given the low level of performance being demonstrated by the State's minority and low income students, the application of these sanctions, unless rapidly cured, will result in students being denied the opportunity to master the skills required in able to meet the standards for academic advancement. This situation would hardly constitute the general diffusion of knowledge required by our Constitution. Additionally, it could also constitute a violation of the United States Constitution. *See, Debra P. v. Turlington*, 644 F.2d 397 (5th Cir. 1981).

C. There are many other dimensions of student performance

The Texas Business and Education Coalition submits that the State accountability system, even at full implementation, falls fall short of the constitutional minimum. As this Court expressly held in its prior *West Orange-Cove* decision,

> The public school system the Legislature has established requires that school districts provide both an accredited education and a general diffusion of knowledge. It may well be that the requirements are identical; indeed, as in *Edgewood IV*, we presume they are, giving deference to the Legislature's choices. But it is possible for them not to be — an accredited education may provide more than a general diffusion of knowledge, or vice versa — and <u>because both are binding, a district may allege that taxation at a maximum rate in order to</u>

satisfy either is a state ad valorem tax. (Emphasis added.)

West Orange-Cove Consolidated Independent School District v. Alanis,107 S.W.3d 558, 581 (Tex. 2003)

As discussed above, the current State accountability system contemplates and permits huge discrepancies between the performance it expects of students and the performance it expects of the institutions responsible for their education. Section III B, pp.15-16 above, discussed the differences between those performance expectations based solely upon the administration of the TAKS test. As will be set forth below, the State defines expectations for student performance in a variety of ways other that success on the TAKS test.

Appellants would have this Court believe that the Texas Legislature's pronouncements on academic expectations or, a "general diffusion of knowledge," are limited solely to TAKS test performance. This is simply not true. Mindful of the Legislature's constitutional role in defining, in the first instance, the required general diffusion of knowledge, we will review a number of various legislative enactments that shed light on the Legislature's intent.

As an initial matter, it is important to point out that, even at its highest standard, an exemplary rating, the Texas accountability system allows for the failure of 10% of the students in the system. In a system which is responsible for the education of approximately 4.4 million students, exemplary status would still allow in excess of 440,000 students to fail to meet the standards set by the passage of the TAKS test. TBEC avers that it is fundamentally unfair and contrary to the best interests of the State to exclude any student. As acknowledged by Appellants in *Appellants' Brief*, the TAKS passing standard is set at the

mid-high school level. As will be discussed below, there are a considerable number of other legislative standards which must be assessed in measuring whether a general diffusion of knowledge has yet occurred.

The provisions of Tex. Educ. Code §7.005 require the State Board of Education to coordinate with the Texas Higher Education Coordinating Board to "ensure that long-range plans and educational programs established by each board provide a comprehensive education for the students of this state under the jurisdiction of that board, extending from early childhood education through postgraduate study."[7] See also, Tex. Educ. Code §61.076. The Legislature has also enacted Tex. Educ. Code §51.3062 which requires students to take and pass an academic skills test or be required to take remedial courses at the college level. According to Texas Higher Education Coordinating Board data, approximately 50% of the Texas students who do go to college must take some form of remediation.[8] Texas can and must do better. A general diffusion of knowledge must be interpreted to give all Texas students the skills necessary to attend college.

At Tex. Educ Code §4.001(a) the Legislature has adopted a mission for the Texas public education system. It provides as follows:

> 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. That mission is grounded on the conviction that a general diffusion of

7 The State Board of Education is the agency responsible for the development of the State curriculum or "essential knowledge and skills" under Tex. Educ. Code § 39.021.

8 See, Annual Texas Academic Skills Program/Alternative (TASP/A) Test Report of Student Performance, Initial Pass rates (with/without Exemptions) by Test Area, by Ethnicity, Gender High School Curriculum, Economically Disadvantaged 1998-2002 High School Graduating Classes published by the Texas Higher Education Coordinating Board

knowledge is essential for the welfare of this state and for the preservation of the liberties and rights of citizens. It is further grounded on the conviction that a successful public education system is directly related to a strong, dedicated, and supportive family and that parental involvement in the school is essential for the maximum educational achievement of a child.

The Objectives for public education adopted by the Texas Legislature set forth at Tex. Educ Code §4.001(b) are as follows:

(b) The objectives of public education are:
OBJECTIVE 1: Parents will be full partners with educators in the education of their children.
OBJECTIVE 2: Students will be encouraged and challenged to meet their full educational potential.
OBJECTIVE 3: Through enhanced dropout prevention efforts, all students will remain in school until they obtain a high school diploma.
OBJECTIVE 4: A well-balanced and appropriate curriculum will be provided to all students.
OBJECTIVE 5: Educators will prepare students to be thoughtful, active citizens who have an appreciation for the basic values of our state and national heritage and who can understand and productively function in a free enterprise society.
OBJECTIVE 6: Qualified and highly effective personnel will be recruited, developed, and retained.
OBJECTIVE 7: The state's students will demonstrate exemplary performance in comparison to national and international standards.
OBJECTIVE 8: School campuses will maintain a safe and disciplined environment conducive to student learning.
OBJECTIVE 9: Educators will keep abreast of the development of creative and innovative techniques in instruction and administration using those techniques as appropriate to improve student learning.
OBJECTIVE 10: Technology will be implemented and used to increase the effectiveness of student learning, instructional management, staff development, and administration.

The goals for public education adopted by the Texas Legislature set forth at Tex. Educ Code §4.002 are as follows:

§ 4.002. PUBLIC EDUCATION ACADEMIC GOALS. To serve as a foundation for a well-balanced and appropriate education:

GOAL 1: The students in the public education system will demonstrate exemplary performance in the reading and writing of the English language.
GOAL 2: The students in the public education system will demonstrate exemplary performance in the understanding of mathematics.
GOAL 3: The students in the public education system will demonstrate exemplary performance in the understanding of science.
GOAL 4: The students in the public education system will demonstrate exemplary performance in the understanding of social studies.

Added by Acts 1995, 74th Leg., ch. 260, § 1, eff. May 30, 1995.

Finally the Texas legislature has expressly accepted its obligation to meet the aforesaid goals and objectives with the following language:[9]

§ 4.003. STATE RESPONSIBILITY FOR PROVISION OF PUBLIC EDUCATION.

(a) It is the policy of this state that the provision of public education is a state responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student enrolled in the public school system shall have access to programs and services that are appropriate to the student's educational needs and that are substantially equal to those available to any similar student

It is the position of the Texas Business and Education Coalition that the stated goals and objectives are more than hortatory language. These provisions enacted in conjunction with the overarching obligation imposed by Art. VII §1 of the Texas Constitution define the basic educational entitlement for each and every student who attends the public schools of our state. Competition for future economic development in an increasingly knowledge based world demands nothing less. The consequences of failure will be the conversion of our thriving economy to third-world status. The Texas

9 Acts 2003, 78th Leg., ch. 201, § 2 added this section effective September 1, 2004, provided the legislature enacts a law that creates a comprehensive school finance system before this date.

Constitution demands a general diffusion of knowledge. Texas statutes have defined the nature of the knowledge to be diffused in terms which are considerably broader that the narrow provisions of the Texas accountability system which are cited by Appellants as the basis for justifying the underfunding of the current system. Against this background where the Legislature has defined the educational entitlement, it is not an unwarranted extension of the judicial power for the courts to be asked whether the Legislature has provided adequate funding for its own educational aspirations. When viewed against the context of the full definition of our public education system, the financial base is clearly inadequate for its intended purpose.

Issue Number Four

The local taxing capacity has been a significant contributing element to the State's recent record of success.

As referenced above, the State's accountability system can hardly be considered the sole determinant of educational success. An accountability system can define success, and in all fairness can drive some degree of higher achievement by allowing for easier public scrutiny of the results. However, the actual task of educating students requires significant financial resources in the form of taxation at some level. In a state such as Texas which relies upon a combination of both state and local resources, the provision of resources has two separate and distinct dimensions. The first dimension, defined ultimately by the robustness of the tax base, be it state or local, from which the resources are drawn, leads ultimately to questions of adequacy. The second dimension, occasioned by the unequal distribution of tax bases among the school districts of the state, is the

problem of equity. The interplay between the two issues has led inevitably to the history of school finance litigation.[10] Ultimately, a balance between the two components must be struck for the system to succeed.

A. Access to the local taxing capacity

The first key element in the State's educational progress over the last decade is the taxing capacity of the local school districts. Local tax increases led to most of the funding increases over the decade of progress touted by the State. During the last decade, local school districts have significantly raised their tax rates in order to fund the educational progress of which the State is so proud. As this Court found in its *Edgewood IV* decision,

> The record reflects that in 1992-93, the average tax rate statewide was already $1.28, and this rate had been rising over the past four years at an average of over $0.10 per year.

Edgewood IV, 917 S.W. 2d at 733.

In contrast to the 1992-93 statewide averages of $1.28 per $100.00 valuation, by the time *West Orange-Cove Consolidated Independent School District v. Alanis*, 107 S.W.3d 558 (Tex. 2003) was tried, 39% of Texas school districts, with 32% of the State's 4.1 million students, had reached maximum tax rates. *West Orange- Cove, Id.* at 573. Since the date of the *West Orange-Cove,* decision many other districts have reached the tax cap.

The trial court made numerous findings with respect to the taxing capacity of the local school districts.

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10 "We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed. Whether the legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the constitution commands--i.e., an efficient system of public free schools throughout the state." *Edgewood I,,* 777 S.W.2d.at 398.

- In Finding of Fact No. 102, the trial court found that since the 1994-1995 biennium, 75% of the new funding has come from the local property tax and that the percentage of education costs directly funded by the State has fallen to less than 40% of the total and is continuing to fall.
- In Finding of Fact No. 104, the trial court found that because the State has not adjusted the funding formulas to keep up with rising costs, districts have had to increase their reliance on local property tax and have been pushed to the $1.50 cap.[11]
- In Finding of Fact No. 105, the trial court found in 1993-94, only 25 out of 1040 districts were taxing at the $1.50 cap, and 930 districts were taxing below $1.40, and the majority of school districts had taxes of less than $1.20.
- In Finding of Fact No. 105, the trial court also found that in fiscal 2003-04, 494 out of 1031 school districts (48%) educating 59% of the State's students were taxing at the $1.50 cap, and that 691school districts (67%), educating 81% of Texas students, were within five cents of the $1.50 cap.
- In Finding of Fact No. 106, the trial court found that the school finance system is out of capacity with over 97% of the potentially available Foundation School Funds being utilized in the 2003-04 school year, as opposed to 83.3% utilization at the time of *Edgewood IV.*

Clearly the taxing authority of the local independent school districts has been consumed over the last decade. The facts in this case clearly demonstrate that virtually no

[11] Tex. Educ. Code § 45.003(d).

additional capacity remains in the system. As observed by this Court in the *West Orange – Cove* case:

> We caution, however, that the amount of "supplementation" in the system cannot become so great that it, in effect, destroys the efficiency of the entire system. The danger is that what the Legislature today considers to be "supplementation" may tomorrow become necessary to satisfy the constitutional mandate for a general diffusion of knowledge

West Orange-Cove, 103 S.W.3d at 571-572.

The trial court's findings, detailed above, provide rich detail concerning how local funding has gone beyond mere supplementation; it has become the bulwark of the system.

B. Local control of educational programs

Since the inception of the 1876 Texas Constitution, the State has delivered education through the means of local schools. The State has not, since the reconstruction which the current Constitution replaced, attempted to directly deliver education. The existence of local school districts is constitutionally provided for in Article VII § 3 of the Texas Constitution, which governs their creation and power to tax. For almost a century and a half, the local school district has been the vehicle through which education has been delivered to the students of the State. Article III §56 also limits legislative interference with matters of local governance. The provision of education through local political subdivisions spurs innovation and has sparked the progress of the last decade. At the heart of the State accountability system is the notion that it is the State's responsibility to define the knowledge to be achieved, to provide the financial means, and to measure the results. How to achieve the results is a local decision. It is axiomatic that innovation in the public school system seldom initiates with the legislative process. Instead, innovation and improvements in the system

most often occur at the local level. Local innovations which are successful are often adopted by other schools or districts. Only after local innovations have proven successful in multiple schools are they typically adopted at a statewide level. As recognized by this Court, the adoption of local innovation is precisely how today's supplementation becomes tomorrow's general diffusion of knowledge. However, local innovation is necessarily limited by the lack of resources. The result of the elimination of all local capacity from the system will be to end local innovation and thus growth in the system. Local resources must be restored if the State is to continue to advance its educational agenda.

C. History of the local tax under Article VII § 3 supports the maintenance of local enrichment and local taxing capacity

The constitutional arguments in this case have primarily focused on the meaning and intent of the various provisions of Article VII § 1 of the Texas Constitution. Amicus submits that the remaining provisions of Article VII must also be considered as bearing on the need for the restoration of local taxing authority and local control of educational innovation to meet the State's goals. The language of Article VII § 1 is unchanged since its adoption as a part of the Texas Constitution of 1876. However, that Constitution of 1876 had other provisions dealing with the issue of school finance. Those provisions deal significantly with the creation, operation and taxing powers of the local school district. As the State has grown more populous and more prosperous, the relationship between the State and the schools has grown more complex.

As originally written, the Constitution of 1876 did not provide for any local tax contribution for the operation of public schools. Article VII § 1 of the 1876 Constitution

limited school funding to not more than one-fourth of the general revenue of the state and to a one dollar poll tax. Funds generated through the provisions of Article VII § 3 were distributed through the Available School Fund governed under the provisions of Tex. Const. Article VII § 5.[12] This is the system that was constitutionally mandated until a constitutional amendment in 1918.

As opposed to the undisturbed text of Article VII §1, the financing provisions the Constitution have been amended numerous times since 1876. In 1883, an authorization for a statewide property tax was added to Article VII § 3 of the Texas Constitution. The Amendment was adopted on August 14, 1883, proclaimed on September 25, 1883, changed Article VII §3 to delete the previous reference to the dedication and to add:

> ...in addition thereto, there shall be levied and collected an annual ad valorem state tax of such an amount not to exceed twenty cents on the one hundred dollars' valuation, as, with the available school fund arising from all other sources, will be sufficient to maintain and support the public free schools....

Joint. Res. 5, Acts 18th Legis, 1883, p. 134. The statewide property tax was actually levied by the Legislature in the school law of 1884. Again under the provisions of Article VII § 5, the statewide property tax revenue was distributed on a per capita basis through the Available School Fund.[13]

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[12] In an early case construing the nature of the Constitution's apparent limitation on the Legislature's ability to add additional funding the Court of Appeals in *Ex parte Cooper*, 3 Tex. App. 489 (Tex. App. 1878) held that the Legislature could authorize additional dedicated taxes for the provision of education. However, the constitutionally mandated taxes had to be distributed on a per capita basis through Art. VII §5.

[13] See, *Webb County v. Board of School Trustees of Laredo*, 95 Tex. 131 65 S.W. 878, 880 (Tex.

The 1883 Amendment to Article VII § 3 also authorized, for the first time, the Legislature to create school districts by general or special law.[14] In the authorization for the creation of local school districts, the 1883 Amendment also created the first authorization for a local school district ad valorem property tax of 20¢ per $100.00 valuation. It is important to note that from the beginning, the new authorization was intended to be supplementary to the State's obligation. The language of the 1883 Amendment makes this abundantly clear. As newly amended, the Article VII § 3 provided "... there shall be levied and collected an annual ad valorem State tax of such an amount, not to exceed twenty cents on the $100 valuation, as with the available school fund arising from all other sources, *will be sufficient to maintain the public free schools of this State...* ." (Emphasis added.). The authorization of the local tax in the same Amendment was couched in significantly different language with respect to local school districts. The locally levied ad valorem tax was to be levied "...*for the further maintenance* of public schools, ant the erection and equipment of school buildings therein... ." (Emphasis added.) Thus, from its inception, the local ad valorem tax was intended to be supplementary to the Legislature's primary responsibility to meet the obligations to provide for a general diffusion of knowledge.

In 1908, the voters of the State approved H.J.R 7, which was adopted by the 30th Legislature. This provision raised the tax ceiling for school districts from 20¢ to 50¢ per $100.00 valuation. In 1915 the voters of the State approved H.J.R 30, which was adopted by

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1901).

[14] See, *State v. Brownson*, 94 Tex. 436, 61 S.W. 114 (Tex. 1901).

the 34th Legislature. This provision raised the tax ceiling for school districts from 50¢ to $1.00 per $100.00 valuation. Neither of these Amendments altered the primary allocation of funding responsibility to the Legislature.

In 1918, the 20¢ per $100.00 valuation statewide ad valorem tax was raised to 35¢ under the provisions of H.J.R. 27, which was adopted by the 35th Legislature. This Amendment also authorized, for the first time, the Legislature to transfer funds directly to school districts as opposed to being distributed on a per capita basis through the provisions of Article VII § 5. This amendment also re-authorized the appropriation of general revenue funds, for the first time since 1883, to public schools. The particular language used in re-authorizing the use of general revenue is significant. The 1918 amendment specifically provided: "...that should the limit of taxation herein named be insufficient the deficit may be met by appropriation from the general funds of the State."[15]

In 1920, Article VII §3 was again amended to remove the constitutional limitation of 50¢ per $100.00 valuation on local taxation. The language was replaced with the current language which delegates the authority to set the maximum local ad valorem tax to the Legislature.

The most recent amendment to Article VII § 3 of the Texas Constitution was proposed by the Texas Legislature at S.J.R 32, Acts 60th Legislature - Regular session 1967, p. 2972. This constitutional amendment proposed the gradual elimination of the 35¢ State ad valorem property tax over a period of time in increments from 1968 through 1974. The measure was

[15] The tax referred by this provision refers to the 35¢ statewide ad valorem tax authorized in another section of the Amendment.

thought by commentators of the time to free up local taxing capacity, and the amendment had that effect until the explosive growth of the local school tax occasioned by the lack of State funding over the last decade. Again, the elimination of this source of revenue did not alter the obligations of the Texas Legislature under the provisions of Article VII §1, nor did it alter in any way the allocation of responsibilities for the provision of the general diffusion of knowledge between the Legislature and the local school districts. The obligation remains where it has always been, upon the Texas Legislature to "make suitable provision." Over the last decade, the need for local school districts to expend virtually all of their local tax bases in pursuit of state mandated student achievement has left the cupboard bare for any future growth. This Court must restore the historic balance in order to allow the local school districts to continue to innovate in pursuit of the best for our school children.

Issue Number Five

The sky has not fallen-Why this Court's prior constitutional rulings have not undermined legislative authority.

A. School finance equity

Another major determinant of the State's educational progress has been this Court and its insistence upon school finance equity. Approximately sixteen years after the United States Supreme Court rejected a challenge to the Texas school finance system in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278 (1973), the matter was placed before the Texas Supreme Court. In that case, after obtaining a favorable ruling from the Third Court of Appeals based upon the Political Question Doctrine, the Texas Attorney General's Office made many of the same arguments presented in Appellants' Brief in this case.[16] The Court's landmark decision in *Edgewood Independent School District v. Kirby* [*Edgewood I*], 777 S.W.2d 391 (Tex. 1989), which required the State to provide similar resources to all school districts, changed the financial landscape for low wealth school districts in the State. On the issue of equity, the Court held:

> There must be a direct and close correlation between a district's tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.

Edgewood I, Id. at 397.

However, the Court did not neglect the so-called adequacy issue:

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[16] Having made those arguments on behalf of the State of Texas in both the Court of Appeals and before the Texas Supreme Court, the undersigned counsel is intimately familiar with the arguments, and how they were ultimately received.

> Under article VII, section 1, the obligation is the legislature's to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an "if funds are left over" basis.

Id. at 397-398. The ruling simultaneously required new resources be made available to low wealth school districts, and because of the leveling of resources, it removed excuses for low performance. The readjustment of resources was a necessary prerequisite for the fair application of the accreditation standards of which the State is justifiably proud.

As history shows, a single school finance equity decision was insufficient to firmly establish the principal of equity as an element of the school finance system. In *Edgewood Independent School District v. Kirby [Edgewood II],* 804 S.W.2d 491 (Tex. 1991), this Court held that the Legislature's response to its *Edgewood I* decision was insufficient to meet the Court's equity standard.

> Even if the approach of Senate Bill 1 produces a more equitable utilization of state educational dollars, it does not remedy the major causes of the wide opportunity gaps between rich and poor districts. It does not change the boundaries of any of the current 1052 school districts, the wealthiest of which continues to draw funds from a tax base roughly 450 times greater per weighted pupil than the poorest district. It does not change the basic funding allocation, with approximately half of all education funds coming from local property taxes rather than state revenue. And it makes no attempt to equalize access to funds among all districts. By limiting the funding formula to districts in which 95% of the students attend school, the Legislature excluded 132 districts which educate approximately 170,000 students and harbor about 15% of the property wealth in the state. A third of our students attend school in the poorest districts which also have about 15% of the property wealth in the state. Consequently, after Senate Bill 1, the 170,000 students in the wealthiest districts are still supported by local revenues drawn from the same tax base as the 1,000,000 students in the poorest districts.
>
> These factors compel the conclusion as a matter of law that the State has made an unconstitutionally inefficient use of its resources. The fundamental flaw of Senate Bill 1 lies not in any particular provisions but in its overall failure to restructure the system.

Edgewood II, 804 S.W.2d at 496.

Finally, in *Edgewood Independent School District v. Meno* [*Edgewood IV*], 917 S.W.2d 717 (Tex. 1995), the Court held that the provisions of SB 7 which passed the Legislature in 1993 and was implemented beginning with the 1993-94 school year, met the Constitution's mandate of school finance equity. The *Edgewood IV* decision ended the *Edgewood* series of cases involving school finance equity. It is no coincidence that the decade of progress currently being touted by the State began with the resolution of the equity issue. In a relatively short span of six years, the Texas Supreme Court has firmly established principles of school finance equity into the State's Foundation School Program. To be sure, debates remain as to precise extent of the State's obligation to provide school finance equity, but as the present case demonstrates, no one would seriously argue whether equity is a necessary element of the school finance system. This is simply another way of saying that the State's provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations. *Edgewood IV,* 917 S.W.2d at 732.

B. The prohibition in Article VIII § 1-e

As set forth above, the adoption of Tex. Const. Art. VIII § 1-e and the phased elimination of the Article VII § 3 statewide property tax ending in 1974, was designed to free the local taxing authority. This Court has had occasion to explore the parameters of the prohibition in three separate decisions.

In response to the *Edgewood II* ruling, the Legislature passed Senate Bill 351 in 1991. SB 351 was the first legislative attempt to directly cure the inequities occasioned by the highly disparate wealth contained within local school district boundaries. Under the provisions of SB 351, the State captured a portion of the local taxing authority through the vehicle of County Education Districts (CED). The Legislature's use of these CEDs to capture a portion of the local taxing authority was held to violate the provisions of Tex. Const Art VIII § 1-e, because the State's usurpation of the local authority deprived the local taxing authorities of any local discretion. In striking down the statute under Article VIII § 1-e, the court held as follows:

> Senate Bill 351 mandates the tax CEDs levy. No CED may decline to levy the tax. The tax rate for all CEDs is predetermined by Senate Bill 351. No CED can tax at a higher rate or a lower rate under any circumstances. Indeed, the very purpose of the CEDs is to levy a uniform tax statewide. The distribution of the proceeds is set by Senate Bill 351. No CED has any discretion to distribute tax proceeds in any manner except as required by statute. Every function of the CEDs is purely ministerial. . . *If the State mandates that a tax be levied, sets the rate, and prescribes the distribution of the proceeds, the tax is a state tax, regardless of the instrumentality which the State may choose to use.* (Emphasis added)

Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District[Edgewood III], 826 S.W.2d 489, 500 (Tex. 1992) (footnote omitted).

In *Edgewood IV*, this Court held that Senate Bill 7 did not impose a state ad valorem tax in violation of Article VIII, § 1-e of the Constitution, against a background in which average tax rates for all school districts ranged below $1.31 per $100.00 valuation. However the Court warned that over time local tax rates would surely rise, as they have, and that eventually, more and more school districts would be constrained by the cap. If that eventuality came to pass the Court expressly held:

> if the cost of providing for a general diffusion of knowledge continues to rise, as it surely will, the minimum rate at which a district must tax will also rise. Eventually, some districts may be forced to tax at the maximum allowable rate just to provide a general diffusion of knowledge. If a cap on tax rates were to become in effect a floor as well as a ceiling, the conclusion that the Legislature had set a statewide ad valorem tax would appear to be unavoidable because the districts would then have lost all meaningful discretion in setting the tax rate.

Edgewood IV. Id. at 738. (footnote omitted).

Finally, in *West Orange-Cove Consolidated Independent School District v. Alanis.* 107 S.W.3d 558 (Tex. 2003), the Court further enunciated constitutional doctrine concerning the statewide property tax issue when it held:

> Thus, a single district states a claim under article VIII, section 1-e if it alleges that it is constrained by the State to tax at a particular rate.

West Orange-Cove, Id. at 579.

In effect, what the Court predicted in *Edgewood IV* has come to pass. Under the current system, the cap on tax rates has become a floor as well as a ceiling. The system cannot be maintained in its current form.

CONCLUSION and REQUEST FOR RELIEF

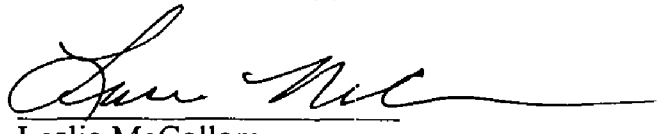
Therefore, Texas Business and Education Coalition urges this Court to uphold the material fact findings of the trial court as being supported by evidence, to affirm the trial court's conclusions of law regarding the unconstitutionality of the current Texas public school finance system under Article VII, §1 of the Texas Constitution, affirm the trial court's conclusions of law regarding the unconstitutionality of the current system under Article VIII, §1-e, and direct the Texas Legislature to enact legislation in conformity with this Court's decision and its constitutional obligations.

Respectfully submitted,

O'Hanlon & Associates

808 West Avenue
Austin, Texas 78701
(512) 494-9949
FAX: (512) 494-9919

Kevin O'Hanlon
State Bar No. 15235500



Leslie McCollom
State Bar No. 13431975
Attorneys for Amicus Curiae
Texas Business and Education Coalition

CERTIFICATE OF SERVICE

I certify that a copy of the Amicus Brief was served by certified mail, return receipt requested, on June 29, 2005, to;

George W. Bramblett, Jr.
HAYNES & BOONE, L.L.P
P.O. Box 165001
One Houston Center
1221 McKinney, Suite 2100
Houston, Texas 77010

Attorneys for West Orange Cove Respondents

R. Ted Cruz
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711

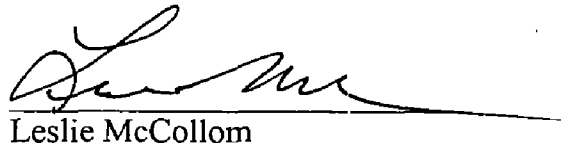
Attorney for Appellants

Randall B. Wood
RAY, WOOD & BONILLA, L.L.P.
2700 Bee Caves Road
Austin, Texas 78746

Attorneys for Alvarado Intervenors

Nina Perales
MALDEF
140 E. Houston St. #300
San Antonio, Texas 78201

Attorneys for Edgewood Intervenors



Leslie McCollom